

**APPEAL NO. 09-17673**

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**TUCSON WOMEN’S CENTER; FAMILY PLANNING ASSOCIATES; WILLIAM  
RICHARDSON, M.D.; PAUL A. ISAACSON, M.D.; and FRANK LAUDONIO, M.D.,**

*Plaintiffs-Appellants,*

**v.**

**ARIZONA MEDICAL BOARD; LISA WYNN, in her official capacity as Executive  
Director of the Arizona Medical Board; and TERRY GODDARD, in his official  
capacity as Attorney General of Arizona**

*Defendants-Appellees,*

**ARIZONA CATHOLIC CONFERENCE and CRISIS PREGNANCY CENTERS OF  
GREATER PHOENIX,**

*Intervenor-Defendants-Appellees.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA  
CIVIL CASE No. 2:09-CV-01909  
THE HONORABLE DAVID G. CAMPBELL**

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**BRIEF OF INTERVENOR-DEFENDANTS-APPELLEES**

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Steven H. Aden  
Matthew S. Bowman (Lead Counsel)  
ALLIANCE DEFENSE FUND  
801 G Street N.W., Suite 509  
Washington, D.C. 20001  
Telephone: (202) 393-8690  
Facsimile: (202) 347-3622  
saden@telladf.org  
mbowman@telladf.org

Deborah Marie Sheasby  
CENTER FOR ARIZONA POLICY  
7227 N 16th St, Suite 250  
Phoenix, AZ 85020  
Telephone: (602) 424-2525  
Facsimile: (602) 424-2530  
dsheasby@azpolicy.org

Nikolas T. Nikas  
BIOETHICS DEFENSE FUND  
6811 E Voltaire Ave  
Scottsdale, AZ 85254  
Telephone: (480)483-3597  
Facsimile: (480) 483-3658  
ntnikas@aol.com

Attorneys for Intervenor-Defendants-Appellees

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1(a), Arizona Catholic Conference and Crisis Pregnancy Centers of Greater Phoenix are each non-profit corporations in the State of Arizona, neither have a parent corporation and neither are publicly held.

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## **INTRODUCTION**

Abortion providers seek the right to collect money from women before their abortion waiting periods have expired, at a time when the women need to be free from financial pressure in order to make their choices voluntarily. Plaintiffs contend that the payment provision of Arizona Revised Statute § 36-2153(D) is unclear, but they ignore the fact that the provision only applies when a waiting period is required under subsection A, which is always a clear circumstance. Plaintiffs conceded before the District Court that the payment provision is not vague with respect to abortion providers, and the District Court relied on that concession. Therefore Plaintiffs should not be able to obtain injunctive relief for abortion providers. Nor should they be able to obtain relief for non-abortion providers, because those doctors are suffering no harm since the District Court made clear that the payment provision does not apply to them. Plaintiffs' appeal is therefore an improper facial challenge under Supreme Court precedent.

## **STATEMENT OF JURISDICTION, FACTS, CASE, ISSUES PRESENTED, AND STANDARD OF REVIEW**

Intervenor-Defendants concur with the statements of jurisdiction, facts, of the case, issues presented, and standard of review offered by Defendants, but additionally reserve the argument that Plaintiffs lack standing. Also, Intervenor-Defendants add to the statement of the case that on November 24, 2009, the District Court granted Intervenor-Defendants' motion to intervene.

## **SUMMARY OF ARGUMENT**

Plaintiff abortion providers *want* Arizona Revised Statute § 36-2153(D) to be ambiguous, because they know what it means. It means that they can't charge a woman for abortions before those women have had the prescribed time to make their choice based on all the facts. It means that Plaintiffs can't make women feel pressured to choose abortion by Plaintiffs demanding their money in advance. No woman wants to fight an abortion doctor's office to try to get her money back.

Plaintiffs conceded before the District Court that the payment provision is clear as applied to abortion patients and providers, and the District Court relied on their concession.<sup>1</sup> But Plaintiffs contend that the law may ambiguously apply when women "inquire" about abortion to non-abortion doctors. This position cannot be reconciled with the payment provision's explicit text, which says that it only applies to inquiring women when the 24-hour waiting period is "required by subsection A." Subsection A applies only when there is "an abortion" and a "physician who is to perform the abortion." Doctors know whether these realities exist so as to trigger a waiting period, and under subsection F doctors aren't held liable unless they violate the statute "knowingly," which eliminates vagueness.

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<sup>1</sup> Pls.' Memo. Supp. Mot. Prelim. Inj at 24 (filed Sept. 14, 2009) (hereinafter "Pls.' Memo"); relied upon by the District Court in Order Denying Prelim. Inj. at 18 (filed on Sept. 29, 2009), Excerpts of Record Tab 65 (hereinafter "Order").

Therefore Plaintiffs have essentially conceded that subsection D is clear in all its applications.

Plaintiffs argue that because the word “inquired” is imprecise, there may be uncertain applications of the law to non-abortion doctors. But even if “inquired” could be considered ambiguous *in isolation*, this fact wouldn’t impose the payment provision to non-abortion doctors because the payment provision never considers “inquiries” in isolation, but only applies when both an inquiry and a required waiting period exist. The waiting period provision limits which “inquiries” count.

Plaintiffs cannot be allowed to abandon the concession that they made and the District Court relied on. At most, Plaintiffs’ arguments justify relief for only non-abortion providers, since they concede that no vagueness exists for abortion providers. But Plaintiffs have no basis to seek appellate relief for non-abortion providers, because the District Court’s order already makes clear that the law does not apply to non-abortion providers. Therefore non-abortion providers are suffering no harm—they cannot satisfy the injunctive relief standard. Despite this fact, Plaintiffs are seeking to enjoin the payment provision even for abortion providers. Therefore their appeal is a facial not as-applied challenge, one that is disallowed by *Gonzales v. Carhart*, 550 U.S. 124 (2007).

## ARGUMENT

### **I. ABORTION PROVIDERS ARE CLAIMING THE RIGHT TO BILL WOMEN BEFORE THEY HAVE MADE THEIR INFORMED AND VOLUNTARY CHOICE ABOUT ABORTION**

This appeal is about nothing less than Plaintiffs' desire for women's money. Plaintiffs want to strike down a provision that does nothing but prevent them from billing women before those women have had one day to consider the information provided and to make their choice about abortion, without financial pressure from their abortion doctors.

Arizona Revised Statute § 36-2153 pursues a thoroughly legitimate state interest of requiring "voluntary and informed consent" for abortion. § 36-2153(A). Since *Planned Parenthood v. Casey*, there is hardly a more well-established issue in abortion law than the principle that states may require informed consent with a waiting period before an abortion. *Cf.* 505 U.S. 833, 885–87. But if the state can cure a woman's lack of information 24 hours before an abortion, *ipso facto* it can remove her financial pressure during the same time period. The state can require abortion providers, prior to the abortion, to wait 24 hours before they demand their money. Financial pressures burden women's choices no less than does their lack of information, and both are within a state's interest to alleviate.

Intervenor-Defendants know personally the lack of knowledge and financial pressures that women face when they are considering abortion. Crisis Pregnancy

Centers of Greater Phoenix and their professional medical staff and peer-counselors have extensive experience counseling women and offering them practical support in these circumstances. Def-Intervenors' Decl. of Barbara Willis ¶¶ 5–9. Many women already have a lack of information when they are seeking abortion. If an abortion provider has already made a woman prepay for an abortion, she will not feel able to make a fully free choice during the waiting period, because she will wonder how she can get her money back or if she will lose it. Before an abortion and before the mere one-day waiting period, abortion providers have no constitutional interest in collecting a woman's money. She can still change her choice during that time. The state is justified in preventing Plaintiffs from requiring an abortion downpayment. Plaintiffs have no constitutional right to assert a financial advantage over women's choices.

## **II. THE PAYMENT PROVISION ONLY APPLIES WHEN AN ABORTION WAITING PERIOD IS REQUIRED**

### **A. The payment provision explicitly limits itself to situations where subsection A requires a 24-hour waiting period**

The payment provision is clear. Subsection D explicitly declares that the delay on charging women only applies when the waiting period is “required by subsection A,” in addition to including when a woman has inquired about abortion or an abortion has been scheduled. There is no ambiguity in the fact that the payment provision does not apply unless a waiting period under subsection A is

required. And there is no ambiguity under subsection A that a waiting period is only required when there is “an abortion” specifically pending and a “physician who is to perform the abortion.” Plaintiffs conceded this point, by conceding that the payment provision is clear for abortion physicians and their patients. Pls.’ Memo at 24; Order at 18.

Furthermore, under subsection F, doctors aren’t held liable unless they violate the statute “knowingly.” The scienter of “knowledge” has the effect of mitigating or “eliminating vagueness,” and statutes with such scienter “have repeatedly withstood vagueness challenges.” *United States v. Jae Gab Kim*, 449 F.3d 933, 943 (9th Cir. 2006) (quoting *Wash. Mercantile Assoc. v. Williams*, 733 F.2d 687, 692 (9th Cir. 1984), and citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). Subsection A (and therefore subsection D) applies only when there is “an abortion” and a “physician who is to perform the abortion.” Doctors will always know whether or not they are planning an abortion. And even if a doctor bills a patient claiming he somehow wasn’t sure whether the waiting period applied, the statute would specifically exempt him from prosecution. In this case, scienter removes even the possibility of vagueness.

The Arizona Supreme Court, knowing the District Court’s interpretation, declined to answer its certified question, which further suggests the interpretation was correct. Because the payment provision applies when a waiting period is

required, it only applies to abortion providers and their patients, and, by concession, all of those circumstances are not vague.

In their brief on appeal, Plaintiffs inadvertently reinforce this interpretation. They emphasize that “[t]he mandated counseling provisions . . . are impossible to meet where a patient is not currently seeking to schedule an abortion.” Pls. App. Brief at 24. Far from making the payment provision impossible to follow, this makes the payment provision impossible to confuse. “[W]here a patient is not currently seeking to schedule an abortion,” Plaintiffs themselves believe that the waiting period is so obviously inapplicable that following it is impossible. But the payment provision’s text says it doesn’t apply to those patients, by not applying when no waiting period is required. Therefore in those situations, the payment provision’s inapplicability is equally obvious. Under Plaintiffs’ own logic, then, it is Plaintiffs’ hypotheticals about vagueness that become impossible.

**B. The word “inquired,” in isolation, does not render the payment provision ambiguous, because the provision only applies after an inquiry *and* a specifically planned abortion.**

Plaintiffs ignore the law’s plain language limiting the payment provision to circumstances in which a waiting period is required. Instead they argue that “inquired about” abortion is unclear, since mere “inquiries” can happen in passing, during any random meeting between a non-abortion doctor and a woman. But this

semantic argument is irrelevant. Even if “inquiry,” taken in isolation, is vague,<sup>2</sup> subsection D never imposes itself merely upon an inquiry. In addition to an inquiry, the provision doesn’t apply unless the waiting period under subsection A is “required.” Every single time the waiting period applies and there has been an inquiry about abortion, it is clear that such an inquiry was the kind of inquiry that qualifies under the payment provision. No doctor, having a specific abortion existing on his schedule or being planned so that he is in the process of putting it on his schedule, has any confusion *at that point* about whether the woman’s questions were the right kind of inquiry: they were. He knows this because he knows the waiting period is required. Plaintiffs conceded this point, in conceding that the payment provision is clear as applied to abortion providers and their patients.

The only kinds of inquiries that are potentially ambiguous are the kinds that occur when a waiting period is not required. But in every one of those cases, it is clear that the payment provision doesn’t apply. Every doctor, pondering whether a woman’s passing mention of an abortion in her office visit constitutes an “inquiry” under the payment provision, knows with absolute certainty that the payment provision does not apply to him *if* he isn’t scheduling an abortion that requires a

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<sup>2</sup> To the extent that the District Court concluded “inquiry” itself to be ambiguous, it went on to correctly conclude the payment provision as a whole not to be ambiguous.

waiting period. And if he is planning and scheduling an abortion that requires a waiting period, he knows with the same certainty that her inquiry does qualify. Finally, the statutes knowing *mens rea* precludes liability for doctors who bill patients while somehow unaware that a waiting period is required. There's no further room for ambiguity.

**C. The payment provision's application to "inquir[ing]" and "schedule[ing]" patients is not superfluous, since the concepts are distinct and both apply only if a waiting period is required.**

Plaintiffs' only rebuttal to the text of the statute is to claim that the payment provision doesn't really apply only when a waiting period is required, because if so, the additional element requiring an inquiry or a scheduled abortion would be superfluous. Subsection D applies only when there exists (a) a required waiting period, and (b) either (i) an inquiry or (ii) a scheduled abortion. A.R.S. § 36-2153(D).

The first thing to note about Plaintiffs' argument is that it contradicts the explicit, non-vague portion of the payment provision, which says that the law only applies when a waiting period is required. Plaintiffs are essentially seeking to interpret the payment provision so that a waiting period is not actually required for its satisfaction. Ironically, Plaintiffs are making this argument in the name of their opposition to interpreting statutes outside the bounds of the text.

The second reason Plaintiffs' argument is incorrect is that the components of the payment provision are not redundant. "Inquiring" about abortion and "scheduling" an abortion are distinct concepts. A woman could inquire about having an abortion, and if the payment provision applied only after it was scheduled, the abortion provider could delay the technicality of penciling it into his calendar until he first requires her to pay. The legislature wanted to prevent such a result, by specifying that once a woman inquires about an actual abortion that is planned (either scheduled or in the process of being scheduled), and thus a waiting period is required, then the woman can't be billed, even if the date and time of the abortion is not fixed in stone. So an inquiry that leads to the doctor and patient agreeing to plan an abortion will trigger the waiting period and the doctor will know that fact. If a woman inquires, in any circumstance, but chooses not to schedule an abortion or comes to no agreement with a doctor to have one, it is clear that the waiting period does not apply and therefore the payment provision would not apply.

On the other hand, a doctor could initiate discussion of abortion on his own when speaking to a pregnant patient who does not inquire. He could convince her to let him schedule the abortion (perhaps to get the waiting period clock running). But if the payment provision only applied when an abortion is scheduled *and* she inquired, the doctor who brought the subject up might be free to bill women more

freely than when it is the woman who inquires. Such a law would actually give doctors a financial incentive to initiate and promote abortion to non-inquiring patients. This legislature intended the opposite: to make abortion more informed and more voluntary, not to subject women to pressure by doctors so they can bill them early.

Thirdly, even if the inquiry or scheduling language could be considered somewhat superfluous, it would still not make the provision vague or unconstitutional. Clear redundancy is still clear. Doctors would still not have any confusion over whether they can or can't bill patients. The Court should not declare clear laws vague just because the legislature uses imperfect language. If every imperfectly drafted, but clear, law were struck down as unconstitutional, few laws would remain. Awkward drafting in a clear law is a foul without a harm.

Both sides in this case rely on canons of statutory construction, emphasizing on the one hand the impropriety of interpreting laws beyond their text, and on the other hand the impropriety of finding laws unconstitutional when the text and context allow for a reasonable constitutional interpretation. The ultimate question for this Court is whether affirmance is more consistent with these guidelines than is reversal. In this case, Plaintiffs' stern opposition to the District Court's duty to reasonably interpret state laws is cut from the same cloth as the "antagonistic canon of construction . . . in cases involving abortion" that the Supreme Court says

it rejected in *Casey* and *Gonzales*. *Gonzales v. Carhart*, 550 U.S. 124, 153–54 (2007). As in *Gonzales*, “The canon of constitutional avoidance . . . extinguishes any lingering doubt as to whether the Act [is constitutional].” *Id.* at 153. “[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Id.* “[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise.” *United States v. Harriss*, 347 U.S. 612, 618 (1954).

A balanced approach to canons of construction leans strongly in favor of affirming the District Court’s decision. There is ample reason to affirm the District Court while adhering to the principle that statutes should be interpreted reasonably. To affirm this Court can rely on language in the payment provision itself, its explicit dependence on a required waiting period, its scienter which excludes any situation in which a doctor is confused, and the entire statute’s linguistic purpose to regulate abortion providers and their patients rather than other doctors.

On the other hand, to reverse the District Court, this Court would need to unreasonably conflate hypothetical confusion in the law and hold the legislature to a standard that requires not just clarity but perfect mastery of language. This approach would give far too little weight to the text of the law as well as insufficient deference to legislatures in their intention to create laws within

constitutional bounds. Even in the First Amendment context, whose stricter standard is inapplicable in abortion challenges, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1845 (2008) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). Plaintiffs’ “basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague.” *Williams*, 128 S. Ct. at 1846.

**III. PLAINTIFFS’ APPEAL IS AN IMPROPER FACIAL CHALLENGE, SINCE NON-ABORTION PROVIDERS SUFFER NO HARM FROM THE DISTRICT COURT’S ORDER, AND PLAINTIFFS CONCEDED THAT NO VAGUENESS EXISTS FOR ABORTION PROVIDERS.**

The District Court justifiably relied on Plaintiffs’ concession that the payment provision is clear as applied to abortion providers and their patients. (Pls.’ Memo at 24; Order at 18.) Plaintiffs frame this case as an as-applied challenge, because they know that recent Supreme Court cases place strict limits on broad pre-enforcement facial challenges to abortion regulations. But Plaintiffs are trying to smuggle a facial attack into their appeal.

Plaintiffs’ appeal is really a facial challenge, because they seek to enjoin all the applications of the payment provision, even though their arguments sound in favor of only non-abortion providers. *See Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1186 (7th Cir. 1998); *see also* Pls. App. Brief at 3, 16, 19 (attacking the payment provision “on its face”). Moreover, a pre-enforcement

challenge must generally be regarded as a facial challenge, not an as-applied one, since the statute has not in fact been applied to any particular party's circumstances. *Id.* In *Wisconsin Right to Life*, the Court determined that the challenge "must be" facial in nature because "WRTL has not engaged in any speech that the Board has found to be inappropriate," and therefore WRTL's argument must be that the "laws are unconstitutional as written rather than as applied." *Id.*

Likewise here, Plaintiffs have not engaged in any activity that the Attorney General or the Board of Medicine has found to be inappropriate, yet Plaintiffs are contending that the language of the payment provision is unconstitutional as written. *See also Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 163-64 (4th Cir. 2000) ("Because of the nature of facial challenges, they could not present the district court with a concrete factual circumstance—a particular case or controversy—to which to apply the Regulation.... Because a trial on a facial challenge can focus only on arbitrarily selected hypotheticals to which the Regulation might apply, a court is required to speculate about the Regulation's overall effect.").

The Supreme Court has deemed it improper for plaintiffs to bring facial challenges such as this appeal. "The latitude given facial challenges in the First Amendment context is inapplicable here. Broad challenges of this type impose 'a

heavy burden' upon the parties maintaining the suit." *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007); *Greenville Women's Clinic*, 222 F.3d at 163 ("[A]bortion clinics undert[ake] a heavy burden in bringing a facial challenge..."). Plaintiffs' challenge is indistinguishable in content and approach from the facial challenge to the federal Partial-Birth Abortion Act the Supreme Court rejected in *Gonzales*. In *Gonzales*, as here, abortion providers brought pre-enforcement challenges to the act, relying upon the testimony of providers that the legal restriction in question imposed an undue burden and was unconstitutionally vague. 550 U.S. at 134–40. The Court concluded that "these facial attacks should not have been entertained in the first instance," *id.* at 167, even though the District Courts conducted lengthy trials and entered permanent injunctions, *id.* at 133. "In these circumstances the proper means to consider exceptions is by as-applied challenge [where] the nature of the [] risk can be better quantified and balanced than in a facial attack." *Id.* "It is neither [the Court's] obligation nor within [its] traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Id.* at 168. *Gonzales* especially lays to rest Plaintiffs' argument that a vagueness challenge can be made when "no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]." *Id.* at 150 (quoting *Hoffman Estates*, 455 U.S. at 503).

Plaintiffs cannot practically pursue their facial challenge in light of their concession that the payment provision is clear for abortion providers and their patients, nor can they revoke their concession after the District Court relied on it. A facial challenge requires at least that Plaintiffs “have [] demonstrated that the Act would be unconstitutional in a large fraction of relevant cases.” *Gonzales*, 550 U.S. at 167–68. But abortion providers and their patients constitute the vast majority of the potential applications of the payment provision. Because the payment provision doesn’t apply until the waiting period is required, most if not all inquiries leading up to that point will be self-evidently the kind of inquiries that meet one element of the payment provision. And even hypothetically confusing situations still remained, the statute’s immunity for doctors who don’t “knowingly” violate its terms would render those situations outside of its scope. Plaintiffs’ concession that the waiting period’s application is clear is therefore also a tacit admission that when compared to abortion situations, any vague non-abortion situations are negligible. Plaintiffs therefore cannot pursue an injunction against the payment provision facially in order to free abortion providers from its application.

Plaintiffs could theoretically pursue an as-applied challenge to the payment provision for non-abortion providers (to whom inquiries might be made when a waiting period is not required). As it turns out, Plaintiffs’ arguments about

vagueness apply only to non-abortion providers. However, an as-applied challenge to vindicate non-abortion providers in this appeal is meritless, because non-abortion doctors are presently suffering no injury. The District Court interpreted the payment provision as applying only to abortion providers and their patients, and the State Defendants likewise conceded—and urged—that the payment provision apply only to women seeking abortion. Order at 19. And again, no violation occurs unless it is done knowingly. Therefore, no injunction is justified to relieve non-abortion providers from the application of the payment provision. Such doctors already face no threat of prosecution under the payment provision. They have no grounds to seek reversal of the District Court’s order.

### **CONCLUSION**

For the reasons stated above, Intervenor-Defendants-Appellees respectfully request that this Court affirm the decision of the District Court.

Respectfully submitted this 25th day of January, 2010,

*By Attorneys for Intervenor-Defendants-Appellants:*

*s/Matthew S. Bowman*

Steven H. Aden

Matthew S. Bowman (Lead Counsel)

ALLIANCE DEFENSE FUND

801 G Street NW, Suite 509

Washington, D.C. 20001

Telephone: (202) 393-8690

Facsimile: (202) 347-3622

saden@telladf.org

mbowman@telladf.org

Deborah Marie Sheasby

CENTER FOR ARIZONA POLICY

7227 N 16th St, Suite 250

Phoenix, AZ 85020

Telephone: (602) 424-2525

Facsimile: (602) 424-2530

dsheasby@azpolicy.org

Nikolas T. Nikas  
BIOETHICS DEFENSE FUND  
6811 E Voltaire Ave  
Scottsdale, AZ 85254  
Telephone: (480)483-3597  
Facsimile: (480) 483-3658  
ntnikas@aol.com

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman.

*s/Matthew S. Bowman*  
Matthew S. Bowman

Dated: January 25, 2010

**STATEMENT OF RELATED CASES**

Appellants are not aware of any related cases.

Dated: January 25, 2010

/s/Matthew S. Bowman  
Matthew S. Bowman

**CIRCUIT RULE 28-2.7 ADDENDUM TO BRIEFS**

All applicable statutes, etc., are contained in the brief or addendum of Plaintiffs-Appellants.

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 25, 2010.

I further certify that some of the participants in the case are not registered CM/ECF users. Upon the clerk's acceptance of the brief, I will mail the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

Gregory David Honig  
OFFICE OF THE ATTORNEY  
GENERAL  
1275 W. Washington Street  
Phoenix, AZ 85007

Jordan Goldberg  
CENTER FOR  
REPRODUCTIVE RIGHTS  
14th Floor  
120 Wall Street  
New York, NY 10005

Aimee H. Goldstein  
SIMPSON, THACHER AND BARTLETT  
425 Lexington Avenue  
New York, NY 10017-3909

Janelle Filson  
SIMPSON, THACHER & BARLETT  
425 Lexington Avenue  
New York, NY 10017-3909

Meryl Rosen  
SIMPSON, THACHER & BARLETT  
425 Lexington Avenue  
New York, NY 10017-3909

*s/Matthew S. Bowman*  
Matthew S. Bowman