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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Paul A. Isaacson. M.D., et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 2:21-cv-01417-DLR

Sharing Down Syndrome Arizona's Motion to Intervene as Defendant and Memorandum in Support

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Introduction

People with Down syndrome and other genetic abnormalities lead lives full of profound love and meaning—experience tells us so. Yet many countries, including the United States, resort to a regime of discriminatory abortion to "deal with" those with Down syndrome. In other words, at the very time the most vulnerable among us need our help, societies across the globe respond instead with violence. Take Iceland, for example. In that country nearly 100% of children with Down syndrome are aborted, a statistic that has been presented as Iceland getting "close to eradicating Down syndrome births[.]" *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780, 1790 (2019) (Thomas, J. concurring); Julian Quinones & Arijeta Lajka, "What Kind of Society Do You Want To Live In?": Inside the Country Where Down Syndrome Is Disappearing, CBS News, https://www.cbsnews.com/news/down-syndrome-iceland/. Meanwhile, Denmark aborts approximately 98% of children diagnosed with Down syndrome, the United Kingdom 90%, and France 77%. *Box*, 139 S. Ct. at 1790-91. And here in the United States, somewhere between 61%-91% of mothers choose to abort their child if he or she is diagnosed with Down syndrome. S.B. 1457 § 15.

Faced with this global and national discriminatory abortion regime, the Arizona legislature passed S.B. 1457 on April 22, 2021. Among other things, the law advances the state's interest in protecting the disabled from discrimination by preventing abortions based solely on "genetic abnormalit[ies]" such as Down syndrome. A.R.S. § 13-3603.02(A)(2). It is an extension of extant Arizona law, which has included protections against race-and sex-selective abortions for over a decade. *See* A.R.S. § 13-3603.02(A)(1) (Effective July 20, 2011). Plaintiffs—who include practicing physicians and the Arizona Medical Association—have challenged S.B. 1457, seeking to cast aside the nondiscrimination and other provisions, leaving those with Down syndrome subject to discriminatory treatment in the form of selective and targeted abortions.

On September 28, 2021, this Court enjoined the nondiscrimination and related provisions, finding that it was likely the provisions were void for vagueness and "impose[d]

an undue burden on the rights of women to terminate pre-viability pregnancies." Doc. No. 52 at 29.

Proposed Intervenor-Defendant Sharing Down Syndrome Arizona is a nonprofit organization which assists and provides support to children and families experiencing Down syndrome. Decl. of Virginia C. Johnson, ¶¶ 3, 6-9, 12, 25-28. The legal challenge filed by the Plaintiffs in this matter directly implicates Sharing Down Syndrome's interests because it seeks to block crucial new legal protections for those with Down syndrome. These protections can help ensure that children diagnosed with Down syndrome receive the same right to life and chance to grow and develop as babies without diagnosed genetic abnormalities. If Plaintiffs are successful, children with Down syndrome are likely to continue to be discriminatorily aborted based on the genetic abnormalities with which they are diagnosed. Plaintiffs' success in ensuring that babies with Down syndrome are stripped of legal protections against discrimination will also inhibit Sharing Down Syndrome's ability to reach, educate, and support children and families experiencing Down syndrome.

As a result, Sharing Down Syndrome has unique interests to defend, and information to supply to this Court, in this litigation.

The Challenged Laws

Since 2011, the state of Arizona has prohibited persons from "perform[ing] an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child." A.R.S. § 13-3603.02(A)(1). In 2021, Arizona added to its ban on discriminatory abortions based on sex and race by including a prohibition against discriminatory abortions based on genetic abnormalities, such as Down syndrome. The Arizona Legislature promulgated S.B. 1457 (the Act), which contains several provisions designed to "protect[] the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions." S.B. 1457 § 15. More specifically, Section 2 of the Act includes a provision prohibiting a person from performing an abortion if that person knows "that the abortion is sought solely because of a genetic abnormality of the child." *Id.* at § 2. "Genetic abnormality" is defined as "the presence or

presumed presence of an abnormal gene expression in an unborn child, including a chromosomal disorder or morphological malformation occurring as the result of abnormal gene expression." A.R.S. § 13-3603.02(G)(2). The Act contains two exceptions. First, a "[g]enetic abnormality . . . [d]oes not include a lethal fetal condition." *Id.* Second, a "medical emergency" exception permits abortions in "the physician's good faith clinical judgment" to prevent the death or "substantial and irreversible impairment of a major bodily function" of the pregnant woman. A.R.S. § 13-3603.02(A), (G)(3); § 36-2151(6). Moreover, the Act explicitly exempts "[a] woman on whom … an abortion because of a child's genetic abnormality is performed" from all criminal or civil liability. A.R.S. § 13-3603.02(F).

In addition to the Non-Discrimination Provision, the Arizona Legislature also added a new statute—the Interpretation Policy—which requires that the state's laws be "interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state." A.R.S. § 1-219(A).

In passing the law, Arizona found that "prohibiting persons from performing abortions knowing that the abortion is sought because of a genetic abnormality of the child advances at least three compelling state interests." S.B. 1457 § 15. The Act: (1) "protects the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions," (2) protects Arizona citizens from coercive medical practices "that encourage selective abortions of persons with genetic abnormalities," and (3) "protects the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortion." *Id.*

Plaintiffs have challenged both the Non-Discrimination Provision and the Interpretation Policy.

Statement of Facts

Sharing Down Syndrome Arizona "is a nonprofit organization dedicated to helping individuals with Down syndrome" and "families who have sons or daughters with Down syndrome." Johnson Decl. ¶ 3. "Sharing Down Syndrome began with five families approximately 31 years ago, and it has grown to include some 5,000 families currently as part of [its] network." *Id.* at ¶ 4. Sharing Down Syndrome was formed so that every child and family would have the best chance at a bright future by receiving early and consistent support from the Down syndrome community. Its goal is to reach every family in Arizona who has a child with Down Syndrome. As part of this process, Sharing Down Syndrome makes hospital visits to newborn babies with Down Syndrome, and their families. In 2020, Sharing Down Syndrome visited 120 families in 29 Arizona cities and the Navajo Nation, providing them with love, support, and educational materials about their baby and his or her development. *Id.* at ¶¶ 6-9.

Sharing Down Syndrome begins its "support efforts to children and families so early . . . because babies with Down syndrome are often faced with a host of medical challenges, which can include heart defects, intestinal and respiratory problems, developmental delays, hearing and vision impairments, and intellectual disabilities." *Id.* at ¶ 10. All of this can be overwhelming to new parents, so one of Sharing Down Syndrome's main goals is to step in to help at the time it is most needed. Additionally, in Sharing Down Syndrome's experience it is unfortunately the case that society and even some in the medical profession "can often place great pressure"—subtle and not so subtle—on parents to abort children with Down syndrome, precisely because children with this diagnosis have so many medical challenges. *Id.* at ¶¶ 17, 25. However, Sharing Down Syndrome has also witnessed that when "families are given loving support and information—even when they have knowledge that their child may have a genetic abnormality and all the health challenges that may come with such a diagnosis—they very often choose to bring their babies to term," and then "cannot imagine life without that child once he or she is born." *Id.* at ¶¶ 18-19.

Sharing Down Syndrome knows from experience that "children with Down syndrome can and do live lives full of meaning and love" just like any other human beings, and "make great sons and daughters, brothers and sisters, and aunts and uncles, as well as friends, students, and employees." *Id.* at ¶ 20. Sharing Down Syndrome is "an organization dedicated to helping those with Down syndrome realize their full potential," and it therefore "supports laws like S.B. 1457, which prohibit the discriminatory treatment of those with Down syndrome and other genetic abnormalities." *Id.* at ¶ 21. Discriminatorily aborting babies with genetic abnormalities is not progress. S.B. 1457 signals an understanding that babies with Down syndrome, like babies who face discrimination based on their sex or race, are deserving of legal protections. "In fact, without such a law, doctors can abort a baby solely because he or she shows signs of Down syndrome. It is difficult to conceive of a more discriminatory practice than that." *Id.* at ¶ 23.

Sharing Down Syndrome has worked with its extensive network of families and children (many of whom are now adults) with Down syndrome for three decades. Its resulting knowledge and experience uniquely equips it to address the challenged provisions' important role in eliminating Down syndrome discrimination inside and outside of the womb.

Sharing Down Syndrome also has extensive knowledge of the factors that often motivate women to seek an abortion after they receive a diagnosis of Down syndrome or other fetal abnormality. Oftentimes, women and families feel they have no alternatives to abortion, given the challenges faced by those who have children with Down syndrome or other genetic abnormalities. Not unexpectedly, Sharing Down Syndrome sees a common theme of hopelessness among some women when they receive the news that their unborn child has Down syndrome. An important part of Sharing Down Syndrome's mission is to communicate to families that they can bring their child into the world, that they have the ability to raise him or her, and that there are support structures available to help them. *Id.* at ¶ 25.

Without the Non-Discrimination provision, the deck is stacked against children with genetic abnormalities like Down syndrome. Without these provisions, it is legally permissible to discriminatorily abort such children solely because they have a disability, and that discrimination stigmatizes Down syndrome people already born. Sharing Down Syndrome considers this an avoidable tragedy and therefore seeks to intervene in this matter to provide the Court its unique perspective and knowledge about children with Down syndrome and their families.

Argument

Sharing Down Syndrome's interests are directly implicated by Plaintiffs' challenge and this Court should grant it intervention as of right, or alternatively, permissive intervention. In evaluating this motion, this Court should "take all well-pleaded, nonconclusory allegations in the motion to intervene . . . and declaration[] supporting the motion as true absent sham, frivolity or other objections." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).

I. Sharing Down Syndrome is entitled to intervene as of right because its unique interest in protecting people with Down Syndrome is implicated and not adequately protected by the parties.

This Court must permit Sharing Down Syndrome to intervene under Federal Rule of Civil Procedure 24(a)(2) if it can demonstrate these four elements: (1) its request is timely; (2) "it has a significant protectable interest relating to" a challenged law; (3) the case outcome "may, as a practical matter, impair or impede [its] ability to protect its interest[s]"; and (4) "the existing parties may not adequately represent [its] interest[s]." *See In re Est. of Ferdinand E. Marcos Hum. Rts. Litig.*, 536 F.3d 980, 984 (9th Cir. 2008). These requirements are "broadly interpreted in favor of intervention." *Id.* at 985. Sharing Down Syndrome satisfies them all.

A. Sharing Down Syndrome's motion to intervene is timely because the case is still in the early stages of litigation.

Courts evaluate three factors when assessing timeliness: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016) (citation omitted). The "crucial date" for determining timeliness is when Sharing Down Syndrome "should have been aware that [its] interests would not be adequately protected by the existing parties." *Id.* (citation omitted). Here, Sharing Down Syndrome's Director became aware of the lawsuit on August 23, 2021, but its full board of directors did not learn of the lawsuit's details until a September 21, 2021, special meeting called to discuss the matter with potential *pro bono* counsel. Johnson Decl. ¶ 30. Given the recency of Sharing Down Syndrome's awareness of its need to intervene and the early stage of the proceedings, all relevant factors demonstrate that its motion is timely.

First, the case proceedings are at a very preliminary stage. This Court just issued its order on Plaintiffs' motion for a preliminary injunction. Doc. No. 52. Discovery is not yet underway, no answer has yet been filed by the State Defendants, and the scheduling conference is not due to take place until December 22, 2021 (Doc. No. 54). Under these circumstances, a determination of timeliness is appropriate. *See, e.g.*, *Safari Club Int'l v. Jewell*, No. CV-16-00094-TUC-JGZ, 2016 WL 7786478, at *1 (D. Ariz. May 13, 2016) (finding motion to intervene timely when filed after issuance of a scheduling order and within three months of scheduled merits briefing); *Sawyer v. Bill Me Later, Inc.*, No. CV 10-04461 SJO (JCGx), 2011 WL 13217238, at *3-6 (C.D. Cal. Aug. 8, 2011) (finding timely a motion to intervene filed one year after the case started where the court had already ruled on a motion to dismiss and choice-of-law arguments and document discovery had recently begun, and noting that other "district courts in the Ninth Circuit have regularly found motions to intervene timely in cases where the stage of the proceedings had advanced further than the

instant case"); *Acosta v. Huppenthal*, No. CV 10-623-TUC-AWT, 2012 WL 12829994, at 2 (D. Ariz. Feb. 6, 2012) (granting permissive intervention when motion was filed more than fourteen months after plaintiffs' complaint was filed, noting that "no discovery ha[d] taken place[,] . . . briefing on the parties' summary judgment motions [was] still ongoing . . . [and] . . . [t]he Court ha[d] yet to deeply engage with the substantive issues").

Second, given the litigation's preliminary stage, the parties will not suffer any prejudice from Sharing Down Syndrome's intervention. *Cf. Smith*, 830 F.3d at 857 (holding that "the only 'prejudice' that is relevant under this factor is that which flows from [the] prospective intervenor's" delay (citation omitted)). The timing of Sharing Down Syndrome's motion cannot be considered prejudicial to the parties when they have yet to even propose a scheduling order to the Court, and the Court has yet to set applicable timelines going forward.

Finally, the time that elapsed prior to Sharing Down Syndrome's filing this motion is reasonable under the circumstances. As soon as its Director learned of the lawsuit, she set out to analyze how the issues would affect Sharing Down Syndrome and then gathered her board of directors for a meeting in order to discuss the matter and make a collective decision. Johnson Decl. ¶ 30. Once it met on September 21, 2021, the Board of Directors evaluated the lawsuit and its potential impact, assessed the merits of participating in the litigation, and discussed the matter with counsel. The Board then gave those members who could not attend the chance to watch the recorded meeting and direct questions to counsel. After that process, Sharing Down Syndrome expeditiously decided to seek intervention and officially retained counsel that was willing to provide *pro bono* services. *Id.*

Understandably, all of this took some time, especially because Sharing Down Syndrome is a nonprofit and all of its board members are volunteers who work other full-time jobs during the day. Regardless, discovery has not yet begun, a scheduling order has not yet been issued, and less than two months has elapsed since the complaint was filed. Given that courts have granted intervention when six or more months have passed prior to

intervention, there can be little question that Sharing Down Syndrome's proposed intervention is timely. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 266 F.R.D. 369, 373 (D. Ariz. 2010) (finding that motion to intervene as of right was timely when filed "approximately nine months after the case was filed and six months after the Amended Complaint"); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1259-60 (11th Cir. 2002) (finding motion to intervene as of right was timely even though intervenor knew of case for six months before moving to intervene, at which time "discovery was largely complete"); *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 989 F.2d 994, 999 (8th Cir. 1993) (finding motion to intervene timely even though filed "some eighteen months after suit had been commenced and nine months after the deadline for filing motions to add parties").

For all these reasons, Sharing Down Syndrome's motion to intervene is timely.

B. Sharing Down Syndrome has a significant, protectable interest in defending a law that protects the dignity of people with Down Syndrome and their families.

There is no "clear-cut or bright-line rule" for determining whether a proposed intervenor has shown a sufficient interest for intervention. *In re Est. of Ferdinand E. Marcos*, 536 F.3d at 984 (citation omitted). Rather, the determination involves "a practical, threshold inquiry. No specific legal or equitable interest need be established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (citation omitted). Courts should utilize the "interest" requirement "primarily [as] a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *In re Est. of Ferdinand E. Marcos*, 536 F.3d at 985 (citation omitted).

A proposed intervenor has a "'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (citation omitted). Notably, intervention is proper even when the law an intervenor seeks to defend "does not give the proposed intervenors

any enforceable rights" or "protect any of their existing legal rights." *Id.* Here, Sharing Down Syndrome "has a sufficient interest for intervention purposes [because] it will suffer a practical impairment of its interests as a result of the pending litigation" if the Plaintiffs prevail. *Id.* And a court in this district granted intervention under similar circumstances. In *Tucson Women's Ctr. v. Az. Med. Bd.*, No. CV-09-1909-PHX-DGC, 2009 WL 4438933, at *3 (D. Ariz. Nov. 24, 2009), the court found that CPC, a nonprofit pregnancy resource center offering "alternatives to abortion," had a significant protectable interest in a lawsuit challenging an Arizona "statute requiring that physicians throughout Arizona advise every abortion patient of the services provided by nonprofit organizations such as CPC." The court found a protectable interest because the law "undoubtedly would have the practical effect of furthering the purpose and work of CPC, and invalidation of the statute likewise would have a practical effect on the organization." *Id.* So too here. The Non-Discrimination provision would, as a practical matter, further Sharing Down Syndrome's purpose and work, and invalidating the statute would also practically affect the organization's work and mission.

Sharing Down Syndrome has multiple interests at stake. For instance, its mission "is to educate and empower, but especially give hope to individuals who have Down syndrome so they may grow up to become independent self-advocates." Johnson Decl. ¶ 3. The Non-Discrimination provision furthers this goal because it codifies respect for the lives of preborn babies with Down syndrome and the fact that they are worthy of legal protection against disability-based discrimination. If Plaintiffs prevail in having the Non-Discrimination provision permanently enjoined, Sharing Down Syndrome's work will continue to be hindered by a system which permits discriminatory treatment of Down syndrome preborn babies, a system which in many instances results in the abortion of such children. And if a court were to determine that preborn babies with Down syndrome are not worthy of antidiscrimination protections, that would severely undermine Sharing Down Syndrome's ability to effectively empower and provide hope to individuals with Down syndrome. Put simply, striking the Non-Discrimination provision will substantially

impair Sharing Down Syndrome's ability to convey its desired message—that children with Down syndrome and other genetic abnormalities have lives that are worth living—and will further impede its work in helping families bring such children to term and secure the very best resources for their upbringing. *Id.* at ¶¶ 12, 24-26.

Moreover, if Plaintiffs succeed, it will likely continue to be the case that many women abort their children upon learning of a diagnosis of genetic abnormality like Down syndrome. It is often the case—in Sharing Down Syndrome's experience—that society and the medical profession can subtly or not so subtly encourage or steer families toward abortion when such diagnoses are made. *Id.* at ¶¶ 17, 25, 31. The Non-Discrimination provision makes it easier for Sharing Down Syndrome to provide support and information to families facing diagnoses of genetic abnormalities before they can be pressured into making a hasty abortion decision they might regret. The provision thus helps level the playing field for Sharing Down Syndrome's message. People with Down syndrome live lives full of love and meaning just like all other people, *id.* at ¶ 20, and permitting a regime of discriminatory abortions targets and punishes them for a genetic abnormality they have no control over. This is a blatant form of discrimination and thwarts Sharing Down Syndrome's ability to fully serve the needs of the Down syndrome community.

Additionally, Sharing Down Syndrome keeps lists of families who are willing to adopt children with Down syndrome, and when the opportunity arises facilitates the placement of such children with willing and loving families. *Id.* at ¶ 15. If the Non-Discrimination provision is permanently enjoined, many mothers will continue to abort their children once they learn of their Down syndrome diagnosis, precisely because there is no law to protect those children against discrimination. Many Down syndrome babies will therefore not be brought to term, and Sharing Down Syndrome's adoption project will suffer as a result. *Id.* at ¶ 35.

Finally, so long as there is no law in effect that protects preborn babies with Down syndrome from discrimination, Sharing Down Syndrome has to use more of its resources convincing families that the best thing for their child and for them is to bring the baby into

the world. Because it is a nonprofit with limited resources, this use of resources takes away from the rest of Sharing Down Syndrome's important work. *Id.* at ¶ 34. Conversely, if the Non-Discrimination provision goes into effect, Sharing Down Syndrome will have more resources available for its hospital visits to newborn babies with Down syndrome, its work to help ensure inclusive education for children with Down syndrome, its adoption program, and its other important events and programs that help empower individuals with Down syndrome. *Cf. Ctr. for Biological Diversity v. Zinke*, No. CV-18-00047-TUC-JGZ, 2018 WL 3497081, at *3 (D. Ariz. July 20, 2018) (finding impairment of protected interests where, *inter alia*, the proposed intervenor "would have to expend more time and resources in developing a new plan which would take resources away from other statewide wildlife programs").

C. Sharing Down Syndrome's ability to protect its interest in advocating for people with Down Syndrome will be impaired by an order enjoining the Non-Discrimination provision.

When a protectable interest exists, a court should have "little difficulty concluding that the disposition of th[e] case may, as a practical matter, affect" the intervenor. *Lockyer*, 450 F.3d at 442. In this case, as already discussed above, if Plaintiffs are successful in convincing this Court to permanently enjoin the Non-Discrimination provision, Sharing Down Syndrome's interest in directly supporting children with Down syndrome, its interest in empowering them and providing them with hope, and its interest in placing them for adoption with willing families on waiting lists, will, as a practical matter, be impaired. Johnson Decl. ¶¶ 31-35. These impairments are more than sufficient to satisfy this factor. *See Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Cir. 2011) (concluding that if plaintiff prevailed and succeeded in "enjoining enforcement of the restrictions of the Interim Order that limit motorized and mechanized use in the Study Area, [the intervenor's] interest in conserving and enjoying wilderness in the Study Area may, as a practical matter, be impaired").

D. No existing party adequately represents Sharing Down Syndrome.

Courts consider three factors when determining whether existing parties adequately represent the interests of the proposed intervenor: "(1) whether the interest of a present party is such that it will *undoubtedly* make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003) (emphasis added).

Sharing Down Syndrome must only show "that representation of [its] interest '*may be*' inadequate" to satisfy this element for intervention. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (citation omitted) (emphasis added). "[T]he burden of making that showing should be treated as minimal." *Id.*

Sharing Down Syndrome satisfies this "minimal" showing. First, it is not clear that the State "will make all of the arguments [Sharing Down Syndrome] would make," *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988). The State does not expressly represent the interests of resource and support organizations like Sharing Down Syndrome, which will face financial, associational, and operational burdens if the Non-Discrimination provision is struck down. In addition, the State is not asserting the specific interests of Sharing Down Syndrome's network.

Additionally, although both Sharing Down Syndrome and the State may "generally seek the same outcome in this litigation," their interests "are not entirely alike." *Zinke*, 2018 WL 3497081, at *4. Indeed, the State's "representation of the public interest" is not "identical to the individual parochial interest" of Sharing Down Syndrome. *Citizens for Balanced Use*, 647 F.3d at 899 (citation omitted). And even though they currently seek the "same result," because they have "distinct reasons for doing so," it is doubtful the State will raise all of Sharing Down Syndrome's arguments. *Wildearth Guardians v. Jewel*, No. 2:14-cv-00833 JWS, 2014 WL 7411857, at *3 (D. Ariz. Dec. 31, 2014) (finding that the applicant "sufficiently demonstrated inadequate representation"). Moreover, "even if [Arizona] and

[Sharing Down Syndrome] have the same goal in this litigation, there is no guarantee that [Arizona] will not change or adjust its policy or position during the course of litigation." *Zinke*, 2018 WL 3497081, at *4 (cleaned up).

Relatedly, the State is not "capable and willing to make" all of Sharing Down Syndrome's arguments because it lacks standing to do so. *Arakaki*, 324 F.3d at 1086. The State does not share Sharing Down Syndrome's "more narrow, parochial interests" and thus cannot raise them. *Nw. Env't Advocates v. U.S. Dep't of Com.*, 769 F. App'x 511, 512 (9th Cir. 2019) (citation omitted) (holding that district court erred in denying intervention as of right). Rather, the State's general interest in setting an interpretation policy and in ensuring nondiscrimination by regulating abortion vis-à-vis those with genetic abnormalities is distinct from Sharing Down Syndrome's specific interests in providing educational, emotional, and material support to individuals with Down syndrome, as well as their families and the broader Down syndrome community. The State will also not represent Sharing Down Syndrome's particular stake in its ability to pursue its mission, operations, and associational relationships. No other party can raise these potential injuries to Sharing Down Syndrome and its members, who are actual individuals with Down syndrome and the families who support and raise them. Johnson Decl. ¶¶ 29-36. Sharing Down Syndrome can advance arguments and bring a perspective to this Court that the State cannot—that of persons with Down syndrome and their families. Put simply, Sharing Down Syndrome will be focused primarily on defending the Non-Discrimination and related provisions from a position of lived experience, and will be able to offer the Court more attentive and fulsome arguments on the validity of those provisions than any other party.

Finally, Sharing Down Syndrome would offer "necessary elements to the proceeding that other parties would neglect" by providing this Court critical evidence and arguments unavailable to the State. *Arakaki*, 324 F.3d at 1086. For instance, Sharing Down Syndrome can provide evidence of the significant impact the Non-Discrimination and related provisions can and likely will have on individuals with Down syndrome and their

families. Johnson Decl. ¶¶ 17-20, 24-26. The Non-Discrimination provision prohibits doctors from performing abortions that they know the mother seeks based solely on the baby's genetic abnormality diagnosis, so it promises to combat societal and medical pressures put on families to abort those children diagnosed with Down syndrome. The provision also promotes Sharing Down Syndrome's message that children with Down syndrome should be treated with equal respect and dignity. Striking that provision would continue a regime where discriminatory abortions result in the tragic deaths of Down syndrome children through abortion, which Sharing Down Syndrome has experienced time and again. Johnson Decl. ¶¶ 25-26, 31. And it would undermine Sharing Down Syndrome's message of hope and empowerment. Members of Sharing Down Syndrome's network stand as a testament to the power of the organization's support in helping provide families what they need to bring their children into the world and raise them to be full and contributing members of society. *Id.* at ¶¶ 18-20, 24-28.

This information is critical to allow the Court to fully assess the benefits of the Non-Discrimination provision in particular. Yet the State does not have access to this information in the way that Sharing Down Syndrome does. Sharing Down Syndrome will offer evidence showing that people often change their minds about abortion and having a child with Down syndrome after learning relevant information and after being supported in ways in which the broader society and even the medical community often neglect to do. *Id.* at ¶¶ 17-20, 25, 31. Sharing Down Syndrome's close working relationship and its position of trust with its supported families makes it uniquely situated to address the benefits of the Non-Discrimination provision—and the harms that will result if it is struck down—in a way that the State of Arizona cannot.

The Supreme Court has confirmed that intervention of right is warranted where, as here, a proposed intervenor has raised "sufficient doubt about the adequacy of representation[.]" *Trbovich*, 404 U.S. at 538. In *Trbovich*, the official prosecuting the law was "performing his duties, broadly conceived, as well as can be expected," but the Supreme Court recognized that the individual whose interests were at stake may have valid concerns

about deficiencies in the official's representation, and may not take "precisely the same approach to the conduct of the litigation." *Id.* at 539.

In sum, Sharing Down Syndrome satisfies the four elements for intervention as of right in this case. Courts, in evaluating these elements, are "guided primarily by practical and equitable considerations." *Arakaki*, 324 F.3d at 1083. And those considerations weigh in favor of intervention here.

II. Sharing Down Syndrome should be granted permissive intervention.

Sharing Down Syndrome also satisfies the requirements for permissive intervention. Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . (B) has a claim or defense that shares with the main action a common question of law or fact." This Rule "does not specify any particular interest that will suffice for permissive intervention[.]" *Protect Lake Pleasant, LLC v. Johnson*, No. CIV 07-454-PHX-RCB, 2007 WL 1108916, at *5 (D. Ariz. Apr. 13, 2007) (citation omitted). It also "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Id.* (citation omitted). The Court must also consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

As already shown, Sharing Down Syndrome's motion is timely and will cause no undue delay or prejudice to the original parties. *See supra* at 7-9. Sharing Down Syndrome does not anticipate raising any new claims or counterclaims that could surprise the parties or slow the case.

In addition, Sharing Down Syndrome's defenses will "share[] with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). *See Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1110 (9th Cir. 2002) (commonality standard satisfied when intervenors "asserted defenses . . . directly responsive to the claims of injunction asserted by plaintiffs"), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). And in doing so, it can provide relevant evidence regarding the benefits of the challenged provisions—most notably the Non-Discrimination provision—and the

harm that results when discriminatory abortions are permitted based on genetic abnormalities.

Accordingly, Sharing Down Syndrome requests that this Court grant it permissive intervention.

Conclusion

Sharing Down Syndrome has unique interests in protecting people with Down syndrome, and has the ability to provide highly relevant information to this Court that the State cannot. Intervention is therefore proper here. Accordingly, Sharing Down Syndrome respectfully requests that this Court grant it intervention as of right, or in the alternative, permissive intervention.[1]

Respectfully submitted this 13th day of October, 2021.

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[1] Sharing Down Syndrome intends to file an answer or responsive pleading when it becomes due.

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, I electronically filed the foregoing paper with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record.

s/ Ken Connelly
Ken Connelly
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