No. 21-16645

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D., ET AL.,
Plaintiffs-Appellees,
v.
MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, IN HIS OFFICIAL CAPACITY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona, No. 2:21-cv-01417-DLR

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A PARTIAL STAY PENDING APPEAL

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October 22, 2021

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, certain appellants, referred to herein as the State Defendants[1] respectfully submit this certificate in connection with their emergency motion to partially stay the injunction entered by the district court on September 28, 2021, pending resolution of the State Defendants' appeal to this Court.

This case involves the State of Arizona's compelling interest in stemming eugenic and discriminatory abortions. For over a decade, the Arizona Legislature has restricted discriminatory abortions based on an unborn child's race or sex. *See* A.R.S. § 13-3603.02(A)(1). The rise in pre-natal genetic testing has, unfortunately, correlated to a rise in discriminatory abortions based on perceived genetic abnormalities. For example, in the United States, between 61% and 91% of children diagnosed with Down syndrome are now aborted. The State unquestionably has a compelling interest in eliminating discriminatory abortions based on race or sex; the same is no less true with respect to discriminatory abortions based solely on genetic abnormalities.

Thus, during the 2021 legislative session, the Arizona Legislature added to the grounds for discriminatory abortion in A.R.S. § 13-3603.02 by including a new

[1] The State Defendants are Mark Brnovich, in his official capacity as Arizona Attorney General; Arizona Department of Health Services; Don Herrington, in his official capacity as Interim Director of the Arizona Department of Health Services; Arizona Medical Board ("AMB"); and Patricia McSorley, in her official capacity as Executive Director of the AMB.

provision prohibiting a person from "knowingly" performing an abortion if that person knows "that the abortion is sought solely because of a genetic abnormality of the child." Senate Bill ("S.B.") 1457 § 2 (codified at A.R.S. § 13-3603.02(A)) (the "Reason Regulation"). Under that provision, a person who performs an abortion knowing that the abortion is sought solely because of a genetic abnormality is guilty of a class 6 felony, and the Arizona Attorney General may bring an action in state court to enjoin activity violating the Reason Regulation. *Id.*; A.R.S. § 13-3603.02(C).

This suit challenges the constitutionality of the Reason Regulation and contends that the U.S. Constitution grants a right for a physician to knowingly perform eugenic or discriminatory abortions. Plaintiffs—two physicians, two nonprofit corporations, and the Arizona Medical Association—asserted claims under the Fourteenth Amendment, claiming that the Reason Regulation (1) violates substantive due process because it is a ban on abortion and (2) violates due process because it is impermissibly vague.

Plaintiffs filed this action on August 17, 2021, and sought a preliminary injunction. ADD-1, 59. Briefing was complete on the motion for preliminary injunction on September 17, 2021. The district court heard oral argument on September 22, 2021.

On September 28, 2021, just one day prior to the Reason Regulation going into effect, the district court found in favor of Plaintiffs and issued a preliminary injunction prohibiting enforcement of the Reason Regulation. ADD-288. The State Defendants thereafter filed a notice of appeal on October 4, 2021, and an emergency motion asking the district court to stay the preliminary injunction on October 5, 2021. Briefing was complete on the emergency stay motion at the district court on October 15, 2021. On October 18, 2021, the district court denied the State Defendants' emergency stay request. ADD-319. The State Defendants now file this emergency motion for a stay pending appeal.

A. Contact Information Of Counsel

The office and email addresses and telephone numbers of the attorneys for the parties are included below as Appendix A to this certificate.

B. Nature Of The Emergency

It is well-established that "a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). 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 of Arizona's multiple compelling interests in enacting the Reason Regulation (discussed further below) will be thwarted for an indeterminate amount of time. In the meantime, some number of physicians will likely perform abortions solely because of discriminatory reasons. The State, through the State Defendants, is thus suffering irreparable harm already as it cannot enforce the prohibition on the knowing performance of discriminatory abortions enacted by its duly elected representatives. This ongoing irreparable harm justifies consideration of the State Defendants' stay request on an expedited basis.

Plaintiffs and their patients, by contrast, will suffer no irreparable harm through expedited consideration or issuance of a stay pending appeal. As the district court correctly concluded, the Reason Regulation will not prohibit any woman from obtaining an abortion. ADD-275. Plaintiffs themselves acknowledge that "patients seek abortion for a wide range of personal reasons, including familial, medical, and financial, and often do not specifically delineate each one." ADD-105 (Decl. of Eric. M. Reuss, M.D., M.P.H. ¶ 47). They also acknowledge that "only the patient can ultimately know all of the reasons why they decided to have an abortion, or where there was a 'sole' reason as opposed to several

concurrent reasons." ADD-125 (Decl. of Paul A. Isaacson, M.D. ¶ 13). Plaintiffs cannot manufacture harm to their patients by refusing to provide abortions based on speculative and unreasonable fears about the potential reach of the Reason Regulation. 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).

C. Notification Of Counsel For Other Parties

The State Defendants notified all parties of their intent to seek an emergency stay pending appeal this morning.

The State Defendants proposed the following briefing schedule:

- Friday, October 22: State Defendants file their emergency motion for a stay.
- Friday, October 29: Plaintiffs' response to State Defendants' motion due.
- Wednesday, November 3: State Defendants' reply to response due.

Counsel for the State Defendants consulted with Plaintiffs-Appellees regarding this proposed schedule. While Plaintiffs-Appellees do not agree that an emergency briefing schedule is warranted by the circumstances here, they have agreed not to oppose the proposed schedule as a professional courtesy.

Appendix A: Contact Information of Attorneys

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INTRODUCTION

Planned Parenthood admits that its founder, Margaret Sanger, supported "a vision that had deeply harmful blind spots" because "Sanger believed in eugenics."[2] That ideology, which gained popularity in the early twentieth century, espouses "the theory that society can be improved through planned breeding for 'desirable traits' like intelligence and industriousness."[3] Whereas Sanger espoused the theory with the goal of preventing those she believed unfit from having children, others concluded that abortion would be a more effective tool. "Many eugenicists . . . supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons." *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring).

With the mapping of the human genome and the advent and development of modern genetic testing during pregnancy, the ability to abort unborn children based on unwanted characteristics has greatly increased, such that "abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability." *Id.* There is compelling evidence that abortion is being used to do exactly that. In the United States, the abortion rate for children diagnosed with

[2] *Our History*, Planned Parenthood, https://www.plannedparenthood.org/about-us/who-we-are/our-history (last visited Oct. 22, 2021).
[3] *Id.*

Down syndrome in utero is approximately 67%. *See id.* at 1790 (citing Will, The Down Syndrome Genocide, Washington Post, Mar. 15, 2018, p. A23, col. 1). "[R]ecent evidence suggests that sex-selective abortions of girls are common among certain populations in the United States as well." *Id.* at 1791. And "abortion in the United States is also marked by a considerable racial disparity." *Id.* (explaining that the "reported nationwide abortion ratio . . . among black women is nearly 3.5 times the ratio for white women.").

The constitutional right to abortion does not, however, include the right to perform a discriminatory or eugenic abortion. In the decades since *Roe* declared a constitutional right to abortion, the Supreme Court has never wavered in recognizing that the right—like all other constitutional rights—is not absolute. *Roe* itself rejected an argument that the constitution grants a woman the right to abort "at whatever time, in whatever way, and for *whatever reason she alone chooses*." 410 U.S. 113, 153 (1973) (emphasis added). The Court has thus rejected challenges to laws regulating the time and manner of obtaining an abortion, upholding waiting periods (time), and method-of-abortion limits (manner). *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–87 (1992) (plurality op.) (24-hour waiting period); *Gonzales v. Carhart*, 550 U.S. 124, 132–33 (2007) (partial-birth method).

To prevent eugenics from coming full circle, at least in Arizona, the State

has enacted several statutory provisions to regulate the "reason" why an abortion is performed. Those provisions narrowly aim to regulate the most pernicious reason for the performance of an abortion: because of the immutable characteristics of the unborn child. The statutes, therefore, narrowly prevent physicians from *knowingly* providing race-, sex-, or disability-selective abortions. In 2011, the State enacted a law making it illegal to knowingly "[p]erform[] an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child." *See* A.R.S. § 13-3603.02(A)(1). This past legislative session, the State enacted the Reason Regulation, making it unlawful to knowingly "[p]erform[] an abortion knowing that the abortion is sought solely because of a genetic abnormality of the child." *See* S.B. 1457 § 2.

Plaintiffs—two abortion providers, two non-profit corporations, and the Arizona Medical Association—brought a facial challenge to the Reason Regulation, arguing that it is an unconstitutional ban on abortion and impermissibly vague.[4] No Supreme Court or Ninth Circuit case has ever ruled on the merits of a regulation similar to the Reason Regulation, and yet the district court enjoined the Reason Regulation as likely invalid. Defendants, Arizona government officials, appealed and now move under Federal Rule of Appellate

[4] Plaintiffs also argued that the Reason Regulation violates the unconstitutional conditions doctrine, but the district court did not address that argument. For the reasons the State Defendants explained below, Plaintiffs' unconstitutional conditions doctrine claim fails badly. See ADD-188–89.

Procedure 8(a)(2) for a stay of that injunction pending appeal.

The district court erred in holding that Plaintiffs are likely to succeed on the merits of their claim that the Reason Regulation is unconstitutional. As to substantive due process, the district court correctly rejected Plaintiffs' sole argument that the Reason Regulation will operate as a ban on pre-viability abortion. But then with no record evidence for support or briefing by the parties, the district court concluded that the Reason Regulation is likely to impose an undue burden in a large fraction of relevant situations. As to Plaintiffs' vagueness challenge, the Reason Regulation provides fair notice of the conduct it prohibits. The terms that Plaintiffs claim are vague are anything but; they are commonly used and have well-accepted meanings. And the provision's scienter requirement ensures that liability will not attach absent proof beyond a reasonable doubt that the physician knew the abortion was being sought solely for a prohibited reason. Because the State Defendants are likely to prevail on appeal, the Court should stay the preliminary injunction. [5]

BACKGROUND

I. Statutory Background

The Arizona Legislature enacted S.B. 1457 earlier this year based on at least three compelling state interests (although there are more than three). First, the

[5] Although the State Defendants have appealed the entirety of the district court's injunction, the State Defendants only seek a stay of that portion enjoining the Reason Regulation (S.B. 1457 § 2).

Legislature found "that in the United States and abroad fetuses with Down syndrome are disproportionately targeted for abortions." S.B. 1457 § 15. The Reason Regulation sends "an unambiguous message that children with genetic abnormalities, whether born or unborn, are equal in dignity and value to their peers without genetic abnormalities, born or unborn." *Id.* Second, the Legislature recognized the Sixth Circuit's finding that reports from parents of children with Down syndrome "attest that their doctors explicitly encouraged abortion or emphasized the challenges of raising children with Down syndrome." *Id.* Thus, the Reason Regulation "protects against coercive health care practices that encourage selective abortions of persons with genetic abnormalities." *Id.* Finally, the Reason Regulation "protects the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortions." *Id.*

Section 2 of S.B. 1457 amends A.R.S. § 13-3603.02 to provide, "A. Except in a medical emergency, a person who knowingly does any of the following is guilty of a class 6 felony: . . . 2. Performs an abortion knowing that the abortion is sought solely because of a genetic abnormality of the child." The term "genetic abnormality" is defined as "the presence or presumed presence of an abnormal gene expression in an unborn child, including a chromosomal disorder or morphological malformation occurring as the result of abnormal gene expression."

S.B. 1457 § 2. But "genetic abnormality" excludes a "lethal fetal condition," *see id.*, which is "a fetal condition that is diagnosed before birth and that will result, with reasonable certainty, in the death of the unborn child within three months after birth," A.R.S. § 36-2158(G)(1). The Reason Regulation also does not apply to a "medical emergency," as defined in A.R.S. § 36-2151(9), and does not subject a woman on whom a genetic-abnormality-selective abortion is performed to civil or criminal liability. *See* S.B. 1457 § 2 (amending A.R.S. § 13-3603.02(F)).

II. Procedural Background

Just weeks before S.B. 1457 would go into effect, Plaintiffs sued the State Defendants and others, seeking a preliminary injunction to stop its enforcement. ADD-1, 59. Plaintiffs alleged that the Reason Regulation violates the abortion rights of their patients by banning pre-viability abortions and violates the void-for-vagueness doctrine. ADD-66–68. Just one day before S.B. 1457 was to become effective, the district court enjoined enforcement of the Reason Regulation and several other provisions contained therein. ADD-288. The court rejected Plaintiffs' argument that the Reason Regulation imposes a ban on pre-viability abortion, but without briefing from the parties concluded that it instead imposes an undue burden on abortion. ADD-274–87. The court also concluded that the Reason Regulation is unconstitutionally vague. ADD-267–74. The court further determined that the threatened harm from enforcement of the Reason Regulation

outweighed any potential harm to the State or the public. ADD-287.

LEGAL STANDARD

In evaluating a motion for stay pending appeal, a court considers "four factors: '(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 issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted).

ARGUMENT

I. The State Defendants Are Likely To Prevail On Appeal.

A. The Reason Regulation Does Not Violate Any Right To Abortion.

1. Neither *Roe* Nor *Casey* Apply To The Reason Regulation.

The Reason Regulation is consistent with the language and reasoning in *Roe* and *Casey*. *Roe* expressly rejected the argument that a right to abortion "is absolute and that [a woman] is entitled to terminate her pregnancy . . . for whatever reason she alone chooses." 410 U.S. at 153. Thus, *Roe* left the door open for states to restrict abortion for prohibited reasons. *See id.* Citing this same language in *Roe*, *Casey* stated that a State may not prohibit a woman from making the "ultimate decision" to terminate a pre-viability pregnancy, and it held that prior decisions "striking down . . . abortion regulations which in no real sense deprived

women of the ultimate decision" had gone "too far." 505 U.S. at 875. *Casey* does not protect the decision whether to bear or beget a *particular child* with potentially disfavored characteristics. Here, the Reason Regulation "in no real sense deprive[s] women of the ultimate decision" to terminate a pregnancy (because it is not a ban)—it restricts only one of many reasons one might seek an abortion. *See id.*

Further, *Casey*'s framework does not apply because *Casey* did not consider or address the validity of any similar anti-discrimination provision. Instead, "the very first paragraph of the respondents' brief in *Casey* made it clear to the Court that Pennsylvania's prohibition on sex-selective abortions was not being challenged." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring) (internal punctuation omitted). "*Casey* did not consider the validity of an anti-eugenics law. Judicial opinions are not statutes; they resolve only the situations presented for decision." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) ("*PPINK*") (Easterbrook, J., dissenting from denial of rehearing en banc). "[T]he constitutionality of other laws like [Arizona's] thus remains an open question." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring).

2. The Reason Regulation Does Not Ban Pre-Viability Abortion.

Even if *Roe* or *Casey* applied, Plaintiffs' sole argument below about why the Reason Regulation violates substantive due process was that it constitutes a ban on pre-viability abortion. ADD-74–79. The district court rejected that argument, instead concluding that "[t]he Reason Regulations do not ban women from terminating pre-viability pregnancies because of a fetal genetic abnormality; they prohibit providers from performing such abortions if they know the patient's motive." ADD-275. Rather than impose a ban, "they regulate the mode and manner of abortion by requiring that a woman seeking an abortion because of a fetal genetic abnormality obtain the abortion from a provider who is unaware of her motive for terminating the pregnancy." ADD-276.

The district court was correct: the Reason Regulation does not impose a ban on pre-viability abortion. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 521 (6th Cir. 2021) (en banc) ("Even under the full force of [the challenged statute], a woman in Ohio who does not want a child with Down syndrome may lawfully obtain an abortion solely for that reason."). There are myriad situations where the Reason Regulation will not apply to a pre-viability abortion, including the following:

- A pregnant woman does not undergo pre-viability genetic testing. Neither she nor her doctor will know whether any genetic abnormality exists.

- A pregnant woman undergoes a pre-viability genetic test, but the results show no genetic abnormality or are inconclusive.

- A pregnant woman undergoes a pre-viability genetic test and it shows a genetic abnormality, but that has no bearing on her decision to obtain an abortion.

- A pregnant woman undergoes a pre-viability genetic test and it shows a genetic abnormality, but that is only one of several reasons why the woman decides to obtain an abortion.

- A pregnant woman undergoes a genetic test and it shows a genetic abnormality and that is the sole reason why the woman decides to obtain an abortion, but she does not share that with the physician actually performing her abortion.

It is only in those rare circumstances where a doctor knows—most likely because they have been told—that the sole reason for an abortion is a genetic abnormality, and neither exception applies, that the Reason Regulation applies to the doctor (again, the Reason Regulation never imposes civil or criminal liability on an expectant mother). Even then, a pregnant woman can still obtain an abortion from another doctor who lacks the knowledge of discrimination. *See Preterm-Cleveland*, 994 F.3d at 522–23 ("The result is that the 'right' at issue would be the woman's right to a specific doctor (one with knowledge of her specific Down-

syndrome-selective reason for the abortion). One would be hard pressed to find that right established anywhere.").

3. The Reason Regulation Does Not Impose An Undue Burden.

Plaintiffs argued only that the Reason Regulation imposes a ban on pre-viability abortion. Plaintiffs did not attempt to establish that the Reason Regulation imposes an undue burden. Plaintiffs did not even cite *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), in their motion for preliminary injunction and only mentioned undue burden in a footnote, circularly arguing that the Reason Regulation imposes an undue burden because it bans pre-viability abortion. ADD-76 n.6. Thus, the State Defendants naturally only focused on whether the Reason Regulation imposes a ban. The district court disagreed with Plaintiffs' "ban" argument, and yet it *sua sponte* conducted an undue burden analysis, and enjoined the Reason Regulation on that basis. Not only was this not permitted, *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020), it predictably resulted in an erroneous analysis.

Plaintiffs did not satisfy their heavy burden to prevail under the undue burden standard. Plaintiffs would have to prove that "in a large fraction of the cases in which [the Reason Regulation] is relevant, [it] will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey*, 505 U.S. at 895; *see also McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015). Yet Plaintiffs'

limited evidence did not show that the Reason Regulation would create a substantial obstacle for *any* woman, let alone a "large fraction" of women.

The Court self-identified the relevant group of affected women as those who want to terminate their pregnancies because of a genetic abnormality. Even if that denominator is correct (and it is not), the record below was devoid of evidence showing how many women fall into that category—again because Plaintiffs did not argue undue burden. The record does not contain evidence that any physician requires women to give their reason for having an abortion. The district court could not, and did not, make any finding regarding the number of women who decide to terminate their pregnancies solely because of a genetic abnormality, nor how many women are regulated in doing so because circumstances exist where a doctor would know that to be the case, nor how many women would then struggle to subsequently find a doctor to perform the desired abortion. This is reversible error. *See Pre-Term Cleveland*, 994 F.3d 523, 959–61; *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017) (reversing because the district court did not make the required factual findings under the undue burden standard).

Because neither *Roe* nor *Casey* recognize a right to eugenic or disability-selective abortion, and because Plaintiffs did not attempt to show an undue burden, rational basis applies. But even if strict scrutiny applies, the Reason Regulation

passes muster.

Had Plaintiffs actually argued undue burden, the State would have identified the following eight benefits: (1) the Reason Regulation protects the State's compelling interest in protecting an entire class of persons from being targeted for discrimination; (2) the Reason Regulation advances the State's compelling interest in eradicating historical animus and bias against persons with disabilities, including persons with Down syndrome; (3) the Reason Regulation safeguards the integrity of the medical profession by preventing doctors from becoming witting participants in genetic-selective abortions; (4) the Reason Regulation sends a message that the State will not permit further advances in testing for genetic traits to result in eugenic abortion; (5) the Reason Regulation counters the stigma that genetically selective abortion imposes on living persons with Down syndrome and other disabilities; (6) the Reason Regulation ensures that the existing disability community does not become starved of resources for research and care for individuals with disabilities; (7) the Reason Regulation protects against the devaluation of all human life inherent in any decision to target a person for elimination based on an immutable characteristic; and (8) the Reason Regulation fosters the diversity of society and protects it from the enormous loss that will occur if people with Down syndrome and other genetic abnormalities are eliminated. These compelling benefits outweigh any minimal burden that the

Reason Regulation has in whatever small number of cases it affects.

The Reason Regulation is narrowly tailored to serve the State's multiple compelling interests. The law prohibits abortions only if the discriminatory purpose is the *sole* reason for the abortion. The law also requires the provider to actually know the discriminatory purpose. S.B. 1457 § 2. Thus, "it is hard to imagine legislation more narrowly tailored to promote this interest than the [Reason Regulation]." *PPINK*, 888 F.3d at 316 (Manion, J., concurring). The Reason Regulation "appl[ies] only to very specific situations and carefully avoid[s] targeting the purported general right to pre-viability abortion." *Id.* It "will not affect the vast majority of women who choose to have an abortion without considering the characteristics of the child. Indeed, it will not even affect women who consider the protected characteristics along with other considerations." *Id.* "If it is at all possible to narrowly tailor abortion regulations, [Arizona] has done so." *Id.*

Because the Reason Regulation satisfies strict scrutiny, the most exacting form of scrutiny, it necessarily satisfies any less rigorous form of scrutiny, including *Casey*'s undue burden test.

B. The Reason Regulation Is Not Impermissibly Vague.

1. Plaintiffs' Vagueness Challenge Is Not Ripe.

Plaintiffs' pre-enforcement vagueness claim is not ripe. *See Gonzales*, 550

U.S. at 150 (rejecting the argument "that the Act should be invalidated on its face because it encourages arbitrary or discriminatory enforcement."). An entirely "speculative" pre-enforcement challenge "where 'no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]'" should be viewed with caution. *Id.* The pre-enforcement nature of Plaintiffs' claims creates serious ripeness issues by introducing only speculative hypotheticals and not a "concrete factual situation." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007).

2. The Reason Regulation Is Not Vague.

The district court's holding that the Reason Regulation is unconstitutionally vague contravenes binding precedent. The burden for prevailing on a vagueness challenge is high. A law is void for vagueness only when it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard less that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). "[P]erfect clarity and precise guidance have never been required," even for criminal laws that implicate constitutional rights. *Id.* "[T]he mere fact that close cases can be envisioned" will not "render[] a statute vague." *Id.* at 305; *Guerrero v. Whitaker*, 908 F.3d 541, 544 (9th Cir. 2019). If it is "clear what the [law] as a whole

prohibits," a vagueness challenge must be rejected. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

The district court did not find the actual terms of the Reason Regulation vague. The district court thought, instead, that the law did not offer "workable guidance about which fetal conditions bring abortion care within the scope of these provisions" and that "'doctors might question' what amounts to a genetic abnormality." ADD-269, 271. This Court has held, though, that a statute is not unconstitutionally vague merely because it "provides an uncertain standard to be applied to a wide range of fact-specific scenarios." *Guerrero*, 908 F.3d at 545. That is true here. The statute provides a definition of "genetic abnormality" that allows doctors to apply the facts of each situation. S.B. 1457 § 2 (defining "genetic abnormality").

The district court also disregarded that in almost all cases, it will be obvious whether the Reason Regulation applies. In 2019, out of approximately 13,000 abortions reported in Arizona, only 161 women "reported that their primary reason for obtaining an abortion was due to fetal health/medical considerations." ADD-203 (Decl. of Steven Robert Bailey ¶ 10). An additional 30 women who reported "other" as their primary reason, included "genetic risk/fetal abnormality" as a detailed reason. *Id.* Thus, in over 98% of cases in 2019, the Reason Regulation's inapplicability would have been obvious. Even among the very small percentage

of cases when the Reason Regulation might apply, the statute's applicability will remain obvious. *See* ADD-186–87.

The district court further erred by holding that the knowledge requirement creates—rather than alleviates—vagueness concerns. The Reason Regulation applies only when a provider has *actual knowledge* that the abortion is being sought solely because of a genetic abnormality. Although the district court acknowledged that "scienter requirements ordinarily alleviate vagueness concerns," it refused to follow that rule by incorrectly concluding that "this law requires that a doctor know the motivations underlying the action of another person to avoid prosecution." ADD-271. But the Reason Regulation does not require a provider to know why someone is seeking an abortion. To the contrary, it applies only when the provider in fact knows that the abortion is being sought solely because of a genetic abnormality. If the provider does not know, then the Reason Regulation does not prohibit the abortion.

Criminal liability often turns on a defendant's knowledge of another's mental state. Federal conspiracy laws require proof of a "meeting of the minds." *United States v. Johnston*, 789 F.3d 934, 940 n.1 (9th Cir. 2015). In Arizona, the offense of facilitation of a felony requires proof that the defendant acted "with knowledge that another person is committing or intends to commit an offense," A.R.S. § 13-1004(A); assisted suicide requires proof of "knowledge that the person

intends to die by suicide," *id.* § 13-1103(A)(3); encouragement of minor suicide requires proof of "knowledge that the minor intends to die by suicide," *id.* § 13-1103(B); and sexual assault requires proof that "the defendant knew [the defined sexual] contact was without the victim's consent," *State v. Witwer*, 175 Ariz. 305, 308 (App. 1993).

Admittedly, in some cases it might be difficult to determine what a person knew about the mental state of another, but that problem is addressed "not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 305–06. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved[,] but rather the indeterminacy of precisely what that fact is." *Id.* at 306.

Whether a physician knew that an abortion was being sought for a proscribed reason "is a true-or-false determination, not a subjective judgment such as whether conduct is 'annoying' or 'indecent.'" *Id.* It is not problematic to allow courts and juries to make that determination. To the contrary, "courts and juries every day pass upon knowledge, belief and intent." *Id.* (quoting *Am. Comm'ns Ass'n v. Douds*, 339 U.S 382, 411 (1950)). As to the Reason Regulation, the term "knowingly" thus "alleviates vagueness concerns, narrows the scope of its prohibition, and limits prosecutorial discretion." *McFadden v. United States*, 576

U.S. 186, 197 (2015) (cleaned up) (quoting *Gonzales*, 550 U.S. at 149).

II. The Equities Weigh Strongly In Favor Of A Stay.

The district court's erroneous conclusions about Plaintiffs' likelihood of success infected its weighing of the equities. ADD-287. But the Reason Regulation is not unconstitutional, so enjoining the law injures the State and the public interest 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).

Plaintiffs, by contrast, will suffer no irreparable harm through issuance of a stay pending appeal. As explained, the Reason Regulation will not prohibit any woman from obtaining an abortion. ADD-275. Plaintiffs acknowledge that "patients seek abortion for a wide range of personal reasons, including familial, medical, and financial, and often do not specifically delineate each one." ADD-105 (Decl. of Eric M. Reuss, M.D., M.P.H. ¶ 47). They also acknowledge that "only the patient can ultimately know all of the reasons why they decided to have an abortion, or where there was a 'sole' reason as opposed to several concurrent reasons." ADD-125 (Paul A. Isaacson, M.D. ¶ 13). Plaintiffs cannot manufacture harm to their patients by refusing to provide abortions based on speculative fears about the potential reach of the Reason Regulation. If any of the Plaintiffs' alleged harms come to pass, they may later seek as-applied relief. *See*

Gonzales, 550 U.S. at 168.

CONCLUSION

The Court should stay the district court's preliminary injunction against the Reason Regulation pending appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this October 22, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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