MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

Brunn (Beau) W. Roysden III (No. 28698)
Michael S. Catlett (No. 25238)
Kate B. Sawyer (No. 34264)
Katlyn J. Divis (No. 35583)
2005 N. Central Ave
Phoenix, AZ 85004-1592
Telephone: (602) 542-3333
Michael.Catlett@azag.gov

Attorneys for Defendant Mark Brnovich in his official capacity as Arizona Attorney General

[Additional counsel and emails listed on signature page]

UNITED STATES DISTRICT COURT

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

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

[EXPEDITED CONSIDERATION REQUESTED]

INTRODUCTION

The State Defendants have satisfied each of the requirements for a stay pending appeal. Plaintiffs' Opposition to the State Defendants' Motion to Stay ("Opposition") does not establish otherwise.

I. The State's Appeal Raises Serious And Difficult Questions Of Law In An Area Where The Law Is Somewhat Unclear.

As to the first stay factor, the State is only required to "show that the 'appeal raises serious and difficult questions of law in an area where the law is somewhat unclear.'" *Overstreet v. Thomas Davis Med. Ctrs., P.C.*, 978 F. Supp. 1313, 1314 (D. Ariz. 1997).

In the Ninth Circuit, the law is not just unclear, it is non-existent. Plaintiffs do not contend otherwise. Instead, Plaintiffs contend that the law is clear because certain other circuits have enjoined similar statutes in other cases. In reality, on vagueness, there is only one circuit opinion enjoining a state law aimed at preventing physicians from performing discriminatory abortions. Not only is that decision arguably inconsistent with an en banc decision from the same circuit upholding a similar law, the vagueness decision was split, with Judge Thapar issuing a lengthy (and in the State Defendants' view, persuasive) dissent. *Compare Memphis Ctr. for Reproductive Health v. Slatery*, —F.4th—, No. 20-5969, 2021 WL 4127691 (6th Cir. 2021) (enjoining such a statute) with *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 516 (6th Cir. 2021) (en banc) (refusing to enjoin such a statute).

As to due process, the Sixth Circuit, sitting en banc, upheld Ohio's law aimed at preventing physicians from performing discriminatory abortions. The Seventh Circuit enjoined Indiana's similar law. *See Planned Parenthood of Ind. & Ky. v. Comm'r of the Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018). Indiana's en banc petition in that case was ultimately denied, but that decision drew a dissent joined by several circuit judges, including future Justice Barrett. *See Planned Parenthood of Ind. & Ky. v. Comm'r of the Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc) ("Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered."). Indiana sought review from the U.S. Supreme Court, which the Court

granted as to another part of Indiana's law, but Justice Thomas concurred to explain why "[g]iven the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana's." *Box v. Planned Parenthood of Ind. & Ky*, 139 S. Ct. 1780, 1784 (2019). In the Eight Circuit, a panel upheld a decision enjoining Arkansas' law prohibiting discriminatory abortions. Arkansas filed a petition for certiorari, which is now being held by the U.S. Supreme Court, presumably pending the Court's decision in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. *See Rutledge v. Little Rock Family Planning Servs.*, No. 20-1434 (U.S.). A separate panel upheld a decision enjoining Missouri's anti-discrimination law, but the Eighth Circuit later sua sponte granted en banc review and vacated the panel opinion. *Reproductive Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, No. 19-2882 (8th Cir. July 13, 2021).

Plaintiffs do not dispute any of this. They instead try to convince the Court to place extra value on the two or three cases that (at least for now) found against laws similar to Arizona's. But this can hardly be called a situation where the law is clear or settled. The sheer number of circuit judges on each side of the ledger demonstrate that the State Defendants' appeal raises serious and difficult questions of law. And in such a situation, democratically enacted laws should be permitted to go into effect pending appeal.

A. The State Is Likely To Succeed On Plaintiffs' Vagueness Challenge.

Even if the Court thinks more is required for a stay, like a showing of likelihood of success on appeal, the Court should still stay its injunction as to the Reason Regulation. Plaintiffs' response does not establish that their vagueness challenge to the Reason Regulation is ripe. Three of the four cases Plaintiffs cite—*Steffel*, *California Pro-Life Council, Inc.*, and *Planned Parenthood of Southern Arizona*—did not involve a due process vagueness challenge like that which Plaintiffs bring here (as opposed to a First Amendment vagueness challenge).[1] The final case, *Doe v. Bolton*, rejected a vagueness challenge to a

[1] *Planned Parenthood of Southern Arizona v. Lawall* mentioned vagueness but only in the context of concluding that the medical emergency provision at issue imposed "a substantial obstacle to abortion in a large fraction of cases in which it applies." *See* 180 F.3d 1022,

Georgia statute making it a "a crime for a physician to perform an abortion except when ... it is based upon his best clinical judgment that an abortion is necessary." 410 U.S. 179, 191 (1973). That conclusion hardly helps Plaintiffs here. Under the Ninth Circuit's standard for when a due process vagueness challenge is ripe, the Plaintiffs' vagueness claim is not justiciable because Plaintiffs have not provided "a 'concrete factual situation ... to delineate the boundaries of what conduct the government may or may not regulate without running afoul' of the Constitution." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007). In the Opposition, Plaintiffs do not dispute that they have failed to do so. Instead, Plaintiffs continue to leave the Court to guess about how the statute might apply to hypothetical future situations involving hypothetical future patients. The State Defendants were entitled to notice of those concrete factual situations where Plaintiffs believe application of the Reason Regulation will be vague. Having failed to come forward with any such situations, Plaintiffs' vagueness challenge is likely to fail.

The Reason Regulation also is not unconstitutionally vague. Plaintiffs' argument (at 7) that the term "genetic abnormality" is unconstitutionally vague because an ordinary doctor cannot know when an abnormal gene expression is present in an unborn child is counter-productive to Plaintiffs' argument. If it is unclear to a physician whether an unborn child has a genetic abnormality, then the Reason Regulation has no application. In other words, if a physician cannot tell whether an unborn child has a genetic abnormality and does not presume so, then the physician cannot know that an abortion was obtained solely because of the presence of a genetic abnormality. The Reason Regulation, properly construed, already accounts for such ambiguity and does not apply when it exists.

Plaintiffs also do not contest that whether the Reason Regulation applies will be obvious in almost every case. In at least 98% of cases where a woman actually obtains an abortion, it will be obvious whether the Reason Regulation applies. *See* Doc. 57 at 11. Plaintiffs argue (at 9) that this is irrelevant, citing *Casey*. But the constitutional inquiry referenced in *Casey* was the inquiry whether a state law imposed an undue burden on a

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1033 (9th Cir. 1999).

woman seeking an abortion. Plaintiffs do not cite any case supporting that the undue burden analysis has any application to whether a law provides sufficient notice for due process purposes. The two are distinct inquiries focusing on different considerations. For purposes of vagueness, it certainly is relevant that in almost all situations where a woman might seek an abortion, the Reason Regulation's application will be obvious.

Finally, Arizona's inclusion of a heightened "knowing" mens rea requirement does not render the statute unconstitutionally vague. Neither Plaintiffs nor the Court have suggested what mens rea requirement Arizona should have used. Instead, Plaintiffs double down on the Sixth Circuit's erroneous description of what a law somewhat similar to the Reason Regulation requires. Plaintiffs gripe (at 8) that "the Reason Regulations are unconstitutionally vague precisely because doctors are unable to determine whether they meet the requisite level of knowledge to trigger prosecution." In truth, however, the "knowingly" requirement protects physicians from prosecution in ambiguous situations. *See Memphis Ctr. for Reproductive Health*, 2021 WL 4127691, at *39 (Thapar, J., dissenting) ("Indeed, the knowledge requirement here protects doctors who incorrectly (but in good faith) conclude that a patient would have sought an abortion regardless of the protected characteristic. The majority notes that it is often difficult to know why a patient makes her decision. Perhaps. But if that's true, then doctors will be relieved of any criminal liability."). Moreover, Plaintiffs' argument is equally applicable to any criminal provision that employs a "knowing" mens rea requirement, and it cannot be the case that any and all such laws are unconstitutionally vague.

The fact that the Reason Regulation's application may be unclear in a small number of future hypothetical cases does not render the Reason Regulation unconstitutionally vague. *See Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2019) ("[T]he statute provides an uncertain standard to be applied to a wide range of fact-specific scenarios. In that sense, the standard is uncertain. But that kind of uncertainty does not mean that a statute is unconstitutionally vague. Many statutes provide uncertain standards and, so long as those standards are applied to real-world facts, the statutes are almost certainly

constitutional.").

B. The State Is Likely To Succeed On Plaintiffs' Undue Burden Argument.

The Court correctly concluded that the Reason Regulation does not impose a ban on any woman who desires to terminate her pregnancy. Having come to that conclusion, Plaintiffs' substantive due process claim could not support a preliminary injunction because that was Plaintiffs' sole argument under substantive due process. Plaintiffs now claim otherwise and cite to footnote 6 of their Motion for Preliminary Injunction to assert they also argued undue burden. But here is what, in relevant part, that footnote actually said: "The *undue burden test does not apply to the Reason Ban* because it is not a regulation, but rather an outright ban on abortion care." Doc. 10 at 11 n.6 (emphasis added). Plaintiffs also claim that the State Defendants raised undue burden. This is also not true. Here is what the State Defendants actually said: "Plaintiffs argue only that the Non-Discrimination Provision is a complete ban in violation of substantive due process. They purposefully fail to argue that the Non-Discrimination Provision does not serve a valid purpose or, if it is not a complete ban, that the Non-Discrimination Provision creates an undue burden in violation of *Casey* or *June Medical v. Russo*[.]" Doc. 46 at 13. In fact, the State Defendants argued that "[h]aving failed to make those arguments, Plaintiffs have waived them (and should not be permitted to make them for the first time in reply). *Id.* at 13 n.8. Plaintiffs, in fact, did not make an undue burden argument in reply. The Court, therefore, enjoined a duly-enacted state law based on a theory that Plaintiffs purposefully failed to make.

Even if Plaintiffs had not waived an undue burden argument, it should have failed. Plaintiffs did not establish that the Reason Regulation imposes a substantial obstacle on a large fraction of relevant patients. To begin, the Court misidentified the relevant patients. The Reason Regulation applies to any woman who discovers that her unborn child has a genetic abnormality. Once that occurs, no such woman can obtain an abortion if her sole reason for obtaining the abortion is the genetic abnormality and the physician knows that is the sole reason. Thus properly defined, there is no evidence supporting that such women

face a substantial obstacle in obtaining an abortion, which is inherent in the Court's conclusion that the Reason Regulation is merely a regulation on abortion and not a ban. Plaintiffs identify the relevant patients as all women who desire to obtain an abortion because of a genetic abnormality. Defining the denominator and the numerator as the same group of women may be a crafty way of obtaining injunctions in all abortion cases, but it is inconsistent with *Casey* and its progeny. Plaintiffs submitted no evidence establishing, even circumstantially, the number of women who fall into the properly-defined denominator. *See Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017) (reversing because "the district court did not determine how many women would face increased travel distances," "failed to estimate the number of women who would [forgo] abortions," and did not "estimate the number of women who would postpone their abortions").

Even if the denominator is comprised only of women who desire to obtain an abortion because of a genetic abnormality, the numerator for purposes of the Reason Regulation is at most those women whose physician *knows* that she desires to obtain an abortion *solely because of* a genetic abnormality. Plaintiffs submitted no evidence establishing the number of women who fall into the numerator or denominator as they define them.

As to the State's interests in enacting the Reason Regulation, Plaintiffs cannot dispute that the Court did not consider all of Arizona's interests in enacting the Reason Regulation (because Plaintiffs did not argue undue burden and so the State did not brief that issue). Instead, Plaintiffs feebly respond (at 18) that the Court provided detailed consideration for rejecting each of the State's purported interests and that the State's eight interests are just variations of the three interests expressly identified in S.B. 1457. The eight interests are not the same as the three interests. Ultimately, however, it is virtually inconceivable that the State does not have a compelling interest in stopping physicians from knowingly performing eugenic abortions, and particularly in performing those that could result in eliminating entire classes of persons with disabilities, including Down

syndrome. Moreover, the Reason Regulation is narrowly tailored to further that interest by regulating abortion only when a physician knows it is being performed solely for discriminatory reasons. The State Defendants are likely to prevail on appeal on this issue; at the very least, the issue is easily fairly debatable.

II. The Equities Support A Stay Pending Appeal.

The Court's conclusion that enforcement of the Reason Regulation would harm Plaintiffs and the public interest rested entirely on its highly debatable conclusion that the law is unconstitutionally vague and imposes an undue burden on abortion. As explained, the Reason Regulation is constitutional, so the preliminary injunction "clearly inflicts irreparable harm on the State" and the public interest, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018), by preventing the enforcement of a statute "enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). If the Reason Regulation remains enjoined pending appeal, the State's multiple compelling interests in enacting the Reason Regulation will be thwarted for an indeterminate amount of time. In the meantime, some number of physicians will perform abortions solely because of discriminatory reasons.

Plaintiffs and their patients, by contrast, will suffer no irreparable harm in the absence of preliminary relief. As the Court concluded, the Reason Regulation will not prohibit any woman from obtaining an abortion. And Plaintiffs cannot manufacture harm to their patients by refusing to provide abortions based on speculative and unreasonable fears about the potential reach of the law. It is well settled that "a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted." 11A Charles Alan Wright, et al., Federal Practice and Procedure § 2948.1 (3d ed. Oct. 2020 update).

CONCLUSION

State Defendants respectfully request that the Court grant a stay of the Reason Injunction pending appeal.

RESPECTFULLY SUBMITTED this 15th day of October, 2021.

MARK BRNOVICH
ATTORNEY GENERAL

By */s/ Michael S. Catlett*
Brunn W. Roysden III (No. 28698)
Michael S. Catlett (No. 25238)
Kate B. Sawyer (No. 34264)
Katlyn J. Divis (No. 35583)
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, Arizona 85004
Telephone: (602) 542-3333
Fax: (602) 542-8308
Beau.Roysden@azag.gov
Michael.Catlett@azag.gov
Kate.Sawyer@azag.gov
Katlyn.Divis@azag.gov

Attorneys for Defendant Mark Brnovich in his official capacity as Arizona Attorney General

MARK BRNOVICH
ATTORNEY GENERAL

Kevin Ray (No. 007485)
Aubrey Joy Corcoran (No. 025423)
Office of the Arizona Attorney General
15 S. 15th Ave
Phoenix, AZ 85007
Telephone: (602) 542-8328
Fax: (602) 364-0700
Kevin.Ray@azag.gov
AubreyJoy.Corcoran@azag.gov

Attorneys for Defendants Arizona Department of Health Services and Don Herrington in his official capacity as Interim Director of the Arizona Department of Health Services

MARK BRNOVICH
ATTORNEY GENERAL

Mary D. Williams (No. 013201)
Carrie H. Smith (No. 022701)
Office of the Arizona Attorney General
15 S. 15th Ave
Phoenix, AZ 85007
Telephone: (602) 542-7992
Fax: (602) 364-3202
MaryD.Williams@azag.gov

Attorneys for Defendants Arizona Medical Board; Patricia McSorley, in her official capacity as Executive Director of the Arizona Medical Board; and R. Screven Farmer, M.D.; James M. Gillard, M.D.; Jodi A. Bain, M.A., J.D.; Bruce Bethancourt, M.D.; Eileen M. Oswald, M.P.H.; Laura Dorrell, M.S.N., R.N.; Pamela E. Jones; and Lois Krahn, M.D., in their official capacities as members of the Arizona Medical Board

BERGIN, FRAKES, SMALLEY & OBERHOLTZER, PLLC

Brian McCormack Bergin (No. 016375)
4343 E. Camelback Road, Suite 210
Phoenix, AZ 85018
Telephone: (602) 888-7858
Fax: (602) 888-7856
bbergin@bfsolaw.com

Attorneys for Defendants Gary R. Figge, M.D. and David Beyer, M.D., in their official capacities as members of the Arizona Medical Board

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ *Michael S. Catlett*