Nos. 21-16645, 21-16711

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D., ET AL.,
Plaintiffs-Appellees and Cross-Appellants,

v.

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, IN HIS OFFICIAL CAPACITY, ET AL.,
Defendants-Appellants and Cross-Appellees.

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

PLAINTIFFS-APPELLEES/CROSS-APPELLANTS' PRINCIPAL AND RESPONSE BRIEF

Jessica Sklarsky
Gail Deady
Catherine Coquillette
Center For Reproductive Rights
199 Water Street
New York, NY 10038
Telephone: (917) 637-3600
jsklarsky@reprorights.org
gdeady@reprorights.org
ccoquillette@reprorights.org

Counsel for Paul A. Isaacson, M.D., National Council of Jewish Women (Arizona Section), Inc., and Arizona National Organization for Women

Victoria Lopez
American Civil Liberties Union Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 650-1854
vlopez@acluaz.org

Counsel for Plaintiffs-Appellees/ Cross-Appellants

[Additional Counsel Below]

Jen Samantha D. Rasay
Center For Reproductive Rights
1634 Eye Street, NW, Suite 600
Washington, DC 20006
Telephone: (917) 637-3769
jrasay@reprorights.org

Counsel for Paul A. Isaacson, M.D., National Council of Jewish Women (Arizona Section), Inc., and Arizona National Organization for Women

Alexa Kolbi-Molinas
Rebecca Chan
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
akolbi-molinas@aclu.org
rebeccac@aclu.org

Counsel for Eric M. Reuss, M.D., M.P.H., and Arizona Medical Association

DISCLOSURE STATEMENT

Plaintiffs-Appellees/Cross-Appellants Paul A. Isaacson, M.D., National Council of Jewish Women (Arizona Section), Inc., Arizona National Organization for Women, Eric M. Reuss, M.D., M.P.H., and Arizona Medical Association do not have parent corporations. No publicly held corporation owns ten percent or more of Plaintiffs-Appellees/Cross-Appellants' stock.

Date: December 20, 2021

/s/ Jessica Sklarsky
Jessica Sklarsky

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION[1]

Arizona Senate Bill 1457 threatens the health and reproductive rights of Arizonans and the constitutional rights of the physicians who care for them. Plaintiffs challenge two sweeping aspects of this law that aim to erode access to a broad range of health and reproductive care, including abortion. While the district court correctly enjoined one aspect of this law (the Reason Scheme, defined *infra* page 5), the failure to enjoin the second (the Interpretation Policy, defined *infra* page 5) constitutes reversible error.

The Reason Scheme criminalizes the provision of abortions if the provider has *some uncertain level* of knowledge that the patient's decision is to *some uncertain degree* motivated by certain fetal conditions. Contrary to decades of precedent, the Reason Scheme would both ban outright and impose an undue burden on abortion care for individuals ensnared in its web. It is also unconstitutionally vague due to its myriad layers of indeterminacy, which fail to provide Plaintiffs with adequate notice of prohibited conduct and encourage arbitrary enforcement. The district court rightly enjoined the Reason Scheme, preserving a decades-long status quo while its complex, inconsistent, and unclear provisions are litigated.

[1] Unless otherwise indicated, for all citations herein: all emphases are added, all internal citations and quotations omitted.

First, Defendants have not identified a single flaw in the district court's well-reasoned and well-supported opinion. And they do not—because they cannot—argue that any of the district court's factual findings are clearly erroneous. Nor do they even contend with Plaintiffs' voluminous record evidence, which shows the immense harms inflicted by the Reason Scheme on pregnant people who undergo fetal genetic screening and testing, including those who would inevitably lose access to time-sensitive and constitutionally-protected abortion care. Instead, Defendants effectively ask this Court to ignore the very provisions that will cause these harms.

Second, the Interpretation Policy mandates that Arizona laws be read to give fetuses, embryos, and even fertilized eggs the same rights as people. Though Defendants admit the Interpretation Policy can presently be used to criminalize medical care regularly provided to pregnant patients, as well as the conduct of pregnant patients themselves, the district court refused to enjoin it on ripeness grounds. Absent action from this Court, the Interpretation Policy dangles the sword of Damocles over Plaintiffs' heads. Any and all Arizona laws that use terms such as "human being" or "child" could form the basis of criminal prosecution or other legal penalties levied against Plaintiffs, rendering hollow the principles of fair notice and freedom from arbitrary enforcement that the vagueness doctrine demands. Plaintiffs meet every factor that supports enjoining the Interpretation Policy on its face, and the district court's denial of injunctive relief warrants reversal.

Accordingly, this Court should affirm the injunction against the Reason Scheme and reverse the denial of the injunction against the Interpretation Policy.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). Pursuant to 28 U.S.C. § 1292(a)(1), this Court has jurisdiction over the appeal of a preliminary injunction. The district court entered its preliminary injunction order on September 28, 2021. 1-ER-32. Defendants timely filed their notice of appeal on October 4, 2021, 3-ER-385, and Plaintiffs timely filed their notice of cross-appeal on October 18, 2021, SER-14. *See* Fed. R. App. P. 4(a)(1)(A), 4(a)(3).

ISSUES PRESENTED

I. Did the district court properly hold, under decades of settled precedent, that the Reason Scheme likely violates the substantive due process rights of Plaintiffs' patients and their members' patients by imposing a substantial obstacle in the path of patients seeking previability abortions?

II. Did the district court properly hold that Plaintiffs are likely to succeed on their vagueness claim against the Reason Scheme, which carries severe criminal and other penalties, because its indeterminate provisions fail to provide fair notice of what conduct is prohibited and encourage arbitrary enforcement, chilling the provision of constitutionally-protected abortion care?

III. Did the district court properly hold that Plaintiffs satisfied the other preliminary injunction factors because enforcement of the Reason Scheme inflicts irreparable harm on Plaintiffs' patients and their members' patients, outweighing any nominal harm to Defendants, and an injunction is in the public interest?

IV. Did the district court err in denying a preliminary injunction against the Interpretation Policy by incorrectly holding Plaintiffs' facial vagueness claim was unlikely to succeed under *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)?

STATUTORY AUTHORITY

The Addendum to Defendants' Opening Brief contains the introduced version of the Act, which differs significantly from the law as enacted. Pursuant to 9th Cir. R. 28-2.7, the final version of the Act appears in the Addendum to this brief. *See infra* page A-1.

STATEMENT OF THE CASE

On April 27, 2021, Governor Ducey signed into law Senate Bill 1457, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (the "Act"). Before the Act's September 29, 2021 effective date, Plaintiffs—who are individual physicians, the largest physicians' association in Arizona, and two organizations that educate Arizonans about their constitutional rights—challenged and sought to preliminarily enjoin two portions of

the Act: (1) the "Reason Scheme," or "Scheme," Act §§ 2, 10, 11, 13, A.R.S. §§ 13-3603.02(A)(2), (B)(2), (D), (E), 36-2157(A)(1), 36-2158(A)(2)(d), 36-2161(A)(25), and (2) the "Interpretation Policy," Act § 1, A.R.S. § 1-219(A), incorporating A.R.S. § 36-2151(16).

I. The Reason Scheme

A. Statutory Provisions

The Reason Scheme consists of several interdependent and internally inconsistent provisions that together ban the provision of abortion if a provider has *some uncertain level* of knowledge that the patient is to *some uncertain degree* motivated by a "genetic abnormality" in the fetus or embryo.[2] Act §§ 2, 10, 11, 13, A.R.S. §§ 13-3603.02(A)(2), (B)(2), (D), (E), 36-2157(A)(1), 36-2158(A)(2)(d), 36-2161(A)(25). The Scheme subjects violators to severe criminal penalties, including imprisonment (A.R.S. §§ 13-3603.02(A)(2), (B)(2), 13-702(D)); civil penalties (A.R.S. §§ 13-3603.02(D), (E)), and loss of medical licensure and professional censure (A.R.S. §§ 32-1401(27), 32-1403(A)(2), 32-1451(A), 32-1403(A)(5), 32-1403.01(A), 32-1451(D)-(E), (I), (K)).

In Section 2 of the Act, the Scheme makes it a class 6 felony for any person to "[p]erform[] an abortion *knowing* that the abortion is sought *solely because of* a

[2] Where not directly quoting the language of the Scheme, Plaintiffs herein refer to the term "genetic abnormalities" as "fetal conditions" or "fetal diagnoses."

genetic abnormality" of the fetus or embryo. Act § 2, A.R.S. § 13-3603.02(A)(2). Section 2 also makes it a class 3 felony for any person to "solicit[] or accept[] monies to finance . . . an abortion *because of* a genetic abnormality" of the fetus or embryo. *Id.* § 13-3603.02(B)(2). In addition, Section 2 broadly imposes liability on any "physician, physician's assistant, nurse, counselor or other medical or mental health professional who *knowingly* does not report *known* violations [of Section 2 of the Reason Scheme] . . . to appropriate law enforcement authorities[.]" *Id.* § 13-3603.02(E).

In Section 10 of the Act, the Scheme prohibits abortion care unless the provider first executes an affidavit swearing "*no knowledge* that the" pregnancy is being terminated "*because of* a genetic abnormality" of the fetus or embryo. Act § 10, A.R.S. § 36-2157.

In Section 11 of the Act, the Scheme prohibits abortion care unless the provider first tells any patient "diagnosed with a non-lethal fetal condition" that Arizona law "prohibits abortion . . . *because of* a genetic abnormality." Act § 11, A.R.S. § 36-2158(A)(2)(d).

Finally, in Section 13 of the Act, the Scheme requires providers to report to the Arizona Department of Health Services ("ADHS") "[w]hether any genetic abnormality . . . 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." Act § 13, A.R.S. § 36-2161(A)(25). This is in addition to the pre-existing requirement that providers ask and report to ADHS every patient's "reason for the abortion," including whether the "abortion is due to fetal health considerations." *Id.* § 36-2161(A)(12).

The Scheme 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." Act § 2, A.R.S. § 13-3603.02(G)(2)(a). It does not provide any guidance about the level of certainty required for a fetal condition to be deemed "presen[t] or presumed presen[t]." *Id.*

Additionally, under the Scheme, "lethal fetal conditions"—those "diagnosed before birth and that will result, with reasonable certainty, in the death of the unborn child within three months after birth"—are excluded. Act § 2, A.R.S. § 13-3603.02(G)(2)(b), incorporating A.R.S. § 36-2158(G)(1). The Scheme provides no further information about which fetal conditions qualify as "lethal"; nor how one would determine with "reasonable certainty" that a condition will result in death within three months after birth, or who must make this determination, nor whether or how external factors, such as potential medical interventions, should be considered.

B. The Complexity and Limitations of Fetal Screening and Diagnosis

Leading authorities in obstetrics and gynecological care, including the American College of Obstetricians and Gynecologists ("ACOG") and the Society for Maternal-Fetal Medicine ("SMFM"), recommend patients routinely be offered fetal genetic testing options. 2-ER-248–49. All prenatal testing aims to provide additional information to both patients and physicians to guide possible prenatal treatment; ensure optimal delivery staff and location; inform consideration of abortion, if that is an option the patient is considering; and, help patients who decide to carry to term prepare to care for the child after birth. 2-ER-251–52.

Testing for fetal conditions is a multi-dimensional medical assessment that requires considerable time. 1-ER-14; 2-ER-248. Screening tests provide information about the likelihood or risk that a condition is present, while diagnostic tests, if available and pursued, aim to determine, with as much certainty as possible, whether a specific genetic condition is present in the fetus. 1-ER-14; 2-ER-249. Because most testing can only begin at later stages of pregnancy, and because it can be a time-consuming process, many fetal conditions cannot be confirmed until well into the second trimester. *See* 2-ER-248; 2-ER-276.

As the district court found, there are inherent uncertainties in fetal testing that make it difficult for doctors to assess whether a condition falls under the Scheme's definition of "genetic abnormality" or whether it falls under one of the Scheme's

exceptions. 1-ER-14; 2-ER-281. For starters, the Scheme's definition of "genetic abnormality" includes "morphological malformation[s]" that are the result of "abnormal gene expression." Act § 2, A.R.S. § 13-3603.02(G)(2)(a). However, "morphological malformation[s]" may result from multiple genes, infectious diseases, environmental factors, or other factors; the cause is not always clear and reasonable physicians may disagree. 2-ER-250, 261; 2-ER-281; *see* 1-ER-14. Similarly, the definition excludes "lethal fetal conditions"—those "diagnosed before birth and that will result with reasonable certainty in the death of the unborn child within three months after birth." Act § 2, A.R.S. § 13-3603.02(G)(2)(b), incorporating A.R.S. § 36-2158(G)(1). But as the district court found, even when a fetal genetic diagnosis is made in utero, there is "considerable uncertainty" and potential disagreement among physicians regarding how a condition will manifest over a child's lifetime or exactly how long a particular child might live. 1-ER-14–15 (citing 2-ER-252; 2-ER-282–84); *see also* 2-ER-248–49, 255; 2-ER-260–61. It is therefore "difficult for a doctor to know" with "reasonable certainty" whether a condition will fall within this exception. 1-ER-14–15.

C. Pregnancy Decision-making

As the ACOG and SMFM guidelines emphasize, testing should occur with complete, non-directive counseling both pre- and post-test. 2-ER-248–49. Physicians, genetic counselors, and/or other health care professionals, including

Plaintiffs Dr. Reuss, Dr. Isaacson, and members of the Plaintiff Arizona Medical Association (collectively, "Plaintiff Physicians"), offer confidential, non-directive counseling, answer questions, and provide facts to their patients. *Id.*; *see also* 2-ER-275–77; 2-ER-257–58; 2-ER-270.

Pre- and post-test counseling enables patients to base any decisions on available medical information and case histories. 2-ER-251–52. Pregnant patients may have misconceptions about fetal conditions or little information about them before testing. *Id*. Without that counseling, patients may exaggerate the significance or likely consequences of a given condition, or confuse it with other genetic and/or structural manifestations. *Id.* This counseling ensures that "patients realize there is a broad range of clinical presentations, or phenotypes, for many genetic disorders and that the results of genetic testing cannot predict all outcomes." *Id.*

Ultimately, each patient's decision about whether to terminate a pregnancy is deeply personal, "complex," and "often . . . motivated by a variety of considerations, some of which are inextricably intertwined with the detection of a fetal genetic abnormality." 1-ER-16; 2-ER-256–57; 2-ER-287. As a result, it is often difficult to delineate how any one reason contributed to a patient's decision-making. 1-ER-16; 2-ER-256; 2-ER-276–77.

By the same token, it can be very difficult for a provider to avoid the inference that a fetal condition played a role in the patient's decision-making. 1-ER-15–16.

Patients may share information directly with physicians or clinic staff or disclose their reasons for seeking abortion care on required clinic forms. 2-ER-277–79, 284–87, 290–91; Act § 13, A.R.S. §§ 36-2161(A)(12)(c), (A)(25). Both parties' evidence shows that some patients indicate fetal conditions as their primary reason for seeking abortion on these forms. 2-ER-286–87; 2-ER-171, 192. Additionally, physicians often learn of any fetal testing during the course of their medical practice, including from prenatal care counseling, state-mandated ultrasounds, or patients' medical records. 2-ER-246–48, 252–54, 257; 2-ER-275, 277, 282, 285–86, 290. Patients may rely on genetic counselors or other specialists to refer them to an abortion provider after testing, which in almost all cases will reveal concern about a condition. 1-ER-15; 2-ER-275–77; 2-ER-254–55. In these and other circumstances—*i.e.*, a patient's abrupt change in demeanor about a pregnancy—physicians will be unable to avoid the inference that a fetal condition played at least some role in a patients' decision-making process. 1-ER-15–16; 2-ER-284–91; 2-ER-255, 261–62; 2-ER-268–70.

D. The Impact of the Reason Scheme

As the district court concluded, while clearly the Reason Scheme intends to forbid at least some previability abortion care, precisely what care is proscribed is uncertain. Crediting the declarations of Plaintiff Physicians, the district court found the Scheme did not make clear which conditions will be deemed "genetic

abnormalities," when such conditions will be deemed "present or presumed," and what it means to "detect" such a condition, particularly given the significant uncertainty and limitations inherent in fetal screening and diagnostic testing. 1-ER-13–15.

Further, the district court found Plaintiff Physicians unable to understand from the Scheme's language what role a "genetic abnormality" must play in a patient's decision-making to trigger the Scheme's prohibitions: must the condition be the "sole reason"? A "but for" reason? Or is it sufficient for the condition to have been just one factor the individual considered? *Id.* at 16–18.

Finally, the district court concluded that it was unclear when Plaintiff Physicians could be deemed to "know" or "believe" that a covered genetic condition exists or their patient's motivations for seeking care. *Id.* at 15–16. Knowledge under Arizona law is broadly defined to "mean[], with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists." A.R.S. § 13-105(10)(b). Arizona courts have acknowledged that culpability and mental state "will rarely be provable by direct evidence and the jury will usually have to infer it from [the defendant's] behaviors and other circumstances surrounding the event." *See State v. Noriega*, 928 P.2d 706, 710 (Ariz. Ct. App. 1996). Under this definition, there are "many realistic scenarios in which

surrounding circumstances could provide evidence of a provider's 'knowledge' that a patient sought an abortion because of a fetal genetic abnormality—likely sufficient to establish a *prima facie* case for criminal or civil liability—even though a patient did not explicitly state that was her motive." 1-ER-17.

Given these uncertainties and the Scheme's severe penalties, the district court determined that Plaintiff Physicians reasonably fear prosecution under innumerable scenarios and therefore will cease offering abortion care whenever there is even the slightest indication of a fetal condition. *Id.* at 26; 2-ER-280–91; 2-ER-259–62. Furthermore, as the district court determined, once a patient is refused care by one provider, it will be a "vexing task" to find a provider "who is both eligible and willing to perform the procedure." 1-ER-25. There are only a few abortion providers in Arizona who offer care at the later stages of pregnancy, when certain fetal conditions are likely to be detected, and the chilling effect caused by the Scheme's vagueness will likely deter any other providers just the same. *Id.* at 25–26. As a result, patients who receive a fetal diagnosis and wish to terminate their pregnancy will be forced to travel out of state, if they are able, or carry their pregnancy to term. *See id.* at 27.

II. The Interpretation Policy

A. Statutory Provisions

The Interpretation Policy establishes a new statutory construction requirement and thereby amends large swaths of the Arizona Revised Statutes ("A.R.S.") to create vast uncertainty for physicians and pregnant people about what actions give rise to criminal and civil liability. Section 1 of the Act constitutes a new provision of Arizona's "General Rules of Statutory Construction," which apply to all civil and criminal statutes. *See* Act § 1, A.R.S. § 1-219. This new section, entitled "Interpretation of laws; unborn child; definition," reads:

> 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 the state, subject only to the Constitution of the United States and decisional interpretations thereof by the United States Supreme Court.

Id.

The Interpretation Policy then expressly incorporates the statutory definition of "unborn child" set forth in Section 36-2151(16), which provides that an "unborn child" is "the offspring of human beings from conception until birth." Act § 8, A.R.S. § 36-2151(16). Conception is statutorily defined as "the fusion of a human

spermatozoon with a human ovum," and is not limited to implantation of a fertilized egg in the uterus, resulting in pregnancy. *Id*. § 36-2151(4).[3]

The Interpretation Policy has two exceptions: It "does not create a cause of action against" (1) "[a] person who *performs* in vitro fertilization ['IVF'] procedures as authorized under the laws" of Arizona; or (2) "[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." Act § 1, A.R.S. § 1-219(B). The Interpretation Policy does not define "program of prenatal care," or provide any guidance on what actions do or do not constitute "properly caring for herself" during pregnancy. *See id*. And it neither specifies nor offers any further clarity on when or how it creates a cause of action in non-exempt contexts, such as when (1) a pregnant person *directly* causes harm to their pregnancy; (2) a person "indirectly" harms their pregnancy by means other than failure to "properly care for herself" or follow a "program of prenatal care," or (3) when a patient or other non-physician makes decisions regarding fertilized eggs, or embryos created during the IVF process.

[3] Pregnancy does not begin until a fertilized egg develops into a blastocyte and implants in the uterus, "occurring about six days after fertilization." *Webster*, 492 U.S. at 563 (Stevens, J., concurring in part and dissenting in part).

B. The Interpretation Policy Subjects Physicians and Pregnant People to Risk of Liability for a Wide Array of Actions

Because the Interpretation Policy applies throughout the entire statutory code, it mandates that hundreds of civil and criminal provisions be "interpreted and construed" to "acknowledge" the rights of fertilized eggs, embryos, and fetuses at any stage of development, regardless of implantation. Act § 1, A.R.S. § 1-219(A). The district court recognized, and Defendants have conceded, this point. *See* 1-ER-9 (finding the Interpretation Policy "is a directive that all other provisions of Arizona law be interpreted in a certain manner"); 2-ER-117 (admitting that the Interpretation Policy "may be used in interpreting other statutes and other provisions of the Arizona Revised Statutes, including civil provisions, probate provisions, criminal provisions, or in any other place in the law where the interpretive . . . preference that's indicating [sic] the statute is triggered.").

The Interpretation Policy on its face provides no notice of the specific provisions that are triggered by its "acknowledgement" mandate, let alone what "acknowledgement" means in any particular context. Nor does it provide *any* standards for the enforcement of the newly imposed criminal penalties, civil liability, heightened legal duties, or other legal consequences—where none would exist absent a pregnancy or a fertilized egg. For example, neither the Interpretation Policy nor any other relevant statutory provision details or offers an objective standard by which to measure: whether and when it is necessary for a medical provider to

prioritize the rights of a fertilized egg, embryo, or fetus over the rights of a patient who is pregnant or could become pregnant, or for someone to endeavor to treat their interests equally. 3-ER-355. *See also* 2-ER-263–64; 2-ER-270–71; 2-ER-322.

Plaintiffs credibly alleged that this lack of clarity "makes it impossible for Arizonans, including pregnant people, people with capacity to become pregnant, and the medical providers who care for them, to identify whether a vast array of actions may now put them at risk of criminal prosecution or other legal penalties." 3-ER-354. Plaintiffs have provided several examples of statutes to which the Interpretation Policy's opaque requirements apply. *See* 2-ER-218, 234–37 (questioning how the Interpretation Policy will be applied to A.R.S. § 13-203 (assault), A.R.S. § 13-1201(A) (reckless endangerment), A.R.S. §§ 13-3612(1), 13-3613 (contributing to delinquency of a child), A.R.S. § 13-3619 (child endangerment), and A.R.S. § 13-3623 (child abuse)). *See also* 3-ER-354–56 (same).

C. The Interpretation Policy's Impact on Plaintiffs and Arizonans with the Capacity for Pregnancy

Plaintiff Arizona Medical Association's ("ArMA") members include over 4,000 physicians providing a broad range of medical care to patients across Arizona—including pregnant patients and those with capacity to become pregnant. 2-ER-246; 2-ER-267; 2-ER-321–22. Plaintiff Physician Dr. Reuss and Plaintiff ArMA's declarants have explained how the Interpretation Policy's lack of clarity leaves them without notice of the new contours of Arizona law and impacts their

ability to provide medical treatment to patients with capacity for pregnancy and pregnant patients. 2-ER-263–64; 2-ER-270–71; 2-ER-322.

Plaintiffs Arizona National Organization for Women and National Council of Jewish Women (Arizona Section), Inc. educate their members and the public in Arizona about their rights. 2-ER-306–08, 311–12; 2-ER-298. The Interpretation Policy's vagueness leaves them without any guideposts with which to educate people—especially pregnant people and those with capacity for pregnancy—on this law's meaning and how it will impact their constitutional right to reproductive decision-making, including the right to choose abortion or to continue a pregnancy, and what actions may incur criminal or civil liability, or subject them to heightened legal duties.

III. Proceedings Below

Plaintiffs challenged the Reason Scheme as violating Plaintiff Physicians' patients' substantive due process right to abortion and as creating an unconstitutional condition that pits Plaintiff Physicians' patients' substantive due process right to abortion against their First Amendment right to free speech. 3-ER-358–60. Plaintiffs also challenged both the Interpretation Policy and the Reason Scheme as unconstitutionally vague, on behalf of Plaintiffs and Plaintiffs' members, including ArMA's member physicians. 3-ER-359–60. In support of Plaintiffs' request for preliminary injunctive relief, Plaintiffs submitted six affidavits, including four from

physicians, evidencing the obstacles and harms both laws would cause if allowed to go into effect. 2-ER-243–323. In its response, Arizona did not dispute any of Plaintiffs' evidence, including as to harms, nor introduce any evidence regarding the laws' purported benefits (beyond the Act itself). *See* 2-ER-168–209. Arizona submitted only a single affidavit verifying ADHS statistics collected pursuant to Arizona's mandatory reporting requirements for abortion providers. 2-ER-168–71. The parties jointly agreed that no evidentiary hearing was necessary. SER-8.

On September 28, 2021, the district court partially granted Plaintiffs' request for preliminary injunctive relief. 1-ER-32. The district court preliminarily enjoined the Reason Scheme on two grounds. First, the court found the Scheme likely violates patients' substantive due process right to abortion because it "will have the effect of placing a substantial obstacle in the paths of a large fraction of women seeking pre-viability abortions." *Id.* at 24. Second, the court found the Scheme likely unconstitutionally vague because it, *inter alia*: (1) fails to provide "workable guidance about which fetal conditions" trigger the law, *id.* at 13; (2) the *mens rea* requirement "injects an extra dose of vagueness because it applies to the subjective motivations of another individual [the patient], even if not directly expressed," *id.* at 16; and (3) the lack of clarity will "chill providers from offering abortions" whenever a fetal condition is indicated, *id.* at 12. The court found that Plaintiffs established irreparable harm because the evidence submitted suggests that the Scheme "will visit

concrete harms on Plaintiffs and their patients," and the likely violation of Plaintiffs' constitutional rights outweighs any harm to Arizona caused by preventing the enforcement of "a likely unconstitutional set of laws." *Id.* at 31.

With respect to the Interpretation Policy, the district court declined to issue a preliminary injunction. Citing *Webster*, the court held that Plaintiffs' vagueness challenge to the Interpretation Policy was unlikely to be ripe. *Id.* at 10.

On October 4, 2021, Arizona appealed "the entirety of the district court's injunction." Defs.' Emergency Stay Mot. 4 n.5, Dkt. 14-1. On October 18, 2021, Plaintiffs timely cross-appealed the district court's denial of preliminary injunctive relief with respect to the Interpretation Policy. SER-12–15.

SUMMARY OF THE ARGUMENT

The district court properly enjoined the Reason Scheme, but erred by declining to enjoin the Interpretation Policy. Plaintiffs have made a strong showing on all four factors necessary to obtain a preliminary injunction against both laws. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). At minimum, under this Circuit's sliding scale test, Plaintiffs have shown there are "serious questions going to the merits," a likelihood of irreparable injury, an injunction serves the public interest, and the balance of hardships tips sharply toward Plaintiffs. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

First, the district court correctly held Plaintiffs likely to succeed on their claim that the Reason Scheme violates substantive due process. The district court properly held *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) govern, and correctly rejected—as should this Court—Defendants' attempt to evade decades of binding precedent. Moreover, the district court properly credited and relied upon Plaintiffs' extensive, detailed, and uncontroverted factual and expert declarations in finding that the Reason Scheme likely imposes an undue burden. Recognizing that this Court has not yet considered the Supreme Court's split decision in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), the district court diligently applied both the plurality's and concurrence's formulations of the undue burden test to this evidence and correctly held that the Reason Scheme fails under each. Indeed, Arizona's insistence that Plaintiffs have waived their undue burden argument is both incorrect and a red herring. Finally, the district court correctly applied the large fraction test, concluding the Reason Scheme warrants facial relief.

Second, the district court correctly held Plaintiffs likely to succeed on their vagueness claim against the Reason Scheme. Under the proper stringent vagueness test, the Scheme fails to adequately define (1) what fetal conditions trigger the law's application; (2) what role a fetal condition must play in a patient's decision-making to trigger the Scheme's prohibitions; and (3) under what circumstances a provider

can be deemed to "know" a patient's reason for seeking abortion care or the existence of a covered condition. The Scheme thus necessarily fails to provide constitutionally-adequate notice of what activity is proscribed under the Scheme and invites arbitrary enforcement against abortion providers. Faced with the district court's well-reasoned analysis, Defendants attempt to distract by raising questions of ripeness, disputing the validity of a facial challenge, and suggesting that the Scheme's terms can be judicially rewritten. These arguments have no merit.

Third, the district court erroneously held that Plaintiffs' facial vagueness challenge to the Interpretation Policy was unripe under *Webster*. This holding cannot stand because it was based on a string of legal errors. Further, the district court erred in refusing to assess the vagueness of the Interpretation Policy's own terms and in concluding that a facial vagueness claim against it was unavailable. It ignored the recent rulings of this Court and the Supreme Court striking down as unconstitutionally vague both civil and criminal laws that similarly served interpretive functions. *See Johnson v. United States*, 576 U.S. 591, 600 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018). Plaintiffs have demonstrated that the Interpretation Policy is subject to, and fails, stringent vagueness review because it fails to provide fair notice of prohibited conduct and invites arbitrary and discriminatory enforcement.

Fourth, absent injunctive relief against the Reason Scheme and the Interpretation Policy, Plaintiffs, their members, and their patients will suffer irreparable harm not only to their constitutional rights, but to the doctor-patient relationship and ability to obtain timely reproductive health care. Plaintiffs will suffer these serious harms if the laws are not enjoined. By contrast, Arizona only stands to lose the ability to enforce a law that is plainly unconstitutional under decades of Supreme Court precedent. Thus, granting an injunction in this case will serve the public interest. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014).

While the district court correctly recognized that the need to maintain the status quo and prevent the Reason Scheme's harms outweighs any purported harm to Defendants, as "Defendants stand only to lose the ability to immediately implement and enforce a likely unconstitutional set of laws," 1-ER-31, the district court erred in drawing a different conclusion with respect to the Interpretation Policy.

Accordingly, the district court decision enjoining the Reason Scheme should be affirmed and denying preliminary injunctive relief from the Interpretation Policy reversed.

STANDARD OF REVIEW

The Court reviews a district court's decision regarding a preliminary injunction for abuse of discretion. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 876 (9th Cir. 2009). The district court's decision granting or denying a preliminary injunction should be reversed if the court "bas[ed] its decision on either an erroneous legal standard or clearly erroneous factual findings." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999). Where the district court is alleged to have relied on erroneous legal premises, issues of law underlying the decision are reviewed de novo. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). Where the district court is alleged to have relied on erroneous factual findings, issues of fact are reviewed for clear error. *All. for the Wild Rockies*, 632 F.3d at 1131.

ARGUMENT

I. The District Court Correctly Found the Reason Scheme Likely Unconstitutional

The district court correctly found the Reason Scheme likely unconstitutional on two separate grounds. First, because it likely imposes an undue burden on Plaintiff Physicians' patients' substantive due process right to abortion. 1-ER-27, 30–31. Second, because it is likely unconstitutionally vague. *Id.* at 18. Both holdings are grounded in the extensive record and in longstanding binding precedent. Struggling to escape the facts and expert evidence, Arizona obfuscates the text of

the law passed by the Legislature, essentially asking this Court to either ignore or rewrite large portions of the Scheme, Defs.' Br. 59-61—a task wholly improper for the judiciary. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("[W]e will not rewrite a state law to conform it to constitutional requirements"). And struggling to escape clear law, Arizona argues controlling precedent is irrelevant and urges that the Scheme's constitutionality be assessed under lenient standards improper in this context. Defs.' Br. 25-28. The Court should reject this misdirection and misapplication of the law.

A. The Reason Scheme Likely Violates the Substantive Due Process Right to Abortion

1. *Roe* and *Casey* Control Plaintiffs' Substantive Due Process Claim

Under *Roe* and *Casey*, laws that either prohibit abortion prior to viability and/or have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" violate the substantive due process right to abortion. *Casey*, 505 U.S. at 846, 877; *Roe*, 410 U.S. at 164-65. The Reason Scheme clearly fails under this standard. Yet Arizona insists that this longstanding precedent does not control, instead urging this Court to apply no heightened scrutiny at all. Defs.' Br. 25-28. For the reasons set forth below, this Court should deny

Arizona's request to blatantly disregard binding Ninth Circuit and Supreme Court precedent.

First, Arizona's argument takes *Roe* entirely out of context. Defs.' Br. 25-26. In *Roe*, the "appellant and some amici" had argued—irrespective to viability—that a pregnant person may terminate a pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses." 410 U.S. at 153. While the Supreme Court rejected this assertion with respect to all points in pregnancy, it held that a State's "important and legitimate interests" *only* "become sufficiently compelling to sustain regulation of the factors that govern the abortion decision" *at viability*. *Id.* at 154, 162-64. *Casey* affirmed this "central holding" of *Roe*: "[A] State may not prohibit *any* woman from making the ultimate decision to terminate her pregnancy *before viability*." *Casey*, 505 U.S. at 879; *see also June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in judgment); *Isaacson v. Horne*, 716 F.3d 1213, 1226 (9th Cir. 2013). As the district court correctly concluded, applying Supreme Court and this Court's precedent, "[a]ny woman means any woman, not any woman (except those who wish to terminate a previability pregnancy for a reason the government finds objectionable)." 1-ER-19 n.11.[4]

[4] Defendants' argument that, contrary to the plain language of its decisions, the Supreme Court has upheld previability abortion bans in the past, is without merit. Defs.' Br. 27. For example, *Gonzales v. Carhart* upheld a federal ban on an uncommon abortion procedure *only* because it found it would not prevent *any* person

Second, Arizona wrongly asserts that "*Casey*'s framework does not apply because *Casey* did not consider or address" a law that purports to further an "anti-eugenics" interest.[5] Defs.' Br. 26-27. To the extent Arizona is comparing the individual, personal decision to terminate a pregnancy to eugenics, the comparison is not only inflammatory but ahistorical.[6] Moreover, the *Casey* Court *did* consider eugenics, appropriately recognizing that if *Roe* had not recognized the fundamental

---

from obtaining a previability abortion. 550 U.S. 124, 164-65 (2007). And while certain procedural requirements may be imposed upon a minor seeking an abortion that could not be imposed on an adult, *see Casey*, 505 U.S. at 898-99 (striking down spousal notice requirement for abortion while upholding a parental consent requirement), the Supreme Court has clearly held that it would be categorically unconstitutional to give absolute veto power to the state or to the parents over a minor's abortion decision. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

[5] Defendants assert that because the plaintiffs in *Casey* did not challenge Pennsylvania's sex-selective abortion ban, *Casey*'s holding does not apply here. Defs.' Br. 26-27. This is wrong: *Casey* espoused a "rule of law" meant to govern *all* abortion cases. 505 U.S. at 878.

[6] Arizona's anti-eugenics arguments and the State's legislative findings for the Act, Act § 15, are rooted in a "biased and ahistorical account of the eugenics movement." Br. of National Asian Pacific American Women's Forum, et al. as *Amici Curiae* Supporting Plaintiffs-Appellees 8 n.20, *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409 (2021). Indeed, "eugenics laws passed in the early 20th century relied on coerced sterilization, not abortion, to regulate devalued populations." Dorothy Roberts, *Dorothy Roberts Argues that Justice Clarence Thomas's* Box v. Planned Parenthood *Concurrence Distorts History*, U. Penn. L., June 6, 2019, https://tinyurl.com/y93e4888. Such laws, like today's abortion bans, "seek to control reproductive decision making for repressive political ends." *Id. See also* Br. of SisterReach and Other Reproductive Justice and Health Organizations as *Amici Curiae* Supporting Plaintiffs-Appellees 26-27, *Memphis Ctr. for Reprod. Health*, 14 F.4th 409 (2021).

right to decide whether to continue a pregnancy "the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or *eugenics*, for example." 505 U.S. at 859 (citing demonstrative cases); *see also* Br. of the Autistic Self Advocacy Network and the Disability Rights Education and Defense Fund as *Amici Curiae* Supporting Respondents 4-10, *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (U.S. Sept. 20, 2021).

Third, to the extent Arizona suggests that, at the time of *Roe* and *Casey*, the Supreme Court was not aware that some patients choose abortion after a fetal diagnosis, *see* Defs.' Br. 27-28, it is wrong. *See e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 389 n.8 (1979). Regardless, even if Arizona were correct that certain "factual developments" had not transpired when *Casey* was decided, it would not permit this Court to abandon the legal standard articulated in *Roe* and *Casey*. These "factual developments" simply reflect the State's purported interests in passing the Reason Scheme and—under *Roe* and *Casey*—no state interest is sufficient to justify imposing a substantial obstacle in the path of a person seeking a previability abortion. *Roe*, 410 U.S. at 163-65; *Casey*, 505 U.S. at 860; *Isaacson*, 716 F.3d at 1223-24.

In short, it is unsurprising that the only opinions Defendants can cite in support of this argument are non-controlling. Defs.' Br. 26-27. No court considering a

similar law has ever failed to apply the standard articulated in *Roe* and *Casey*, and it would be legal error for this Court to fail to do so here. *See Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 688-90 (8th Cir. 2021) (applying *Roe* and *Casey* to abortion reason ban); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 305-07 (7th Cir. 2018), *cert. denied in part and granted in part, judgment rev'd in part on other grounds sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc*, 139 S. Ct. 1780 (2019) (same); *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 520-35 (6th Cir. 2021) (en banc) (same); *see also Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 1 F.4th 552, 560-61 (8th Cir. 2021), *reh'g en banc granted, opinion vacated* (July 13, 2021), *cert. denied sub nom. Schmitt v. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc.*, No. 21-3, 2021 WL 4509073 (U.S. Oct. 4, 2021) (same).

2. The District Court Did Not Err in Applying the Undue Burden Standard

Arizona also argues that the district court committed "reversible error" by "*sua sponte*" conducting an undue burden analysis—falsely claiming that Plaintiffs "never made an 'undue burden' argument" and therefore waived it. Defs.' Br. 36.

This is legally incorrect[7] and misunderstands Plaintiffs' substantive due process claim, their arguments, and the extensive record evidence in support thereof.

To begin, Plaintiffs did make an undue burden argument: Plaintiffs have argued consistently that their substantive due process claim would succeed regardless of whether the Scheme was deemed a previability abortion ban, rendering it *per se* unconstitutional, or if it was considered a restriction subject to the undue burden standard. 2-ER-227 n.6. Moreover, even if Plaintiffs had failed to argue the Reason Scheme fails under the undue burden test, it would be irrelevant. When "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see also Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013). And here, Defendants do not—because they cannot—contend that Plaintiffs failed to raise the claim that the Reason Scheme violates Plaintiff

[7] The cases Defendants cite for waiver do not support their argument here. In *Butler v. Curry*, a criminal defendant was barred from raising an argument *for the first time at oral argument before this Court*, after he failed to raise it before the district court or in appellate briefing. 528 F.3d 624, 642 (9th Cir. 2008). In *Arpin v. Santa Clara Valley Transportation Agency*, this Court found that the plaintiff, on appeal, had waived certain claims by not raising any arguments with respect to the grant of summary judgment on those claims. 261 F.3d 912, 919 (9th Cir. 2001).

Physicians' patients' substantive due process right to previability abortion. 3-ER-331, 348–49, 358–59.[8]

Arizona further complains that, because Plaintiffs purportedly did not make an undue burden argument, "[t]he record is void of the required evidence, and the court did not (and could not) make the required findings." Defs.' Br. 36. But, as discussed below, Plaintiffs submitted extensive and detailed factual and expert declarations evincing the extreme burdens the Scheme would impose, which the district court relied upon in its decision. 2-ER-243–323; 2-ER-53–61. This evidence would be the same regardless of whether the Scheme was considered a ban or a restriction, and Arizona had every opportunity to challenge the statements in Plaintiffs' declarations; it not only declined to do so in its opposition filings, but agreed an evidentiary hearing was unnecessary. 2-ER-168–209; SER-8. Arizona's decision to ignore the substantial evidence of the burdens the Scheme would impose is its error alone. *See Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 742 (7th Cir. 2021) (affirming preliminary injunction where "[t]he State defendants

[8] To the extent Arizona believes there are two distinct substantive due process *claims*—one for abortion bans and one for restrictions—this is incorrect. *See Casey*, 505 U.S. at 878 (summarizing framework for analyzing violations of substantive due process right to abortion); *Little Rock Fam. Plan. Servs. v. Rutledge*, 398 F. Supp. 3d 330, 384 (E.D. Ark. 2019) (enjoining previability abortion ban and recognizing that "even if the Court [were] to apply the undue burden analysis, the Court likewise finds [it] not only places a 'substantial,' but an insurmountable, obstacle in the path of women . . . seeking previability abortions.").

chose not to offer evidence at that stage of the case . . . [or] challenge the reliability or credibility of plaintiff's evidence").

3. The District Court Correctly Found that the Reason Scheme Likely Inflicts an Undue Burden on the Right to Previability Abortion

After concluding that the Reason Scheme regulates rather than bans previability abortion, the district court assessed the law's constitutionality using the undue burden test. 1-ER-19–20.[9] Arizona's objection boils down to nothing more than a disagreement with the court's assessment of the evidence at this preliminary stage of the case. Defs.' Br. 40-43. But "[d]ecisions on preliminary injunctions require the district court to assess the plaintiff's *likelihood* of success on the merits, not whether the plaintiff has *actually* succeeded on the merits." *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004). And while Defendants suggest disagreement, they make no effort to show—nor could they—that any of the district court's factual findings were clearly erroneous. None of the district court's factual or legal findings give this Court reason to disturb the preliminary injunction as to the Reason Scheme.

[9] This Court could affirm the district court either on this ground or on the ground that the Reason Scheme is unconstitutional under the "bright-line" rule that this Circuit applies to previability abortion bans. *Isaacson*, 716 F.3d at 1226; *see also Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011).

a. The Reason Scheme Would Impose a Substantial Obstacle On the Right to Abortion

Based on its review of the evidence and the Reason Scheme, the district court correctly concluded that the law would "place a substantial obstacle in the paths of women seeking to terminate their pre-viability pregnancies because of a fetal genetic abnormality." 1-ER-27.

First, the district court found the Reason Scheme will drastically reduce the number of providers "willing and able to provide services" "whenever they have information from which they might infer that a fetal genetic abnormality is a reason why a patient is seeking to terminate." *Id.* at 26–27. While Arizona claims the Scheme will only ban abortion when the physician "knows" that the care is sought "solely because of" a "genetic abnormality," Defs.' Br. 30-31, this ignores large swaths of statutory language and Plaintiffs' evidence.

Far from "reading 'solely' completely out of the [Reason Scheme's] prohibition[s]," *id.* at 41, the district court appropriately considered the law as a whole, which—in several parts—indicates far more abortion care is outlawed. As the district court correctly noted, 1-ER-17, the word "solely" appears only in Section 2(A)(2), which makes it a class 6 felony for physicians to provide care if they "know" that the abortion is sought "solely because of" a "genetic abnormality." A.R.S. § 13-3603.02(A)(2). Importantly, this qualifier does not appear in Section 2(B)(2), which makes accepting money to finance an abortion sought "because of"

a "genetic abnormality" a class 3 felony. A.R.S. § 13-3603.02(B)(2). As the district court concluded, "considering many providers accept money for their services," the "liability under [Section 2(B)(2)] would eclipse liability under [Section 2(A)(2)]." 1-ER-17. Further, because the Scheme prohibits the provision of an abortion unless providers first sign an affidavit attesting that they have "no knowledge" that the abortion is sought "because of" a "genetic abnormality," Act § 10, A.R.S. § 36-2157(A)(1), the Scheme effectively prohibits physicians from providing care whenever they have any information that could indicate a fetal condition contributed to the patient's decision. *See* 1-ER-13, 15–16.

Moreover, in light of "Arizona's broad definition of knowledge and the vagueness of the [Scheme's] criminal and civil liability provisions," *id.* at 26, the district court credited the declarations of Drs. Isaacson and Reuss who "avow[ed] that they will stop performing abortions out of fear of prosecution if the [Scheme] take[s] effect" in any instance where "they might infer that a fetal genetic abnormality is a reason why a patient is seeking to terminate." *Id.* And, employing "common sense," the district court found it "likely that many other providers in Arizona will be [similarly] chilled."[10] *Id.* Arizona characterizes Plaintiff Physicians'

[10] Insofar as Arizona argues that the potential "chilling effect" on the provision of constitutionally-protected abortion care is not legitimate grounds for a preliminary injunction outside of the First Amendment context, *see* Defs.' Br. 42-43, this is demonstrably false. *See, e.g.*, *Colautti*, 439 U.S. at 394 (affirming the injunction of

fears as "speculative and unreasonable," Defs.' Br. 43, but offers no reason why the district court's contrary view of the evidence is clearly erroneous. *See* 1-ER-26.

Because of these varying standards and the broad definition of knowledge under Arizona law, providers will be forced to assume the broadest reading to avoid the Scheme's severe penalties and will cease offering care whenever they are aware of a fetal condition. Indeed, Defendants' claim that the Scheme only prohibits abortion when a provider "knows" that the abortion is sought "solely because of" a "genetic abnormality" is only its latest interpretation. Earlier in litigation, Arizona plainly acknowledged that the Scheme outlawed a wider swath of abortion care. *See, e.g.*, 2-ER-155 (stating that the affidavit requirement "merely institutes the State's incremental regulation of abortion by merely conditioning them on being, *at least in part*, nondiscriminatory"); 2-ER-90 (stating that the physician could not "move forward with performing an abortion under Section 2" if a patient says, "I want an abortion *because of* a genetic abnormality"); 2-ER-89 (conceding that "theoretically,

---

an abortion law as void for vagueness in part because it "presents serious problems of . . . [a] chilling effect on the exercise of [the] constitutional right[]" to access a previability abortion). In any event, the First Amendment *is* clearly implicated here as Arizona itself proposes that to access an abortion patients must refrain from sharing fetal diagnosis information with their physician. Defs.' Br. 42; 2-ER-151–52; 2-ER-92, 101; *see also Preterm-Cleveland*, 994 F.3d at 550-51 (Coles, J., dissenting) (abortion reason prohibition "restricts the information and opinions a woman may share with her doctor" and impermissibly forces her to "trade one constitutional right for another").

liability could attach without an express disclosure"). This forces Plaintiff Physicians into the untenable and constitutionally improper position of either "abandoning [their and their patients'] rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Second, the district court found that it often will be difficult for providers to avoid any inference that a "genetic abnormality" played a role in a patient's decision-making. 1-ER-26. For example, the State requires abortion providers to ask their patients why they are seeking an abortion and to report their responses on a state-mandated form. *Id.*; A.R.S. § 36-2161(A)(12). As a result, many patients self-disclose—as the State's own evidence shows. 2-ER-171, 192. In 2019 alone, 161 patients reported their "primary reason" for obtaining an abortion as "fetal health/medical considerations" and another 30 patients reported "other" and then specified "genetic risk/fetal abnormality" as the reason. *Id*. As Plaintiffs' declarations further attest, even if patients do not disclose such a reason in the state-mandated forms, it often comes up during interactions with clinic staff and physicians. 2-ER-277–79, 284–85, 290.

Beyond self-disclosure, the district court found that Drs. Isaacson and Reuss "persuasively explained," 1-ER-26, the "myriad ways," described more fully *supra* pages 10-11, that physicians "can and often do infer a patient's motive for terminating a pregnancy, even though the patient might not have explicitly disclosed

that information." 1-ER-15–16. As the district court concluded, all these "realistic scenarios" are "likely sufficient to establish a *prima facia* case for criminal and civil liability," *id.* at 17, and providers will "likely . . . be chilled from performing abortions" in them all. *Id.* at 26.

Third, the district court rejected Arizona's unsupported claim that even if a patient intentionally or unintentionally discloses their motive, the patient will still be able to obtain an abortion from another provider. *Id.* at 24–27. Based on the evidence, the district court correctly determined that finding a doctor who does not "know" the patient's reason will be "easier said than done." *Id.* at 24. To start, the Reason Scheme requires providers to inform patients that Arizona law "prohibits abortion . . . because of a genetic abnormality." Act § 11, A.R.S. § 36-2158(A)(2)(d). Arizona, at oral argument, and the district court have deemed this provision a "clear misstatement of the law," 1-ER-25; 2-ER-85, though it reveals the true legislative impact.[11] The district court drew "[t]he only reasonable inference" it could: the provision's purpose and effect is to "make it less likely that

[11] Arizona's most recent attempt at an about-face fails. Arizona now argues that the district court should have read this provision to require providers to inform their patients 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." Defs.' Br. 44. No such rewriting is allowed. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (holding federal courts may not "rewrit[e] state law to conform it to constitutional requirements").

a woman, though desiring to terminate her pregnancy because of a fetal genetic abnormality, will successfully exercise her right to do so . . . in the face of state-mandated misinformation." 1-ER-25.

The district court also credited the ample evidence showing that a pregnant person will face "a vexing task" in finding another abortion provider who does not "know" the patient's reason, in time to exercise their right to previability abortion care. *Id.* Because very few medical practices in Arizona offer abortion at gestational ages when fetal conditions are likely to be detected and/or diagnosed, the court found that "at the point women receive a fetal genetic diagnosis, they likely will be at a stage of pregnancy for which there are relatively few doctors providing abortion care." *Id.* at 25–26. Together, the limited pool of eligible and willing abortion providers and the time-sensitive nature of fetal genetic testing and abortion care create a "rac[e] against a clock," wherein "the time it takes her to do the sort of doctor shopping suggested by Defendants could push her past viability." *Id.* at 27.

Finally, the district court found that the Scheme's permeating vagueness, and the resulting chilling effect on providers and referring physicians will "dry[] up the supply of providers willing and able to provide services to these women." *Id.* Should a patient seek out another doctor who does not "know" their reason, subsequent doctors will face the same likely and realistic scenarios in which it will be impossible to avoid inferring that a diagnosis is one of the patient's reasons. *Id.* at 26. Arizona's

arguments are not based on contrary evidence and do not disturb the district court's well-reasoned findings.

b. The State's Purported Interests Do Not Justify the Reason Scheme

Based on its conclusion that the Reason Scheme regulates rather than bans previability abortion, the district court diligently assessed the Scheme's constitutionality using both formulations of the undue burden test and properly found the Reason Scheme unconstitutional under both. *Id.* at 19–20, 24–31. Under Chief Justice Roberts' articulation of the undue burden test in *June Medical*, which the State argues should apply here, Defs.' Br. 47, once a substantial obstacle is established, the State's interests cannot justify the Reason Scheme—no matter how compelling. *See June Med. Servs.*, 140 S. Ct. at 2138.

Under the balancing test articulated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), the district court found that the State's interests failed to justify the "substantial obstacle" imposed by the Reason Scheme. 1-ER-27–31.[12]

[12] Although Chief Justice Roberts criticized this balancing test in his concurrence in *June Medical*—arguing instead that courts should strike abortion restrictions either because they impose a substantial obstacle (without regard to the benefits) or are not reasonably related to a legitimate state interest—his criticism is not controlling, and the test remains good law. 140 S. Ct. at 2138 (Roberts, C.J., concurring in judgment). Indeed, the Chief Justice was clear that *Hellerstedt* endures: "The question today . . . is not whether [*Hellerstedt*] was right or wrong, but whether to adhere to it in deciding the present case." *Id.* at 2133. Regardless, under either formulation of the test, the Reason Scheme imposes an undue burden.

First, the district court determined that while the Scheme potentially furthered Arizona's interest in "protect[ing] the disability community from discriminatory abortions[,]" *id.* at 28, the Scheme contravened *Casey*'s overarching holding that state laws may only "inform the woman's free choice, not hinder it." *Id.* at 28–29 (quoting 505 U.S. at 877-78). Thus, Arizona's purported anti-discrimination interest cannot render the Reason Scheme constitutional.

Second, the district court considered Arizona's interest in "protect[ing] against coercive health care practices," but found that the burdens the Scheme would impose far outweigh any purported benefits. *Id.* at 29–30. Specifically, the court found "the evidence raises doubt about whether such coercive health practices are a problem in Arizona" and, moreover, the Scheme is "too blunt an instrument":

> Rather than enact measures regulating or proscribing specific coercive practices, Arizona has chosen instead to enact a broad penal and regulatory scheme that ensnares physicians like Drs. Reuss, Isaacson, and Glaser, who do not appear to engage in any such coercive practices.

Id.

Contrary to what Arizona argues, Defs.' Br. 49, the district court specifically cited the Act's findings and weighed them against Plaintiffs' testimony, concluding that the Scheme's benefits do not outweigh its burdens. 1-ER-30. Furthermore, while legislative findings are afforded some deference, they are not dispositive. *Id.* at 27 (citing *Whole Woman's Health*, 136 S. Ct. at 2310). That is particularly true here, where the legislative findings indirectly referenced other materials, such as an

amicus brief, to bootstrap those materials' contentions and conclusions into the legislative record without any specificity. *See* Act § 15. Arizona offers no record evidence regarding any benefits here.

Third, the district court acknowledged Arizona's interests in "preventing doctors from becoming witting participants in genetic-abnormality-selective abortions," 1-ER-30, but recognized that patients (not physicians) make abortion decisions and credited Plaintiff Physicians' testimony attesting to the greater harms the Scheme will impart upon the doctor-patient relationship by "discouraging frank, open, and honest communication, and adversely impact[ing] the quality of care as a result." *Id.* None of these findings were clearly erroneous and this Court has no valid reason to vacate the district court's ruling.

c. The Reason Scheme is Facially Invalid Under the Large-Fraction Test

Facial relief is clearly warranted under the large-fraction test. "[A] State's abortion-related law is unconstitutional on its face if 'it will operate as a substantial obstacle to a woman's choice to undergo an abortion' in 'a large fraction of the cases in which [it] is relevant.'" *June Med. Servs.*, 140 S. Ct. at 2132 (citing *Casey*, 505 U.S. at 895); *see also id.* at 2134 (Roberts, C.J., concurring in judgment) (concurring in judgment applying large fraction test to facially enjoin challenged law). The Supreme Court has made clear that the test must focus on the population "for whom [the law] is an actual rather than an irrelevant restriction." *Casey*, 505 U.S. at 895.

Arizona quibbles that no specific numbers evince the Scheme's impact. Defs.' Br. 40-43. But the large fraction test "is more conceptual than mathematical," *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 374 (6th Cir. 2006); a court may make a qualitative judgment based on the available evidence and common sense, and need "not conduct a mathematical determination of the fraction," *Preterm-Cleveland*, 994 F.3d at 535. And, at the preliminary injunction stage, the district court "need only find probabilities that necessary facts can be proved." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984). Here, the district court did not guess or make assumptions, as Arizona suggests. Defs.' Br. 21-22, 42. The court reasonably relied on both parties' evidence to conclude that the Scheme will impose a substantial obstacle on every pregnant person for whom it will be relevant.

Further, "[t]he denominator" for the purpose of the "large fraction" standard does not consist of "all women, or even all women seeking abortions" in Arizona, but of "women who wish to terminate a pre-viability pregnancy because of a fetal genetic abnormality." 1-ER-21, 24; *Casey*, 505 U.S. at 894. As the district court correctly found, the "numerous situations" cited by Arizona where the Scheme *does not apply*, *see* Defs.' Br. 30, have no bearing on the large fraction test nor the Scheme's facial constitutionality. 1-ER-24.

In any event, with respect to the situations where the Scheme is relevant, Arizona concedes that it prohibits physicians from providing abortion care to patients who expressly disclose that the sole reason for their abortion is a fetal condition. Defs.' Br. 30; 2-ER-92, 113–14. Arizona's own evidence also affirms that some such disclosures occur through state forms. 1-ER-24, 26. And in cases where a patient does not directly disclose that a fetal condition factored into their decision, the district court found credible the "myriad ways" in which physicians can reliably infer the patient's reasons such that they must deny care. *Id.* at 15. The district court accordingly rejected Arizona's argument that patients denied abortion by one physician could still obtain care by "doctor shopping." *Id.* at 24–26. The evidence thus supports the district court's conclusion that in a large fraction of relevant cases, the Scheme will impose a substantial obstacle on people seeking to terminate their pregnancy due to a fetal condition.

B. The District Court Correctly Held the Reason Scheme Likely Fails for Vagueness

1. The Reason Scheme Must Satisfy a Stringent Due Process Standard to Guide Those It Governs

The Due Process Clause ensures that those governed by a state law have fair warning and those charged with its enforcement have explicit standards, so that arbitrary or discriminatory use of the law cannot ensue. *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). "The degree of vagueness

that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Id.*

"[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law[,] is whether it threatens to inhibit the exercise of constitutionally protected rights." *Id.* at 499. Courts are especially vigilant in prohibiting vagueness when a "statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,'" to avoid inhibiting "the exercise of (those) freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). And, "[i]f a statute subjects violators to criminal penalties," the due process need for definite standards "is even more exacting." *McCormack v. Herzog*, 788 F.3d 1017, 1031 (9th Cir. 2015); *see also Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187, 197 (6th Cir. 1997) (citing *Hoffman Ests.*, 455 U.S. at 499).

Under these standards, the Reason Scheme plainly triggers the most stringent vagueness review. The Scheme threatens physicians with severe criminal penalties (Act § 2, A.R.S. §§ 13-3603.02(A)(2), (B)(2); A.R.S. § 13-702(D)) in addition to serious civil penalties (Act § 2, A.R.S. §§ 13-3603.02(D), (E); A.R.S. §§ 32-1401(27), 32-1403(A)(2), 32-1451(A), 32-1403(A)(5), 32-1403.01(A), 32-1451(D)-(E), (I), (K)) that carry a "prohibitory and stigmatizing effect." *See Hoffman Ests.*, 455 U.S. at 499. Perhaps "most important," *id.*, the Reason Scheme interferes with constitutionally-protected activities—patients' access to abortion and

physician-patient communications that implicate "core First Amendment values."[13] *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002).

2. The District Court Correctly Recognized That the Reason Scheme's Many Layers of Impermissible Vagueness Fail to Provide Adequate Notice and Invite Arbitrary Enforcement

As the district court correctly held, the Reason Scheme does not come close to satisfying stringent vagueness review: the Scheme's "squishy" terms and reliance on physicians' "knowledge" of "the subjective motivations of another individual" fail to adequately notify Plaintiff Physicians of what activity is proscribed and impermissibly expose physicians to arbitrary criminal prosecutions and other severe penalties, contrary to due process. 1-ER-16-18. And, given "the potential for harassment of abortion providers, it is particularly important" that such vague provisions be enjoined. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554 (9th Cir. 2004).

First, the district court found that the Scheme's definition of "genetic abnormality" and its exception for a "lethal fetal condition" do "not amount to an objective criterion." 1-ER-16. Instead, relying on undisputed and extensive physician testimony regarding fetal screening and diagnosis, the district court

[13] Although the district court did not need to consider Plaintiffs' First Amendment unconstitutional conditions claim to support the preliminary injunction, 1-ER-11, that claim reinforces the need for especially careful vagueness scrutiny.

correctly concluded that those terms were "as vague as prohibiting abortions after delivering 'a substantial portion' of the fetus," leaving doctors (and law enforcement) to question what constitutes a "genetic abnormality" covered by the Scheme. *Id.* at 15.

As the district court found, in the context of fetal screening and diagnosis, there is "considerable uncertainty as to whether a fetal condition exists, has a genetic cause, or will result in death within three months after birth." *Id.* at 14. Specifically, "because of the uncertainties and limitations inherent in genetic screening and diagnostic testing, it is not always clear whether a condition has a genetic or solely genetic cause." *Id.* This is particularly true for "morphological malformations," which are more common than chromosomal conditions or single gene disorders that are often the subject of fetal testing. 2-ER-250. Also, because positive genetic screening results only report some degree of likelihood of a particular condition, it is unclear whether—for patients who do not pursue diagnostic testing—a provider "can be said to know or to have detected that such a condition is present." 1-ER-14; *see also* 2-ER-248–50, 252–53, 260–61; 2-ER-281–84. Furthermore, "there can be considerable uncertainty as to how long a child born with a genetic anomaly may live, making it difficult for a doctor to know whether a particular fetal genetic abnormality" is excluded as "lethal" under the Scheme. 1-ER-15.

"Instead of providing clarity," these initial definitions raise many questions, including, "according to whom or what standard?" *McCormack,* 788 F.3d at 1031. Specifically, when considering the definition of "lethal fetal condition," whose "reasonable certainty" governs? And what kind and level of proof is required to determine with "reasonable certainty" that a given fetus with the presumed condition will not live more than three months after birth? How, if at all, are possible medical interventions or recent scientific advancements factored into that assessment? 2-ER-252, 260; 2-ER-282–84.

The Scheme provides *no answers*. It instead requires abortion providers (and enforcement officials reviewing their conduct) to "play out" how an "ordinary case" might manifest—without discernible standards or knowing whether and how a particular fetus's presumed condition would manifest after birth. This is precisely what the Supreme Court found so objectionable in *Johnson* and *Dimaya*. *See Guerrero v. Whitaker*, 908 F.3d 541, 544-45 (9th Cir. 2018). Contrary to Defendants' portrayal, the threshold definitions of "genetic abnormality" and "lethal fetal condition" do not empower physicians to apply any discernible, objective test to "the facts of each situation," Defs.' Br. 58, but instead require physicians to decipher testing probabilities and uncertain causation, all without clearly delineating how and where to draw the line. Where a criminal statute's distinctions for physicians are so indeterminant, there is both a "dearth of notice and [of] standards

for enforcement," so that a procedure that seems permissible to one physician might later be deemed illegal by the state. *Forbes v. Napolitano*, 236 F.3d 1009, 1013 (9th Cir. 2000), *amended by* 260 F.3d 1159 (9th Cir. 2001).

Second, the Scheme does not "only" prohibit abortion when the provider "knows" that the care is sought "solely because of" a "genetic abnormality," Defs.' Br. 21-22, 40, 51, 60-61. Instead, as described more fully *supra* pages 33-36, the Scheme employs three different motivation standards—each of which could trigger severe criminal or civil penalties—that implicate a much larger swath of patient care.

Regardless, pretending that the Scheme includes only the "solely because of" motivation standard does not create clarity in this context. *See* 1-ER-16–17. If a patient explains they do not want a child to potentially suffer pain from a detected condition, is that abortion decision "solely because of" "a genetic abnormality"? What if the patient instead explains they do not have the means to care for a child with complex medical needs—is that decision "solely because of" the genetic fetal condition? The Scheme's remaining "because of" standard is even less clear. Must the "genetic abnormality" be a "but for" cause of the patient's decision? Or are the prohibitions triggered if the condition played any role in the patient's decision-making?

As the district court recognized, answering any of these questions is "exacerbated by the reality that the decision to terminate a pregnancy is a complex

one, and often is motivated by a variety of considerations, some of which are inextricably intertwined with the detection of a fetal genetic abnormality." 1-ER-16. As such, under any of these standards, the Scheme calls on physicians to interpret patients' subjective beliefs and motivations and to assess how a particular factor contributed to an often complex and deeply personal decision. Such an assessment is a far cry from the simple "true-false determination" of a clearly specified incriminating fact, or proof of another's specific consent or criminal intent. Defs.' Br. 61-62.

Third, the aforementioned vagueness in both the Scheme's definitions and motivation standard is further compounded by the Scheme's "knowingly" *mens rea* requirement, which raises "special difficulties" here. 1-ER-15. As the district court concluded, it is "unclear" under these standards when during "the multidimensional screening and diagnostic process a doctor can be deemed to be 'aware' or 'believe' that a fetal genetic abnormality exists," and, even "[m]ore troubling," similarly unclear when "a doctor can be deemed to 'know' or 'believe' what is in the mind of a patient[.]" *Id.*

Rather than grapple with these complexities, Arizona argues that the Scheme does not apply when there is "considerable uncertainty" regarding a fetal condition, Defs.' Br. 59-60, that abortions are only prohibited if they are sought "solely because of" a "genetic abnormality," and further insists that a provider will only be deemed

to "know" a patient's motivations when they are explicitly disclosed. *Id.* at 30-31, 60-61. But, as the district court concluded, these positions ignore the Scheme's statutory language, 1-ER-16–17, and are "irreconcilable with Arizona's much broader definition of knowledge, and with the reality that knowledge can be and most often is proven through circumstantial, rather than direct evidence." *Id.* at 17. Moreover, Arizona's assertion that providers must have direct knowledge of patients' motivations to trigger the law, Defs.' Br. 60-61, is belied by the requirement that physicians must disavow *any* knowledge of an improper motive. Act § 10, A.R.S. § 36-2157.

As Plaintiffs' declarations "persuasively explained," there are "many realistic scenarios in which surrounding circumstances could provide evidence of a provider's 'knowledge' that a patient sought an abortion because of a fetal genetic abnormality—likely sufficient to establish a *prima facie* case for criminal or civil liability—even though a patient did not explicitly state that was her motive." 1-ER-17, 26; *see supra* pages 10-11. The physician might not deem the circumstances as "knowledge" of a covered condition playing an impermissible role in the patient's decision, but a prosecutor, judge, or jury—looking at the circumstantial evidence—could reach a different answer under these subjective standards, and the physician would face severe criminal and civil penalties. The Reason Scheme thus leaves providers adrift in trying to discern which circumstances

surrounding a patient's care could be used after the fact to establish that a "genetic abnormality" existed, that the condition played an impermissible role in the patient's decision-making, or that the provider possessed the requisite knowledge of both. 2-ER-245, 260–61; 2-ER-268–69; 2-ER-280–91.

Additionally, Arizona's contention that the *mens rea* requirement necessarily alleviates vagueness concerns here is misguided. Defs.' Br. 60. While scienter requirements *may* alleviate vagueness concerns, this typically is true when, unlike here, they require criminal defendants to have some level of knowledge that their own conduct is proscribed. *See Hoffman Ests.*, 455 U.S. at 499 & n.14 (noting that a scienter requirement "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed"); *Colautti*, 439 U.S. at 395 nn.12-13; *Boyce Motor Lines v. United States*, 342 U.S. 337, 342 (1952); *Screws v. United States*, 325 U.S. 91, 101-03 (1945); *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 505 (6th Cir. 2012) (noting that any hypothetical vagueness was cured by requirement that a physician "knowingly violate[] one of the requirements," meaning physicians could not be convicted if they had a "good-faith" belief they had complied or "accidentally" failed to comply). The *mens rea* requirement here is far broader and provides no relief to a physician acting in good faith.

Furthermore, *mens rea* requirements do not (and cannot) alleviate vagueness concerns when, as here, they modify inherently vague descriptions of what activity is proscribed. *See supra* pages 11-13; *see also Colautti*, 439 U.S. at 395-97 & n.13 (quoting *Screws*, 325 U.S. at 101-02); *see also R.I. Med. Soc. v. Whitehouse*, 66 F. Supp. 2d 288, 310-12 (D.R.I. 1999) (scienter requirement did not cure vagueness where it modified vague "legal standard"), *aff'd*, 239 F.3d 104 (1st Cir. 2001).

3. The Scheme's Vagueness Will Chill Constitutionally-Protected Abortion Care and Curb Physician-Patient Communications

The Reason Scheme's vagueness also stymies other important constitutional protections. As the district court found, and as described more fully *supra* pages 33-36, providers will be forced to assume the broadest reading to avoid the Scheme's severe penalties and will cease offering abortion care whenever they are aware a fetal condition may be present. In these instances, as Plaintiff Physicians "have persuasively explained" "it often will be difficult for providers to avoid the inference that a patient seeking an abortion soon after receiving abnormal genetic testing results is doing so at least in part because of those results" and Plaintiff Physicians reasonably fear prosecution in these circumstances. 1-ER-26; *see also id.* at 15–16.

The Scheme also interferes with unfettered physician-patient communications about the nature of fetal risks, the possible expression of genetic conditions, pregnancy options, and the patient's thoughts—because such discussions might compromise physicians' ability to provide an abortion or to refer the patient

elsewhere. 2-ER-260; 2-ER-269; 2-ER-285–87. Indeed, as the district court found, the Scheme's vagueness also works harms "upon the host of Arizonans who, while not directly performing abortions, nonetheless help patients access such care" both through its requirement that health professionals report known violations (or face a $10,000 fine), Act § 2, A.R.S. § 13-3603.02(E), and through Arizona's accomplice and facilitation laws, A.R.S. §§ 13-301, 13-303, which "potentially implicat[e] those who refer a patient to an abortion provider knowing that the patient has decided to terminate her pregnancy because of a fetal genetic abnormality, and that such motive easily will be inferred by the new doctor." 1-ER-18.

Because the Scheme leaves Arizona physicians "uncertain how to comply" and facing arbitrary felony and licensing enforcement, *id.*, they must steer "far wider" in limiting speech and avoiding any potentially-prohibited abortion care than a clear law would require. *Grayned*, 408 U.S. at 109. For all these reasons, the district court acted well within its discretion in finding Plaintiffs likely to succeed.

4. Defendants' Efforts to Distract from the Scheme's Widespread Vagueness All Miss Their Mark

Unable to provide a non-vague reading of the Reason Scheme's provisions, Arizona tries to throw up roadblocks to judicial review and asks the Court to rewrite the Scheme's terms. Those efforts fail, and only reinforce the validity of the district court's injunction.

First, Arizona argues that Plaintiffs' vagueness challenge is not ripe because Plaintiffs submitted "no evidence" and failed to provide the Court with "concrete factual scenarios" in which the Scheme's provisions apply. Defs.' Br. 52-53. This farcical contention ignores the voluminous evidence filed with the preliminary injunction motion, which the district court credited as "persuasively" laying out "many realistic scenarios" in which the Scheme's provisions would—albeit unclearly—apply. 1-ER-17, 26. Similarly absurd is Arizona's contention that Plaintiffs' claim is unripe because there is no threatened enforcement. Defs.' Br. 52, 56, 63. Arizona clearly intends to enforce the Scheme and has pressed throughout this litigation for the immediate ability to do so—including by most recently seeking a partial stay from the Supreme Court. *See, e.g.*, *id.* at 65 (expressing "strong interest in seeing the policy decisions of [the Legislature in enacting the Reason Scheme] carried out without interference"); Defs.' Emergency Stay Mot. 20, Dkt. 14-1 (requesting a partial stay of the preliminary injunction to allow immediate enforcement); Appl. Partial Stay 1, *Brnovich v. Isaacson, et al.*, No. 21A-222 (U.S. Dec. 14, 2021) (same).

Indeed, Arizona's argument—if accepted here—would preclude *every* pre-enforcement vagueness challenge—even those that implicate constitutional rights. That result would be contrary to "[y]ears of Ninth Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes

infringing upon constitutional rights." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003). This includes the right to abortion. *See, e.g.*, *Colautti*, 439 U.S. at 395-97. In a pre-enforcement declaratory judgment action like this one, a party can establish both standing and ripeness by demonstrating a well-founded fear of the law's enforcement and a threatened injury that is sufficiently real and imminent. *See, e.g.*, *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155-56 (9th Cir. 2000) (noting salient facts of government not disavowing enforcement and of sufficient constitutional injuries flowing from a law's own terms, when those terms will cause parties to curtail their behavior). Plaintiffs have definitively made this showing. Regulated parties are not required, as Arizona advocates, to choose between abandoning their rights or risking prosecution—"a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *MedImmune, Inc.*, 549 U.S. at 129.

Second, Defendants' claim that Plaintiffs are limited to an as-applied vagueness challenge is equally wrong. Defs.' Br. 53-54, 56. Arizona's argument invokes case law that has been eclipsed by *Johnson*, *Dimaya*, and this Court's decisions applying those cases to alter the availability of and standard for facial vagueness claims—clearly rejecting the proposition that Plaintiffs need prove a law vague in every application to obtain facial relief. *See, e.g.*, *Johnson*, 576 U.S. at 602-03. On the contrary, where, as here, a statute is "plagued by" layers of

indeterminacy, 1-ER-12 (quoting *Kashem v. Barr*, 941 F.3d 358, 377 (9th Cir. 2019))—including in its definitional categories and tests that will cut across its individual uses—and the challengers urge vagueness as to both their own and others' conduct, they may proceed with a facial attack.

Finally, Defendants in passing float the ideas of a limiting construction or severance as they search for a way around the Reason Scheme's vagueness. They urge this Court, for example, to apply the "canon of constitutional avoidance" to limit the Scheme, Defs.' Br. 57, or to wait for a state court to apply its terms, *id*. at 53. But both of those options would require "a reasonable construction of the statute that would eliminate vagueness concerns." *Id*. at 57 (citing *Gonzales*, 550 U.S. at 153). Defendants offer none and the district court correctly found none. 1-ER-17 n.9.

Instead, Arizona hints that a court could add words to multiple provisions of the Scheme, and replace the Legislature's decision to use three different motivation standards with a uniform "solely because of" approach. *Id.* Such rewriting and usurping of the legislature's function is not a permissible means of "construction." *Id.* (citing *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020)). Moreover, it would not solve any of the vagueness in the Scheme's definitions, nor explain how to parse another person's subjective, intertwined motivations that may all trace from a perceived fetal condition. *See supra* pages 7, 10-13, 45-51.

Defendants' suggestion that the district court "should have severed" unconstitutional provisions is also misplaced. Defs.' Br. 45 n.20. It ignores that the case is only at the preliminary injunction stage and only likelihood of success on the merits is now at issue. A court cannot start lopping off provisions of this Scheme to help Defendants before any final rulings on the provisions' merits. And, again, Defendants themselves never offer the specifics of any reasonable construction or feasible severance that might save any aspect of the Scheme from its unconstitutional vagueness.

* * * * *

This Court should therefore affirm the preliminary injunction against the Reason Ban on both substantive due process and vagueness grounds.

II. The District Court Erred in Declining to Enjoin the Interpretation Policy

The district court's denial of the preliminary injunction against the Interpretation Policy—because "Plaintiffs have not shown a likelihood that their pre-enforcement facial challenge to Arizona's Interpretation Policy will meet a different fate than the facial challenge to Missouri's similar provision" in *Webster*, 1-ER-11—is based on a chain of legal errors and should be reversed. *See L.A. All. for Hum. Rts. v. County of Los Angeles*, 14 F.4th 947, 956 (9th Cir. 2021).

A. Plaintiffs' Facial Vagueness Challenge to the Interpretation Policy is Ripe

Contrary to the district court's analysis, *Webster* does not control whether the Interpretation Policy vagueness claim is ripe. The district court's exclusive reliance on *Webster* in refusing to enjoin the policy was based on a fundamental misreading of the laws challenged in that case and a failure to recognize the different posture of the State Defendants here.

First, the court erroneously found that the Interpretation Policy is "substantially and materially similar" to the "language in the Missouri law at issue in *Webster*" and thus "likely will meet the same fate[.]" 1-ER-10. This is glaringly incorrect. In *Webster*, the question before the Court was whether two subsections of a legislative preamble, Mo. Rev. Stat. §§ 1.205.1(1), (2), should be struck down on substantive due process grounds. *See* 492 U.S. at 504. These challenged subsections of the preamble set forth "'findings' by the Missouri Legislature that '[t]he life of each human being begins at conception,' and that '[u]nborn children have protectable interests in life, health, and well-being.'" *Id.* (alterations in original) (quoting Mo. Rev. Stat. §§ 1.205.1(1), (2)). This language differs from the Interpretation Policy in both form and effect. *Compare* Act § 1, A.R.S. § 1-219 *with* Mo. Rev. Stat. §§ 1.205.1(1), (2).

While dicta in *Webster* mentions another Missouri statutory provision that bears closer resemblance to the Interpretation Policy, Mo. Rev. Stat. § 1.205.2, that

law was *not challenged* in *Webster*. This plainly escaped the district court's attention, as it describes *Webster* as involving a facial challenge to Mo. Rev. Stat. § 1.205 in its entirety.[14] 1-ER-9–10. This misreading of *Webster* is the cornerstone of the court's ripeness analysis; without it, the court's efforts to transpose *Webster* onto this case collapse.

Second, the district court ignored that Plaintiffs brought an entirely different claim—not contemplated by the *Webster* Court—challenging the Interpretation Policy as unconstitutionally vague on its face. 2-ER-234–37; 3-ER-353–56, 360. The *Webster* Court—considering a preamble both substantially and materially *different* from the Interpretation Policy—did not consider any facial vagueness claim, let alone determine whether such a claim would be ripe. It considered only plaintiffs' *substantive* due process claim that the preamble violated their patients' rights to abortion and contraception and found it unripe. 492 U.S. at 505-06.

Third, the district court erred by relying on *Webster* to conclude that "[w]hether and to what extent the Interpretation Policy might be used to interpret other provisions of Arizona law is something that Arizona courts must decide[.]" 1-ER-10. In *Webster*, after the plaintiffs alleged that the challenged preamble was

[14] The district court reproduced all four provisions of Mo. Rev. Stat. § 1.205 in its Preliminary Injunction Order, but miscited them as "Mo. Rev. Stat. § 1.205.1." 1-ER-9–10.

"an operative part of the [legislative] Act intended to guide the interpretation of other provisions of the Act," 492 U.S. at 505, Missouri offered a narrowing construction that the preamble was "precatory," "impose[d] no substantive restrictions on abortions," and was "simply" an "express[ion]" of Missouri's "value judgment favoring childbirth over abortion." *Id.* at 505-06. This narrowing construction was essential to the ruling in *Webster* because it offered a reasonable alternative interpretation of the preamble that would not violate the plaintiffs' constitutional rights to abortion or contraception. In view of this available saving construction, the Supreme Court deferred passing on the preamble's constitutionality unless and until Missouri courts suggested otherwise. *Id.* at 506-07.

Here, in stark contrast, Defendants have never offered a narrowing construction of the Interpretation Policy that would allow for a potentially constitutional alternative reading. They instead stand silent against Plaintiffs' allegations that the Interpretation Policy lacks any discernable guidelines yet may be used to expand the scope of numerous Arizona statutes to criminalize pregnant people for actions that would not be illegal but for their pregnancy status. *See* 2-ER-158 (discussing 2-ER-234). This silence speaks volumes about Defendants' plans for using the Interpretation Policy against Plaintiffs and other Arizonans.

Where, as here, ripeness is satisfied, the Interpretation Policy "is not fairly subject to an interpretation which will avoid or modify the federal constitutional

question, it is the duty of a federal court to decide the federal question when presented to it." *Baggett v. Bullitt*, 377 U.S. 360, 375 n.11 (1964). This is especially important where, as here, individuals to whom the challenged law plainly applies have alleged that they cannot understand what is required of them, that they "do not want to forswear doing all that is literally or arguably within the purview of the vague terms," and no single adjudication by a state court could eliminate the constitutional difficulty. *Id*. at 378.

Fourth, the district court erred in concluding that allowing the Interpretation Policy to go into effect would not "restrict[] Plaintiffs' activities 'in some concrete way[.]'" 1-ER-10 (quoting *Webster*, 492 U.S. at 506). Indeed, as noted above, unlike in *Webster*, Arizona has never asserted that the Interpretation Policy is merely precatory, and there is no question it intends to enforce the Interpretation Policy in a manner that will constrain Plaintiffs' activities. Defendants admit they intend to use the Interpretation Policy without delay "in interpreting other statutes and other provisions of the [A.R.S.], including civil provisions, probate provisions, criminal provisions, or in any other place in the law where the . . . statute is triggered." 2-ER-117.

Moreover, the Interpretation Policy on its face shows that it is intended to specifically constrain Plaintiff Physicians' activities by providing an exception only for physicians who provide IVF care, as opposed to exempting all medical care

providers who treat pregnant people and those with capacity for pregnancy. *See* Act § 1, A.R.S. § 1-219(B)(1). If the Arizona Legislature had intended the Interpretation Policy to be "precatory" and a mere expression of the State's "preference for childbirth," as Missouri argued in *Webster*, 492 U.S. at 505, 510, there would be no need for the IVF exception. *Blausey v. U.S. Tr.*, 552 F.3d 1124, 1133 (9th Cir. 2009) ("The general rule of statutory construction is that the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.").

B. The Interpretation Policy is Subject to Vagueness Review

The district court also erred by holding that Plaintiffs' facial vagueness claim is unlikely to succeed under *Webster*. As explained *supra* pages 58-61, *Webster* involved a different legal challenge to a dissimilar statutory provision and therefore does not control the outcome of Plaintiffs' facial vagueness claim. Moreover, the district court's refusal to conduct a vagueness analysis here was entirely without legal support. Under the correct legal standard, Plaintiffs easily meet their burden of showing a likelihood of success on the merits of their facial vagueness claim against the Interpretation Policy.

First, the district court erred by refusing to apply *any* level of vagueness review to the Interpretation Policy. Mistakenly relying only on *Webster*, the court found that because the Interpretation Policy is "neither a penal statute nor a civil

regulatory provision" but is instead "a directive that all other provisions of Arizona law be interpreted in a certain manner," 1-ER-9, Plaintiffs cannot facially challenge it and must instead challenge every statute it renders vague, *see id*. But this Court's and the Supreme Court's recent precedents hold otherwise: both civil and criminal statutes directing the way other laws are to be interpreted can be challenged *and struck down* on facial vagueness grounds. *Johnson*, 576 U.S. at 600; *Dimaya*, 138 S. Ct. at 1223.

For example, in *Johnson*, the Court held facially unconstitutional a statute that required judges to determine whether any one of thousands of crimes would be considered a "violent felony" within its meaning, where there was no "generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition." 576 U.S. at 600. The Court reached the same conclusion for a similar civil statute in *Dimaya*. 138 S. Ct. at 1223. And the same is true here. Nothing in the Interpretation Policy provides a "generally applicable test" that would make its potential application to thousands of Arizona statutes subject to anything more than "guesswork and intuition." *Johnson*, 576 U.S. at 600. The fact that some circumstance may fall within its scope does not exempt the whole of the statute from a vagueness challenge. *Id.* at 602-03.

Second, the district court should have subjected the Interpretation Policy to stringent vagueness review, as set forth *supra* pages 43-45. Contrary to the district

court's conclusions, stringent vagueness review is not limited to criminal statutes; it also applies to "quasi-criminal" laws and those that impose only civil penalties but nonetheless carry a "prohibitory and stigmatizing effect." *See Kashem*, 941 F.3d at 370 (quoting *Hoffman Ests.*, 455 U.S. at 499)). Defendants concede that the Interpretation Policy may be used to interpret "criminal provisions" within the A.R.S. 2-ER-117. Thus, even if the Interpretation Policy is not itself a penal statute, it is at minimum quasi-criminal. *See Hoffman Ests.*, 455 U.S. at 499-500 & n.16 (classifying local ordinance intended to discourage use of drug paraphernalia as "quasi-criminal"). And, moreover, the Interpretation Policy unquestionably "carries a prohibitory and stigmatizing effect" by imposing heightened legal duties based entirely on the status of being pregnant or having capacity for pregnancy. Indeed, the Interpretation Policy on its face announces that the act of becoming pregnant may result in the State subordinating a person's rights to those of an embryo or fetus. This warrants stringent vagueness review.

C. The Interpretation Policy is Vague on its Face

The Interpretation Policy on its face fails to give constitutionally adequate notice of what it requires and, moreover, invites arbitrary and discriminatory enforcement.

There is no way it "can be construed to avoid the constitutional vagueness problem short of rewriting it." *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d

1022, 1025 n.2 (9th Cir. 1999). By its own terms, its sole function is to create an "interpretive rule" that applies across the A.R.S., but it lacks any explicit standards or "generally applicable test" that would make its potential application to hundreds of Arizona statutes anything more than "guesswork and intuition." *Johnson*, 576 U.S. at 600.

Specifically, for any of the statutes "indicating the [Interpretation Policy] is triggered," 2-ER-117, individuals and courts must determine (1) what it means to "acknowledge" that fertilized eggs, embryos, and fetuses have "equal rights" to people; and (2) whether an exception applies. The Interpretation Policy provides no standards, guidance, or test governing either of these threshold inquiries. Moreover, the exceptions to the Interpretation Policy further exacerbate its vagueness. *See supra* pages 15, 61-62.

For example, Plaintiff Physicians include obstetricians who provide medical treatment to people throughout their pregnancies, including during labor and delivery. 2-ER-246; 2-ER-267; 2-ER-321–22. Plaintiff Physicians have no way of knowing if they or their patients will be prosecuted for the routine obstetrical and gynecological care they provide. 2-ER-263–64; 2-ER-271; 2-ER-322. How are Plaintiff Physicians to conform their behavior to "acknowledge" the rights of a fetus alongside the medical needs of their patients when, for example, medication that is necessary to treat a pregnant person's medical condition poses risks to a developing

fetus? Will Plaintiff Physicians be penalized under medical malpractice laws if they treat the pregnant person *and* if they do not? Or, if they do treat the pregnant person, will Plaintiff Physicians be penalized under Arizona's child endangerment statute? If a patient insists on receiving the medical treatment, are Plaintiff Physicians required to report the patient to child protective services?

The Interpretation Policy provides Plaintiff Physicians no notice as to how they must conform their behavior to avoid criminal, civil, or professional penalties in these situations. It requires an altered interpretation of all Arizona laws, and directs that interpretation toward health care for pregnant patients, but does not explain in any fashion its actual effect or how physicians might protect fetal "equal rights." That is the very definition of an unconstitutionally vague law.

Additionally, Plaintiffs include advocacy organizations who educate their members and the public about their constitutional rights, including the right to decide to become pregnant and carry a pregnancy to term. 2-ER-306–09, 311–12; 2-ER-296–98. Under any application of the Interpretation Policy, how are those Plaintiffs to educate the public—including pregnant people and people with capacity for pregnancy—about what actions may land them in jail if they decide to carry a pregnancy to term? For example, what does it mean to "acknowledge" a fetus's equal rights when a pregnant person is considering whether to give birth in a hospital with a physician or at home with a midwife? Will *following* a program of prenatal care

give rise to civil or criminal penalties if it results in harm to the fetus? Does the requirement to "acknowledge" a fetus's equal rights permit the State to force a pregnant person to have a medical procedure that is necessary to avoid harm to the fetus but would put the pregnant person's life or health at risk? Will the pregnant patient face criminal charges for refusing such treatment?

The Interpretation Policy offers no answers to these questions. It instead flatly fails to provide fair notice of what it requires, lacks clear standards for when and how it will be "triggered" to expand existing laws, and accordingly "vests virtually complete discretion in the hands of the police[,]" prosecutors, and courts to decipher what actions fall within its exemptions. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

Laws like the Interpretation Policy that leave "statutory gaps so large" that "police officers, prosecutors, and judges are essentially defining crimes and fixing penalties" are unconstitutionally vague. *Knox v. Brnovich*, 907 F.3d 1167, 1182 (9th Cir. 2018). Legislators "may not 'abdicate their responsibilities for setting the standards of the criminal law'" in this way. *Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)); *see also id.* at 1228 (legislative power emphatically does not belong with courts, police, and prosecutors). Where, as here, the statute does not provide sufficient standards to

govern its enforcement, it may permit "policemen, prosecutors, and juries to pursue their personal predilections," *Kolender*, 461 U.S. at 358. This the law does not allow.

For these reasons, the Interpretation Policy's terms themselves are impermissibly vague. The Court can resolve Plaintiffs' facial vagueness claim without ascertaining all of the Interpretation Policy's potential applications or waiting for insight from Arizona courts, and should find Plaintiffs likely to succeed on the merits of this claim.

III. Plaintiffs Satisfy the Remaining Preliminary Injunction Factors With Respect to the Reason Scheme and Interpretation Policy

Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief enjoining the Interpretation Policy and the Reason Scheme. *See Winter*, 555 U.S. at 20; 2-ER-237–38. "[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Planned Parenthood Ariz. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014) (alteration in original) (quoting *Melendres*, 695 F.3d at 1002).

If the Reason Scheme is permitted to take effect, Plaintiff Physicians' patients and other Arizonans will be unduly impeded, and in some cases prevented altogether, from accessing constitutionally-protected abortion care. 1-ER-31. Because abortion care is time-sensitive medical care that "simply cannot be postponed," *Bellotti*, 443 U.S. at 643, the presumption of irreparable harm applies with particular force, *see Humble*, 753 F.3d at 911. Banning abortion and forcing a person to carry a pregnancy to term against their will imposes immense irreparable

injuries because of the invasion of their bodily autonomy and ability to control their own future. *Roe*, 410 U.S. at 153. If permitted to go into effect, the Scheme will inflict further harm by trampling Plaintiff Physicians' and their patients' First Amendment rights, stifling patient-physician communications, and degrading the quality of medical care.

If the district court's failure to enjoin the Interpretation Policy is not reversed, the tremendous harms Plaintiffs, their members and their patients, and other Arizonans currently suffer will continue to befall them. Pregnant and potentially pregnant Arizonans will continue to face severely curtailed medical care and state regulation based on their pregnancy status as their interests are subordinated to those of the fertilized egg, embryo, or fetus they may carry inside them. In addition, both the Reason Scheme and the Interpretation Policy expose Plaintiffs to uncertain legal obligations and arbitrary prosecution. *See supra* pages 45-53, 64-68; *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (credible threat of prosecution under statute challenged as void for vagueness established likelihood of irreparable harm).

While Plaintiffs will suffer these serious harms if the Interpretation Policy is not enjoined or the Reason Scheme takes effect, Defendants stand to lose only the ability to enforce laws that are plainly unconstitutional under decades of Supreme Court precedent. *See* 1-ER-31; *see also Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th

Cir. 2014) ("No opinion for the Court adopts [the] view" that "a state suffers irreparable injury when one of its laws is enjoined."). Further, granting injunctive relief "is always in the public interest," where—as here—it "prevent[s] the violation of a party's constitutional rights." *See Melendres*, 695 F.3d at 1002. The balance of hardships tips sharply toward Plaintiffs.

CONCLUSION

For the reasons set forth above, this Court should affirm the preliminary injunction against the Reason Scheme and reverse the denial of the preliminary injunction against the Interpretation Policy.

Date: December 20, 2021

Respectfully submitted,

/s/ Jessica Sklarsky

Victoria Lopez
American Civil Liberties Union
Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 650-1854
vlopez@acluaz.org

Counsel for Plaintiffs-Appellees/ Cross-Appellants

Alexa Kolbi-Molinas
Rebecca Chan
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
akolbi-molinas@aclu.org
rebeccac@aclu.org

Counsel for Eric M. Reuss, M.D., M.P.H., and Arizona Medical Association

Jessica Sklarsky
Gail Deady
Catherine Coquillette
Center For Reproductive Rights
199 Water Street
New York, NY 10038
Telephone: (917) 637-3600
jsklarsky@reprorights.org
gdeady@reprorights.org
ccoquillette@reprorights.org

Jen Samantha D. Rasay
Center For Reproductive Rights
1634 Eye Street, NW, Suite 600
Washington, DC 20006
Telephone: (917) 637-3769
jrasay@reprorights.org

Counsel for Paul A. Isaacson, M.D., National Council of Jewish Women (Arizona Section), Inc., and Arizona National Organization for Women

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellees/Cross-Appellants state that they know of no related case pending in this Court beyond the two cases addressed in this cross-appeal brief, Nos. 21-16645 and 21-16711.

/s/ Jessica Sklarsky
Jessica Sklarsky

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

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

I am the attorney or self-represented party.

This brief contains 16,260 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).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[X] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature */s/ Jessica Sklarsky* **Date** *December 20, 2021*

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system. I further certify that counsel for all parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Jessica Sklarsky
Jessica Sklarsky

ADDENDUM

Table of Contents

Page

Conference Engrossed

abortion; unborn child; genetic abnormality

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

CHAPTER 286

SENATE BILL 1457

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 35-196.04, 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:

1. A PERSON WHO PERFORMS IN VITRO FERTILIZATION PROCEDURES AS AUTHORIZED UNDER THE LAWS OF THIS STATE.

2. 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~~ 6 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 SOLELY BECAUSE OF A GENETIC ABNORMALITY OF THE CHILD.

B. A PERSON WHO KNOWINGLY DOES EITHER 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":

(a) 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.

(b) DOES NOT INCLUDE A LETHAL FETAL CONDITION. FOR THE PURPOSES OF THIS SUBDIVISION, "LETHAL FETAL CONDITION" HAS THE SAME MEANING PRESCRIBED IN SECTION 36-2158.

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. Public educational institution facility; prohibition; definitions

A. A FACILITY THAT IS RUN BY OR THAT OPERATES ON THE PROPERTY OF A PUBLIC EDUCATIONAL INSTITUTION MAY NOT PERFORM OR PROVIDE AN ABORTION, UNLESS THE ABORTION IS NECESSARY TO SAVE THE LIFE OF THE WOMAN HAVING THE ABORTION.

B. 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 35-196.04, Arizona Revised Statutes, is amended to read:

35-196.04. Use of public monies prohibited; human cloning research involving fetal remains from abortion; other prohibited research; 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 FETAL REMAINS FROM AN ABORTION OR 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. 6. 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. 7. 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. 8. 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. 9. 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. 10. 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. 11. 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. 12. 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. 13. 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. 14. 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. 15. Legislative findings and intent

The Legislature finds 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. First, this act protects the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions. The Legislature finds that in the United States and abroad fetuses with Down syndrome are disproportionately targeted for abortions, with between 61 percent and 91 percent choosing abortion when it is discovered on a prenatal test. See Box v. Planned Parenthood of Indiana and Kentucky, Inc., 139 S. Ct. 1780, 1790-91 (2019) (Thomas, J., concurring). The Legislature intends 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. **Second, this act protects against coercive health care practices that encourage selective abortions of persons with genetic abnormalities.** **The Sixth Circuit Court of Appeals recently found 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, and there is medical literature to that effect.** **See Preterm-Cleveland v. McCloud, No. 18-3329, __ F.3d __, 2021 WL 1377279, at *2 (6th Cir. Apr. 13, 2021) (citing David A. Savitz, How Far Can Prenatal Screening Go in Preventing Birth Defects, 152 J. of Pediatrics 3, 3 (2008) (arguing that "selective pregnancy terminations and reduced birth prevalence [of Down**

syndrome is] a desirable and attainable goal")).\u2022 Third, this act protects the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortions. The Legislature finds that an industry that is associated with the view that some lives or potential lives are worth more than others is less likely to earn or retain the public's trust. All three of these purposes are also present for the similar prohibition in Arizona law on performing 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.\u2022 The Legislature incorporates into its findings the statistics recently provided by this state and other states to the Supreme Court of the United States.\u2022 See Brief of the States of Wisconsin et al. at pages 17-25, Box v. Planned Parenthood of Indiana and Kentucky Inc., No. 18-483, 2018 WL 6042853, available at https://www.supremecourt.gov/DocketPDF/18/18-483/72184/20181115122354603_18-483%20Brief%20of%20States%20of%20Wisconsin%20et%20al%20Supporting%20Petitioners.pdf.

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.

APPROVED BY THE GOVERNOR APRIL 27, 2021.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 27, 2021.