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

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A PARTIAL STAY PENDING APPEAL

Mark Brnovich
Arizona Attorney General
Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn ("Beau") W. Roysden III
Solicitor General

Michael S. Catlett
Deputy Solicitor General
Counsel of Record
Kate B. Sawyer
Assistant Solicitor General
Katlyn J. Divis
Assistant Attorney General
OFFICE OF THE ARIZONA ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
michael.catlett@azag.gov

November 3, 2021

Counsel for Arizona Attorney General Mark Brnovich
(Additional counsel listed after signature block)

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INTRODUCTION

The abortion regulation at issue—the Reason Regulation—does not apply until a physician knows that the sole reason why a woman desires to terminate a pregnancy is because of a genetic abnormality. In almost all abortion procedures (over 98% of them), the regulation will have no application. Nonetheless, Plaintiffs argued below that the regulation and other features of Arizona's law should be enjoined because they covertly constitute a ban on pre-viability abortion. That was Plaintiffs' sole argument why the Reason Regulation violates *Casey*.

But Plaintiffs admit that their patients do not typically disclose the reason why they are choosing to terminate a pregnancy and, even when they do, there are multiple reasons. Even if a patient discloses genetic abnormality as the sole reason, the patient may obtain an abortion from a provider without such knowledge. Thus, the district court rejected that Arizona's new law bans pre-viability abortion. Having so concluded, Plaintiffs' request for a preliminary injunction should have failed.

But that is not what happened. Instead, without briefing, the district court conducted its own undue burden analysis, concluding that the Reason Regulation will impose an undue burden on some unknown subset of an unknown total of women who desire to obtain an abortion solely because of a genetic abnormality. The district court also concluded that the Arizona Legislature's use of the terms

"genetic abnormality" and "knowingly" rendered the Reason Regulation facially vague. Those conclusions were legally erroneous.

ARGUMENT

I. THE DISTRICT COURT ERRED ON THE MERITS.

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

1. States May Regulate The Reason For An Abortion.

Under the Reason Regulation, any woman may obtain a pre-viability abortion. The Reason Regulation regulates only the reason why a physician performs an abortion, applying when a physician knows the sole reason for an abortion is the child's genetic makeup. *Roe* expressly acknowledged that states may regulate the reason for an abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973). That is likely why a Pennsylvania law regulating abortions based on the sex of the unborn child was not even challenged in *Casey*. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (describing the provisions at issue).

Yet Plaintiffs, quoting *Casey* and citing *Isaacson v. Horne*, argue that "a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Plaintiffs' Response ("Resp.") at 16. But, again, that is not what Arizona has done here, which is why the district court concluded that the Reason Regulation does not constitute a ban on pre-viability abortion. ADD-275. Plaintiffs do not challenge that conclusion.

Plaintiffs instead attempt to undercut *Preterm-Cleveland v. McCloud*, 994

F.3d 512 (6th Cir. 2021), claiming that case "dealt with a much different law and record." Resp. at 17 n.5. It is not clear what Plaintiffs think was different about the law and record in *Preterm*. In reality, the law in *Preterm* was broader in several respects than the Reason Regulation—the law there bans abortion where the provider has knowledge that a pregnant woman is seeking an abortion, *in whole or in part*, because there is *any reason to believe* an unborn child has Down syndrome. 994 F.3d at 517. Still, the Sixth Circuit upheld that law.

So far as the record goes, there is no material difference between the interests the Reason Regulation serves and those present in *Preterm*. In fact, the Arizona Legislature expressly relied on the record in *Preterm* in passing S.B. 1457. S.B. 1457 § 15; ADD-55–56. The only difference between the record in *Preterm* and here is that the plaintiffs in *Preterm* actually attempted to establish that the law imposed an undue burden. Here, Plaintiffs made no such attempt. *See infra*.

2. The District Court *Sua Sponte* Took Up Undue Burden.

Having rejected Plaintiffs' sole argument under *Casey*, the district court should have denied the request for an injunction. Plaintiffs try to re-invent the record to claim that they argued undue burden. Resp. at 17–18. They did no such thing. Plaintiffs now claim they included an undue burden argument in footnote 6 of their preliminary injunction motion. 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*." ADD-76 n.6.

Plaintiffs also accuse the State Defendants of having made an undue burden argument. Here is what the State Defendants actually said: "Plaintiffs argue only that the [Reason Regulation] is a complete ban in violation of substantive due process. They purposefully fail to argue that the [Reason Regulation] does not serve a valid purpose or, if it is not a complete ban, that the [Reason Regulation] creates an undue burden in violation of *Casey* or *June Medical v. Russo*[.]" ADD-187. In fact, the State Defendants argued that "[h]aving failed to make those arguments, Plaintiffs have waived them[.]" ADD-187 n.8.

Plaintiffs also claim they raised undue burden at oral argument. By then it was too late,[1] but even if not, after much discussion, Plaintiffs finally confirmed that the entirety of their undue burden argument was contained in footnote 6 quoted above. Pls.' ADD-18–19 ("Your Honor, footnote 6 of our brief lays this out.... But that is where in our brief we explain how this will work."). The district court, therefore, improperly enjoined a state law using a theory Plaintiffs failed to make.[2] *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

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

[1] *See Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008) (finding argument waived when raised for the first time at oral argument).

[2] Plaintiffs rely on cases where the parties asked a court to apply the wrong legal standard or failed to raise an antecedent legal question. Resp. at 18 (citing *Kamen*, *Thompson*, and *Amado*). Those cases do not apply.

Plaintiffs did not assert, and the district court could not find, 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. The record is absent as to how many women seek an abortion because of a genetic abnormality, let alone *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. The district court was required to make such findings; failing to do so was reversible error. *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017).

Plaintiffs respond that they submitted "six detailed declarations" but fail to pinpoint where in any of those documents the foregoing information is located. Resp. at 18. Plaintiffs contend only that evidence "shows at least 191 Arizona patients identified fetal health/medical considerations as their primary reason in a single year." Resp. at 19. That figure does not help Plaintiffs. In fact, they admit that "a 'primary reason' is not the same as a sole reason." Resp. at 14. We still do not know how many of the 191 patients had an unborn child with a genetic abnormality (which is a subset of "fetal health/medical considerations"). Or how many desired to terminate a pregnancy *solely* because of a genetic abnormality. Or how many shared that sole reason with a provider. Or how many would have been

unable to find another provider without the regulated knowledge. It was Plaintiffs' heavy burden to develop such evidence, and they failed to do so. *Whole Woman's Health v. Paxton*, 10 F.4th 430, 453–55 (5th Cir. 2021) ("[B]ecause the plaintiffs rested only on their argument that SB8 is a ban on all D&E abortions, they did not develop any evidence related to SB8's specific impact on abortion access.").

Instead, Plaintiffs attempt to cobble together "evidence" supporting an undue burden. But that "evidence"—purportedly summarized in four bullet points—is self-serving, anecdotal, ambiguous (using terms like "few," "some," and "often"), and circular (e.g., the law imposes an undue burden because it is vague). Resp. at 20. Significantly more evidence than this is required before a federal court can preliminarily enjoin a duly-enacted state law.

B. The Reason Regulation Is Not Impermissibly Vague.

1. Plaintiffs' Vagueness Challenge Is Premature.

Plaintiffs' pre-enforcement vagueness claim is not ripe because Plaintiffs did not present a "concrete factual situation." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007); *see also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 506–07 (1989) (declining to review a challenge to an abortion statute before a concrete factual situation was presented). Plaintiffs respond that they can bring their vagueness challenge now because there is "a genuine threat of enforcement." Resp. at 11. Plaintiffs sued the State Defendants

before the Reason Regulation could legally be enforced against anyone. Moreover, the record is devoid of evidence that the State Defendants threatened Plaintiffs with enforcement, which is why Plaintiffs could not present the district court with a concrete factual situation. The only enforcement action Plaintiffs identify is the State Defendants' "request for emergency relief here." Resp. at 12 n.3. Plaintiffs apparently believe that they have generated justiciability by seeking a preliminary injunction and prevailing, thereby requiring the State Defendants to seek emergency relief. Obviously, that is not how justiciability works. The district court erred in entertaining Plaintiffs' vagueness claim and guessing how the Reason Regulation might operate once effective.

2. The Reason Regulation Is Not Vague.

It is entirely clear what the Reason Regulation "as a whole prohibits"—performing an abortion knowing the sole reason for the abortion is a genetic abnormality. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). In nearly all cases where an abortion is sought, it will be clear whether the Reason Regulation applies. Mot. at 16–17. Vagueness does not turn on whether counsel can imagine scenarios where the Reason Regulation's application may be unclear. *United States v. Williams*, 553 U.S. 285, 305 (2008). And it is perfectly fine for a statute to "provide[] an uncertain standard to be applied to a wide range of fact-specific scenarios." *Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2019).

Plaintiffs do not dispute that the Reason Regulation "provides a definition of 'genetic abnormality' that allows doctors to apply the facts of each situation." Mot. at 16. All Plaintiffs can muster is the district court's statement—based on a single paragraph in a single declaration—that there are complexities inherent in genetic screening because of false-positives, false-negatives, or uninterpretable results. Resp. at 13 (citing ADD-270–71). But it is obvious when the Reason Regulation would apply to such screening results: it would apply to a false-positive result (hence use of the word "presumed" in the statute) but not a false negative or inconclusive result. In any event, the mere existence of "complexities" is insufficient to hold a law unconstitutionally vague. *See Guerrero*, 908 F.3d at 545.

Plaintiffs next take issue with the State Defendants' point that in most cases it will be obvious whether the Reason Regulation applies or not. Plaintiffs do not dispute that in 2019, at most, approximately 191 women might have been impacted. This is out of 13,000 women who obtained abortions in Arizona that year. ADD-203 ¶ 10. Plaintiffs further admit that even among the 191 women, the Reason Regulation might not have applied because "a 'primary reason' is not the same as a sole reason." Resp. at 14. That proves the State's point—when far less than 191 out of 13,000 instances *might* result in application of a law, and otherwise the law's application is clear, the law cannot be unconstitutionally vague.

Plaintiffs also argue that they submitted evidence of many scenarios where it

will be impossible not to *infer* or *believe* that a patient is seeking an abortion for a reason *related* to a genetic abnormality. Resp. at 14. The Reason Regulation, however, does not apply when a physician merely infers or believes that a patient is seeking an abortion for a reason related to a genetic abnormality. Rather, it applies only when the physician actually knows that a genetic abnormality is the sole reason for the abortion. Plaintiffs cannot re-write the statute and then use their imaginary version to claim that the actual version is impermissibly vague.

Finally, Plaintiffs again assert that the Arizona's decision to include an actual knowledge requirement renders the Reason Regulation vague. Plaintiffs argue that "Providers must conclusively rule out the Act's vague impermissible reasons or they must provide care." Resp. at 14. That is not true, and it is inconsistent with what the Reason Regulation actually says. Plaintiffs claim it is problematic that knowledge might be proven with circumstantial evidence. That does not differentiate the Reason Regulation from any other statutory restriction. Policing whether circumstantial evidence is sufficient is the job of juries, not the vagueness doctrine. *See United States v. Williams*, 553 U.S. 285, 305–06 (2008).

The Reason Regulation is no different than other statutes requiring knowledge of another's intent.[3] Mot. at 17–18. But the Reason Regulation is very

[3] Plaintiffs' claim that conspiracy, facilitation, assisted suicide, and sexual assault statutes merely require the defendant to make a binary determination falls flat. Mis-framing the Reason Regulation the way Plaintiffs mis-frame those statutes

different than any abortion restriction this Court has struck down as vague. *See McCormack v. Herzog*, 788 F.3d 1017, 1031 (9th Cir. 2015) (using the undefined terms "properly" and "satisfactory"); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554–55 (9th Cir. 2004) (requiring that patients "be treated with consideration, respect, and full recognition of the patient's dignity and individuality").

II. THE EQUITIES FAVOR A STAY.

Plaintiffs argue that the State Defendants are not entitled to a stay because they have not established irreparable harm. But boiled down, Plaintiffs' argument is that a stay is not justified because Plaintiffs will prevail on the merits. As explained, Plaintiffs' claims lack merit, and thus, if the Reason Regulation remains enjoined, Arizona (along with unborn children discriminatorily aborted) will suffer the irreparable harm identified in the Motion.

On the other hand, Plaintiffs admit that their patients often have myriad reasons for obtaining an abortion and often do not disclose any of those reasons. Plaintiffs cannot establish that the Reason Regulation bans any woman from obtaining an abortion, that it will otherwise impose an undue burden on a large fraction of relevant women, or that it is impermissibly vague.

CONCLUSION

The Court should grant the State Defendants' request for a stay.

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also results in a binary determination: Does the patient want an abortion solely because the unborn child has a genetic abnormality?

November 3, 2021

Respectfully submitted,

/s/ Michael S. Catlett

MARK BRNOVICH
ATTORNEY GENERAL

Joseph A. Kanefield
Chief Deputy & Chief of Staff
Brunn W. Roysden III
Solicitor General
Michael S. Catlett
Deputy Solicitor General
Counsel of Record
Kate B. Sawyer
Assistant Solicitor General
Katlyn J. Divis
Assistant Attorney General
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
michael.catlett@azag.gov

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

/s/ Aubrey Joy Corcoran (with permission)

MARK BRNOVICH
ATTORNEY GENERAL

Kevin Ray
Section Chief Counsel
Aubrey Joy Corcoran
Unit Chief Counsel
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
kevin.ray@azag.gov
EducationHealth@azag.gov

Attorneys for Defendants Arizona Department of Health Services and Don Herrington as Interim Director of the Arizona Department of Health Services

/s/ Mary D. Williams (with permission)

MARK BRNOVICH
ATTORNEY GENERAL

Mary D. Williams
Section Chief Counsel
Office of the Arizona Attorney General
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333
maryd.williams@azag.gov

Attorney for Defendants Arizona Medical Board and Patricia McSorley as Executive Director of the Arizona Medical Board

CERTIFICATE OF SERVICE

I hereby certify that on this November 3, 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.

/s/ Michael S. Catlett
Michael S. Catlett
OFFICE OF THE ARIZONA
ATTORNEY GENERAL
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-3333