Nos. 21-16645, 21-16711

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D., on behalf of himself and his patients, 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

DEFENDANTS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

People with disabilities, including due to their genetic makeup, add incalculable joy, beauty, and diversity to our society. Take Frank Stephens for example. Mr. Stephens, who was born with Down syndrome, is an athlete, actor, author, and model, but he is also an advocate. In October 2017, Mr. Stephens testified before Congress on the importance of Down syndrome research and the immorality of aborting fetuses based on genetic abnormality. Mr. Stephens told Congress that, "If you take one thing away from today, I want you to know that I am a man with Down syndrome and my life is worth living."[1] Mr. Stephens justifiably received the first-ever standing ovation at a congressional hearing.

Unfortunately, eugenic abortion of children with genetic abnormalities is now epidemic, thereby depriving society of people like Frank Stephens. In the United States, for example, between 61% and 91% of unborn children diagnosed with Down syndrome are aborted. *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1790 (2019)

[1] Frank Stephens, Address before the U.S. House of Representatives Subcommittee on Labor, Health and Human Services, and Education (Oct. 25, 2017).

(Thomas, J., concurring) (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").

To address this crisis, Arizona has enacted narrowly-tailored regulations preventing physicians from performing an abortion when the physician knows that the abortion is sought because of an immutable characteristic of the unborn child. For over a decade, Arizona has restricted discriminatory abortions based on an unborn child's race or sex or the race of a parent. *See* A.R.S. § 13-3603.02(A)(1). During the 2021 legislative session, Arizona enacted S.B. 1457, which, in relevant part, makes 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 S.B. 1457,

arguing that it constitutes an unconstitutional ban on abortion and is impermissibly vague. No Supreme Court or Ninth Circuit decision has ever ruled on the merits of a regulation similar to S.B. 1457, and yet the district court enjoined certain portions of the law as likely invalid. Defendants, Arizona government officials, now appeal.[2]

To put this case in its clearest terms, Plaintiffs are attempting to establish a new constitutional right to perform eugenics-based abortions that has no basis in the Constitution's text or history. Plaintiffs' proposed right also has no limiting principle—it would apply equally to decisions to abort because a child is determined to not have a sufficiently high IQ, athletic prowess, or any other characteristic that the medical profession finds desirable. Neither *Roe* nor *Casey* nor any other binding precedent supports the existence of such a right.

Plaintiffs' arguments, if accepted, will derail the States' efforts at "preventing abortion from becoming a tool of modern-day eugenics." *Box*,

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[2] Appealing 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.

139 S. Ct. at 1783 (Thomas, J., concurring); *see also Preterm-Cleveland v. McCloud*, 994 F.3d 512, 538–39 (6th Cir. 2021) (en banc) (Griffin, J., concurring); *id.* at 541 (Bush, J., concurring). "How a society treats its most vulnerable members may do more than grandiosity to shape its lasting worth." *Richmond Med. Ctr. For Women v. Herring*, 570 F.3d 165, 182 (4th Cir. 2009) (Wilkinson, J., concurring). The district court's decision stops Arizona from regulating the medical profession to prevent its most vulnerable members—unborn children—from being aborted based on immutable characteristics. That decision should be reversed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction over a preliminary injunction appeal under 28 U.S.C. § 1292(a). The district court entered its order partially granting a preliminary injunction on September 28, 2021. 1-ER-32. In accordance with Federal Rule of Appellate Procedure 4(a)(1)(A), State Defendants filed a timely notice of appeal on October 4, 2021. 3-ER-385.

ISSUES PRESENTED FOR REVIEW

For nearly a decade, Arizona has prevented providers from performing pre-viability abortions "knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child."

A.R.S. § 13-3603.02(A)(1). During the 2021 legislative session, Arizona added another immutable characteristic to the statute—genetic abnormality. *See* S.B. 1457. Thus, Arizona law now also prevents providers from performing "an abortion knowing that the abortion is sought solely because of a genetic abnormality of the child." A.R.S. § 13-3603.02(A)(2). Plaintiffs sought a preliminary injunction, arguing that this new regulation and other statutory provisions implementing it violate the Fourteenth Amendment and the void for vagueness doctrine. The district court concluded that Plaintiffs are likely to succeed on the merits of their claims and granted, in part, a preliminary injunction.

This appeal thus presents the following issues:

(1) Whether Plaintiffs are likely to succeed on their claim that a state violates the Fourteenth Amendment by regulating the medical profession to prevent discriminatory abortions based on genetic abnormality.

(2) Whether Plaintiffs are likely to succeed on their claim that use of the terms "genetic abnormality" and "knowing" renders the statute at issue unconstitutionally vague.

The text of the law at issue, S.B. 1457, is included in full as an addendum to this brief.

STATEMENT OF THE CASE

The district court preliminarily enjoined an Arizona law designed to protect those who have been diagnosed with a genetic abnormality from discriminatory abortion. It is important to begin with the history that led the Arizona Legislature to pass this law.

A. Discrimination Against Individuals With Disabilities

Sadly, discrimination against individuals with disabilities has been pervasive in our country's history. By the 1920s, eugenics courses were taught at 376 universities and colleges. *Box*, 139 S. Ct. at 1785 (Thomas, J., concurring). But eugenics did not remain an academic concept reserved for debate in the classroom. This discrimination permeated society, with many municipalities going as far as "prohibiting certain individuals with disabilities from marrying, from voting, from attending public schools, and even from appearing in public." *Tennessee v. Lane*, 541 U.S. 509, 534 (2004) (Souter, J., concurring). These types of practices prevented a child with cerebral palsy from attending public school "lest he 'produc[e] a depressing and nauseating effect' upon others." *Id.* at 535 (Souter, J., concurring) (discussing the history of disability

discrimination in America) (quoting *State ex rel. Beattie v. Bd. of Educ. of Antigo*, 172 N.W. 153 (1919)).

Discrimination gradually shifted from keeping the disabled invisible to preventing them from being born. In 1907, Indiana was the first state to enact a eugenic sterilization law, and by 1931, 28 States had followed Indiana's lead and adopted eugenic sterilization laws. *Box*, 139 S. Ct. at 1786 (Thomas, J., concurring). The legitimacy of these laws was even upheld by the Supreme Court in its infamous opinion in *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . . Three generations of imbeciles are enough."). As a result, "more than 60,000 people . . . were involuntarily sterilized between 1907 and 1983." *Box*, 139 S. Ct. at 1786 (Thomas, J., concurring).

One of the country's largest abortion providers, Planned Parenthood, admits that its founder, Margaret Sanger, supported "a vision that had deeply harmful blind spots" because "Sanger believed in

eugenics."[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*, 139 S. Ct. at 1784 (Thomas, J., concurring).

The Americans with Disabilities Act—arguably the broadest law protecting people with disabilities—was not passed until 1990 in an attempt to combat this pervasive history of discrimination. In enacting that law, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem[.]" 42 U.S.C. § 12101(a)(2). Congress recognized that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities

[3] *Our History*, Planned Parenthood, https://www.plannedparenthood.org/about-us/who-we-are/our-history (last visited Nov. 12, 2021).

have been precluded from doing so because of discrimination[.]" 42 U.S.C. § 12101(a)(1).

Despite decades of anti-discrimination efforts, individuals with mental or physical challenges continue to face discrimination. Specifically, many people and governments still promote the idea that reducing or eliminating the number of people with disabilities would be a positive development. The Dutch government, for example, aggressively markets prenatal testing as a way to end Down syndrome.[4] An Oxford professor advocated that after a prenatal diagnosis of Down syndrome, parents have an ethical responsibility to "abort it and try again."[5] In California, a brochure for pregnant women whose children screen positive for Down syndrome stated that "[t]his birth defect causes mental retardation and some serious health problems."[6] A California

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[4] Renate Lindeman, *A Moral Duty to Abort*, Huffington Post (Sept. 21, 2017, 9:30 AM), https://www.huffpost.com/entry/a-moral-duty-to-abort_b_59c3a01ae4b0ffc2dedb5b3c.

[5] John Bingham, *Richard Dawkins: 'Immoral' to Allow Down's Syndrome Babies to Be Born*, Telegraph (Aug. 20, 2014, 7:45 PM) https://www.telegraph.co.uk/news/health/news/11047072/Richard-Dawkins-immoral-to-allow-Downs-syndrome-babies-to-be-born.html.

[6] Linda L. McCabe & Edward R. B. McCabe, *Down Syndrome: Coercion and Eugenics*, 13 Genetics in Medicine 708, 709 (2011).

prenatal screening program also "described such pregnancies that are continued as 'missed opportunities.'"[7]

Sadly, 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." *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring). There is compelling evidence that abortion is being used for that exact purpose. For example, unborn children diagnosed with Down syndrome have been a target of discriminatory abortions. In Iceland, nearly 100% of unborn children diagnosed with Down syndrome are aborted. *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring). The rates of discriminatory Down-syndrome-selective abortions are similarly high in other European countries: "98% in Denmark, 90% in the United Kingdom, [and] 77% in France." *Id.* at 1790–91. And unfortunately, the United States is not far behind with between 61% and 91% of mothers choosing to abort their unborn child if the child is diagnosed with Down syndrome. S.B. 1457 § 15. "The use of abortion to achieve eugenic goals is not merely hypothetical"; "a growing body of evidence suggests that

[7] *Id.*

eugenic goals are already being realized through abortion." *Box*, 139 S. Ct. at 1783, 1787 (Thomas, J., concurring).

Some within the medical profession itself may be driving this increase in eugenic abortion.[8] Many studies show that the advice and care that follows prenatal testing can provide biased information and pressure to abort. During a 2017 study, "[a] mother shared that she was encouraged to terminate" and told by her healthcare professionals that if they were to personally experience the same issue, "they would choose to terminate as well."[9] Further, "[o]ther mothers who received a post-natal diagnosis were given the option and strongly encouraged to either institutionalize or allow their child to become a ward of the state after testing revealed indicators of D[own] [syndrome]."[10]

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[8] *Preterm-Cleveland*, 994 F.3d at 518 ("Academic literature confirms such practices within the United States medical community, including examples of health professionals who gave families 'inaccurate and overly negative information,' perceivably 'intended to coerce a woman into a decision to terminate her pregnancy if the fetus is diagnosed with Down syndrome.'").

[9] Hannah Korkow-Moradi et al., *Common Factors Contributing to the Adjustment Process of Mothers of Children Diagnosed with Down Syndrome: A Qualitative Study*, 28 J. Fam. Psychotherapy 193, 197 (2017).

[10] *Id.*

A 2013 study reported that many parents of children with Down syndrome had experienced "pressure to terminate the pregnancy."[11] A 2009 study noted that mothers who "received a prenatal diagnosis of D[own] [syndrome] and chose to continue their pregnancies . . . indicated that their physicians often provided incomplete, inaccurate, and, sometimes, offensive information about [D]own syndrome."[12] In a survey of 499 primary care physicians, thirteen percent admitted that "they 'emphasize' the negative aspects of D[own] [syndrome] so that parents would favor a termination."[13]

It is precisely this type of discrimination and coercion that is now resulting in laws regulating discriminatory abortions, which promote a state's "compelling interest in preventing abortion from becoming a tool

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[11] Briana S. Nelson Goff et al., *Receiving the Initial Down Syndrome Diagnosis: A Comparison of Prenatal and Postnatal Parent Group Experiences*, 51 Intellectual & Developmental Disabilities 446, 455 (2013).

[12] Brian G. Skotko, *With New Prenatal Testing, Will Babies with Down Syndrome Slowly Disappear*, 94 Archives of Disease Childhood 823, 824 (2009).

[13] Brian G. Skotko, *Prenatally Diagnosed Down Syndrome: Mothers Who Continued Their Pregnancies Evaluate Their Health Care Providers*, 192 Am. J. Obstetrics & Gynecology 670, 670–71 (2005).

of modern-day eugenics." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

B. S.B. 1457

On April 22, 2021, the Arizona Legislature passed S.B. 1457 (the "Act") to further the State's interests in protecting the disabled community from discrimination. *See* 2021 Ariz. Legis. Serv. Ch. 286. The Act was scheduled to take effect on September 29, 2021. *See* Ariz. Const. art. 4 pt. 1, § 1(3); *see also General Effective Dates*, Ariz. State Legislature, https://www.azleg.gov/general-effective-dates/ (last visited Nov. 14, 2021). Plaintiffs did not ask the district court to enjoin the entire Act, but rather asked the court to enjoin only certain provisions of the Act. In particular, Plaintiffs sought an injunction of §§ 2, 10, 11, and 13, collectively the "Reason Regulations," as well as § 1, the "Interpretation Policy."[14]

1. Arizona's Original Non-Discrimination Provision

In 2011, the Arizona Legislature enacted A.R.S. § 13-3603.02 in order to combat discriminatory abortions. *See* 2011 Ariz. Legis. Serv. Ch. 9. Since that time, § 13-3603.02 has prohibited persons from

[14] For consistency, State Defendants adopt the terms used by the district court.

"knowingly" "perform[ing] 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). In its findings, the Legislature recognized that "[t]he purpose of [the statute] is to protect unborn children from prenatal discrimination in the form of being subjected to abortion based on the child's sex or race by prohibiting sex-selection or race-selection abortions." 2011 Ariz. Legis. Serv. Ch. 9, § 3. It reasoned that "[t]here is no place for such discrimination and inequality in human society," especially where such "abortions are elective procedures that do not in any way implicate a woman's health." *Id.*

2. The Reason Regulations

In 2021, the Arizona Legislature bolstered this protection by promulgating S.B. 1457, which includes several provisions intended to "protect[] the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions." S.B. 1457 § 15. In particular, Section 2 of the Act adds to the pre-existing prohibitions of A.R.S. § 13-3603.02 by including a provision prohibiting a person from performing an abortion if that person knows "that the abortion is sought *solely* because of a genetic abnormality of the child."

("Performance Provision") (emphasis added). The Act defines "genetic abnormality" 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." A.R.S. § 13-3603.02(G)(2)(a).[15] A knowing violation of this provision is a class 6 felony. A.R.S. § 13-3603.02(A).

Section 2 of the Act further amends A.R.S. § 13-3603.02 by making it a class 3 felony for any person to "[s]olicit[] or accept[] monies to finance . . . an abortion because of a genetic abnormality of the child." ("Solicitation Provision"). The statute explicitly exempts "[a] woman on whom . . . an abortion because of a child's genetic abnormality is performed" from all criminal or civil liability for violations of this section. A.R.S. § 13-3603.02(F).

The Act, however, provides two exceptions to these provisions. *First*, a "genetic abnormality" for purposes of this section does not include "a lethal fetal condition," which is "a fetal condition that is diagnosed before birth and that will result, with reasonable certainty, in the death

[15] Unless otherwise indicated, citations to statutes amended by S.B. 1457 reference the amended versions of the statutes.

of the unborn child within three months after birth." *Id.*; A.R.S. § 36-2158(G)(1). *Second*, the Act adds a "medical emergency" exception that allows a physician to use "good faith clinical judgment" to terminate a woman's pregnancy "to avert her death" or to protect her from "substantial and irreversible impairment of a major bodily function," even if the abortion would otherwise be prohibited under the statute. *See* A.R.S. § 13-3603.02(A), (G)(3); § 36-2151(9).

The Act also amends several related statutes. Section 10 amends A.R.S. § 36-2157, which requires a person to complete an affidavit prior to performing an abortion. ("Affidavit Provision"). The amendment requires that the affidavit include a statement that the person "is not aborting the child . . . because of a genetic abnormality," and that the person "has no knowledge" that the child is being aborted "because of a genetic abnormality." A.R.S. § 36-2157(A)(1). Section 11 amends A.R.S. § 36-2158 by adding additional information a person must share with a woman whose unborn child has been diagnosed with a nonlethal fetal condition when obtaining her informed consent to perform an abortion. ("Notification Provision"). Specifically, the Act adds that a person must also inform a woman "[t]hat section 13-3603.02 prohibits abortion

because of the unborn child's sex or race or because of a genetic abnormality." A.R.S. § 36-2158(A)(2)(d). Lastly, Section 13 amends the abortion reporting requirements of A.R.S. § 36-2161(A)(25) to require a facility reporting the abortion to the Arizona Department of Health Services to also include "[w]hether any genetic abnormality of the unborn child was detected at or before the time of the abortion by [any form of] genetic testing." ("Reporting Provision").

3. The Interpretation Policy

S.B. 1457 § 1 also adds a new statute which establishes a general policy for the State that its laws be "interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state." A.R.S. § 1-219(A). The statute also provides that the policy "does not create a cause of action against" either (1) "a person who performs in vitro fertilization procedures as authorized" by state law, or (2) a woman who indirectly harms "her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care." A.R.S. § 1-219(B).

4. The Legislature's Findings

The Legislature made express findings in enacting S.B. 1457. Specifically, the Legislature found that "prohibiting persons from performing abortions knowing that the abortion is sought because of a genetic abnormality of the child advances at least three compelling state interests." S.B. 1457 § 15. *First*, the Act "protects the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions." *Id.* *Second*, the Act protects Arizona citizens from coercive medical practices "that encourage selective abortions of persons with genetic abnormalities." *Id.* *Finally*, the Act "protects the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortion." *Id.*[16]

C. Proceedings Below

On August 17, 2021, just weeks before S.B. 1457 would go into effect, Plaintiffs sued State Defendants and others, and sought a

[16] The Act also contains a severability provision which provides that "[i]f a provision of this act . . . is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable." S.B. 1457 § 18.

preliminary injunction to stop the Act's full enforcement. 2-ER-217. In their preliminary injunction motion, Plaintiffs asserted that they were likely to succeed on the merits of the claims because (1) the Reason Regulations impose an unconstitutional ban on pre-viability abortion; (2) the Reason Regulations impose an unconstitutional condition on patients' free speech rights; and (3) that both the Reason Regulations and the Interpretation Policy are unconstitutionally vague. 2-ER-225.

On September 28, 2021, the district court issued an order preliminarily enjoining the Reason Regulations. 1-ER-32. However, the court declined to enjoin the Interpretation Policy. 1-ER-32. The court concluded that Plaintiffs were likely to succeed on the merits of their claims that the Reason Regulations are unconstitutionally vague and that the Reason Regulations "unduly burden the rights of women to terminate pre-viability pregnancies." 1-ER-11. Because the court held that these two claims provided sufficient grounds for granting preliminary relief, it declined to address Plaintiffs' unconstitutional conditions claim. 1-ER-11. The State Defendants timely filed a notice of appeal on October 4, 2021. 3-ER-385. Plaintiffs also filed a cross-appeal.

SUMMARY OF THE ARGUMENT

The district court erred by preliminarily enjoining the Reason Regulations. Plaintiffs did not establish that they are likely to succeed on the merits of either their substantive due process claim or their vagueness claim; nor did they satisfy the remaining factors necessary to obtain a preliminary injunction. Yet the district court concluded otherwise and enjoined the Reason Regulations. This was reversible error.

As to the substantive due process claim, the district court erred by concluding that the due process standard from *Roe* and *Casey* applies to an anti-discrimination prohibition like the one in S.B. 1457. *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." *Roe v. Wade*, 410 U.S. 113, 153 (1973). And "*Casey* did not consider the validity of an anti-eugenics law." *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). The widespread science and

technology that exist today for performing accurate testing for genetic abnormalities were largely non-existent at the time of *Casey*.

But even if *Roe* and *Casey* apply, Plaintiffs only argued that the Reason Regulations violate substantive due process because they constitute an impermissible "ban" on pre-viability abortion. The district court correctly rejected this argument. The Reason Regulations do not ban any woman from obtaining a pre-viability abortion. The law only prohibits a doctor from performing an abortion if the doctor knows that the *sole* reason for the abortion is the unborn child's diagnosis of a genetic abnormality. Even a woman seeking an abortion solely for this reason can still obtain an abortion from a doctor who is unaware of the woman's sole reason.

After concluding that the Reason Regulations do not constitute a ban, the district court should have denied Plaintiffs' motion. Instead, the district court constructed an "undue burden" argument for Plaintiffs and concluded that Plaintiffs are likely to show that the Reason Regulations impose a substantial obstacle on women seeking an abortion. The district court did this without making key findings—it did not make findings regarding the number of women who decide to terminate their

pregnancies *solely* because of a genetic abnormality; the number of women within that group who would be regulated because a doctor would know that she is seeking the abortion for that sole reason; or regarding how many of those women would subsequently struggle to find a doctor to perform the abortion. The district court also erred by relying on an erroneous interpretation of Section 11 (the "Notification Provision") to reach its conclusion that the Reason Regulations create an undue burden.

The district court further erred by conducting a balancing of the perceived burdens with the benefits of the law. This analysis is unnecessary after Chief Justice Roberts' *June Medical* concurrence. The district court also erred in the analysis by discounting the Legislature's express findings and reaching its conclusion without briefing from the State on the additional benefits of the law.

As to Plaintiffs' vagueness claim, the district court should have ended its analysis by concluding that Plaintiffs' vagueness challenge is not ripe. Plaintiffs brought an entirely speculative pre-enforcement challenge, without presenting the court with a concrete factual situation. The district court was left to guess about how the Reason Regulations might apply to hypothetical future situations.

The district court also erred by concluding that Plaintiffs are likely to succeed in showing that the Reason Regulations are vague. The district court concluded that the Regulations 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." But that conclusion ignores that the statute provides a definition of "genetic abnormality," and this Court has held 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 v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2019). And instead of adhering to the usual standard that "scienter requirements alleviate vagueness concerns," *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007), the district court erred by holding that the knowledge requirement built into the Reason Regulations creates, rather than alleviates, vagueness concerns.

The district court also erred by concluding that Plaintiffs satisfied the other requirements for obtaining a preliminary injunction. The stated irreparable harm to Plaintiffs is the alleged "deprivation of constitutional rights," but that conclusion hinges on the district court's

erroneous analysis. The State's and the public's interests, on the other hand, are injured when a constitutional law is enjoined. The State has an interest in regulating abortions to ensure they are not performed for discriminatory reasons, including during the pendency of this lawsuit, and the court erred by determining that the equities weigh in favor of Plaintiffs.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). A "plaintiff [must] make a showing on *all four prongs*" to obtain a preliminary injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (stating that a plaintiff "must show" all four factors before an injunction may issue (citation and internal quotation marks omitted)).

This Court reviews the district court's issuance of a preliminary injunction for an abuse of discretion. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 876 (9th Cir. 2009). "A district court abuses its discretion in issuing a preliminary injunction if its decision is based on either an erroneous legal standard or clearly erroneous factual findings[.]" *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1096 (9th Cir. 2008). "The legal issues underlying the injunction are reviewed de novo because a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of law." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir. 2000) (citation and internal quotation marks omitted). By contrast, the district court's factual findings are reviewed for clear error. *See Lahoti v. VeriCheck, Inc.*, 586 F.3d 1190, 1195–96 (9th Cir. 2009).

ARGUMENT

I. The District Court Erred In Determining That Plaintiffs Are Likely To Succeed On The Merits Of Their Substantive Due Process Claim.

A. Neither *Roe* Nor *Casey* Apply To The Reason Regulations.

The Reason Regulations are 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* did not close the door to states (or the federal government) restricting 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." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875 (1992). *Casey* does not protect the decision whether to bear or beget a *particular child* with potentially disfavored characteristics. Here, the Reason Regulations "in no real sense deprive[] 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.*

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." *PPINK*, 917 F.3d at 536 (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).

Further, in *Casey* and *Gonzales*, the Supreme Court upheld prohibitions against certain kinds of pre-viability abortions that were at least as restrictive as the Reason Regulations. *Casey* upheld a complete restriction on pre-viability abortions where the patient is a minor who does not obtain parental consent or judicial bypass. 505 U.S. at 899. *Gonzales* upheld a complete prohibition on pre-viability abortions performed through the gruesome "partial-birth" abortion procedure. 550 U.S. at 135–38.

In rejecting *Roe*'s trimester framework, *Casey* recognized that "time ha[d] overtaken some of *Roe's* factual assumptions." 505 U.S. at 860. Likewise, *Casey* could not have considered critical factual developments relevant to the Reason Regulations, because they had not occurred at the time. *Casey* was decided as the transformation of societal attitudes

toward persons with disabilities was still occurring, as reflected in the contemporaneous passage of the Americans with Disabilities Act. Moreover, the technology and science necessary to perform accurate testing for a genetic abnormality on a widespread basis were not yet in existence. And the adverse impact of abortion on the integrity of the medical profession—which became evident to the Court at the time of *Gonzales*—was neither available nor considered in *Roe* or *Casey*. Like the technology underlying it, the right Plaintiffs assert—the right to perform an abortion based on the results of genetic testing—is novel, and therefore undeserving of heightened judicial scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (analyzing for due process purposes "whether this asserted right has any place in our Nation's traditions").

For the same reasons, no prior Ninth Circuit precedent is controlling here. This Court has never addressed whether the federal constitution prohibits enacting any similar *anti-discrimination* law with respect to pre-viability abortions, where such discrimination is only even feasible due to recent advancements in genetic screening.

B. The Reason Regulations Do Not Ban Pre-Viability Abortion.

Even if *Roe* or *Casey* applies, Plaintiffs' sole argument below about why the Reason Regulations violate substantive due process is that they constitute a ban on pre-viability abortion (*see infra*). The district court rejected that argument, instead correctly 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." 1-ER-29. The court reasoned that 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." 1-ER-20.

The district court was correct, in concluding that the Reason Regulations do not impose a ban on pre-viability abortion. *Preterm-Cleveland*, 994 F.3d at 521 ("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 Regulations 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 multiple 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 that information is not known by the physician performing her abortion.

It is only in the circumstances where a doctor knows—most likely because the doctor has been informed—that the woman's sole reason for

an abortion is a genetic abnormality, and neither statutory exception applies, that the Reason Regulations will apply to the doctor (again, the Reason Regulations never impose civil or criminal liability on an expectant mother). Plaintiffs admit that their patients do not typically disclose the reasons why they are choosing to terminate a pregnancy and, even when they do, there are multiple reasons. *See* 2-ER-276 (Decl. of Paul A. Isaacson, M.D. ¶ 13). Even if a genetic abnormality is the sole reason for obtaining an abortion, a pregnant woman can still obtain an abortion from any 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.").

As the district court recounted, "at oral argument [Plaintiffs] confirmed that they are not arguing there are women in Arizona who want to terminate their pre-viability pregnancies because of a fetal genetic abnormality but will do so only if they can also tell their doctors about their motives." 1-ER-20 n.13 (citing Oral Argument Tr. at 28–29). And the district court correctly recognized that "[i]t strains credulity to

believe that a woman who wants to terminate her pregnancy because of a fetal genetic abnormality would nonetheless choose to carry her unwanted pregnancy to term because the procedure cannot be performed by a doctor who knows of her motive for seeking the abortion." *Id.*

Plaintiffs have attempted to undercut *Preterm-Cleveland* on grounds that the Ohio law at issue there was different than the law here. In reality, the law in *Preterm-Cleveland* was broader in several respects than the Reason Regulations—the Ohio law there regulates 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 en banc Sixth Circuit upheld that law.

In the district court, Plaintiffs relied primarily on a single case, *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013) ("*Isaacson I*"), to argue that the Reason Regulations impose a ban. Based on that single case, Plaintiffs argued that this Court recognizes a ban on a woman's right to a pre-viability abortion when the challenged "law does not allow for abortions 'in cases of fetal anomaly[.]'" 2-ER-225. But Plaintiffs' reliance on *Isaacson I* is misplaced.

Isaacson I concerned an Arizona law that expressly banned all abortions beginning at twenty weeks gestation. 716 F.3d at 1226 ("[T]he stated purpose of H.B.2036 is to '[p]rohibit' a woman from electing abortion once the fetus reaches twenty weeks gestational age."). The law's *only* exception was for a medical emergency. This Court held that "while a health exception is necessary to save an *otherwise constitutional* post-viability abortion ban from challenge, it cannot save an *unconstitutional prohibition* on the exercise of a woman's right to choose to terminate her pregnancy before viability." *Id.* at 1228 (emphases added). The Court reasoned that the medical emergency exception would not cover all women seeking pre-viability abortions—*e.g.*, it would not cover "cases of fetal anomaly or pregnancy failure." *Id.* Therefore, because the law prohibited nearly all abortions prior to viability, the Court held that a medical emergency exception was not enough to save it. *Id.* The Court acknowledged, however, that the Arizona Legislature is free to "set[] standards for the manner and means through which abortions are to be provided." *Id.* at 1229.

Contrary to Plaintiffs' arguments, *Isaacson I* does not support that the Reason Regulations create a ban on pre-viability abortions. Unlike

in *Isaacson I*, not only do the Reason Regulations contain a broad exception for the life or health of the mother, they also allow any woman to obtain a pre-viability abortion solely because of a genetic abnormality where the fetus is reasonably certain not to survive for more than three months after birth (which also covers a pregnancy failure). Thus, those exceptions the Court thought necessary in *Isaacson I* are present here.

Even when those exceptions are inapplicable, the Reason Regulations are not an outright ban on any woman's choice to have a pre-viability abortion; as explained above, there are numerous situations where the Reason Regulations do not apply at all. And in those situations where the Regulations do apply, they merely regulate the medical profession by restricting a physician from *knowingly* performing discriminatory abortions solely based on genetic abnormality. In this way, they qualify as "standards for the manner and means through which abortions are to be provided," which the Arizona Legislature retained the power to enact even under *Roe* and *Casey*. *See id.* at 1229.

The Reason Regulations do not "ban" pre-viability abortions any more than Arizona's existing regulation of abortions based on race or sex. *See* A.R.S. § 13-3603.02(A)(1). The Reason Regulations, therefore,

constitute a permissible regulation on the manner in which the medical profession conducts pre-viability abortions. *See Casey*, 505 U.S. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."); *see also Preterm-Cleveland*, 994 F.3d at 521.

C. The Reason Regulations Do Not Create An Undue Burden.

Casey also prohibits states from "impos[ing] an undue burden on the woman's ability to obtain an abortion." *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring). "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* (quoting *Casey*, 505 U.S. at 877). This standard is met only if plaintiffs can prove that "in a large fraction of the cases in which [the 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). When plaintiffs raise a broad facial challenge to an abortion regulation, plaintiffs have a

"heavy burden" in "maintaining the suit." *Gonzales*, 550 U.S. at 167. If plaintiffs cannot show that a law "pose[s] a substantial obstacle to abortion access" in a large fraction of cases, the law is permissible as long as it is "'reasonably related' to a legitimate state interest." *June Med.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting *Casey*, 505 U.S. at 878).

Even if the undue burden test applies here, Plaintiffs did not argue that the Reason Regulations create such a burden. The record is void of the required evidence, and the court did not (and could not) make the required findings. But the court still found that the Reason Regulations create an undue burden. This was error. Plaintiffs did not come close to satisfying their heavy burden. They failed to show that the Reason Regulations will create a substantial obstacle for *any* woman to receive an abortion, let alone a "large fraction" of women. And the State's many compelling interests in the Reason Regulations far outweigh any burden.

1. The District Court *Sua Sponte* Conducted An Undue Burden Analysis.

Plaintiffs never made an "undue burden" argument. Plaintiffs' only argument under *Casey* was that the Reason Regulations function as a complete ban on access to abortion and are thus *per se* unconstitutional—

an argument the district court correctly rejected. *See supra* § I(B). Plaintiffs' motion for preliminary injunction mentions the undue burden standard only once. That single reference (in a short footnote) affirmatively disavowed that the standard applies here at all, and then circularly claimed that even if the test does apply, the "law imposes a substantial obstacle—indeed a complete one." 2-ER-227 n.6. In response to Plaintiffs' actual arguments, State Defendants naturally focused only on whether the Reason Regulations impose a ban. The State could not refute the existence of obstacles which Plaintiffs did not assert. Thus, when the district court concluded that the Reason Regulations do not constitute a ban, Plaintiffs' motion should have been denied. *See Whole Woman's Health v. Paxton*, 10 F.4th 430, 455 (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.").

But instead, the district court constructed an "undue burden" argument for the Plaintiffs out of whole cloth, and then concluded that

Plaintiffs would likely succeed on that basis.[17] 1-ER-27. At oral argument, the court repeatedly questioned Plaintiffs about whether they argued in their briefing that the Reason Regulations impose an undue burden.[18] *See, e.g.*, 2-ER-52 ("Where in the briefing can I find your argument that the Reason Provision, viewed as a manner regulation rather than a ban, nonetheless imposes a substantial obstacle on a woman's right to terminate pre-viability pregnancy?"); *id.* ("I want you specifically to point me to where it is in your brief."); *id.* ("Where you say that--where you argue that the Reason Provision, viewed as a manner regulation rather than a ban, nonetheless imposes a substantial obstacle on a woman's right to terminate a pre-viability pregnancy."). Plaintiffs again replied with the same circular statement that they made in their brief—the undue burden test would be satisfied because the Reason

[17] Tellingly, the district court's eleven-page undue burden analysis fails to cite even once to Plaintiffs' motion for preliminary injunction. *See* 1-ER-19–31.

[18] Plaintiffs were not permitted to make an alternative undue burden argument for the first time at oral argument. *See Butler v. Curry*, 528 F.3d 624, 642 (9th Cir. 2008) (finding argument waived when raised for the first time at oral argument); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (holding that issues not raised in the parties' briefs are waived).

Regulations constitute a ban. The district court had difficulty understanding Plaintiffs' circular reasoning:

> THE COURT: . . . At footnote 6 of your opening brief, you argue that if the undue burden standard does apply, the Reason Provision fails that test because it, quote, imposes a substantial obstacle, indeed a complete one, and as the Supreme Court has already found, no state interest is strong enough to support a prohibition of abortion before viability. I don't see any meaningful difference between a prohibition or ban on the one hand and a complete obstacle on the other, so this doesn't read to me like a true alternative argument. You're not accepting, in the alternative, that the law is a regulation rather than a ban and then arguing that it is too burdensome. You're just reiterating your belief that the law is a ban. That's how I see it, and I have several questions about this.

2-ER-50.[19] After additional pressing by the court, Plaintiffs could only point to declarations attached to the brief to explain how patients would be impacted by the law, 2-ER-53, leaving the court to unilaterally parse through select statements within those declarations to reach its own conclusion. In so doing, the district court enjoined a duly-enacted state law without ever giving the State an opportunity to address the theory

[19] *See also* 2-ER-51("[Plaintiffs:] [T]here are women in Arizona whose access to abortion will be eliminated altogether. So the burden is more than substantial, it's absolute for those patients. [The Court:] Okay. I'm not sure I understood. Did you just answer my question saying you're arguing that it is a ban?").

upon which unconstitutionality was based. This, alone, was reversible error. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

2. The District Court Could Not Make The Findings Necessary For An Undue Burden.

Without the benefit of adversarial briefing, the court's analysis predictably resulted in legal error. In piecing together an undue burden argument for Plaintiffs, the district court erred by concluding that the Reason Regulations "have the effect of placing a substantial obstacle in the paths of a large fraction of women seeking pre-viability abortions." 1-ER-24. The district court could not, and did not, make the necessary factual findings to reach this conclusion. This is reversible error. *See Preterm-Cleveland*, 994 F.3d at 523; *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959–61 (8th Cir. 2017) (reversing because the district court did not make the required factual findings under the undue burden standard).

The court did not make any finding regarding the number of women who decide to terminate their pregnancies *solely* because of a genetic abnormality. To the contrary, the record shows that abortions based on genetic abnormality are only a small fraction of abortions performed and women often have multiple reasons for terminating a pregnancy. *See* 2-

ER-170–71 (Decl. of Steven Robert Bailey ¶ 10); 2-ER-256 (Decl. of Eric M. Reuss, M.D., M.P.H. ¶ 47) ("In my experience, patients seek abortion for a wide range of personal reasons, including familial, medical, and financial, and often do not specifically delineate each one."); *see also* 2-ER-276 (Decl. of Paul A. Isaacson, M.D. ¶ 13) ("But 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."). The district court's conclusion ignores this evidence by reading "solely" completely out of the Reason Regulations' prohibition.

Within that unknown, but clearly small, fraction of women who decide to terminate their pregnancies *solely* because of a genetic abnormality, the court did not make any finding regarding how many of those women would be regulated because circumstances exist where a doctor would know that she is seeking an abortion solely because of the genetic abnormality. The record indicates that relatively few women officially report that *one of the reasons* for an abortion is "fetal health/medical considerations" or "genetic risk/fetal abnormality." 2-ER-170–71 (Decl. of Steven Robert Bailey ¶ 10). And the court recognized that a woman "may choose not to answer" when asked the reason for the

abortion. 1-ER-26. There is nothing in the record indicating that a woman must tell the doctor the sole reason for the abortion. Nor is there evidence of how many women reveal that their sole reason is the unborn child's diagnosis.

Importantly, nothing in the record indicates how many women, within this unknown but small fraction of women who are seeking an abortion solely because of a genetic abnormality and further have informed their doctor that this is the sole reason, would then struggle to subsequently find a doctor to perform the desired abortion. At most, the court could assume that in these circumstances, one doctor would be eliminated from the "pool of doctors" available to perform the abortion. And Plaintiffs' offered no evidence (certainly no quantifiable evidence) establishing that eliminating one doctor from Plaintiffs' pool of doctors would create a substantial obstacle. *See, e.g.*, 1-ER-25 (noting Plaintiffs/Physicians' statements regarding "few" abortion providers and a "handful" of doctors). The court further relied on an anticipated "chilling effect" that the Reason Regulations will have on doctors. 1-ER-26–27. But performing abortions is neither speech nor inherently expressive conduct; thus, a "chilling effect" on conduct is not a legitimate

ground for injunction. *See Wong v. Bush*, 542 F.3d 732, 736 (9th Cir. 2008) (citing *Rumsfeld v. F for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006)).

And further, even if it were, a burden created by Plaintiffs refraining from that conduct—*i.e.*, refusing to provide abortions based on speculative and unreasonable fears about the potential reach of the Reason Regulations—cannot justify an injunction.

3. The District Court Instead Relied On An Erroneous Interpretation Of Section 11.

Rather than make the necessary findings supported by actual evidence, the district court relied primarily on an erroneous reading of Section 11. 1-ER-25. Section 11, which the district court referred to as the "Notification Provision," amends Arizona's notice and informed consent requirements to add that a woman must be informed "*[t]hat section 13-3603.02* prohibits abortion because of the unborn child's sex or race or because of a genetic abnormality." A.R.S. § 36-2158(A)(2)(d) (emphasis added). In the district court's view, Section 11 "is a clear misstatement of the law" because "[n]owhere does § 2 of the Act [amending A.R.S. § 13-3603.02] outright prohibit abortions because of a fetal genetic abnormality." 1-ER-25. The court reasoned that Section 11

will thus "make it less likely that a woman who wants to terminate her pre-viability pregnancy because of a fetal genetic abnormality will know that she has the right to do so." 1-ER-25.

The actual text of Section 11, however, is inconsistent with the district court's reading, which treats Section 11 as a script that the provider must read verbatim to the patient. But Section 11 is not a script. Instead, it merely requires that a woman be notified of what "section 13-3603.02 prohibits." That is, it merely requires the provider to accurately inform the patient what Arizona law provides—that a person may not perform an abortion knowing that one reason is the sex or race of the unborn child or that the sole reason for the abortion is the unborn child's genetic abnormality. As the district court itself concluded, § 13-3603.02 does not outright prohibit or ban abortions because of fetal genetic abnormalities, 1-ER-19, and by extension neither can Section 11's requirement that a provider simply inform a patient about what is contained in § 13-3603.02. The district court's treatment of Section 11's

language as a script that doctors must read verbatim to their patients ignores the actual nature and language of the statute.[20]

4. The Benefits Of The Reason Regulations Far Outweigh Any Perceived Burdens.

Because the Reason Regulations do not impose an undue burden on any women seeking an abortion, the Reason Regulations are constitutional under *Casey*, without regard to the Reason Regulations' benefits. Even if the Reason Regulations' benefits are relevant, those benefits are significant and far outweigh any perceived burden that the Reason Regulations impose.

In 2016, the U.S. Supreme Court departed from the established understanding of the undue burden test when it stated that *Casey* "requires that courts consider the burdens a law imposes on abortion

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[20] Alternatively, if the district court thought Section 11, or any other individual section of S.B. 1457, is unconstitutional, the court should have severed that provision from the statutory scheme without enjoining the remaining provisions. This Court should similarly sever individual provisions without enjoining the remaining. *See* S.B. 1457 § 18 (Act's severance provision); *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) ("Severability is of course a matter of state law."); *State v. Patel*, 486 P.3d 188, 195 (Ariz. 2021) (severance turns on the courts "'ability to determine the intent of the lawmakers who enacted the statute . . . in order to give full effect to their intent.'"); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) (applying severability principles in the abortion context).

access together with the benefits those laws confer." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). A plurality of the Court repeated *Whole Women's Health*'s iteration of *Casey* four years later in *June Medical*. 140 S. Ct. at 2112. While Chief Justice Roberts concurred in *June Medical*'s judgment based on principles of stare decisis, he disavowed *Whole Women's Health*'s interpretation of *Casey*. 140 S. Ct. at 2136 (Roberts, C.J., concurring) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.").

Since *June Medical*, circuits have split on whether Chief Justice Roberts' concurrence controls in entirety or whether the benefits/burdens analysis from *Whole Women's Health* remains a part of the undue burden standard. Under *Marks v. United States*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 188, 193 (1977). Using that rule, three circuits have held that the Chief Justice's concurrence controls and there is therefore no benefits/burdens analysis required. *See Whole Woman's*

Health v. Paxton, 10 F.4th 430, 441 (5th Cir. 2021) ("[T]he Chief Justice's concurrence controls and we do not balance the benefits and burdens in assessing an abortion regulation."); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 434 (6th Cir. 2020) (same); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (same). But two circuits have concluded otherwise. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1259 n.6 (11th Cir. 2021) ("The benefits-burdens approach to the undue burden analysis from *Whole Woman's Health* . . . continues to bind us."); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 748 (7th Cir. 2021) ("*Whole Woman's Health* remains precedent binding on lower courts."). This Circuit has not yet weighed in on the question. The district court therefore applied both tests.

This Court should join the Fifth, Sixth, and Eighth Circuits and hold that, under *Marks*, Chief Justice Roberts' concurring opinion controls in full and there is no benefits/burdens analysis conducted under the undue burden test. *See EMW Women's Surgical Ctr., P.S.C.*, 978 F.3d at 431–37 (explaining why *Marks* dictates that the Chief Justice's opinion controls).

But even if this Court follows *Whole Women's Health* and applies a benefit/burden analysis, Plaintiffs would still not succeed in showing that any perceived burdens outweigh the Reason Regulations' benefits. The district court erred in concluding otherwise. Plaintiffs did not dispute the benefits of the law in their briefing. But if they had, the State would have identified the many compelling interests furthered by the Reason Regulations.

The Legislature found at least three compelling interests. *First*, the Act "protects the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions." S.B. 1457 § 15. The Legislature found that between 61% and 91% of all fetuses diagnosed with Down syndrome are aborted. *Id.* The Legislature enacted the bill in order "to send 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.* The district court correctly recognized that "*Casey* makes clear that states may 'enact rules and regulations designed to encourage [women] to know that there are philosophic and social arguments of great weight that can be brough[t] to bear in favor of continuing the pregnancy to full

term," and that "States may also enact measures designed to persuade women 'to choose childbirth over abortion.'" 1-ER-28–29 (quoting *Casey*, 505 U.S. at 872, 878). But instead of weighing that benefit and the alleged burden, the court instead found the State's interest was not furthered because the Reason Regulations created a substantial obstacle. 1-ER-29. That type of circular analysis fails to properly weigh the tremendous importance of the State's interest in protecting the disability community from discriminatory abortions.

Second, the Legislature sought to "protect[] against coercive health care practices that encourage selective abortions of persons with genetic abnormalities." 1-ER-28. The Legislature recognized the Sixth Circuit's recent finding "that empirical 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[.]" 1-ER-28. But the district court found that the benefit of this interest is outweighed because the court lacked "evidence that coercive medical practices are prevalent in Arizona." 1-ER-30. This finding ignored evidence incorporated into the Act, and discussed herein, showing that the bias expressed to parents of children with prenatal diagnoses of Down

syndrome "takes the form of the 'subtle shading of information by counselors against persons with Down syndrome,' or even open advocacy for the 'eradication' of Down syndrome via 'widespread acceptance of selective termination' of unborn children with the condition." Brief of the State of Wisconsin, et al., As *Amici Curiae* Supporting Petitions at 22, *Box*, 139 S. Ct. 1780 (No. 18-483) (citations omitted). The State's interest in preventing this type of underlying bias is strong and should not have been discounted by the district court.

Third, the Legislature sought to "protect[] the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortions." S.B. 1457 § 15. The district court down-played this interest, finding it is outweighed by harms to the doctor-patient relationship. 1-ER-30. The court reasoned that it may "discourag[e] frank, open, and honest communication, and adversely impact the quality of care as a result." 1-ER-30. But the Reason Regulations prevent only one thing—performing abortions knowing that the sole reason for the abortion is a genetic abnormality diagnosis. Patients are still able to communicate with doctors about the likely consequences of a genetic abnormality on the pregnancy and the

child. All the law prohibits is a particular doctor from performing an abortion if the doctor knows genetic abnormality is the sole reason for the abortion. And nothing in the record indicates that knowing a patient's reason is necessary for performing an abortion.

In addition to the three supported legislative findings, the State would have also offered the following benefits for the court's consideration: (1) the Reason Regulations will advance the State's compelling interest in eradicating historical animus and bias against persons with disabilities, including persons with Down syndrome; (2) the Reason Regulations will draw a clear boundary against additional eugenic practices targeted at disabled persons and others—modern technology will one day allow testing for any manner of genetic traits and the State will send a message that it will not permit those advances to result in eugenic abortion; (3) the Reason Regulations will counter the stigma that genetically selective abortion imposes on living persons with Down syndrome and other disabilities; (4) the Reason Regulations will ensure that the existing disability community does not become starved of resources for research and care for individuals with disabilities; (5) the Reason Regulations will protect against the devaluation of all human life

inherent in any decision to target a person for elimination based on an immutable characteristic; and (6) the Reason Regulations will foster the diversity of society and protect it from the enormous loss that will occur if people with Down syndrome and other genetic abnormalities are eliminated.

Each of these compelling benefits on its own outweighs any burden that the Reason Regulations' impact on "the mode and manner of abortion," 1-ER-20, will have in whatever small number of cases are impacted by the Reason Regulations. Together, the compelling benefits crush any perceived burden.

II. The District Court Erred By Determining That Plaintiffs Were Likely To Succeed On The Merits Of Their Vagueness Claim.

A. Plaintiffs' Vagueness Challenge Is Not Ripe.

Plaintiffs brought, and the district court erroneously considered, a pre-enforcement, facial claim for vagueness under the Due Process Clause to challenge the Reason Regulations. 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. *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." (emphasis added)). Similarly, under this Court's standard for when a due process vagueness challenge is ripe, a plaintiff must provide "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) (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996)); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir. 1996) ("Where there are insufficient facts to determine the vagueness of a law as applied, the issue is not ripe for adjudication.").

Plaintiffs never disputed that they failed to present the district court with the concrete factual situation this Court requires. Instead, Plaintiffs left the district court to guess about how the statute might apply to hypothetical future situations. The State Defendants were entitled to notice of those concrete factual situations where Plaintiffs believe application of the Reason Regulations will be vague. Otherwise, Arizona state courts should first be permitted to interpret and apply the

Reason Regulations in concrete factual situations. Facing such situations, Plaintiffs could then assert a due process challenge if they believe S.B. 1457 did not put them on adequate notice that the law would be enforced in the particular manner at issue. *See San Diego Cnty. Gun Rights Comm.*, 98 F.3d at 1133. But having failed to come forward with any such situations, Plaintiffs' vagueness challenge should fail.

Unfortunately, the district court rejected the State Defendants' ripeness argument and engaged in a guessing game about how the Reason Regulations might apply in future situations. The district court believed that this Court's opinions in *Guerrero*, 908 F.3d at 544, and *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019), altered the ripeness standard for vagueness challenges, thereby allowing it to consider Plaintiffs' claim. 1-ER-12. But neither case addressed the standard for *when* vagueness challenges are ripe. Instead, those decisions discuss the identity of litigants who have standing to assert a vagueness challenge and, if they have standing, the requirements they must satisfy on the merits. In other words, neither case altered the ripeness standard for pre-enforcement vagueness challenges, which requires presentation of a

concrete factual situation. *See Alaska Right to Life Pol. Action Comm.*, 504 F.3d at 849.

The district court's conclusion that Plaintiffs' vagueness challenge to the Reason Regulations is ripe is particularly confounding given that the district court determined that Plaintiffs' vagueness challenge to another portion of S.B. 1457 is *not* ripe. 1-ER-10. Relying on the Supreme Court's decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the district court concluded that determining how that portion would be applied in individual cases "is something that Arizona courts must decide in the first instance." 1-ER-10. If a particular application would be unconstitutional, "the federal courts stand ready to address any constitutional challenges as to that specific application." 1-ER-10. But the district court determined that it "is not positioned to decide 'abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'" 1-ER-10 (quoting *Webster*, 492 U.S. at 507).

These principles from *Webster* apply equally to the Reason Regulations. In *Webster*, the Court recognized that the plaintiffs were

asking federal courts to weigh in on a "state statute which ha[d] not yet been applied or threatened to be applied by the state courts to petitioners or others in the manner anticipated." *Webster*, 492 at 506–07 (quoting *Alabama State Fed'n of Lab. v. McAdory*, 325 U.S. 450, 460 (1945)). Utilizing the "abstract propositions" language above, the Court held that the plaintiffs' constitutional challenge was premature. *Id.* at 507.

Plaintiffs here similarly ask federal courts to weigh in on a state statute that has not yet been applied or threatened to be applied by the state courts. Plaintiffs do so before any state courts have had an opportunity to interpret the statutory terms that Plaintiffs contend render the Reason Regulations impermissibly vague. And Plaintiffs do so without presenting a concrete factual situation to the district court. Thus, the district court should have stayed its hand.

B. The Reason Regulations Are Not Vague.

The district court's holding that the Reason Regulations are 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 standardless 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*, 908 F.3d at 544. 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).

"In evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." *Kolender v. Lawson*, 461 U.S. 352, 355 (1983). And under the canon of constitutional avoidance, a court may not strike down a law on vagueness grounds if there is a reasonable construction of the statute that would eliminate vagueness concerns. *See Gonzales*, 550 U.S. at 153. These principles apply fully in challenges to abortion regulations. *See id.* at 154 (explaining that "*Casey* put . . . to rest" the Court's previous approach of avoiding permissible readings of abortion statutes "at all costs").

The district court did not find the actual terms of the Reason Regulations vague. The district court concluded, instead, that the Regulations 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." 1-ER-15. 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 Regulations apply. 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." 2-ER-170–71 (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

Regulations' inapplicability would have been obvious. Even among the very small percentage of cases when the Reason Regulations might apply, the statute's applicability will remain obvious. *See supra* § I(B). 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.

The district court seemed to believe that sufficient proof of vagueness could be established by identifying hypothetical scenarios where there could be uncertainty about the Reason Regulations' application. But "the mere fact that close cases can be envisioned" under a statute does not establish vagueness. *Williams*, 553 U.S. at 305. "Close cases can be imagined under virtually any statute." *Id.* at 306.

In any event, the scenarios the district court expressed concern about are not close cases. The district court worried 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." 1-ER-14. But where such "considerable uncertainty" exists, the provider may perform the abortion without running afoul of the Reason Regulations. The district court was also concerned that "patients

sometimes report that they are terminating a pregnancy because they lack the financial, emotional, family, or community support to raise a child with special and sometimes challenging needs." 1-ER-16. The Reason Regulations would not prohibit an abortion when reasons other than the presence of a genetic abnormality are expressed.[21]

The district court further erred by holding that the knowledge requirement creates—rather than alleviates—vagueness concerns. The Reason Regulations apply only when a provider has *actual knowledge* that the abortion is being sought solely because of a genetic abnormality.

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[21] Similarly, the district court expressed concern that

> "sometimes a patient who initially reacted to a positive pregnancy test with excitement will suddenly decide to terminate a pregnancy after receiving abnormal genetic test results, or a patient who volunteered no initial reaction to the pregnancy nonetheless schedules an abortion immediately after receiving and discussing genetic test results; sometimes a patient is referred for an abortion shortly after receiving genetic screening or diagnostic results; and sometimes a patient receiving an abortion after receiving genetic test results asks how quickly after the procedure she can get pregnant[.]"

1-ER-15–16. These scenarios come at the Reason Regulations from the wrong direction. The correct analysis is whether the doctor actually "knows" that the existence of a genetic abnormality is the "sole" reason for the abortion. None of these scenarios, without more, are likely to result in a finding that the Reason Regulations were violated.

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." 1-ER-15. But the Reason Regulations do not require a provider to know why someone is seeking an abortion. To the contrary, the Regulations apply 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 Regulations do not prohibit the abortion. The district court and Plaintiffs cannot rewrite the statute and then use their version to claim that the actual, enacted version is impermissibly vague.

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," A.R.S. § 13-1103(A)(3); encouragement of minor suicide requires proof of "knowledge that the minor intends to die by suicide," A.R.S. § 13-1103(B); and sexual assault requires proof that "the defendant knew [the defined sexual] contact was without the consent of the victim," *State v. Witwer*, 856 P.2d 1183, 1186 (Ariz. 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 Regulations, the term "knowingly" thus "alleviates vagueness concerns, narrows the scope of [the] prohibition, and limits prosecutorial discretion." *McFadden v. United States*, 576 U.S. 186, 197 (2015) (cleaned up) (quoting *Gonzales*, 550 U.S. at 149).

Finally, the Reason Regulations do not, as the district court wrongly concluded, implicate arbitrary enforcement concerns. 1-ER-18. In this pre-enforcement challenge, "no evidence has been, or could be, introduced to indicate whether the [law] has been enforced in a discriminatory manner." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 503 (1982). And "the speculative danger of arbitrary enforcement does not render" a law void for vagueness. *Id.*

The Reason Regulations are not like any abortion restriction this Court has ever struck down as vague. *See McCormack*, 788 F.3d at 1031 (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"). Thus, the Court should

conclude that Plaintiffs are not likely to succeed on the merits of their vagueness claim.[22]

III. The District Court Erred By Determining That Plaintiffs Satisfied All Other Requirements For A Preliminary Injunction.

The district court's erroneous conclusions regarding Plaintiffs' likelihood of success infected its weighing of the equities. 1-ER-31. Plaintiffs did not establish that irreparable harm would result absent injunctive relief. The district court held that "deprivation of constitutional rights unquestionably constitutes irreparable injury." 1-ER-31. But as State Defendants have explained herein, the Reason Regulations are not unconstitutional. Indeed, Plaintiffs were unable to establish that any woman would be unable to obtain an abortion under the Reason Regulations.

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[22] Plaintiffs also asserted below that the Reason Regulations violate their patients' First Amendment rights under the "unconstitutional conditions" doctrine. Because the district court concluded that the Reason Regulations were likely unconstitutional on other grounds, the district court did not address Plaintiffs' unconstitutional conditions claim. 1-ER-11. For the reasons the State Defendants set forth in their response to Plaintiffs' motion for preliminary injunction, Plaintiffs' unconstitutional conditions claim fails badly. 2-ER-156–57.

Instead, enjoining a constitutional 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). More specifically, the Legislature intended "to send 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." S.B. 1457 § 15. The Legislature provided detailed findings regarding how S.B. 1457 would further its interest in preventing discriminatory abortions. *See supra* 48–52. And the State has a long-recognized interest in preventing discrimination. *See, e.g.*, *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 n.5 (1988). Discrimination based on disability should not be more accepted in the abortion context.

Here, the Arizona Legislature has made the decision to prohibit doctors from knowingly performing abortions because of a genetic abnormality diagnosis. The district court's preliminary injunction has voided that decision. In a democracy, officials have a strong interest in seeing the policy decisions of its citizens' elected representatives carried out without interference. And the Supreme Court confirmed decades ago

that states have "legitimate interests from the outset of [a] pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 834; *see also Isaacson I*, 716 F.3d at 1233 (Kleinfeld, J., concurring). Consequently, the district court erroneously concluded that the remaining factors favored injunctive relief.

CONCLUSION

The Court should reverse and dissolve the district court's preliminary injunction.

November 15, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance

9th Cir. Case Number(s): 21-16645, 21-16711

I am the attorney or self-represented party.

This brief contains 12,940 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on this November 15, 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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ADDENDUM

TABLE OF CONTENTS

REFERENCE TITLE: abortion; unborn child; genetic abnormality

State of Arizona
Senate
Fifty-fifth Legislature
First Regular Session
2021

SB 1457

Introduced by
Senators Barto: Boyer, Gray, Kerr, Leach, Livingston, Petersen, Shope

AN ACT

AMENDING TITLE 1, CHAPTER 2, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 1-219; AMENDING SECTION 13-3603.02, ARIZONA REVISED STATUTES; REPEALING SECTION 13-3604, ARIZONA REVISED STATUTES; AMENDING TITLE 15, CHAPTER 1, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 15-115.01; AMENDING SECTIONS 35-196.02, 35-196.04, 36-449.01, 36-449.03, 36-2151, 36-2153, 36-2157 AND 36-2158, ARIZONA REVISED STATUTES; AMENDING TITLE 36, CHAPTER 20, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 36-2160; AMENDING SECTION 36-2161, ARIZONA REVISED STATUTES; RELATING TO ABORTION.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 1, chapter 2, article 2, Arizona Revised Statutes, is amended by adding section 1-219, to read:

1-219. Interpretation of laws; unborn child; definition

A. THE LAWS OF THIS STATE SHALL BE INTERPRETED AND CONSTRUED TO ACKNOWLEDGE, ON BEHALF OF AN UNBORN CHILD AT EVERY STAGE OF DEVELOPMENT, ALL RIGHTS, PRIVILEGES AND IMMUNITIES AVAILABLE TO OTHER PERSONS, CITIZENS AND RESIDENTS OF THIS STATE, SUBJECT ONLY TO THE CONSTITUTION OF THE UNITED STATES AND DECISIONAL INTERPRETATIONS THEREOF BY THE UNITED STATES SUPREME COURT.

B. THIS SECTION DOES NOT CREATE A CAUSE OF ACTION AGAINST A WOMAN FOR INDIRECTLY HARMING HER UNBORN CHILD BY FAILING TO PROPERLY CARE FOR HERSELF OR BY FAILING TO FOLLOW ANY PARTICULAR PROGRAM OF PRENATAL CARE.

C. FOR THE PURPOSES OF THIS SECTION, "UNBORN CHILD" HAS THE SAME MEANING PRESCRIBED IN SECTION 36-2151.

Sec. 2. Section 13-3603.02, Arizona Revised Statutes, is amended to read:

13-3603.02. Abortion; sex and race selection; genetic abnormality; injunctive and civil relief; failure to report; definitions

A. EXCEPT IN A MEDICAL EMERGENCY, a person who knowingly does any of the following is guilty of a class 3 felony:

1. Performs 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.

2. PERFORMS AN ABORTION KNOWING THAT THE ABORTION IS SOUGHT BECAUSE OF A GENETIC ABNORMALITY OF THE CHILD.

B. A PERSON WHO KNOWINGLY DOES ANY OF THE FOLLOWING IS GUILTY OF A CLASS 3 FELONY:

~~2.~~ 1. Uses force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection or race-selection abortion OR AN ABORTION BECAUSE OF A GENETIC ABNORMALITY OF THE CHILD.

~~3.~~ 2. Solicits or accepts monies to finance a sex-selection or race-selection abortion OR AN ABORTION BECAUSE OF A GENETIC ABNORMALITY OF THE CHILD.

~~B.~~ C. The attorney general or the county attorney may bring an action in superior court to enjoin the activity described in subsection A OR B of this section.

~~C.~~ D. The father of the unborn child who is married to the mother at the time she receives a sex-selection or race-selection abortion OR AN ABORTION BECAUSE OF A GENETIC ABNORMALITY OF THE CHILD, or, if the mother has not attained eighteen years of age at the time of the abortion, ~~the~~ A maternal ~~grandparents~~ GRANDPARENT of the unborn child, may bring a civil action on behalf of the unborn child to obtain appropriate relief with respect to a violation of subsection A OR B of this section. The court

may award reasonable attorney fees as part of the costs in an action brought pursuant to this subsection. For the purposes of this subsection, "appropriate relief" includes monetary damages for all injuries, whether psychological, physical or financial, including loss of companionship and support, resulting from the violation of subsection A OR B of this section.

~~D.~~ E. A physician, physician's assistant, nurse, counselor or other medical or mental health professional who knowingly does not report known violations of this section to appropriate law enforcement authorities shall be subject to a civil fine of not more than ~~ten thousand dollars~~ $10,000.

~~E.~~ F. A woman on whom a sex-selection or race-selection abortion OR AN ABORTION BECAUSE OF A CHILD'S GENETIC ABNORMALITY is performed is not subject to criminal prosecution or civil liability for any violation of this section or for a conspiracy to violate this section.

~~F.~~ G. For the purposes of this section: ~~,~~

1. "Abortion" has the same meaning prescribed in section 36-2151.

2. "GENETIC ABNORMALITY" MEANS 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.

3. "MEDICAL EMERGENCY" HAS THE SAME MEANING PRESCRIBED IN SECTION 36-2151.

Sec. 3. Repeal

Section 13-3604, Arizona Revised Statutes, is repealed.

Sec. 4. Title 15, chapter 1, article 1, Arizona Revised Statutes, is amended by adding section 15-115.01, to read:

15-115.01. Prohibited services; definitions

A. A FACILITY THAT IS RUN BY OR THAT OPERATES ON THE PROPERTY OF A PUBLIC EDUCATIONAL INSTITUTION MAY NOT DO ANY OF THE FOLLOWING:

1. PERFORM OR PROVIDE AN ABORTION, UNLESS THE ABORTION IS NECESSARY TO SAVE THE LIFE OF THE WOMAN HAVING THE ABORTION.

2. COUNSEL IN FAVOR OF ABORTION.

3. PROVIDE A REFERRAL FOR AN ABORTION.

B. A PERSON WHO IS EMPLOYED BY A PUBLIC EDUCATIONAL INSTITUTION AND WHO IS ACTING WITHIN THE SCOPE OF THE PERSON'S EMPLOYMENT MAY NOT DO ANY OF THE FOLLOWING:

1. PERFORM OR PROVIDE AN ABORTION, UNLESS THE ABORTION IS NECESSARY TO SAVE THE LIFE OF THE WOMAN HAVING THE ABORTION.

2. COUNSEL IN FAVOR OF ABORTION.

3. PROVIDE A REFERRAL FOR AN ABORTION.

C. FOR THE PURPOSES OF THIS SECTION:

1. "ABORTION" HAS THE SAME MEANING PRESCRIBED IN SECTION 36-2151.

2. "MEDICAL EMERGENCY" HAS THE SAME MEANING PRESCRIBED IN SECTION 36-2151.

3. "PUBLIC EDUCATIONAL INSTITUTION" MEANS ANY OF THE FOLLOWING:

(a) A COMMUNITY COLLEGE AS DEFINED IN SECTION 15-1401.

(b) A UNIVERSITY UNDER THE JURISDICTION OF THE ARIZONA BOARD OF REGENTS.

(c) A SCHOOL DISTRICT, INCLUDING ITS SCHOOLS.

(d) A CHARTER SCHOOL.

(e) AN ACCOMMODATION SCHOOL.

(f) THE ARIZONA STATE SCHOOLS FOR THE DEAF AND THE BLIND.

Sec. 5. Section 35-196.02, Arizona Revised Statutes, is amended to read:

35-196.02. Use of public funds or insurance for abortion prohibited; exception

A. Notwithstanding any provisions of law to the contrary, no public funds nor tax monies of this state or any political subdivision of this state nor any federal funds passing through the state treasury or the treasury of any political subdivision of this state may be expended for payment to any person or entity for the performance of any abortion unless an abortion is necessary to save the life of the woman having the abortion.

B. Notwithstanding any other law, public monies or tax monies of this state or any political subdivision of this state shall not be expended directly or indirectly to pay the costs, premiums or charges associated with a health insurance policy, contract or plan that provides coverage, benefits or services related to the performance of any abortion unless an abortion is necessary to either:

1. Save the life of the woman having the abortion.

2. Avert substantial and irreversible impairment of a major bodily function of the woman having the abortion.

C. Notwithstanding any other law, public monies or tax monies of this state or any political subdivision of this state or any federal funds passing through the state treasury or the treasury of any political subdivision of this state or monies paid by students as part of tuition or fees to a state university or a community college shall not be expended or allocated for training to perform abortions.

D. NOTWITHSTANDING ANY OTHER LAW, THIS STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE SHALL NOT ENTER INTO A CONTRACT OR COMMERCIAL TRANSACTION WITH AN ABORTION PROVIDER OR AN AFFILIATE OF AN ABORTION PROVIDER. THIS SUBSECTION DOES NOT APPLY TO A CONTRACT OR COMMERCIAL TRANSACTION THAT IS SUBJECT TO A FEDERAL LAW THAT IS IN CONFLICT WITH THIS SUBSECTION, AS DETERMINED BY THE DEPARTMENT OF ADMINISTRATION IN A WRITTEN DECISION MADE AVAILABLE TO THE PUBLIC.

~~D.~~ E. This section does not prohibit the state from complying with the requirements of federal law in title XIX and title XXI of the social security act.

Sec. 6. Section 35-196.04, Arizona Revised Statutes, is amended to read:

35-196.04. Use of public monies for human cloning, abortion or other prohibited research; prohibition; definition

A. Notwithstanding any other law, tax monies of this state or any political subdivision of this state, federal monies passing through the state treasury or the treasury of any political subdivision of this state or any other public monies shall not be used by any person or entity, including any state funded institution or facility, for human somatic cell nuclear transfer, commonly known as human cloning.

B. NOTWITHSTANDING ANY OTHER LAW, PUBLIC MONIES OR TAX MONIES OF THIS STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE, ANY FEDERAL MONIES PASSING THROUGH THE STATE TREASURY OR THE TREASURY OF ANY POLITICAL SUBDIVISION OF THIS STATE OR MONIES PAID BY STUDENTS AS PART OF TUITION OR FEES TO A STATE UNIVERSITY OR A COMMUNITY COLLEGE SHALL NOT BE EXPENDED OR ALLOCATED FOR OR GRANTED TO OR ON BEHALF OF AN EXISTING OR PROPOSED RESEARCH PROJECT THAT INVOLVES ABORTION, HUMAN SOMATIC CELL NUCLEAR TRANSFER OR ANY RESEARCH THAT IS PROHIBITED BY TITLE 36, CHAPTER 23.

~~B.~~ C. This section does not restrict areas of scientific research that are not specifically prohibited by this section, including research in the use of nuclear transfer or other cloning techniques to produce molecules, deoxyribonucleic acid, cells other than human embryos, tissues, organs, plants or animals other than humans.

~~C.~~ D. For the purposes of this section, "human somatic cell nuclear transfer" means human asexual reproduction that is accomplished by introducing the genetic material from one or more human somatic cells into a fertilized or unfertilized oocyte whose nuclear material has been removed or inactivated so as to produce an organism, at any stage of development, that is genetically virtually identical to an existing or previously existing human organism.

Sec. 7. Section 36-449.01, Arizona Revised Statutes, is amended to read:

36-449.01. Definitions

In this article, unless the context otherwise requires:

1. "Abortion" means the use of any means with the intent to terminate a woman's pregnancy for reasons other than to increase the probability of a live birth, to preserve the life or health of the child after a live birth, to terminate an ectopic pregnancy or to remove a dead fetus. Abortion does not include birth control devices or oral contraceptives.

2. "Abortion clinic" means a facility, other than a hospital, in which five or more first trimester abortions in any month or any second or third trimester abortions are performed.

3. "BODILY REMAINS" HAS THE SAME MEANING PRESCRIBED IN SECTION 36-2151.

~~3.~~ 4. "Director" means the director of the department of health services.

5. "FINAL DISPOSITION" HAS THE SAME MEANING PRESCRIBED IN SECTION 36-301.

~~4.~~ 6. "Medication abortion" means the use of any medication, drug or other substance that is intended to cause or induce an abortion.

~~5.~~ 7. "Perform" includes the initial administration of any medication, drug or other substance intended to cause or induce an abortion.

~~6.~~ 8. "Surgical abortion" has the same meaning prescribed in section 36-2151.

~~7.~~ 9. "Viable fetus" has the same meaning prescribed in section 36-2301.01.

Sec. 8. Section 36-449.03, Arizona Revised Statutes, is amended to read:

36-449.03. Abortion clinics; rules; civil penalties

A. The director shall adopt rules for an abortion clinic's physical facilities. At a minimum these rules shall prescribe standards for:

1. Adequate private space that is specifically designated for interviewing, counseling and medical evaluations.

2. Dressing rooms for staff and patients.

3. Appropriate lavatory areas.

4. Areas for preprocedure hand washing.

5. Private procedure rooms.

6. Adequate lighting and ventilation for abortion procedures.

7. Surgical or gynecologic examination tables and other fixed equipment.

8. Postprocedure recovery rooms that are supervised, staffed and equipped to meet the patients' needs.

9. Emergency exits to accommodate a stretcher or gurney.

10. Areas for cleaning and sterilizing instruments.

11. Adequate areas ~~for the secure storage of~~ TO SECURELY STORE medical records and necessary equipment and supplies.

12. The display in the abortion clinic, in a place that is conspicuous to all patients, of the clinic's current license issued by the department.

B. The director shall adopt rules to prescribe abortion clinic supplies and equipment standards, including supplies and equipment that are required to be immediately available for use or in an emergency. At a minimum these rules shall:

1. Prescribe required equipment and supplies, including medications, required ~~for the~~ TO conduct, in an appropriate fashion, ~~of~~ any abortion procedure that the medical staff of the clinic anticipates

performing and ~~for monitoring~~ TO MONITOR the progress of each patient throughout the procedure and recovery period.

2. Require that the number or amount of equipment and supplies at the clinic is adequate at all times to ~~assure~~ ENSURE sufficient quantities of clean and sterilized durable equipment and supplies to meet the needs of each patient.

3. Prescribe required equipment, supplies and medications that shall be available and ready for immediate use in an emergency and requirements for written protocols and procedures to be followed by staff in an emergency, such as the loss of electrical power.

4. Prescribe required equipment and supplies for required laboratory tests and requirements for protocols to calibrate and maintain laboratory equipment at the abortion clinic or operated by clinic staff.

5. Require ultrasound equipment.

6. Require that all equipment is safe for the patient and the staff, meets applicable federal standards and is checked annually to ensure safety and appropriate calibration.

C. The director shall adopt rules relating to abortion clinic personnel. At a minimum these rules shall require that:

1. The abortion clinic designate a medical director of the abortion clinic who is licensed pursuant to title 32, chapter 13, 17 or 29.

2. Physicians performing abortions are licensed pursuant to title 32, chapter 13 or 17, demonstrate competence in the procedure involved and are acceptable to the medical director of the abortion clinic.

3. A physician is available:

(a) For a surgical abortion who has admitting privileges at a health care institution that is classified by the director as a hospital pursuant to section 36-405, subsection B and that is within thirty miles of the abortion clinic.

(b) For a medication abortion who has admitting privileges at a health care institution that is classified by the director as a hospital pursuant to section 36-405, subsection B.

4. If a physician is not present, a registered nurse, nurse practitioner, licensed practical nurse or physician assistant is present and remains at the clinic when abortions are performed to provide postoperative monitoring and care, or monitoring and care after inducing a medication abortion, until each patient who had an abortion that day is discharged.

5. Surgical assistants receive training in counseling, patient advocacy and the specific responsibilities of the services the surgical assistants provide.

6. Volunteers receive training in the specific responsibilities of the services the volunteers provide, including counseling and patient advocacy as provided in the rules adopted by the director for different types of volunteers based on their responsibilities.

D. The director shall adopt rules relating to the medical screening and evaluation of each abortion clinic patient. At a minimum these rules shall require:

1. A medical history, including the following:

(a) Reported allergies to medications, antiseptic solutions or latex.

(b) Obstetric and gynecologic history.

(c) Past surgeries.

2. A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa.

3. The appropriate laboratory tests, including:

(a) Urine or blood tests for pregnancy performed before the abortion procedure.

(b) A test for anemia.

(c) Rh typing, unless reliable written documentation of blood type is available.

(d) Other tests as indicated from the physical examination.

4. An ultrasound evaluation for all patients. The rules shall require that if a person who is not a physician performs an ultrasound examination, that person shall have documented evidence that the person completed a course in ~~the operation of~~ OPERATING ultrasound equipment as prescribed in rule. The physician or other health care professional shall review, at the request of the patient, the ultrasound evaluation results with the patient before the abortion procedure is performed, including the probable gestational age of the fetus.

5. That the physician is responsible for estimating the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding the estimation of fetal age as defined in rule and shall write the estimate in the patient's medical history. The physician shall keep original prints of each ultrasound examination of a patient in the patient's medical history file.

E. The director shall adopt rules relating to the abortion procedure. At a minimum these rules shall require:

1. That medical personnel is available to all patients throughout the abortion procedure.

2. Standards for the safe conduct of abortion procedures that conform to obstetric standards in keeping with established standards of care regarding the estimation of fetal age as defined in rule.

3. Appropriate use of local anesthesia, analgesia and sedation if ordered by the physician.

4. The use of appropriate precautions, such as ~~the establishment of~~ ESTABLISHING intravenous access at least for patients undergoing second or third trimester abortions.

5. The use of appropriate monitoring of the vital signs and other defined signs and markers of the patient's status throughout the abortion procedure and during the recovery period until the patient's condition is deemed to be stable in the recovery room.

6. For abortion clinics performing or inducing an abortion for a woman whose unborn child is the gestational age of twenty weeks or more, minimum equipment standards to assist the physician in complying with section 36-2301. For the purposes of this paragraph, "abortion" and "gestational age" have the same meanings prescribed in section 36-2151.

F. THE DIRECTOR SHALL ADOPT RULES RELATING TO THE FINAL DISPOSITION OF BODILY REMAINS. AT A MINIMUM THESE RULES SHALL REQUIRE THAT:

1. THE FINAL DISPOSITION OF BODILY REMAINS FROM A SURGICAL ABORTION BE BY CREMATION OR INTERMENT.

2. FOR A SURGICAL ABORTION, THE WOMAN ON WHOM THE ABORTION IS PERFORMED HAS THE RIGHT TO DETERMINE THE METHOD AND LOCATION FOR FINAL DISPOSITION OF BODILY REMAINS.

~~f.~~ G. The director shall adopt rules that prescribe minimum recovery room standards. At a minimum these rules shall require that:

1. For a surgical abortion, immediate postprocedure care, or care provided after inducing a medication abortion, consists of observation in a supervised recovery room for as long as the patient's condition warrants.

2. The clinic arrange hospitalization if any complication beyond the management capability of the staff occurs or is suspected.

3. A licensed health professional who is trained in ~~the management of~~ MANAGING the recovery area and WHO is capable of providing basic cardiopulmonary resuscitation and related emergency procedures remains on the premises of the abortion clinic until all patients are discharged.

4. For a surgical abortion, a physician with admitting privileges at a health care institution that is classified by the director as a hospital pursuant to section 36-405, subsection B and that is within thirty miles of the abortion clinic remains on the premises of the abortion clinic until all patients are stable and are ready to leave the recovery room and to facilitate the transfer of emergency cases if hospitalization of the patient or viable fetus is necessary. A physician shall sign the discharge order and be readily accessible and available until the last patient is discharged.

5. A physician discusses RhO(d) immune globulin with each patient for whom it is indicated and ~~assures~~ ENSURES THAT it is offered to the patient in the immediate postoperative period or that it will be available to her within seventy-two hours after completion of the abortion procedure. If the patient refuses, a refusal form approved by the department shall be signed by the patient and a witness and included in the medical record.

6. Written instructions with regard to postabortion coitus, signs of possible problems and general aftercare are given to each patient. Each patient shall have specific instructions regarding access to medical care for complications, including a telephone number to call for medical emergencies.

7. There is a specified minimum length of time that a patient remains in the recovery room by type of abortion procedure and duration of gestation.

8. The physician ~~assures~~ ENSURES that a licensed health professional from the abortion clinic makes a good faith effort to contact the patient by telephone, with the patient's consent, within twenty-four hours after a surgical abortion to assess the patient's recovery.

9. Equipment and services are located in the recovery room to provide appropriate emergency resuscitative and life support procedures pending the transfer of the patient or viable fetus to the hospital.

~~G.~~ H. The director shall adopt rules that prescribe standards for follow-up visits. At a minimum these rules shall require that:

1. For a surgical abortion, a postabortion medical visit is offered and, if requested, scheduled for three weeks after the abortion, including a medical examination and a review of the results of all laboratory tests. For a medication abortion, the rules shall require that a postabortion medical visit is scheduled between one week and three weeks after the initial dose for a medication abortion to confirm the pregnancy is completely terminated and to assess the degree of bleeding.

2. A urine pregnancy test is obtained at the time of the follow-up visit to rule out continuing pregnancy. If a continuing pregnancy is suspected, the patient shall be evaluated and a physician who performs abortions shall be consulted.

~~H.~~ I. The director shall adopt rules to prescribe minimum abortion clinic incident reporting. At a minimum these rules shall require that:

1. The abortion clinic records each incident resulting in a patient's or viable fetus' serious injury occurring at an abortion clinic and shall report them in writing to the department within ten days after the incident. For the purposes of this paragraph, "serious injury" means an injury that occurs at an abortion clinic and that creates a serious risk of substantial impairment of a major body organ and includes any injury or condition that requires ambulance transportation of the patient.

2. If a patient's death occurs, other than a fetal death properly reported pursuant to law, the abortion clinic reports it to the department not later than the next department work day.

3. Incident reports are filed with the department and appropriate professional regulatory boards.

~~I.~~ J. The director shall adopt rules relating to enforcement of this article. At a minimum, these rules shall require that:

1. For an abortion clinic that is not in substantial compliance with this article and the rules adopted pursuant to this article and section 36-2301 or that is in substantial compliance but refuses to carry out a plan of correction acceptable to the department of any deficiencies that are listed on the department's statement of deficiency, the department may do any of the following:

(a) Assess a civil penalty pursuant to section 36-431.01.

(b) Impose an intermediate sanction pursuant to section 36-427.

(c) Suspend or revoke a license pursuant to section 36-427.

(d) Deny a license.

(e) Bring an action for an injunction pursuant to section 36-430.

2. In determining the appropriate enforcement action, the department consider the threat to the health, safety and welfare of the abortion clinic's patients or the general public, including:

(a) Whether the abortion clinic has repeated violations of statutes or rules.

(b) Whether the abortion clinic has engaged in a pattern of noncompliance.

(c) The type, severity and number of violations.

~~J.~~ K. The department shall not release personally identifiable patient or physician information.

~~K.~~ L. The rules adopted by the director pursuant to this section do not limit the ability of a physician or other health professional to advise a patient on any health issue.

Sec. 9. Section 36-2151, Arizona Revised Statutes, is amended to read:

36-2151. Definitions

In this article, unless the context otherwise requires:

1. "Abortion" means the use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will cause, with reasonable likelihood, the death of the unborn child. Abortion does not include birth control devices, oral contraceptives used to inhibit or prevent ovulation, conception or the implantation of a fertilized ovum in the uterus or the use of any means to save the life or preserve the health of the unborn child, to preserve the life or health of the child after a live birth, to terminate an ectopic pregnancy or to remove a dead fetus.

2. "Auscultation" means the act of listening for sounds made by internal organs of the unborn child, specifically for a heartbeat, using an ultrasound transducer and fetal heart rate monitor.

3. "BODILY REMAINS" MEANS THE PHYSICAL REMAINS, CORPSE OR BODY PARTS OF AN UNBORN CHILD WHO HAS BEEN EXPELLED OR EXTRACTED FROM HIS OR HER MOTHER THROUGH ABORTION.

~~3.~~ 4. "Conception" means the fusion of a human spermatozoon with a human ovum.

5. "FINAL DISPOSITION" HAS THE SAME MEANING PRESCRIBED IN SECTION 36-301.

6. "GENETIC ABNORMALITY" HAS THE SAME MEANING PRESCRIBED IN SECTION 13-3603.02.

~~4.~~ 7. "Gestational age" means the age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman.

~~5.~~ 8. "Health professional" has the same meaning prescribed in section 32-3201.

~~6.~~ 9. "Medical emergency" means a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

~~7.~~ 10. "Medication abortion" means the use of any medication, drug or other substance that is intended to cause or induce an abortion.

~~8.~~ 11. "Physician" means a person who is licensed pursuant to title 32, chapter 13 or 17.

~~9.~~ 12. "Pregnant" or "pregnancy" means a female reproductive condition of having a developing unborn child in the body and that begins with conception.

~~10.~~ 13. "Probable gestational age" means the gestational age of the unborn child at the time the abortion is planned to be performed and as determined with reasonable probability by the attending physician.

~~11.~~ 14. "Surgical abortion" means the use of a surgical instrument or a machine to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will cause, with reasonable likelihood, the death of the unborn child. Surgical abortion does not include the use of any means to increase the probability of a live birth, to preserve the life or health of the child after a live birth, to terminate an ectopic pregnancy or to remove a dead fetus. Surgical abortion does not include patient care incidental to the procedure.

~~12.~~ 15. "Ultrasound" means the use of ultrasonic waves for diagnostic or therapeutic purposes to monitor a developing unborn child.

~~13.~~ 16. "Unborn child" means the offspring of human beings from conception until birth.

Sec. 10. Section 36-2153, Arizona Revised Statutes, is amended to read:

36-2153. Informed consent; requirements; information; website; signage; violation; civil relief; statute of limitations

A. An abortion shall not be performed or induced without the voluntary and informed consent of the woman on whom the abortion is to be

performed or induced. Except in the case of a medical emergency and in addition to the other requirements of this chapter, consent to an abortion is voluntary and informed only if all of the following are true:

1. At least twenty-four hours before the abortion, the physician who is to perform the abortion or the referring physician has informed the woman, orally and in person, of:

(a) The name of the physician who will perform the abortion.

(b) The nature of the proposed procedure or treatment.

(c) The immediate and long-term medical risks associated with the procedure that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.

(d) Alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.

(e) The probable gestational age of the unborn child at the time the abortion is to be performed.

(f) The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed.

(g) The medical risks associated with carrying the child to term.

2. At least twenty-four hours before the abortion, the physician who is to perform the abortion, the referring physician or a qualified physician, physician assistant, nurse, psychologist or licensed behavioral health professional to whom the responsibility has been delegated by either physician has informed the woman, orally and in person, that:

(a) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care.

(b) The father of the unborn child is liable to assist in the support of the child, even if he has offered to pay for the abortion. In the case of rape or incest, this information may be omitted.

(c) Public and private agencies and services are available to assist the woman during her pregnancy and after the birth of her child if she chooses not to have an abortion, whether she chooses to keep the child or place the child for adoption.

(d) It is unlawful for any person to coerce a woman to undergo an abortion.

(e) The woman is free to withhold or withdraw her consent to the abortion at any time without affecting her right to future care or treatment and without the loss of any state or federally funded benefits to which she might otherwise be entitled.

(f) The department of health services maintains a website that describes the unborn child and lists the agencies that offer alternatives to abortion.

(g) The woman has ~~a~~ THE right to review the website and that a printed copy of the materials on the website will be provided to her free of charge if she chooses to review these materials.

(h) IN THE CASE OF A SURGICAL ABORTION, THE WOMAN HAS THE RIGHT TO DETERMINE FINAL DISPOSITION OF BODILY REMAINS AND TO BE INFORMED OF THE AVAILABLE OPTIONS FOR LOCATIONS AND METHODS FOR DISPOSITION OF BODILY REMAINS.

3. The information in paragraphs 1 and 2 of this subsection is provided to the woman individually and in a private room to protect her privacy and to ensure that the information focuses on her individual circumstances and that she has adequate opportunity to ask questions.

4. The woman certifies in writing before the abortion that the information required to be provided pursuant to paragraphs 1 and 2 of this subsection has been provided.

5. IN THE CASE OF A SURGICAL ABORTION, IF THE WOMAN DESIRES TO EXERCISE HER RIGHT TO DETERMINE FINAL DISPOSITION OF BODILY REMAINS, THE WOMAN INDICATES IN WRITING HER CHOICE FOR THE LOCATION AND METHOD OF FINAL DISPOSITION OF BODILY REMAINS.

B. If a woman has taken mifepristone as part of a two-drug regimen to terminate her pregnancy, has not yet taken the second drug and consults an abortion clinic questioning her decision to terminate her pregnancy or seeking information regarding the health of her fetus or the efficacy of mifepristone alone to terminate a pregnancy, the abortion clinic staff shall inform the woman that the use of mifepristone alone to end a pregnancy is not always effective and that she should immediately consult a physician if she would like more information.

C. If a medical emergency compels the performance of an abortion, the physician shall inform the woman, before the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert the woman's death or to avert substantial and irreversible impairment of a major bodily function.

D. The department of health services shall establish and shall annually update a website that includes a link to a printable version of all materials listed on the website. The materials must be written in an easily understood manner and printed in a typeface that is large enough to be clearly legible. The website must include all of the following materials:

1. Information that is organized geographically by location and that is designed to inform the woman about public and private agencies and services that are available to assist a woman through pregnancy, at childbirth and while her child is dependent, including adoption agencies. The materials shall include a comprehensive list of the agencies, a description of the services they offer and the manner in which these agencies may be contacted, including the agencies' telephone numbers and website addresses.

2. Information on the availability of medical assistance benefits for prenatal care, childbirth and neonatal care.

3. A statement that it is unlawful for any person to coerce a woman to undergo an abortion.

4. A statement that any physician who performs an abortion on a woman without obtaining the woman's voluntary and informed consent or without affording her a private medical consultation may be liable to the woman for damages in a civil action.

5. A statement that the father of a child is liable to assist in the support of that child, even if the father has offered to pay for an abortion, and that the law allows adoptive parents to pay costs of prenatal care, childbirth and neonatal care.

6. Information that is designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including pictures or drawings representing the development of unborn children at two-week gestational increments and any relevant information on the possibility of the unborn child's survival. The pictures or drawings must contain the dimensions of the unborn child and must be realistic and appropriate for each stage of pregnancy. The information provided pursuant to this paragraph must be objective, nonjudgmental and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

7. Objective information that describes the methods of abortion procedures commonly employed, the medical risks commonly associated with each procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with carrying a child to term.

8. Information explaining the efficacy of mifepristone taken alone, without a follow-up drug as part of a two-drug regimen, to terminate a pregnancy and advising a woman to immediately contact a physician if the woman has taken only mifepristone and questions her decision to terminate her pregnancy or seeks information regarding the health of her fetus.

E. An individual who is not a physician shall not perform a surgical abortion.

F. A person shall not write or communicate a prescription for a drug or drugs to induce an abortion or require or obtain payment for a service provided to a patient who has inquired about an abortion or scheduled an abortion until the ~~expiration of the~~ twenty-four-hour reflection period required by subsection A of this section EXPIRES.

G. A person shall not intimidate or coerce in any way any person to obtain an abortion. A parent, a guardian or any other person shall not coerce a minor to obtain an abortion. If a minor is denied financial support by the minor's parents, guardians or custodian due to the minor's refusal to have an abortion performed, the minor is deemed emancipated for the purposes of eligibility for public assistance benefits, except that the emancipated minor may not use these benefits to obtain an abortion.

H. An abortion clinic as defined in section 36-449.01 shall conspicuously post signs that are visible to all who enter the abortion clinic, that are clearly readable and that state it is unlawful for any person to force a woman to have an abortion and a woman who is being forced to have an abortion has the right to contact any local or state law enforcement or social service agency to receive protection from any actual or threatened physical, emotional or psychological abuse. The signs shall be posted in the waiting room, consultation rooms and procedure rooms.

I. A person shall not require a woman to obtain an abortion as a provision in a contract or as a condition of employment.

J. A physician who knowingly violates this section commits an act of unprofessional conduct and is subject to license suspension or revocation pursuant to title 32, chapter 13 or 17.

K. In addition to other remedies available under the common or statutory law of this state, any of the following may file a civil action to obtain appropriate relief for a violation of this section:

1. A woman on whom an abortion has been performed without her informed consent as required by this section.

2. The father of the unborn child if the father was married to the mother at the time she received the abortion, unless the pregnancy resulted from the plaintiff's criminal conduct.

3. ~~The~~ A maternal ~~grandparents~~ GRANDPARENT of the unborn child if the mother was not at least eighteen years of age at the time of the abortion, unless the pregnancy resulted from the plaintiff's criminal conduct.

L. A civil action filed pursuant to subsection K of this section shall be brought in the superior court in the county in which the woman on whom the abortion was performed resides and may be based on a claim that failure to obtain informed consent was a result of simple negligence, gross negligence, wantonness, wilfulness, intention or any other legal standard of care. Relief pursuant to subsection K of this section includes the following:

1. Money damages for all psychological, emotional and physical injuries resulting from the violation of this section.

2. Statutory damages in an amount equal to ~~five thousand dollars~~ $5,000 or three times the cost of the abortion, whichever is greater.

3. Reasonable attorney fees and costs.

M. A civil action brought pursuant to this section must be initiated within six years after the violation occurred.

Sec. 11. Section 36-2157, Arizona Revised Statutes, is amended to read:

36-2157. Affidavit

A person shall not knowingly perform or induce an abortion before that person completes an affidavit that:

1. States that the person making the affidavit is not aborting the child because of the child's sex or race OR BECAUSE OF A GENETIC ABNORMALITY OF THE CHILD and has no knowledge that the child to be aborted is being aborted because of the child's sex or race OR BECAUSE OF A GENETIC ABNORMALITY OF THE CHILD.

2. Is signed by the person performing or inducing the abortion.

Sec. 12. Section 36-2158, Arizona Revised Statutes, is amended to read:

36-2158. Informed consent; fetal condition; website; unprofessional conduct; civil relief; statute of limitations; definitions

A. A person shall not perform or induce an abortion without first obtaining the voluntary and informed consent of the woman on whom the abortion is to be performed or induced. Except in the case of a medical emergency and in addition to the other requirements of this chapter, consent to an abortion is voluntary and informed only if all of the following occur:

1. In the case of a woman seeking an abortion of her unborn child diagnosed with a lethal fetal condition, at least twenty-four hours before the abortion the physician who is to perform the abortion or the referring physician has informed the woman, orally and in person, that:

(a) Perinatal hospice services are available and the physician has offered this care as an alternative to abortion.

(b) The department of health services maintains a website that lists perinatal hospice programs that are available both in this state and nationally and that are organized geographically by location.

(c) The woman has a right to review the website and that a printed copy of the materials on the website will be provided to her free of charge if she chooses to review these materials.

2. In the case of a woman seeking an abortion of her unborn child diagnosed with a nonlethal fetal condition, at least twenty-four hours before the abortion the physician who is to perform the abortion or the referring physician has informed the woman, orally and in person:

(a) Of up-to-date, evidence-based information concerning the range of outcomes for individuals living with the diagnosed condition, including physical, developmental, educational and psychosocial outcomes.

(b) That the department of health services maintains a website that lists information regarding support services, hotlines, resource centers or clearinghouses, national and local peer support groups and other education and support programs available to assist the woman and her unborn child, any national or local registries of families willing to adopt newborns with the nonlethal fetal condition and contact information for adoption agencies willing to place newborns with the nonlethal fetal condition with families willing to adopt.

(c) That the woman has a right to review the website and that a printed copy of the materials on the website will be provided to her free of charge if she chooses to review these materials.

(d) THAT SECTION 13-3603.02 PROHIBITS ABORTION BECAUSE OF THE UNBORN CHILD'S SEX OR RACE OR BECAUSE OF A GENETIC ABNORMALITY.

3. The woman certifies in writing before the abortion that the information required to be provided pursuant to this subsection has been provided.

B. The department of health services shall establish ~~a website within ninety days after the effective date of this section~~ and ~~shall~~ annually update ~~the~~ A website~~. The website shall include~~ THAT INCLUDES the information prescribed in subsection A, paragraph 1, subdivision (b) and paragraph 2, subdivision (b) of this section.

C. A physician who knowingly violates this section commits an act of unprofessional conduct and is subject to license suspension or revocation pursuant to title 32, chapter 13 or 17.

D. In addition to other remedies available under the common or statutory law of this state, any of the following individuals may file a civil action to obtain appropriate relief for a violation of this section:

1. A woman on whom an abortion has been performed without her informed consent as required by this section.

2. The father of the unborn child if the father ~~is~~ WAS married to the mother at the time she received the abortion, unless the pregnancy resulted from the father's criminal conduct.

3. ~~The~~ A maternal ~~grandparents~~ GRANDPARENT of the unborn child if the mother was not at least eighteen years of age at the time of the abortion, unless the pregnancy resulted from ~~either of~~ the maternal grandparent's criminal conduct.

E. A civil action filed pursuant to subsection D of this section shall be brought in the superior court in the county in which the woman on whom the abortion was performed resides and may be based on a claim that failure to obtain informed consent was a result of simple negligence, gross negligence, wantonness, wilfulness, intention or any other legal standard of care. Relief pursuant to this subsection includes the following:

1. Money damages for all psychological, emotional and physical injuries resulting from the violation of this section.

2. Statutory damages in an amount equal to ~~five thousand dollars~~ $5,000 or three times the cost of the abortion, whichever is greater.

3. Reasonable attorney fees and costs.

F. A civil action brought pursuant to this section must be initiated within six years after the violation occurred.

G. For the purposes of this section:

1. "Lethal fetal condition" means 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.

2. "Nonlethal fetal condition" means a fetal condition that is diagnosed before birth and that will not result in the death of the unborn child within three months after birth but may result in physical or mental disability or abnormality.

3. "Perinatal hospice" means comprehensive support to the pregnant woman and her family that includes supportive care from the time of diagnosis through the time of birth and death of the infant and through the postpartum period. Supportive care may include counseling and medical care by maternal-fetal medical specialists, obstetricians, neonatologists, anesthesia specialists, clergy, social workers and specialty nurses who are focused on alleviating fear and ensuring that the woman and her family experience the life and death of the child in a comfortable and supportive environment.

Sec. 13. Title 36, chapter 20, article 1, Arizona Revised Statutes, is amended by adding section 36-2160, to read:

36-2160. Abortion-inducing drugs; definition

A. AN ABORTION-INDUCING DRUG MAY BE PROVIDED ONLY BY A QUALIFIED PHYSICIAN IN ACCORDANCE WITH THE REQUIREMENTS OF THIS CHAPTER.

B. A MANUFACTURER, SUPPLIER OR PHYSICIAN OR ANY OTHER PERSON IS PROHIBITED FROM PROVIDING AN ABORTION-INDUCING DRUG VIA COURIER, DELIVERY OR MAIL SERVICE.

C. THIS SECTION DOES NOT APPLY TO DRUGS THAT MAY BE KNOWN TO CAUSE AN ABORTION BUT THAT ARE PRESCRIBED FOR OTHER MEDICAL INDICATIONS.

D. FOR THE PURPOSES OF THIS SECTION, "ABORTION-INDUCING DRUG" MEANS A MEDICINE OR DRUG OR ANY OTHER SUBSTANCE USED FOR A MEDICATION ABORTION.

Sec. 14. Section 36-2161, Arizona Revised Statutes, is amended to read:

36-2161. Abortions; reporting requirements

A. A hospital or facility in this state where abortions are performed must submit to the department of health services on a form prescribed by the department a report of each abortion performed in the hospital or facility. The report shall not identify the individual patient by name or include any other information or identifier that would make it possible to identify, in any manner or under any circumstances, a woman who has obtained or sought to obtain an abortion. The report must include the following information:

1. The name and address of the facility where the abortion was performed.

2. The type of facility where the abortion was performed.

3. The county where the abortion was performed.

4. The woman's age.

5. The woman's educational background by highest grade completed and, if applicable, level of college completed.

6. The county and state in which the woman resides.

7. The woman's race and ethnicity.

8. The woman's marital status.

9. The number of prior pregnancies and prior abortions of the woman.

10. The number of previous spontaneous terminations of pregnancy of the woman.

11. The gestational age of the unborn child at the time of the abortion.

12. The reason for the abortion, including at least one of the following:

(a) The abortion is elective.

(b) The abortion is due to maternal health considerations, including one of the following:

(i) A premature rupture of membranes.

(ii) An anatomical abnormality.

(iii) Chorioamnionitis.

(iv) Preeclampsia.

(v) Other.

(c) The abortion is due to fetal health considerations, including the fetus being diagnosed with at least one of the following:

(i) A lethal anomaly.

(ii) A central nervous system anomaly.

~~(iii) Trisomy 18.~~

~~(iv) Trisomy 21.~~

~~(v) Triploidy.~~

~~(vi)~~ (iii) Other.

(d) The pregnancy is the result of a sexual assault.

(e) The pregnancy is the result of incest.

(f) The woman is being coerced into obtaining an abortion.

(g) The woman is a victim of sex trafficking.

(h) The woman is a victim of domestic violence.

(i) Other.

(j) The woman declined to answer.

13. The type of procedure performed or prescribed and the date of the abortion.

14. Any preexisting medical conditions of the woman that would complicate pregnancy.

15. Any known medical complication that resulted from the abortion, including at least one of the following:

(a) Shock.

(b) Uterine perforation.

(c) Cervical laceration requiring suture or repair.

(d) Heavy bleeding or hemorrhage with estimated blood loss of at least five hundred cubic centimeters.
(e) Aspiration or allergic response.
(f) Postprocedure infection.
(g) Sepsis.
(h) Incomplete abortion retaining part of the fetus requiring reevacuation.
(i) Damage to the uterus.
(j) Failed termination of pregnancy.
(k) Death of the patient.
(l) Other.
(m) None.

16. The basis for any medical judgment that a medical emergency existed that excused the physician from compliance with the requirements of this chapter.

17. The physician's statement if required pursuant to section 36-2301.01.

18. If applicable, the weight of the aborted fetus for any abortion performed pursuant to section 36-2301.01.

19. Whether a fetus or embryo was delivered alive as defined in section 36-2301 during or immediately after an attempted abortion and the efforts made to promote, preserve and maintain the life of the fetus or embryo pursuant to section 36-2301.

20. Statements by the physician and all clinical staff who observed the fetus or embryo during or immediately after the abortion certifying under penalty of perjury that, to the best of their knowledge, the aborted fetus or embryo was not delivered alive as defined in section 36-2301.

21. The medical specialty of the physician performing the abortion, including one of the following:
(a) Obstetrics-gynecology.
(b) General or family practice.
(c) Emergency medicine.
(d) Other.

22. The type of admission for the patient, including whether the abortion was performed:
(a) As an outpatient procedure in an abortion clinic.
(b) As an outpatient procedure at a hospital.
(c) As an inpatient procedure at a hospital.
(d) As an outpatient procedure at a health care institution other than an abortion clinic or hospital.

23. Whether anesthesia was administered to the mother.

24. Whether anesthesia was administered to the unborn child.

25. WHETHER ANY GENETIC ABNORMALITY OF THE UNBORN CHILD WAS DETECTED AT OR BEFORE THE TIME OF THE ABORTION BY GENETIC TESTING, SUCH AS MATERNAL SERUM TESTS, OR BY ULTRASOUND, SUCH AS NUCHAL TRANSLUCENCY SCREENING, OR BY OTHER FORMS OF TESTING.

26. IF A SURGICAL ABORTION WAS PERFORMED, THE METHOD OF FINAL DISPOSITION OF BODILY REMAINS AND WHETHER THE WOMAN EXERCISED HER RIGHT TO CHOOSE THE FINAL DISPOSITION OF BODILY REMAINS.

B. The hospital or facility shall request the information specified in subsection A, paragraph 12 of this section at the same time the information pursuant to section 36-2153 is provided to the woman individually and in a private room to protect the woman's privacy. The information requested pursuant to subsection A, paragraph 12 of this section may be obtained on a medical form provided to the woman to complete if the woman completes the form individually and in a private room.

C. If the woman who is seeking the abortion discloses that the abortion is being sought because of a reason described in subsection A, paragraph 12, subdivision (d), (e), (f), (g) or (h) of this section, the hospital or facility shall provide the woman with information regarding the woman's right to report a crime to law enforcement and resources available for assistance and services, including a national human trafficking resource hotline.

D. The report must be signed by the physician who performed the abortion or, if a health professional other than a physician is authorized by law to prescribe or administer abortion medication, the signature and title of the person who prescribed or administered the abortion medication. The form may be signed electronically and shall indicate that the person who signs the report is attesting that the information in the report is correct to the best of the person's knowledge. The hospital or facility must transmit the report to the department within fifteen days after the last day of each reporting month.

E. Any report filed pursuant to this section shall be filed electronically at an internet website that is designated by the department unless the person required to file the report applies for a waiver from electronic reporting by submitting a written request to the department.

Sec. 15. Exemption from rulemaking

For the purposes of this act, the department of health services is exempt from the rulemaking requirements of title 41, chapter 6, Arizona Revised Statutes, for one year after the effective date of this act.

Sec. 16. Intervention

The Legislature, by concurrent resolution, may appoint one or more of its members who sponsored or cosponsored this act in the member's official capacity to intervene as a matter of right in any case in which the constitutionality of this act is challenged.

Sec. 17. Construction

This act does not create or recognize a right to an abortion and does not make lawful an abortion that is currently unlawful.

Sec. 18. Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.