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PRELIMINARY STATEMENT

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2 Plaintiff Arizona Coalition Against Domestic Violence (“AzCADV” or “the
3 Coalition”), the statewide organization representing domestic violence service providers
4 in Arizona, brings this challenge under the First Amendment to Arizona law HB 2384,
5 which prevents any entity that, *inter alia*, engages in constitutionally protected abortion-
6 related speech from participating in a beneficial tax credit program. Absent an injunction
7 from this Court, HB 2384 will go into effect December 31, 2011. This law is not only
8 patently unconstitutional under well-settled law but is also dangerous to the health and
9 well being of many abused women. In its zeal to punish any organization that has
10 anything to do with abortion, the State seeks to deprive pregnant victims of domestic and
11 sexual violence, some of whom do not want to be forced to bear their abuser’s child, of
12 critical reproductive health information and services. The First Amendment does not
13 permit the State to use the threat of expulsion from the tax credit program, and the
14 ensuing loss of donations, to coerce Plaintiff’s members to give up constitutionally
15 protected speech and to withhold this information from the women they serve.

BACKGROUND

I. ARIZONA COALITION AGAINST DOMESTIC VIOLENCE

20 Plaintiff AzCADV is a 501(c)(3) non-profit membership organization based in
21 Phoenix, Arizona, which is comprised of thirty residential domestic violence service
22 programs, as well as other concerned individuals and groups, across the state. *See* Ex. 1
23 ¶¶ 4-5 (Decl. of Elizabeth Ditlevson) (“Ditlevson Decl.”). The Coalition’s members
24 provide a range of valuable services to women, men, and children throughout the state.
25 For example, members provide victims of domestic violence (and their children) with
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1 emergency shelter and transitional housing; legal advocacy; support groups and one-on-
2 one advocacy and support; crisis hotlines; transportation; batterer intervention programs;
3 employment services; child care; and referrals for medical care and other support
4 services. *Id.* at ¶ 7.

5 In turn, the Coalition provides its members with a range of benefits and services in
6 order to improve and augment the services they provide to victims of domestic violence.
7 *Id.* at ¶¶ 2, 4, 9. Of particular relevance here, when counseling members about
8 budgetary issues, the Coalition advises them to take advantage of and participate in the
9 Working Poor Tax Credit Program, assuming they meet the criteria for participation. *Id.*
10 at ¶ 9; *see also infra*. As of 2011, two-thirds of the Coalition's members were listed by
11 the state as participants in the program. Ditlevson Decl. ¶ 9.

14 **II. THE WORKING POOR TAX CREDIT PROGRAM**

15 Since 1998, the Working Poor Tax Credit Program (“tax credit program” or “the
16 program”) has created an incentive for Arizona taxpayers to donate to organizations
17 serving low income and disadvantaged individuals. The program allows taxpayers who
18 make voluntary cash donations to qualifying organizations to claim a dollar-for-dollar
19 credit against their state taxes. *See* Ariz. Rev. Stat. Ann. § 43-1088 (2011). Under the
20 program, a single individual or head of household may claim a credit of up to two
21 hundred dollars, and a couple filing jointly may claim a credit of up to four hundred
22 dollars, in any taxable year. *See id.* § 43-1088(A). If the allowable tax credit exceeds the
23 taxes otherwise due on the claimant's (or claimants') income, or if there are no taxes due,
24 the taxpayer(s) may carry forward the amount of the claim not used to offset future taxes
25 for up to five consecutive taxable years. *See id.* § 43-1088(C). To claim the credit, a
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1 taxpayer must provide the name of the qualifying charitable organization and the amount
2 of the contribution on forms provided by the Department of Revenue when filing his or
3 her taxes. *Id.* § 43-1088(E). In order to facilitate taxpayers' ability to identify qualifying
4 charitable organizations, the Department of Revenue publishes a list of participating
5 organizations each year. *See* Ex. 2 (List of Qualifying Charitable Organizations, 2011).¹
6

7 In order to participate in the program, an organization must provide the
8 Department with written certification that it meets the following criteria: (1) The
9 organization must have 501(c)(3) status under the federal tax code or be a designated
10 community action agency that receives a federal community services block grant; and (2)
11 the organization must be able to demonstrate that it spends at least 50% of its budget on
12 services to Arizona residents who receive temporary assistance for needy families
13 benefits, who are low income residents of the state, or who are chronically ill or
14 physically disabled children. Ariz. Rev. Stat. Ann. § 43-1088(G), (I)(3). The statutory
15 definition of "services" includes "cash assistance, medical care, child care, food, clothing,
16 shelter, job placement and job training services." *Id.* § 43-1088(I)(4). The Department
17 reviews each certification and notifies the organization of its determination. *Id.* § 43-
18 1088(H).² An organization that knowingly or intentionally provides fraudulent
19 information to the Department is subject to both criminal and civil penalties under
20 Arizona law. *See, e.g., Id.* §§ 42-1125, -1127. Hundreds of organizations currently
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25 ¹ The list is also available at *Working Poor Tax Credit*, Ariz. Dept. of Revenue,
26 <http://www.azdor.gov/TaxCredits/WorkingPoorTaxCredit.aspx> (last visited Oct. 25,
2011).

27 ² The Department may also periodically request recertification. *See* Ariz. Rev. Stat. Ann.
28 § 43-1088(H). In addition, an organization is required to notify the department of any
changes that might affect its qualifications under the statute. *See id.* at § 43-1088(F).

1 qualify for the program. *See* Ex. 2.

2 Because of its broad focus on supporting a wide range of services for the working
3 poor, the tax credit program has resulted in significant donations to a diverse array of
4 organizations, ranging from Habitat to Humanity, nursery schools and youth centers to a
5 number of organizations which counsel women against having an abortion (“crisis
6 pregnancy centers”) and domestic violence service providers. *See, e.g.*, Ex. 2. Indeed,
7 the program has been very successful: in 2008, more than 36,000 Arizona taxpayers
8 claimed the tax credit for a total of 11.06 million dollars.³

10 **III. HB 2384**

11 In 2011, the Arizona Legislature passed HB 2384, which amends the tax credit
12 program to exclude otherwise qualifying organizations that “provide, pay for, promote,
13 provide coverage of or provide referrals for abortions” and/or organizations that
14 “financially support any other entity that provides, pays for, promotes, provides coverage
15 of or provides referrals for abortions.” *See* Ex. 3 (“HB 2384”). The statute does not
16 define or provide examples of what it means to “promote” abortion.
17

18 Until now, no other subject matter or point of view has been legislatively excluded
19 from the tax credit program. Moreover, HB 2384 is explicitly aimed at only one
20 viewpoint about abortion: it bars organizations that refer for or “promote” abortion from
21 participating in the program, but it allows organizations that express an anti-abortion
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27 ³ *The Revenue Impact of Arizona’s Tax Expenditures FY 2009/10*, Ariz. Dep’t of
28 Revenue, at 48 (2010), available at <http://www.azdor.gov/LinkClick.aspx?fileticket=JL-F9b7MZ-M%3d&tabid=108&mid=492>.

viewpoint to continue to participate in the program.⁴

1
2 **IV. EFFECT OF HB 2384 ON PLAINTIFF'S MEMBERS AND THE**
3 **WOMEN THEY SERVE**

4 If it is allowed to go into effect, HB 2384, will force Plaintiff's members to
5 choose between (a) participation in a tax credit program that yields much needed
6 resources for their work or (b) suppressing abortion-related speech, thereby risking their
7 clients' health and safety. This choice is no choice at all: regardless of what they choose
8 to do, if HB 2384 is allowed to go into effect it will undermine Plaintiff's members'
9 ability to provide comprehensive services to victims of domestic violence.
10

11 As domestic violence advocates, Plaintiff's members are committed to survivor
12 or client centered advocacy. This means that they work to provide a survivor with
13 resources and information about all her options without making any decisions for her. In
14 particular, it is important that a survivor regain the ability to make her *own* health related
15 decisions when she leaves or is considering leaving the abusive relationship. *See*
16 Ditlevson Decl. ¶¶ 19-20 . For many survivors of violence, complete and accurate
17 information about abortion and reproductive health care is critical.
18

19
20 Indeed, women in violent or abusive relationships will often experience a range of
21 sexually abusive behaviors that can lead to unintended pregnancy, such as rape or the use
22 of verbal demands, threats and physical violence to pressure their current or former
23 spouse or girlfriend to become pregnant. Others may engage in what is known as birth
24

25 ⁴ *See* Ex. 2 (listing, e.g., 1st Way Pregnancy Center,
26 <http://1stway.net/pregnant/abortionInfo/>; House of Ruth Pregnancy Care Center,
27 http://www.cottonwoodpregnancy.com/index.php?option=com_content&view=article&id=3&Itemid=3; Community Pregnancy Center, <http://www.cpcprescott.org/our-work>;
28 Women's Pregnancy Center, http://wpctucson.com/abortion_info/services/index.php;
Lake Havasu Pregnancy Care, <http://lakehavasupregnancycare.com/>)).

1 control sabotage—deliberate acts that ensure that a woman cannot use contraception or
2 prevent an unwanted pregnancy, such as preventing a woman from going to a family
3 planning clinic, flushing birth control pills down the toilet, intentional breaking or
4 removing of condoms, and removing contraceptive rings or patches. *See id.* at ¶¶ 12-15.

5 As a result of this abuse, some survivors of domestic and sexual violence will ask
6 Plaintiff’s members about abortion services. These women have many reasons for
7 seeking abortion services. For example, they may not want to be forced to remain
8 pregnant and bear their abuser’s child; they may fear that a pregnancy will increase the
9 abuse and put their health and lives at even greater risk; they may fear that any child they
10 bring into the family will also be abused; and/or they may fear creating such a lasting
11 connection with their abuser that. *See id.* at ¶¶ 16-18.

14 If HB 2384 is allowed to go into effect, AzCADV members can continue to
15 participate in the tax credit program only by withholding information about abortion
16 services from their clients. Moreover, HB 2384 would not just gag Plaintiff’s members
17 from providing abortion referrals. The law also prohibits organizations that “promote”
18 abortion, and organizations that provide financial support to an entity that refers for,
19 provides or “promotes” abortion, from participating in the tax credit program, without
20 providing any explanation of what it means to do any of those things. Because these
21 restrictions are so vague, members would have to refrain from providing or making
22 available any information or services—short of providing a referral—that might facilitate
23 a woman’s ability to access abortion in order to be sure they are in compliance with the
24 law and the parameters of the tax credit program. For example, one of Plaintiff’s
25 members regularly invites Planned Parenthood to provide presentations on reproductive
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1 health to residents of the shelter. *Id.* at ¶ 24. Other members are located in areas where
2 the health care entities that provide abortions are also the only entities in that area or
3 region providing low- or no-cost family planning services or services for sexually
4 transmitted infections (“STIs”). *Id.* Given the broad and undefined language in HB
5 2384, the law jeopardizes their ability to direct clients to abortion providers, even if in
6 conjunction with referrals for non-abortion services such as birth control and STI
7 treatment, because they could still be considered to be “promoting” or financially
8 supporting an entity that “promotes” abortion. *Id.* at ¶¶ 23-24. Likewise, members will
9 be chilled from providing referrals to doctors who themselves do not provide abortions
10 with the intention and knowledge that that doctor will provide a third party referral to an
11 abortion provider. *Id.* Because participation in the tax credit program requires members
12 to certify, on penalty of perjury, that they meet the criteria for participation, and because
13 HB 2384 adds such vague criteria to the program, members who wish to continue to
14 participate will have no choice but to err on the side of caution and discontinue providing
15 not just abortion referrals, but a range of other information and services, as well. *Id.*

19 ARGUMENT

20 THE ACT MUST BE ENJOINED BECAUSE IT VIOLATES THE 21 FIRST AMENDMENT

22 A plaintiff seeking preliminary injunctive relief must establish (1) a likelihood of
23 success on the merits; (2) a likelihood of suffering irreparable harm in the absence of
24 preliminary relief; (3) that the balance of equities tips in plaintiff’s favor; and (4) that an
25 injunction is in the public interest. *Am. Trucking Ass’ns, Inc., v. City of L.A.*, 559 F.3d
26 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7,
27 20 (2008)). Plaintiff here satisfies all four criteria.
28

I. THE PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS

1 HB 2384 violates the First Amendment and is unconstitutional in at least two
2 independent respects. First, it imposes an unconstitutional condition on Plaintiff's
3 members by forcing them to suppress protected speech in order to participate in a
4 government program. Second, HB 2384 discriminates against Plaintiff's members on the
5 basis of viewpoint, excluding them from the tax credit program on the basis of pro-
6 choice, abortion-related speech but allows individuals and groups that express anti-
7 abortion opinions to remain in the program.
8
9

10 **A. HB 2384 Unconstitutionally Excludes Plaintiff's Members From**
11 **Participating in a Government Program Because of Their**
12 **Constitutionally Protected Speech.**

13 HB 2384 prohibits Plaintiff's members from receiving a government benefit
14 (participation in the tax credit program) based solely on the exercise of pro-choice,
15 abortion-related speech.⁵ Such a prohibition is blatantly unconstitutional. Indeed, it is
16 well-settled that the government cannot force individuals or entities to give up a
17 constitutional right in order to receive a government benefit. As the U.S. Supreme Court
18 Court explained in *Perry v. Sindermann*,

19
20 [E]ven though a person has no "right" to a valuable government
21 benefit and even though the government may deny him the benefit
22 for any number of reasons, there are some reasons upon which the
23 government may not rely. It may not deny a benefit to a person on a
24 basis that infringes his . . . interest in freedom of speech. For if the
25 government could deny a benefit to a person because of his
26 constitutionally protected speech or associations . . . [t]his would
27 allow the government to 'produce a result which [it] could not
28

25 ⁵ Referrals for abortion, abortion counseling, and abortion advertising are constitutionally
26 protected speech. See *Bigelow v. Virginia*, 421 U.S. 809 (1975) (statute making it a
27 misdemeanor to sell or circulate any publication encouraging or prompting the procuring
28 of an abortion declared an infringement of freedom of speech).

1 command directly.’ Such interference with constitutional rights is
2 impermissible.

3 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see*
4 *also Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707 (1981) (denial of
5 unemployment benefits to Jehovah’s Witness who left job for religious reasons declared
6 unconstitutional); *Elrod v. Burns*, 427 U.S. 347 (1976) (dismissal from nonpolicymaking
7 position on basis of political affiliation declared unconstitutional); *Sherbert v. Verner*,
8 374 U.S. 398 (1963) (holding unconstitutional application of unemployment
9 compensation statute so as to deny benefits to claimant who had refused employment
10 because of her religious beliefs); *Speiser*, 357 U.S. 513 (discriminatory denial of a tax
11 exemption for engaging in speech is an unconstitutional limitation on free speech).

12
13 The law of this Circuit was clearly established when the Ninth Circuit invalidated
14 a similar Arizona statute. *See Planned Parenthood of Cent. and N. Ariz. v. Babbitt*, 718
15 F.2d 938 (9th Cir. 1983), *and* 789 F.2d 1348 (9th Cir. 1986), *aff’d* 479 U.S. 926 (1986).
16 That statute prohibited the distribution of any state money to nongovernmental agencies
17 or entities that, *inter alia*, offered abortion counseling and referrals. *See id.* In its holding
18 striking the *Babbitt* statute, the Ninth Circuit made very clear that, even though the State
19 may prefer its pregnant citizens choose childbirth over abortion, it could not attempt “to
20 dissuade constitutionally protected [pro-choice] speech activities by withdrawing a
21 government benefit from those who engage[d] in such activities.” 718 F.2d at 942.⁶

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24 Thus, U.S. Supreme Court and Ninth Circuit precedent clearly demonstrate that
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27 ⁶ *Cf. Planned Parenthood of Mid-Mo. and E. Kan., Inc., v. Dempsey*, 167 F.3d 458 (8th
28 Cir. 1998) (unconstitutional conditions doctrine prevents state from “prohibit[ing]
 grantees from having any affiliation with abortion service providers”).

1 the State cannot condition participation in the tax credit program on the suppression of
2 pro-choice, abortion-related speech. Because the Constitution does not permit the State
3 to use the threat of expulsion from the tax credit program, and the loss of a private,
4 fundraising opportunity, as a means of preventing Plaintiff's members from providing
5 abortion counseling and referrals to the women they serve, HB 2384 must be enjoined.⁷
6

7 **B. HB 2384 Violates Plaintiff's Members First Amendment Rights by**
8 **Limiting Access to the Tax Credit Program on the Basis of Viewpoint.**

9 HB 2384 is also a textbook example of impermissible viewpoint discrimination.
10 Indeed, it excludes organizations that express a pro-choice viewpoint from participating
11 in and benefitting from the tax credit program, while permitting organizations that
12 express the opposite viewpoint to continue to do so. Supreme Court precedent could not
13 be clearer: the viewpoint discrimination created by HB 2384 violates Plaintiff's
14 members' right to free speech.
15

16 More than two decades ago, in a case strikingly similar to this one, the Supreme
17 Court considered the constitutionality of a program that allowed qualifying organizations
18 to solicit federal employees for tax-deductible donations. *Cornelius v. NAACP Legal*
19 *Def. and Educ. Fund, Inc.*, 473 U.S. 788, 804-06 (1985). Participation in that program
20

21
22 ⁷ In addition to chilling constitutionally protected speech, HB 2384's prohibitions on
23 "promoting" abortion and on providing financial support to any entity that provides,
24 refers for, or "promotes" abortion are so vague that the law will invariably restrict
25 Plaintiff's members' First Amendment associational rights, as well. *See Christian Legal*
26 *Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct 2971,
27 3010 (2010) ("The First Amendment protects the right of 'expressive association' – that
28 is, 'the right to associate for the purpose of speaking.'") (internal citations and quotations
omitted). For example, one of Plaintiff's members regularly invites Planned Parenthood
to provide presentations on reproductive health to residents of the shelter, and is
concerned that these presentations could not continue. *See Ditlevson Decl.* ¶ 24; *supra*
pp. 6-7.

1 was limited to charitable, health and welfare organizations that provided or supported
2 direct services to individuals or their families. *Id.* at 795. However, otherwise qualified
3 organizations that engaged in political and legal advocacy were specifically barred from
4 participation. *Id.* The NAACP and others brought suit challenging their exclusion from
5 the program. *Id.* at 793. The Court held that by creating a program that encouraged
6 federal employees to donate to certain organizations that were allowed to solicit
7 donations through that program, the government had created a forum for speech, and
8 could not exclude NAACP and others from the charitable solicitation program on the
9 basis of the viewpoints advanced or expressed in their work. *See id.* at 806 (“[T]he
10 government violates the First Amendment when it denies access to a speaker [to a non-
11 public forum] solely to suppress the point of view he espouses on an otherwise includible
12 subject”).

13
14
15 In all relevant aspects, the tax credit program operates exactly like the charitable
16 solicitation program in *Cornelius*: as in *Cornelius*, the tax credit program is a
17 government-created program designed to encourage individuals to donate to
18 organizations that provide a range of social welfare services, including counseling and
19 information about and referrals for health care. As in *Cornelius*, Defendant cannot deny
20 Plaintiff’s members access to the tax credit program on the basis of viewpoints expressed
21 in their work—particularly on “an otherwise includible subject,” such as abortion.

22
23 *Cornelius*, 473 U.S. at 806.⁸ Yet this is precisely what HB 2384 does: it explicitly

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26 ⁸ Although *Cornelius* found the solicitation program at issue in that case was a
27 nonpublic forum, under today’s case law, the tax credit program would probably be
28 considered a limited public forum. *See, e.g., Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d
956, 970 (9th Cir. 2008) (finding Arizona specialty license plate program a limited public

1 amends the tax credit program to exclude *only* those qualifying organizations that express
2 a pro-choice viewpoint in their work. What is more, HB 2384 allows organizations that
3 counsel women against abortion to continue to participate in the program. As such, the
4 statute is “an effort to suppress expression merely because public officials oppose the
5 speaker’s view[s]” about abortion and must be enjoined by this Court. *Perry Educ. Ass’n*
6 *v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 46 (1982). *See also Ariz. Life Coal. Inc.*,
7 515 F.3d at 972; *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217 (9th Cir. 2003) (holding
8 state highway nonpublic forum and policy allowing American flags to be displayed on
9 highway overpasses, but not other expressive banners, e.g., anti-war signs, was
10 unconstitutional viewpoint discrimination).
11
12

13 **II. PLAINTIFF’S MEMBERS AND CLIENTS WILL SUFFER**
14 **IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS**
15 **NOT GRANTED.**

16 HB 2384 will cause Plaintiff’s members to suffer irreparable harm. *Collins v.*
17 *Brewer*, 727 F. Supp. 2d 797, 812 (D. Ariz. 2010), *aff’d*, *Diaz v. Brewer*, --- F.3d ----,
18 2011 WL 3890755 (9th Cir. 2011)). As a threshold matter, “a party seeking preliminary
19 forum because program was restricted by statute “to only nonprofit organizations with
20 community driven purposes that do not promote a specific religion, faith or antireligious
21 belief.”); *Gentala v. City of Tucson*, 213 F.3d 1055, 1062 (9th Cir. 2002) (“a
22 government-created source of funding to cover costs associated with engaging in
23 behavior deserving First Amendment protection . . . is a [limited public] forum within the
24 meaning of the First Amendment”). However, regardless of the forum, “[o]ne thing is
25 clear, ‘once the government has chosen to permit discussion of certain subject matters, it
26 may not then silence speakers who address those subject matters from a particular
27 perspective.’” *Ariz. Life Coal. Inc.*, 515 F.3d at 972 (quoting *Cogswell v. City of Seattle*,
28 347 F.3d 809, 815 (9th Cir. 2003)); *see also Cornelius*, 473 U.S. at 806. Thus, because
HB 2384 is so obviously viewpoint discriminatory, it is unnecessary for this Court to
determine what kind of forum the tax credit program constitutes in order to rule for
Plaintiff here.

1 injunctive relief in a First Amendment context can establish irreparable injury sufficient
2 to merit the grant of relief by demonstrating the existence of a colorable First
3 Amendment claim,” as Plaintiff has done here. *Sammartano v. First Jud. Dist. Ct.*, 303
4 F.3d 959, 973 (9th Cir. 2002) (internal quotation marks and citation omitted); *see also*
5 *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009) (finding irreparable
6 injury where plaintiff demonstrated a likelihood of success on the merits of his claims
7 “[g]iven the free speech protections at issue in th[e] case”). It is well-established that
8 “[t]he loss of First Amendment freedoms, for even minimal periods of time,
9 unquestionably constitutes irreparable injury.” *Thalheimer v. City of San Diego*, 645
10 F.3d 1109, 1128 (9th Cir. 2011) (quoting *Elrod*, 427 U.S. at 373).

13 Moreover, chilling Plaintiff’s members’ speech poses an immediate and
14 significant risk of harm to their patients.⁹ As explained above, victims of domestic and
15 sexual violence experience a range of abusive behaviors that can result in unintended
16 pregnancy. Ditlevson Decl. ¶¶ 11-16; *see supra* pp. 5-6. Some of these women will
17 understandably seek information about abortion services. Ditlevson Decl. ¶¶ 16, 18, 21.
18 Indeed, for some women being forced to bear their abuser’s child will compound the
19 abuse, and/or could make it more difficult, even impossible, for her to leave the
20 relationship. *Id.* at ¶ 17. Therefore, it will be detrimental to survivors’ health and safety
21 to restrict advocates from referring women to agencies that can provide medically
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23

25 ⁹ *See, e.g., Portland Feminist Women’s Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d
26 681, 686 (9th Cir. 1988) (“The primary interest of the district court in issuing the
27 preliminary injunction is to protect the rights of the clinic and its patients from irreparable
28 harm. Inextricably entwined with this interest is the interest in protecting the ability of the
clinic to provide medical services free from interference that may endanger the health and
safety of its patients.”).

1 accurate information in order to help them reach a decision about an unintended
2 pregnancy. *Id.* at ¶¶ 7-8.

3 Prohibiting not only referrals for abortion care, but also anything that could be
4 deemed to “promote” abortion, or anything that could be deemed to financially support
5 an entity that “provides,” “refers for,” or “promotes” abortion, HB 2384 would
6 predictably force Plaintiff’s members to withhold information and referrals about other
7 basic forms of reproductive health care. *Id.* at ¶¶ 23-24; *supra* 6-7. This too threatens the
8 health and well being of some of Arizona’s most vulnerable women.
9

10 Finally, absent an injunction from this Court, those members that opt to continue
11 to provide comprehensive and accurate information about abortion to their clients will
12 lose the ability to participate in the tax credit program and suffer the loss of a critical
13 fundraising opportunity. Members have reported that participation in the program leads
14 to a tangible increase in donations. However, were the law allowed to take effect and
15 were Plaintiff to thereafter prevail, there would be no way for Plaintiff’s members to
16 know how much they would have received in donations had they been able to participate
17 in the program. Because this sort of financial harm would be impossible to quantify or
18 recover should Plaintiff later succeed on the merits it too constitutes irreparable harm.
19

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21 *Bean v. Pearson Educ., Inc.*, 2011 WL 1211684, at 2 (D. Ariz. 2011).¹⁰
22

23
24 ¹⁰ Moreover, even if those lost donations were somehow quantifiable, Eleventh
25 Amendment immunity would likely bar Plaintiff’s members from recovering those funds
26 from Defendant in federal court. *See Cal. Pharm. Ass’n v. Maxwell-Jolly*, 563 F.3d 847,
27 852 (9th Cir. 2009). Thus, because the money Plaintiff’s members will lose by not being
28 permitted to participate in the tax credit program is neither quantifiable nor recoverable,
Plaintiff’s members’ injuries cannot be fully remedied with a financial award and are
therefore irreparable. *See Collins*, 727 F.Supp.2d at 812 (noncompensable injuries
constitute irreparable harm).

1 In sum, HB 2384 presents Plaintiff's members with a Hobson's choice: Suppress
2 abortion-related speech, in violation of their First Amendment rights and at the risk of
3 their clients' health and safety, or lose access to a beneficial tax credit program. Either
4 way, if HB 2384 is allowed to go into effect it will violate Plaintiff's members'
5 constitutional rights and will undermine Plaintiff's members' ability to provide critical,
6 comprehensive services to victims of domestic violence.
7

8 **III. THE PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC**
9 **INTEREST.**

10 The interests of Plaintiff and the public are aligned in this case, weighing heavily
11 in favor of a preliminary injunction. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-*
12 *Jolly*, 572 F.3d 644, 659 (9th Cir. 2009) ("The public interest analysis for the issuance of
13 a preliminary injunction requires us to consider 'whether there exists some critical public
14 interest that would be *injured* by the grant of preliminary relief.'") (emphasis added)
15 (quoting *Hybritech Intc. v. Abbott Labs.*, 849 F.2d 1446, 1458 (Fed. Cir. 1988)). The
16 Ninth Circuit has "consistently recognized the significant public interest in upholding
17 free speech principles." *Klein*, 584 F.3d at 1208 (quoting *Sammartano*, 303 F.3d at 974
18 (collecting cases) (internal quotation marks omitted)). Thus, a preliminary injunction is
19 warranted in this case because the same First Amendment violations that would
20 irreparably harm Plaintiffs concurrently harm the public interest. *See Reed v. Purcell*,
21 2010 WL 4394289, at *4 (D. Ariz. 2010) ("It is always in the public interest to prevent
22 the violation of a party's constitutional rights.") (internal quotations omitted).
23
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25

26 Furthermore, as set forth in the previous section, maintaining the status quo will
27 ensure Plaintiff's members can continue to provide comprehensive information and
28

1 services to the Arizona women who need it most. It is in the public interest to ensure that
2 pregnant victims of sexual violence and abuse are able to obtain the care they need,
3 whether that is pre-natal care, adoption counseling, or abortion services. *See Portland*
4 *Women's Health Ctr.*, 859 F.2d at 686.

5 **IV. THE BALANCE OF EQUITIES TIPS SHARPLY IN FAVOR OF THE**
6 **PLAINTIFF.**

7 Defendant would suffer no harm from the grant of the preliminary injunction. In
8 assessing whether the balance of equities favors injunctive relief, the district court must
9 “balance the interests of all parties and weigh the damage to each.” *Stormans, Inc. v.*
10 *Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (quoting *L.A. Mem'l Coliseum Comm'n v.*
11 *Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir.1980)). Plaintiff is seeking an
12 injunction to maintain the status quo while the case is pending. As described above, the
13 irreparable harms facing Plaintiff's members without a preliminary injunction are
14 overwhelming, and courts frequently find the equities favor an injunction to preserve the
15 status quo in just such a situation. *See AFL v. Chertoff*, 552 F. Supp. 2d 999, 1006-07
16 (N.D. Cal. 2007); *Nat'l Ctr. for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368 (9th
17 Cir. 1984) (agreeing that irreparable harm to plaintiffs outweighed harm to government
18 from delay in implementing regulation). Indeed, the preservation of the status quo in the
19 face of widespread and significant irreparable harms is precisely the purpose of any
20 preliminary injunction. *See Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d
21 1415, 1422 (9th Cir. 1984). By contrast, an injunction would not force Defendant to
22 change its existing practices, policies, or procedures, as HB 2384 has not yet taken effect.
23 Plaintiff seeks merely to prevent Defendant from implementing an unconstitutional law
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1 in order to prevent broad irreparable harms to Plaintiff's members and the public. As
2 such, the equities tip sharply in favor of the grant of a preliminary injunction.

3 **CONCLUSION**

4 For all the reasons stated herein, HB 2384 violates the First Amendment and is
5 unconstitutional. Accordingly, Plaintiff respectfully requests this Court enjoin HB 2384
6 from going into effect on December 31, 2011.
7

8
9 Respectfully submitted,

10 Dated this 26th Day of October, 2011.

11 /s/ Alexa Kolbi-Molinas

12
13 Alexa Kolbi-Molinas
14 American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
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15 *On behalf of Attorneys for Plaintiff.*
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CERTIFICATE OF SERVICE

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I hereby certify that on October 26, 2011, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record in this matter.

/s/ Alexa Kolbi-Molinas_____