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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Paul A. Isaacson, M.D., on behalf of himself and his patients, et al.,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS' EMERGENCY MOTION TO STAY A PORTION OF THE COURT'S SEPTEMBER 28, 2021 PARTIAL PRELIMINARY INJUNCTION PENDING APPEAL

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Defendants have not met their heavy burden to justify a stay of this Court's preliminary injunction order. Following full briefing and two-plus hours of oral argument, this Court issued a detailed and well-reasoned explanation of its decision to preliminarily enjoin Defendants' Reason Regulation Scheme. ECF No. 52. The Court found the Reason Regulations unconstitutional on multiple grounds: both because they violate substantive due process by placing an undue burden on the right to pre-viability abortion *and* because they are unconstitutionally vague. Unsatisfied with this result, Defendants have lodged a last-ditch motion seeking to lift the injunction with respect to one provision of their scheme, A.R.S. § 13-3603.02(A)(2). Defendants do not explain why they seek a stay only as to that one provision of the Reason Regulation Scheme, which is unconstitutional for the same reasons as the rest. Indeed, Defendants have noticed an appeal that covers the entire injunction, ECF No. 56, but nonetheless accept that all other aspects of the Reason Regulation Scheme can remain enjoined pending appeal. Defendants have pointed to no aspect of Section 13-1603.02(A)(2) that warrants special treatment, and indeed there is none.

Defendants have failed to show any flaw in the Court's decision—much less a basis to justify the extraordinary relief of a stay. First, Defendants have not shown that they are likely to succeed on appeal. To secure a stay, Defendants would have to show that they are likely to succeed in reversing both the Court's holdings on the vagueness claims *and* on the substantive due process claims. Defendants' motion raises no serious doubt with respect to either. At best, their motion mischaracterizes relevant precedent and ignores extensive evidence submitted by Plaintiffs—all of which, along with Defendants' own evidence, only supports the Court's decision to enjoin the Reason Regulations.

Second, the balance of harms overwhelmingly favors leaving the injunction in place. A stay cannot be granted unless Defendants establish that they will face likely and actual irreparable harm during the pendency of an appeal. Defendants have not come close to meeting this high standard, and indeed have not articulated any concrete harm that they will suffer at all—*i.e.*, if Section 13-1603(A)(2) remains enjoined pending appeal, just like

the rest of the Reason Regulation Scheme. And, to the extent a state may have an abstract interest in implementing its laws, it is well-settled that any such interest must be balanced against competing harms to Plaintiffs and the public interest. As this Court already found, the Reason Regulations would cause immense harm to people across Arizona, including those who would lose access to time-sensitive and constitutionally-protected abortion care, and health care providers who would face uncertain legal obligations and arbitrary prosecution. The risk of those harms is now even starker based on Defendants' motion to stay—since the State's fervor in pursuing implementation of this law further evidences its intent to prosecute Plaintiffs for the provision of constitutionally-protected healthcare.

Accordingly, Defendants' Emergency Motion to Stay should be denied.

I. LEGAL STANDARD

A "stay is an 'intrusion into the ordinary processes of administration and judicial review'" and "'an exercise of judicial discretion.'" *Nken v. Holder*, 556 U.S. 418, 427, 433 (2009) (citations omitted). The movant bears the burden of convincing the Court that circumstances warrant such unusual intervention. *Id.* at 434. In determining whether to grant a stay, the Court considers:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. (internal quotation and citation omitted).

The first two factors "are the most critical." *Id.* at 434. Moreover, a "showing of irreparable injury is an absolute prerequisite" for a stay. *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at *2 (9th Cir. June 17, 2020); *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (a stay applicant "must show that an irreparable injury is the more probable or likely outcome"). But, a "stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 1006.

II. DEFENDANTS' APPEAL IS UNLIKELY TO SUCCEED ON THE MERITS

This Court correctly held that "the Reason Regulations [] are likely unconstitutional" both because they are impermissibly vague and because they "place a substantial obstacle in the paths of women seeking to terminate pre-viability pregnancies because of a fetal genetic abnormality." Order on Motion for Preliminary Injunction ("Order") at 28-29. Contrary to Defendants' assertions, Defs.' Mot. for Stay at 3-4 ("Defs.' Mot."), the Court's decision is aligned with binding Supreme Court precedent *and* the weight of authority from courts that have addressed similar laws that restrict abortion based on a patient's reason. To the extent that "[c]ourts across the country have grappled with statutes similar to those challenged here," *id.* at 3, any objective view of that case law only confirms that Plaintiffs' claims are likely to succeed.

First, Defendants are quick to say that "the Ninth Circuit has not yet addressed a law of this nature." *Id.* But, that ignores what this Court has correctly recognized: Defendants' positions are "incompatible with both existing Supreme Court and Ninth Circuit precedent." Order at 17 n.11. As the Court explained, "The Supreme Court clearly held in *Casey* that 'a State may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy before viability'" and "[a]ny woman means any woman, not any woman (except those who wish to terminate a pre-viability pregnancy for a reason the government finds objectionable)." *Id.* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992)). The Court further recognized that the Ninth Circuit confirmed this principle in *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013) (*Isaacson I)*, when it "held unequivocally that a state may not proscribe abortion pre-viability." *Id.* (citing *Isaacson I*, 716 F.3d at 1226); *see also Isaacson I*, 716 F.3d at 1228 (noting "significanc[e]" of the fact that the law created no exception for "abortions in cases of fetal anomaly.").

Second, the *only* Circuit court to consider a vagueness challenge levied against a similar abortion reason regulation held it unconstitutionally vague. *See Memphis Ctr. for Reprod. Health, et al. v. Slatery*, No. 20-5969, 2021 WL 4127691, at *14-17 (6th Cir. Sept.

10, 2021). For similar reasons, this Court was correct to decide that Plaintiffs' vagueness claims are likely to succeed here.

Finally, multiple Circuit courts have enjoined similar reason regulations on substantive due process grounds. This Court's Order is wholly consistent with that precedent, which makes plain that states cannot deprive people of their constitutional right to pre-viability abortion by eliminating that right (or else regulating it out of existence) because of the patient's reason. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 307 (7th Cir. 2018), *reversed in part on other grounds ("PPINK")*[1]; *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021). Rather than address these on-point cases, Defendants rely only on the lone case in which a reason regulation was upheld, Defs.' Mot. at 3 (citing *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 516 (6th Cir. 2021) (en banc),[2] but tellingly provide no further context about that case. This is because, as explained in Plaintiffs' preliminary injunction briefing, *Preterm* dealt with a much different law and record, in addition to making numerous unfounded assumptions. *See* ECF 48 at 2 n.2. By contrast, as this Court has already recognized, Order at 17 n.11, the Reason Regulations at issue here are far more similar to the Arkansas and Indiana laws that were enjoined by the Eighth and Seventh Circuits, and clearly support the Court's order in this case.

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[1] Following the Seventh Circuit's decision in *PPINK,* the Supreme Court denied a petition for certiorari seeking to reinstate Indiana's law barring knowing provision of abortion based on a patient's prohibited reason. *See Box v. PPINK*, 139 S. Ct. 1780 (2019). Defendants' reliance on *Box* (and in particular on Justice Thomas's dissent in that case), Defs.' Mot. at 4, is thus especially misplaced—since that case only highlights that the Supreme Court has expressly declined to consider this very issue and thereby chose to let the decision striking down that similar statute stand.

[2] Defendants also refer to pending matters at the Supreme Court and the Eighth Circuit, Defs.' Mot. at 4, but that does not help them. Principles of *stare decisis* make clear that courts are bound by existing precedent, not some hypothetical outcome based on what courts might do in the future. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)) (only the Supreme "Court [has] the prerogative of overruling its own decisions.").

In sum, because this Court's order is consistent with the overwhelming weight of authority addressing similar laws and related issues, and is further supported by the record evidence presented with the preliminary injunction briefing (*see infra*), Defendants are unlikely to succeed on the merits of their appeal. Defendants have offered no credible reason why this Court should have departed from that precedent, much less why an "intrusion into the ordinary processes of administration and judicial review" is justified under these circumstances. *Nken*, 556 U.S. at 427.

A. The Court Correctly Determined that Plaintiffs are Likely to Succeed on their Vagueness Challenge

1. Plaintiffs' Vagueness Claims are Ripe

The Court correctly determined that Plaintiffs' vagueness challenge is ripe, and nothing in Defendants' motion calls that into question. While Defendants attempt to make much about the "pre-enforcement nature" of this case, Defs.' Mot. at 9, precedent makes clear that relief may be appropriate when "no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." *Steffel v. Thompson*, 415 U.S. 452, 475 (1974); *see also California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (acknowledging "years of Ninth Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights").[3]

The Supreme Court's decision in *Doe v. Bolton,* 401 U.S. 179 (1973) is instructive. In that case, abortion providers challenged Georgia's criminal abortion statutes on constitutional grounds, including vagueness. The Court held that the physicians' claims were properly before the Court "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes," because the providers "should not be required to await and undergo a

[3] Tellingly, Defendants' motion does not dispute that Plaintiffs' substantive due process claims are ripe, and Plaintiffs' vagueness claims are ripe for the same reasons.

criminal prosecution as the sole means of seeking relief." *Id*. at 188; *see also Planned Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022 (9th Cir.), *opinion amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999) (allowing facial challenge to abortion statute). The same is true here.[4]

2. The Reason Regulations are Unconstitutionally Vague

Defendants fail to demonstrate any flaw in this Court's holding that the Reason Regulations are likely to be found unconstitutionally vague—much less a reason that the decision would be reversed on appeal. As the Court explained in great detail, the challenged law is impermissibly vague because it: (1) "does not offer workable guidance about which fetal conditions bring abortion care within the scope of these provisions," (2) does not make clear "at what point in the multidimensional screening and diagnostic process a doctor can be deemed to be 'aware' or 'believe' that a fetal genetic [condition] exists," much less "[a]t what point can a doctor be deemed to 'know' or 'believe' what is in the mind of a patient," and (3) uses "solely because of" in a way that does not account for the "reality that the decision to terminate a pregnancy is a complex one, and often is motivated by a variety of considerations, some of which are inextricably intertwined with the detection of a fetal genetic [condition]." Order at 11-14. Nothing in Defendants' motion seriously calls these findings into question.

Defendants mount three arguments against this Court's sound reasoning—none of which have merit. First, Defendants take issue with the "great weight" placed by this Court on the Reason Regulations' lack of "workable guidance" about which fetal conditions trigger the law's prohibition and "what amounts to a genetic abnormality." Defs.' Mot. at

[4] Defendants' motion also takes issue with the fact that the Court "discusses" *Guerrero v. Whitaker*, 908 F.3d 541 (9th Cir. 2019) and *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019). Defs.' Mot. at 10. But, those cases do nothing to alter the well-settled principle that pre-enforcement challenges are proper in cases like this one. On the contrary, those cases merely build on that principle, by clarifying that plaintiffs may bring facial challenges under "exceptional circumstances" like those the Court found present here. Order at 10; *see also Johnson v. U.S.*, 576 U.S. 591 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Defendants' motion does not discuss, much less dispute, the Court's finding that this case presents exceptional circumstances warranting facial relief. *See* Order at 10.

10 (quoting Order at 11, 13). But, Defendants' only support for their disagreement on this point is a single conclusory statement—that they believe the statute's definition of "genetic abnormality' [] allows doctors to apply the facts of each situation." *Id.* at 11. This sentence merely assumes what Defendants already set out (and failed) to prove, and it is no match for this Court's thoughtful analysis of this issue. The Court reviewed the text of the statute, including its definition of and exceptions to the term "genetic abnormality," as well as the detailed testimony submitted by Plaintiffs about the inherent complexities and limitations of genetic screening and diagnosis (which Defendants have never attempted to dispute or rebut).[5] Order at 12-13. The Court also found that "[t]he evidence shows . . . that there can be considerable uncertainty as to whether a fetal condition exists, has a genetic cause, or will result in death within three months after birth." *Id.* at 12. Under these circumstances, the Court aptly determined that the Reason Regulations "fail[] to give ordinary people fair notice of the conduct it punishes, or [are] so standardless that [they] invite[] arbitrary enforcement." Defs.' Mot. at 11 (quoting *Johnson,* 576, U.S. at 595); *see also Kolender v. Lawsom*, 461 U.S. 352, 353 (1983); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979).[6]

Second, there is no merit to Defendants' argument that the Court ignored "well-established precedent" by finding that the Reason Regulations' use of "knowingly" contributes to, rather than alleviates, vagueness concerns. Defs.' Mot. at 11. Tellingly,

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[5] It is equally telling that Defendants only vaguely reference the law's "one exception" for lethal fetal conditions, Defs.' Mot. at 11, but otherwise conveniently omit from their discussion the Court's finding that "there can be considerable uncertainty as to how long a child born with a genetic [condition] may live, making it difficult for a doctor to know whether a particular fetal genetic abnormality or condition qualifies as a 'lethal fetal condition' under Arizona law." Order at 13.

[6] Defendants also seem to misapprehend what legal standard applies to this issue. Relying on *Guerrero*, 908 F.3d at 545, they assert that "a statute is not unconstitutionally vague just because it 'provides an uncertain standard to be applied to a wide range of fact-specific scenarios.'" Defs.' Motion at 10-11 (quoting). But, this misrepresents the holding in *Guerrero*—which was about when a facial challenge to a statute is appropriate on vagueness grounds, not the substantive standard for determining whether a law is vague in the first place. In any event, this Court already provided a careful analysis of *Guerrero* and correctly found that a facial challenge is appropriate here. *See supra* n.5.

Defendants cite no case law for this point.[7] Instead, Defendants merely bemoan the Court's "characterization" of the challenged statute—specifically the Court's finding that "the distinct wording of this law requires that a doctor know the motivations underlying the action of another person to avoid prosecution, while simultaneously evaluating whether the decision is because of that subjective knowledge." *Id*. at 11 (quoting Order at 13). The Court's finding was consistent with the record and with the applicable law, as confirmed by the fact that the only other Circuit to consider a vagueness challenge against a similar law struck it down for the same reason. Order at 13 (citing *Memphis Ctr. for Reprod. Health*, 2021 WL 4127691, at *14).

By contrast, Defendants' assertion that, under the Reason Regulations, "[a] doctor is not required to *know* anything to avoid prosecution" Defs.' Mot. at 11 (emphasis in original), is incorrect and misses the point. A doctor must indeed try to rule out possession of any potentially incriminating information—*i.e*., the patient's motivations for seeking an abortion—under a subjective, undiscernible standard. As Defendants concede, prosecution "would [] be triggered if the doctor *knew* that a woman was seeking an abortion" for the prohibited reason. *Id.* That concession goes straight to the heart of the matter—the Reason Regulations are unconstitutionally vague precisely because doctors are unable to determine whether they meet the requisite level of knowledge to trigger that prosecution. As the Court explained, "[g]iven Arizona's broad definition of knowledge and the vagueness of the Reason Regulations . . . [t]he evidence, along with common sense, [led] the Court to find

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[7] While Defendants do not specify what "precedent" they could be alluding to, it is significant that the Court considered and applied Supreme Court precedent on this issue. The Court correctly found that, while a scienter requirement may "*ordinarily* alleviate[] vagueness concerns" under some circumstances, Order at 13 (citing *Gonzalez v. Carhart*, 550 U.S. 124, 149 (2006)) (emphasis added), no such clarity is provided by the "knowing" element of the statute at issue here. Unlike in this case, the law in *Gonzales* included "clear guidelines as to prohibited conduct" and "objective criteria" for enforcement—and the Court correctly found that neither are present here. *Id.* at 14. Thus, the Court aptly concluded that "[t]ogether, the squishy 'genetic abnormality' threshold and expansive scienter render [the Reason Regulations] vaguer than the challenged law in *Gonzales*." *Id*.

it likely that many other providers in Arizona will be chilled from performing abortions *whenever they have information from which they might infer that a fetal genetic abnormality is a reason why a patient is seeking to terminate a pregnancy*." Order at 24 (emphasis added). Such chilling of constitutionally-protected conduct goes to the very core of what the vagueness doctrine is designed to prevent. *See Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.").

Third, Defendants wrongly insist that the Reason Regulations cannot be unconstitutionally vague because it will be "obvious" that they do not apply in abortion cases that do not implicate fetal diagnosis. Defs.' Mot. at 11. This is a red herring. It is completely beside the point that the statute's application would be clear in situations where it is wholly irrelevant. *See Casey*, 505 U.S. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

Finally, to the extent Defendants insist the Reason Regulations are so clear that they will only impact the "small" number of cases in which patients directly report a fetal diagnosis as their reason, that is contrary to the record. The evidence and law clearly support the Court's determination that the Reason Regulations' vagueness will force providers to withhold constitutionally-protected care in a wide array of cases.[8] As the Court explained, Defendants' "position is irreconcilable with Arizona's much broader definition of knowledge, and with the reality that knowledge can be and most often is proven through circumstantial, rather than direct, evidence." Order at 15. And the Court further recognized that provider declarants "describe[d] many realistic scenarios in which surrounding circumstances could provide evidence of a provider's 'knowledge' that a patient sought an

[8] While the law's vagueness will force providers to withhold abortion care based on circumstantial evidence in many cases, it is also notable that the number of patients who directly report fetal diagnoses as their reason is actually not "small," despite Defendants' repeated attempts to characterize it that way. *See infra* Part II.B.

abortion because of a fetal genetic abnormality—likely sufficient to establish a *prima facie* case for criminal or civil liability—even though a patient did not explicitly state that was her motive." *Id.* By contrast, Defendants have not—and cannot—cite any evidence in support of their untenable position.[9]

B. The Court Correctly Determined that Plaintiffs are Likely to Succeed on their Substantive Due Process Challenge

The Court correctly determined that Plaintiffs are likely to succeed on their claim that the Reason Regulations violate the right to pre-viability abortion. Having concluded that the Reason Regulations "regulate the mode and manner of abortion by requiring that a woman seeking an abortion because of a fetal abnormality obtain the abortion from a provider who is unaware of her motive," the Court turned to the "determinative question," specifically "whether the Reason Regulations likely will have the effect of unduly burdening this right." Order at 18. The Court applied this standard based on a detailed survey and analysis of fifty years of precedent. *Id.* at 18-22.

Defendants do not dispute the Court's decision to apply the undue burden standard in this case—indeed, it is Defendants who pushed for the undue burden standard from the outset. *See* ECF 46 at 13.[10] Instead, Defendants' motion boils down to their dissatisfaction

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[9] Defendants' motion does not address or dispute the Court's additional finding that the language "solely because of"—as used in the provision they ask the Court to reinstate—renders the law unconstitutionally vague. This perhaps is because, as the Court explained, the statute's "squishy 'genetic abnormality' threshold and expansive scienter" alone are enough to render it unlawfully vague, although that problem also "is *exacerbated* by the reality that the decision to terminate a pregnancy is a complex one, and often is motivated by a variety of considerations, some of which are *inextricably intertwined* with the detection of a fetal genetic abnormality." Order at 14 (emphasis added). Moreover, Defendants themselves have proved unable to identify what "solely" means for purposes of this statute, as evidenced by their treatment of "because of" and "solely because of" as interchangeable throughout the Reason Regulation Scheme. *See* Order at 14-15. For all the same reasons, Section 13-3602(A) and (A)(2) are just as vague as the rest of the Reason Regulation Scheme—notwithstanding that Defendants without explanation ask the Court to stay the injunction only as to that one provision.

[10] While it is not entirely clear based on Defendants' motion, they seem to take issue with the fact that Plaintiffs' preliminary injunction briefing did not primarily frame their claim under the undue burden standard. Defs.' Mot. at 6-7. But, Defendants are incorrect to

with the Court's assessment of the evidence at this preliminary stage of the case. But, while Defendants contend that "Plaintiffs did not satisfy their heavy burden to prevail under the undue burden standard," Defs.' Mot. at 6, they fail to recognize that "[d]ecisions on preliminary injunctions require the district court to assess the plaintiff's *likelihood* of success on the merits, not whether the plaintiff has *actually succeeded* on the merits." *S. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2003) (emphasis added). In other words, the District Court "need[ed] only [to] find probabilities that the necessary facts can be proved." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422-23 (9th Cir. 1984). The evidence here, and the Court's order, clearly meet that standard. None of Defendants' complaints undermine this Court's well-reasoned evaluation of Plaintiffs' substantive due process claims at this preliminary stage, much less satisfy their heavy burden to justify the extraordinary relief of staying the injunction.

First, Defendants take issue with the Court's application of the "large fraction test," but lack any basis to do so. Defendants do not, and cannot, dispute that an abortion restriction is unlawful where it imposes a substantial obstacle for a large fraction of those patients *to whom it is relevant*. *See* Defs.' Mot. at 6; Order at 22; *Casey*, 505 U.S. at 888-95; *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2132 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016). The Court sensibly determined that "the denominator" for the purpose of the "large fraction" standard "consists of women who wish to terminate a pre-viability pregnancy because of a fetal genetic abnormality" as "[t]hese are the women to whom the Reason Regulations will operate as an actual, rather

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suggest that Plaintiffs "did not assert an undue burden claim" at all. *Id*. at 6. On the contrary, Plaintiffs explained why their claims would succeed under *either* standard. ECF 10 at 11 n.6. And, at oral argument, Plaintiffs' counsel provided a detailed assessment of the benefits and burdens at stake, upon the Court's request. Oral Argument Tr. at 19-27. In any event, both the Supreme Court and the Ninth Circuit have made clear that when "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013). The Court clearly acted within its power to apply the undue burden standard here.

than irrelevant, restriction." Order at 22; *see also Isaacson I*, 716 F.3d at 1228 (quoting *Casey*, 505 U.S. at 894). Yet, Defendants inexplicably insist that "the relevant group of women are those who know that their unborn child has a genetic abnormality." Defs.' Mot. at 6. Defendants offer no explanation as to why this *abortion* regulation would be relevant to any pregnant person who has no desire to terminate their pregnancy, and indeed there is none. Defendants' argument defies common sense, finds no support in case law, and cannot be credited.

Second, Defendants claim that "the record is completely devoid of how many women fall into that category" of patients who seek abortion care due to a fetal diagnosis. Defs.' Mot. at 6. That is demonstrably false. Defendants' *own* evidence shows at least 191 Arizona patients identified fetal health/medical considerations as their primary reason *in a single year*. *See* Order at 22.[11] The Court also relied on, *inter alia*:

- evidence in the record showing that very few Arizona providers offer abortion at later stages of pregnancy, when fetal conditions are likely to be detected, *id.* at 23-24;
- Arizona's requirement that providers collect and report information about abortions, including the "reason for the abortion," which will drive some patients to disclose their prohibited reason, *id.* at 24;
- evidence showing that patients' circumstances often make it difficult or impossible for providers to avoid the inference that they are seeking an abortion because of a fetal diagnosis, *id.*; and
- evidence showing that providers will be chilled from providing abortion care throughout Arizona, including because the state's "broad definition of knowledge and the vagueness of the Reason Regulations' criminal and civil liability provisions" will force the Plaintiff providers to "stop performing abortions out of fear of prosecution if the Reason Regulations take effect." *Id.*[12]

[11] Defendants attempt to dismiss this statistic by stating that 191 pregnant patients is an "exceedingly small" number. Defs.' Mot. at 7. It is both notable and concerning that the State considers the infringement of 191 people's constitutional rights to be so insignificant.

[12] Defendants are wrong to take issue with the Court's reliance on Plaintiffs' affidavits.

Thus, the Court was not "left to guess," as Defendants suggest, Defs.' Mot. at 7, but rather properly relied on evidence available at the preliminary injunction stage of this case. *See Sierra On-Line, Inc.*, 739 F.2d at 1422-23 (To issue a preliminary injunction "[t]he district court is not required to make any binding findings of fact; it need only find probabilities that the necessary facts can be proved."). Based on the record, the Court determined that accessing pre-viability abortion was likely to be a very burdensome task for patients affected by the Reason Regulations. Order at 23. Defendants have offered neither counter-evidence nor contrary authority that undermines the Court's findings.

Third, Defendants claim the Court "erred in rejecting the benefits that the State will obtain from the Reason Regulation." Defs.' Mot. at 7. That characterization of the Court's decision is again demonstrably false. The Court provided detailed consideration for each of the State's purported interests and, based on the evidence at this stage, held it is likely that the Reason Regulations do not advance those interests and/or that they are outweighed by the substantial burdens the Reason Regulations impose. Order at 26-29.[13]

Finally, Defendants wrongly assert that the Court "erroneously collapsed the substantial obstacle and benefits analyses." Defs.' Mot. at 9. The Court evaluated the burdens that the Reason Regulations impose and weighed them against the State's

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Defs.' Mot. at 7. A "preliminary injunction may be granted upon affidavits." *Ross-Whitney Corp. v. Smith Kline & French Lab'ys*, 207 F.2d 190, 198 (9th Cir. 1953); *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir. 1972) ("A verified complaint or supporting affidavits may afford the basis for a preliminary injunction."); *see also Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015) ("[D]eclarations are often self-serving, and this is properly so because the party submitting it would use the declaration to support his or her position.").

[13]Defendants list eight purported benefits of the Reason Regulations. Defs.' Mot. at 8. All of the items on this list are just variations of the three interests set out in the law's legislative findings, and a repackaging of the arguments in the State's prior briefs—all of which the Court has already considered. These new variations thus hold no more logic and weight than the interests the Court has already analyzed and rejected.

purported benefits. That is precisely the balancing test contemplated by the Supreme Court in *Whole Woman's Health*, 136 S. Ct. 2309; *see also* Order at 20.[14]

III. DEFENDANTS WILL NOT SUFFER IRREPARABLE HARM ABSENT A STAY

Defendants must demonstrate that they will suffer irreparable harm as "an absolute prerequisite" for a stay. *Ahlman*, 2020 WL 3547960, at *2. A stay applicant must show that an irreparable injury is "the more probable or likely outcome." *Al Otro Lado*, 952 F.2d at 1007. Defendants have not—and cannot—meet this heavy burden. As this Court already explained, "Defendants stand only to lose the ability to immediately implement and enforce a likely unconstitutional set of laws." Order at 29.

Defendants primarily rely on the general assertion that states "by definition suffer[] irreparable harm when [they] are precluded from carrying out the laws passed by [their] democratic processes." Defs.' Mot. at 12. That is insufficient. Even to the extent "a state may suffer an abstract form of harm whenever one of its acts is enjoined" that "is not dispositive of the balance of harms analysis. If it were, then the rule requiring 'balance' of 'competing claims of injury' would be eviscerated." *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606 (2012); *see also Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014) (noting that "[n]o opinion for the Court adopts [the] view" that "a state suffers irreparable injury when one of its laws is enjoined"); *Arizona Democratic Party v. Hobbs*, No. 20-01143-PHX-DLR, 2020 WL

[14] To the extent Defendants dispute whether the *Whole Woman's Health* balancing test applies here, that position only further undermines their reliance on any purported state interests. The State argues that Chief Justice Roberts' concurrence in *June Medical* controls. Defs.' Mot. at 7 n.5. Under that test "the only question for a court is whether [the] law has the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *June Med.* 140 S. Ct. at 2138. Thus, under the standard urged by Defendants, the State's purported interests would not factor into the analysis at all. For that additional reason, Defendants' complaints about the Court's evaluation of the State's interests cannot be credited. In any event, the Court analyzed the Reason Regulations here under both tests "out of caution," Order at 22, and correctly found that Plaintiffs were likely to succeed either way.

6555219, at *1 (D. Ariz. Sept. 18, 2020) (explaining that a state's loss of implementing its laws "alone does not support a stay when balanced against the harms a stay would impose on others"); *Jordahl v. Brnovich*, No. 17-08263, 2018 WL 6422179, at *2 (D. Ariz. Oct. 19, 2018) ("We reject the . . . suggestion that, merely by enjoining a state legislative act, we create a per se harm trumping all other harms").[15]

And, to the extent Defendants also claim they will suffer from an inability "to send an unambiguous message that children with genetic abnormalities, whether born or unborn, are equal in dignity and value," Defs.' Mot. at 12, that harm is neither actual nor irreparable; the State remains free to articulate that message through other means that do not constrain the constitutional rights of its constituents. Defendants simply cannot convey their message through an unconstitutional law that subjects doctors to vague felonies and unduly burdens Arizonans' access to abortion.

IV. A STAY WOULD IRREPARABLY INJURE PLAINTIFFS AND THE PUBLIC INTEREST

The Court correctly determined that Plaintiffs and their patients will suffer manifest irreparable harm absent an injunction. Without an injunction, Arizonans will be unduly impeded, and in some cases prevented altogether, from accessing abortion; and health care providers will be exposed to uncertain legal obligations and arbitrary prosecution. *See* ECF No. 7 at 21. Thus, the Court found that "the evidence suggests that the Reason Regulations will visit concrete harms on Plaintiffs and their patients." Order at 29. The Court also rightly recognized that "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Id.* (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).

[15]Defendants' claimed concern about "carrying out laws passed by its democratic processes," Defs.' Mot. at 12, is even less credible here, in light of the fact that they seek a stay of just one part of the overall legislative scheme that is enjoined. Because A.R.S. § 13-3603.02(A)(2) was not passed in isolation, but rather as part of an interlocking legislative scheme, a stay with respect to that one provision could not implement what the legislature intended. Having accepted that all other aspects of the Reason Regulation Scheme can remain enjoined pending appeal, Defendants cannot seriously claim that they are motivated by fidelity to the legislative process.

For these same reasons, the Court also found that the public interest favors maintaining the injunction here. *See Melandres*, 695 F.3d at 1002 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). Nothing in Defendants' motion alters that sound analysis. Indeed, all four stay factors weigh against Defendants, and the balance of harms strongly tips in Plaintiffs' favor to support retaining the injunction of the Reason Regulations just as this Court entered it.

V. CONCLUSION

Accordingly, Defendants' motion to stay the preliminarily injunction as it applies to Section 13-1603(A)(2) should be denied.

Dated: October 13, 2021

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing. All counsel of record are registrants and are therefore served via this filing and transmittal.

/s/ *Victoria Lopez*
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