Nos. 21-16645, 21-16711

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D., on behalf of himself and his patients, et al.,
Plaintiffs-Appellees,
v.
MARK BRNOVICH, Attorney General of Arizona, in his official capacity, et al.,
Defendants-Appellants.

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

DEFENDANTS-APPELLANTS' REPLY AND CROSS-APPEAL RESPONSE BRIEF

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INTRODUCTION

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

Neither the Supreme Court nor this Court have ever recognized the broad abortion right Plaintiffs claim—a right to race-, sex-, or genetic-selective abortions. That claimed right is novel, with no basis in the Constitution's text or the Nation's history or traditions, and therefore undeserving of heightened judicial scrutiny. *See Washington v.*

Glucksberg, 521 U.S. 702, 723 (1997) (analyzing for due process purposes "whether this asserted right has any place in our Nation's traditions"). And despite that Plaintiffs have now filed briefs at every level of the federal court system, they have never explained why their proposed right would not apply equally to decisions to abort when genetic testing will one day predict any number of immutable characteristics. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) ("Troubling, too, the petitioners have not offered any meaningful limiting principles for their theory."). Just as "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Stati[stics]," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), it does not enact Mr. Peter Singer's Practical Ethics.

Even if *Casey*'s undue burden standard applies, Plaintiffs' substantive due process claim fails. In the district court, Plaintiffs argued only that the new law at issue bans pre-viability abortion. The district court correctly rejected that argument. Plaintiffs now abandon it completely. Instead, they argue that the new law imposes a substantial obstacle in a large fraction of relevant cases. But the record evidence and the district court's decision below are devoid of any actual support for

Plaintiffs' new theory. Instead, the record supports that few women give genetic abnormality as even a partial reason for obtaining an abortion. Plaintiffs admit that their patients do not typically disclose the reason why they are choosing to terminate a pregnancy and, even when they do, there are multiple reasons. Plaintiffs have never asserted that knowing a woman's internal motivations for obtaining an abortion is medically necessary. And Plaintiffs disavowed that there are any women in Arizona who will only obtain an abortion from a doctor who knows the reasons for the abortion. And, under the challenged law, even if a patient discloses genetic abnormality as the sole reason for an abortion, the patient may obtain an abortion from another provider without such knowledge. There is no undue burden here.

Plaintiffs' defense of their pre-enforcement, facial vagueness claims is similarly lacking in merit. Those claims are both premature because both ask the district court to predict in a vacuum how state law might be applied to future, imaginary, hypothetical scenarios.

On the merits, Plaintiffs' void-for-vagueness claim as to the discriminatory abortion regulation and its implementing provisions (the "Reason Regulations") fails. The provisions contained therein proscribe

a comprehensible course of conduct and contain an ascertainable standard for inclusion and exclusion, all that is required for a law to withstand a facial vagueness standard. The district court also erred badly in concluding that the Reason Regulations are rendered vaguer because they include a "knowing" mens rea requirement, when the Supreme Court has repeatedly held that such a requirement alleviates vagueness. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010) ("[T]he knowledge requirement of the statute further reduces any potential for vagueness[.]")

Finally, as to the interpretative statute at issue in the cross-appeal (the "Interpretation Policy"), which merely instructs how other state laws should be construed, the vagueness doctrine does not apply. That statute is a non-substantive provision that contains no regulation, prohibits no conduct, and imposes no penalty. Thus, it does not trigger due process concerns at all.

The district court erred only in refusing to allow the entirety of Senate Bill 1457 to go into effect.

ISSUE PRESENTED FOR REVIEW ON CROSS-APPEAL

The cross-appeal presents the following issue:

Whether the district court correctly declined to preliminarily enjoin a non-substantive statute directing that Arizona law be interpreted to acknowledge that an unborn child has the same rights and privileges as other persons.

STATUTORY PROVISIONS

The text of S.B. 1457 is contained in full in the addendum of Plaintiffs-Appellees/Cross-Appellants' Principal and Response Brief.

STATEMENT OF THE CASE

A. The Interpretation Policy

At issue in Plaintiffs' cross-appeal is Section 1 of S.B. 1457, which adds a new provision, § 1-219, to the Arizona Revised Statutes (the "Interpretation Policy"). The Arizona Legislature added the Interpretation Policy to the first title of the Arizona Code, which is titled "General Provisions." Specifically, the Interpretation Policy was added to an article of code titled "General Rules of Statutory Instruction," which provides "rules and [] definitions" to "be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature." A.R.S. § 1-211(A).

The Interpretation Policy establishes a general policy for the State that its laws be "interpreted and construed to acknowledge, on behalf of an unborn child at every stage of development, all rights, privileges and immunities available to other persons, citizens and residents of this state." A.R.S. § 1-219(A). The statute also provides that the policy "does not create a cause of action against" either (1) "a person who performs in vitro fertilization procedures as authorized" by state law, or (2) a woman who indirectly harms "her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care." A.R.S. § 1-219(B). "Unborn child" is defined to mean "the offspring of human beings from conception until birth." A.R.S. § 1-219(C); A.R.S. § 36-2151(16).

B. Missouri's Near-Identical Provision

The Interpretation Policy is not a novel law. Several other states have enacted statutes substantially similar to the Interpretation Policy. *See, e.g.*, Mo. Rev. Stat. § 1.205; Kan. Stat. Ann. § 65-6732; *see also* 18 Pa. Cons. Stat. § 3202(c). Missouri's statute, in particular, contains language almost identical to the language in Arizona's Interpretation Policy. And like in Arizona, the Missouri statute is found in the opening title to

Missouri's state code. Missouri's statute has been in effect since 1988, and was addressed by the U.S. Supreme Court in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).

C. District Court Proceedings

Before the Interpretation Policy could go into effect, Plaintiffs brought this challenge (along with their challenge to the Reason Regulations) in the district court. Plaintiffs argued that the Interpretation Policy is unconstitutionally vague and thus "violates their due process rights because it fails to provide adequate notice of prohibited conduct, and also because it will lead to arbitrary enforcement." 2-ER-234.

But unlike with the Reason Regulations, the district court denied Plaintiffs' request to enjoin the Interpretation Policy. 1-ER-11. The district court recognized that "[t]he Interpretation Policy is neither a penal statute nor a civil regulatory provision." 1-ER-9. The district court also pointed out that "Plaintiffs do not challenge the specific statutes that they believe will become vague; they challenge the interpretive rule that would, in their view, render vast swaths of Arizona law vague if applied by law enforcement agencies, prosecutors, courts, juries, and regulators."

1-ER-9. The court also properly concluded that "[t]he most useful guidance for addressing Plaintiffs' challenge to the Interpretation [Policy] is the Supreme Court's decision in *Webster*," which discusses Missouri's similar statute. 1-ER-9. Looking to *Webster*, the district court declined to enjoin the Interpretation Policy concluding instead that "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[.]" 1-ER-11.

Since the Interpretation Policy went into effect on September 29, 2021, nothing in the record indicates that it has been arbitrarily implemented or used against Plaintiffs or their patients, or anyone else, in any way.

SUMMARY OF THE ARGUMENT ON CROSS-APPEAL

The district court correctly refused to grant Plaintiffs' request to preliminarily enjoin the Interpretation Policy. Plaintiffs did not come close to establishing that they are likely to succeed on their facial, pre-enforcement vagueness challenge, and they did not (and could not) satisfy the remaining factors necessary to obtain a preliminary injunction. The

district court correctly denied their request, and that refusal should be affirmed.

Plaintiffs fail to recognize that the Interpretation Policy is just that—a policy. It is a rule of statutory construction directing that all other provisions of Arizona law be interpreted in a certain manner. It is a non-substantive provision that contains no regulation, prohibits no conduct, and imposes no penalty. Thus, on its own, it does not implicate due process at all or otherwise raise the concerns underlying the void-for-vagueness doctrine.

Plaintiffs' challenge also fails because, under binding precedent from the U.S. Supreme Court, their challenge to the Interpretation Policy standing alone is both flawed and premature. The district court correctly recognized that *Webster v. Reproductive Health Services* dictates the outcome of Plaintiffs' challenge. In *Webster*, the Supreme Court addressed a Missouri statute with language nearly identical to that in the Interpretation Policy. Following *Webster*, the district court correctly concluded that it should be Arizona state courts that decide in the first instance how, if at all, to use the Interpretation Policy. And Plaintiffs cannot distinguish *Webster* in any meaningful way.

Nothing in the record indicates that the Interpretation Policy has been used against Plaintiffs (or anyone else) in any way, let alone in an arbitrary or unanticipated manner. Plaintiffs can only create imaginary hypotheticals and guess how the Interpretation Policy *may* be used in the future by state court judges.

The district court was correct when it denied Plaintiffs' request to preliminarily enjoin the Interpretation Policy. Plaintiffs did not show a likelihood of success on the merits of their vagueness claim, and this Court should affirm the district court's refusal to preliminarily enjoin the Interpretation Policy.

ARGUMENT

I. The District Court Erred By Determining That Plaintiffs Are Likely To Succeed On Their Substantive Due Process Challenge To The Reason Regulations.

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

The U.S. Constitution does not grant Plaintiffs or other third parties a right—subject to heightened judicial review—to terminate the life of an unborn child based on that child's genetic makeup, as reflected

in pre-viability genetic tests.[1] There is nothing in the text, structure, or history of the Constitution, or this Nation's history generally, supporting Plaintiffs' claimed right to perform an abortion solely because of an unborn child's genetic makeup, let alone supporting heightened federal judicial scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (analyzing for due process purposes "whether this asserted right has any place in our Nation's traditions").

U.S. Supreme Court precedent also does not support the existence of such a right. In *Roe v. Wade*, the Court rejected the argument that a right to abortion "is absolute and that [a woman] is entitled to terminate her pregnancy . . . for whatever reason she alone chooses." 410 U.S. 113, 153 (1973). While the Pennsylvania statute at issue in *Casey* contained a restriction on sex-selective abortion, the plaintiffs did not challenge that provision, and no provision challenged there is remotely analogous to the provision at issue here. *See Box v. Planned Parenthood of Ind. &*

[1] The New York Times recently reported that the results of such tests are highly inaccurate and have led physicians to pressure patients to obtain abortions based on non-existent genetic abnormalities. Aarish Bhatia, *When They Warn of Rare Disorders, These Prenatal Tests Are Usually Wrong*, N.Y. Times (Jan. 1, 2022), https://www.nytimes.com/2022/01/01/upshot/pregnancy-birth-genetic-testing.html.

Ky., Inc., 139 S. Ct. 1780, 1793 (2019) (Thomas, J., concurring). And this Court has never independently recognized the purported right at issue—the right of a physician or other third party to perform genetic-selective abortions.

Not only is Plaintiffs' claimed right unsupported, it is problematic. Their purported right to perform genetic-selective abortions, based on the results of genetic testing, has no limiting principle. It would apply equally to performing abortions because genetics predicts low IQ, lack of athletic prowess, or any other characteristic that the medical profession finds undesirable. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) ("Troubling, too, the petitioners have not offered any meaningful limiting principles for their theory.").

Plaintiffs assert otherwise, claiming they and other third parties have a federal constitutional right subject to heightened judicial review to perform abortions knowing that the sole reason for the abortion is the genetic makeup of the unborn child. Plaintiffs claim that State Defendants take "*Roe* entirely out of context." Pls.' Br. at 38. Plaintiffs argue that *Roe*'s statement that a woman cannot terminate a pregnancy "for whatever reason she alone chooses" was merely rejecting an

assertion that abortion could occur at "all points in pregnancy." *Id.* Plaintiffs' attempt to limit *Roe* in this fashion is belied by the fact that *Roe* also rejected the assertion that abortion could occur "at whatever time." *See* 410 U.S. at 153. But *Roe* did not stop there; it also concluded that abortion could not occur "for whatever reason [a woman] alone chooses." *Id.* Plaintiffs' characterization of *Roe* would render this additional limitation *on the reason* for an abortion superfluous. And Plaintiffs do not dispute that *Casey* did not consider a regulation analogous to that here.

Plaintiffs next recoil at the fact that the Reason Regulations seek to stop Plaintiffs and other third parties from performing eugenic abortions. Plaintiffs attempt to distance genetic-selective abortion from eugenics on grounds that the eugenics movement purportedly relied on sterilization, not abortion. But Plaintiffs can only make such argument by claiming that genetic-selective abortion was not technically part of the "eugenics movement" of the early 20th Century. This is an odd defense. In reality, the movement to legalize abortion "developed alongside the American eugenics movement." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). Plaintiffs also do not dispute that "abortion advocates—

including future Planned Parenthood President Alan Guttmacher—endorsed the use of abortion for eugenic reasons." *Id.* at 1784. Ultimately, though, whether performing unfettered genetic-selective abortions, as Plaintiffs desire, equates to eugenics is irrelevant. What is relevant is that performing genetic-selective abortions on demand based on modern genetic testing is a novel concept, so regardless of why such conduct might occur, there is no extant right in the U.S. Constitution to perform such abortions.

Plaintiffs also argue (at 40) that *Planned Parenthood of Southeastern Pennsylvania v. Casey* considered eugenics because the Supreme Court explained that, without recognizing the interests discussed therein, the State might be able to "restrict a woman's right to choose to carry a pregnancy to term . . . to further asserted state interests in population control, or eugenics, for example." 505 U.S. 833, 859 (1992). This passage from *Casey* demonstrates the Court's *concern* about the use of abortion, including state-mandated abortion, for eugenic purposes, and hardly supports Plaintiffs' claim that physicians and third parties have a federal constitutional right to perform genetic-selective abortions. The passage, which supports only that the Court does not want the State

requiring or encouraging eugenic abortion, does not support Plaintiffs' contrary position that the Court has held that the State is powerless to restrict eugenic abortion or that regulation of genetic-selective abortion is subject to heightened review. The passage instead supports the State Defendants' position that Arizona can discourage genetic-selective abortion by regulating physicians from performing abortions knowing that the sole reason for the abortion is a genetic abnormality.

Next, Plaintiffs assert that, at the time of *Roe* and *Casey*, the Supreme Court was aware that some patients choose abortion after a fetal diagnosis, citing to footnote eight in *Colautti v. Franklin*, 439 U.S. 379 (1979). Pls.' Br. at 40. Contrary to Plaintiffs' characterization, the information contained in that footnote was part of the plaintiffs-appellees' argument in that case that the statute at issue was overbroad. *Colautti*, 439 U.S. at 389 ("This provision is also said to be unconstitutionally overbroad . . . ."). The Court clearly indicated just a short while later in its opinion that it would not be addressing that overbreadth argument. *Id.* at 390 ("[W]e find it unnecessary to consider appellees' alternative arguments based on the alleged overbreadth of § 5(a)."). That a stray sentence in a footnote about evidence submitted in

support of an argument never addressed is the best Plaintiffs can muster to support the application of *Roe* and *Casey* speaks volumes. Of course, nothing in *Colautti* actually addresses that *Roe* rejected the notion that a woman "is entitled to terminate her pregnancy . . . for whatever reason she alone chooses." *Roe*, 410 U.S. at 153. And what better reason is there for state regulation than regulating the performance of abortions because of an immutable characteristic of the unborn child, including race, sex, or genetic makeup?

Lastly, Plaintiffs critique the State Defendants (at 40) for failing to cite binding precedent when no such precedent exists. Of course, it is not the State Defendants' burden to show the non-existence of a right subject to heightened judicial review. Plaintiffs, instead, are required to demonstrate that constitutional text, or history or tradition (or at least precedent) support that the right they assert—performing genetic-selective abortion—is subject to special protection. But Plaintiffs come forward with no binding support at all for such a right. Plaintiffs only attempt to convince this Court that no court has rejected a right to perform a genetic-selective abortion. Plaintiffs ignore the en banc Sixth Circuit, which recently upheld an Ohio law regulating Down-syndrome-

selective abortions because "the 'right' at issue would be the woman's right to a specific doctor (one with knowledge of her specific Down-syndrome-selective reason for the abortion). One would be hard pressed to find that right established anywhere." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 522–23 (6th Cir. 2021) (en banc); *see also id.* at 536 (Sutton, J., concurring) ("I do not find this case difficult as a matter of federal constitutional law. The United States Supreme Court has never considered an anti-eugenics statute before."); *id.* at 544 (Bush, J., concurring) ("[T]he Supreme Court has not held that the undue-burden standard should apply to a law that regulates eugenic abortion.").

The en banc Sixth Circuit is correct: both *Roe* and *Casey* are concerned with preserving a woman's ability to make the ultimate decision to terminate a pregnancy. The Reason Regulations have no impact on a woman's ability to do so. As explained further (*infra* 18–19), Plaintiffs have abandoned their primary argument below that the Reason Regulations *ban* abortion. And Plaintiffs have disclaimed any argument that there are women in Arizona who will only obtain a pre-viability abortion if they are able to disclose their motives for doing so to the

physician performing the abortion.[2] 1-ER-20. Plaintiffs' attempt to preserve their own ability to perform abortions for whatever reason they so choose does not implicate the concern at the core of *Roe* and *Casey*.

B. Plaintiffs Have Now Abandoned The Only Substantive Due Process Argument They Made Below.

The State Defendants established, and the district court below agreed, that the Reason Regulations do not constitute a ban on abortion. 1-ER-19. In so holding, the district court denied the sole arguments Plaintiffs made below about how the Reason Regulations allegedly violate substantive due process. Plaintiffs previously referred to the Reason Regulations as the "Reason Ban" (now it's the "Reason Scheme" to Plaintiffs) and repeatedly argued that the Reason Regulations ban abortion. For example, Plaintiffs claimed that "S.B. 1457 bans abortion for any patient who is seeking to terminate a pregnancy because of a 'genetic abnormality'"; "[T]he Act newly bans only previability abortions"; "[A] state may not ban abortion prior to viability"; and "By . . . banning

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[2] Plaintiffs' own amici—consisting of "national organizations representing physicians and other medical professionals"—admit that such disclosure "is not clinically required." Br. of *Amici Curiae* American College of Obstetricians and Gynecologists, et al., Dkt. 48-2 at 20. Thus, Plaintiffs seek a heightened constitutional right to perform an abortion knowing information that "is not clinically required."

previability abortion for an entire group of pregnant people, S.B. 1457 directly contravenes this binding precedent." 2-ER-225–26. These quotes are from just two contiguous pages of Plaintiffs' brief supporting their motion for preliminary injunction; there were numerous other references to the "ban" throughout that brief.

Despite that Plaintiffs argued exclusively below that the Reason Regulations *ban* abortion, Plaintiffs' Responding Brief is now devoid of argument that the Reason Regulations constitute such a ban. Plaintiffs have, therefore, waived that argument. *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) ("Generally, an appellee waives any argument it fails to raise in its answering brief.").

C. Plaintiffs Waived Any Argument That If Not A Ban, The Reason Regulations Still Fail *Casey*'s Undue Burden Test.

Rather than impose a ban, the district court correctly concluded that the Reason Regulations "regulate the mode and manner of abortion[.]" 1-ER-20. And Plaintiffs did not attempt to establish that the Reason Regulations impose an undue burden under *Casey*. Plaintiffs mentioned the undue burden standard only briefly in a footnote and circularly argued that the Reason Regulations impose an undue burden

because they constitute a ban. 2-ER-227 n.6. Thus, the State Defendants in response naturally only focused on whether the Reason Regulations impose a ban, which the State Defendants reasonably (and correctly it turns out) determined did not require an evidentiary hearing to defeat.[3] Having not argued undue burden to the district court, Plaintiffs waived that argument. *See Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008) ("[T]he claim was not presented to the district court, so it is not appropriately before this court."); *Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002) ("[I]t is well-established that an appellate court will not consider issues that were not properly raised before the district court.").

[3] Plaintiffs' citation (at 43) to *Planned Parenthood of Indiana and Kentucky, Inc. v. Box*, 991 F.3d 740, 742 (7th Cir. 2021) is inapposite. That was not a case where the plaintiffs relied entirely on one theory in the trial court ("the statute is a ban"), only to abandon that theory in the court of appeals in favor of a new theory ("the statute creates a substantial obstacle"), and thus the defendants there were on notice of the actual arguments against which they should defend. Here, the State Defendants were not on such notice. Regardless, as the party with the burden of proof and persuasion, it was Plaintiffs who were required to adduce evidence of undue burden (the State Defendants were not required to negate undue burden) to justify a preliminary injunction and they failed badly.

Plaintiffs attempt to avoid waiver, but their arguments fall flat. Plaintiffs claim that they actually argued undue burden below. To establish this, they cite only the footnote in their preliminary injunction motion discussed above, where they argued that "[t]he undue burden test *does not apply* to the Reason Ban because it is not a regulation, but rather an outright ban on abortion care." 2-ER-227 n.6 (emphasis added). Arguing that the undue burden test does not apply because the Reason Regulations constitute an outright ban is certainly an odd way to argue undue burden.

Otherwise, Plaintiffs assert that *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991), and *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013), establish that the district court was free to overlook their sleight of hand and adjudicate a factual claim—that the Reason Regulations impose a substantial obstacle to a large fraction of women seeking abortions—that it never made or attempted to develop. Those cases do no such thing. Instead, those cases involve a situation where the parties asked the court to apply the wrong legal standard. They do not sanction the unfair practice Plaintiffs employ here of pursuing one factual theory of the record in the district court (that the

Reason Regulations create an "outright ban") and yet another on appeal (that the Reason Regulations impose a "substantial obstacle" in a "large fraction" of situations). And the U.S. Supreme Court frowns upon lower courts declaring laws unconstitutional based on factual and legal theories the parties did not raise (let alone develop), as the district court did here. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

D. Even If Plaintiffs Did Not Waive Undue Burden, The District Court's Conclusion Was Incorrect.

1. The Record Does Not Show That The Reason Regulations Would Create A "Substantial Obstacle" For Any Woman Seeking An Abortion, Let Alone For A "Large Fraction" Of Women.

The Reason Regulations do not directly regulate pregnant women, and the text makes that reality express. *See* A.R.S. § 13-3603.02(F) ("A woman on whom . . . 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[.]"). Thus, to the extent there is any burden imposed on a pregnant woman, it is indirect through regulation of her physician. And any such indirect burden here is minimal at most. Thus, the district court erred when it concluded that Plaintiffs are likely to succeed in showing that the Reason Regulations create an undue burden for women seeking pre-viability abortions. That conclusion was faulty

both as to whether the Reason Regulations create a "substantial obstacle," and as to whether any obstacle affects a "large fraction" of relevant cases.

The evidence Plaintiffs presented did not establish that the Reason Regulations will cause even one woman to face a substantial obstacle in obtaining an abortion. As previously explained (Defs.' Br. at 50–53), the district court failed to make any of the key findings necessary to conclude that the Reason Regulations create an undue burden. The record is void, for example, as to how many women seek an abortion because of an unborn child's diagnosis of a genetic abnormality, let alone *solely* because of that genetic abnormality. The record also lacks any evidence concerning how many of those women are regulated by the Reason Regulations because circumstances exist where a doctor would know she is seeking an abortion *solely* for that reason. And absolutely nothing in the record indicates how many of those women might struggle to subsequently find another doctor to perform the desired abortion. Lacking any quantifiable evidence that a substantial obstacle would actually exist for any woman, the district court's conclusion was error.

At best, the evidence shows that Plaintiffs-doctors would refrain from performing some abortions based on their own unilateral and self-interested interpretation of the law. But a burden created by Plaintiffs refraining from conduct—*i.e.*, refusing to provide abortions based on speculative fears about the potential reach of the Reason Regulations—does not establish an undue burden.

Plaintiffs, in response, make no attempt to establish that the record contains the evidence that the State Defendants identified as necessary to prove undue burden. Plaintiffs instead argue (at 54) that the district court's conclusion was justified because "the large fraction test 'is more conceptual than mathematical'" and that "a court may make a qualitative judgment based on the available evidence and common sense[.]" Not only are those tacit admissions that the district court's conclusion has no real evidentiary foundation, the argument is irrelevant. Even if a district court can enjoin state law based on qualitative assessments and guesswork, there can hardly be a large fraction—conceptual or mathematical—when the evidence does not support a numerator above zero.

As the en banc Sixth Circuit explained in *Preterm-Cleveland*, "[t]he plaintiffs have not shown, nor even genuinely argued, that this act by this woman (expressing this personal and otherwise private opinion to the doctor who will perform her abortion) is necessary to either her choice to have the abortion or the doctor's ability to perform it." 994 F.3d at 527. Even if a woman reveals to a physician that her reason for obtaining an abortion is the presence of a genetic abnormality, the added time, cost, and inconvenience of finding a new doctor does not rise to the level of an undue burden. *Id.* at 528.

The same is true here—Plaintiffs have never argued that knowing the reason for an abortion is medically necessary, and their amici admit it is not. The record contains no evidence about how much time, cost, or inconvenience a woman will experience if she must acquire another physician, let alone that obtaining an abortion will then become unduly burdensome.

Further, the district court's undue burden analysis, which Plaintiffs would have this Court endorse, completely ignores that the Act's core provision—A.R.S. § 13-3603.02(A)—prohibits a doctor from performing an abortion only when the doctor knows that the woman's *sole* reason is

the unborn child's genetic abnormality. The district court relied on the Act's other civil provisions' failure to use the word "solely." But it is clear that those other provisions do no more than implement the Reason Regulations' core, located in § 13-3603.02(A), which prohibits the performance of an abortion knowing it is sought *solely because of* the presence of a genetic abnormality. The other civil provisions within the Reason Regulations should be interpreted *in pari materia* with the Reason Regulations' core. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 315–16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law." (cleaned up)); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (explaining that the rule of *in pari materia* "makes the most sense when the statutes were enacted by the same legislative body at the same time").

Even if Plaintiffs had shown the existence of a substantial obstacle in some cases (which they did not), they certainly did not show that to be true in a large fraction of cases. *Casey*'s use of the phrase "large fraction" has to mean something. "Indeed, it would be odd to hold that a law regulating abortion is facially unconstitutional when it can be applied

consistent with the Constitution in a majority of cases." *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478, 485 (6th Cir. 2021); *see also Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361, 374 (6th Cir. 2006) ("To date, no circuit has found an abortion restriction to be unconstitutional under *Casey's* large-fraction test simply because some small percentage of the women actually affected by the restriction were unable to obtain an abortion."). Thus, even using a "conceptual" or "common sense" approach, Plaintiffs must satisfy *Casey*'s large-fraction standard. And they failed badly to do so here (likely because they argued only that the Reason Regulations impose a ban).

In this case, the court erred by relying on "amorphous groups of women to reach its conclusion that the Act [i]s facially unconstitutional." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 959 (8th Cir. 2017).

2. The Multiple Benefits To The State In Regulating The Performance Of Discriminatory Abortions Far Outweigh Any Minimal Burden On Physicians.

The Reason Regulations significantly further at least three compelling government interests: (1) protecting the disability community from discriminatory abortions, (2) eliminating coercive health practices

that encourage selective abortions based on genetic abnormality, and (3) protecting the integrity and ethics of the medical profession. The Supreme Court has acknowledged each of the compelling state interests furthered by the Reason Regulations. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing that states have a "compelling interest in eliminating discrimination"); *Casey*, 505 U.S. at 870 (recognizing that states have a legitimate interest "in promoting the life or potential life of the unborn"); *Gonzales*, 550 U.S. at 157 ("There can be no doubt the government 'has an interest in promoting the integrity and ethics of the medical profession."). Even if balancing applies,[4] when weighed against any minimal burden imposed in the limited circumstances when the Reason Regulations apply, the benefits easily prevail.

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[4] As already explained (Defs.' Br. at 55–57), although the district court conducted a benefits/burdens analysis "out of caution," 1-ER-24, the standard used to determine whether an undue burden exists does not include a benefits/burdens analysis. *See June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts."); *accord* 1-ER-21 (district court agreeing that "[t]he undue burden standard articulated in *Casey* does not contemplate balancing the benefits and burdens of a challenged law").

Plaintiffs offer nothing new in response and merely echo the district court's erroneous analysis. They adopt the district court's statement that the Reason Regulations do not further an anti-discrimination interest because the Reason Regulations impose an undue burden. As explained in the State Defendants' Opening Brief and herein, that conclusion is incorrect on several grounds. Moreover, that type of faulty analysis defeats the entire point of balancing. In conducting its analysis, the court should have analyzed whether the State's interest is weightier than any actual burden.

Next, the district court determined, and Plaintiffs now claim, that the Reason Regulations do not provide any benefit as to the elimination of coercive health practices because of insufficient evidence that such practices occur in Arizona or that Plaintiffs engage in them. This takes an overly narrow view of a state's ability to prophylactically regulate unethical medical practices. That such coercive health practices exist, including to coerce genetic-selective abortions, is well documented. *See e.g.*, Pls.' Br. at 37–38; *Preterm-Cleveland*, 994 F.3d at 518 ("Academic literature confirms such practices within the United States medical community[.]"); Brief of the States of Missouri and Sixteen Other States

as *Amici Curiae*, Dkt. 30 at 15 ("One survey found that, among women receiving genetic counseling, '83% reported they did not receive balanced counseling regarding the quality of life for children with disabilities.'" (citation omitted)). Even so, the Supreme Court has rejected the notion that a state is required to show evidence of untoward behavior within its own borders before taking prophylactic steps to stop such behavior from ever occurring. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194–96 (2008) (affirming that Indiana could take steps to prevent in-person voting fraud without first showing evidence that such fraud had occurred in Indiana).

Finally, the district court determined, and Plaintiffs now claim, that the interest in preventing doctors from becoming unwitting participants in genetic-selective abortions is not furthered because it is patients who make abortion decisions, not doctors. This makes little sense given the actual language in the Reason Regulations. In reality, those Regulations are narrowly tailored such that they are only triggered when the physician knows that the sole motivation for the abortion is the presence of a genetic abnormality.

The Reason Regulations also do not discourage frank and open communications between doctor and patient about relevant medical information. As explained further below, the Reason Regulations regulate the conduct of performing an abortion, not speech. And Plaintiffs have never asserted that the reason for obtaining an abortion is medically necessary (their *amici* admit such information is not "clinically necessary"). Arizona clearly has an interest in preventing physicians from performing abortions once they know they are being asked to do so because of the race, sex, or genetic makeup of an unborn child, and the Reason Regulations are written in a manner to further that interest. The fact that regulating discriminatory abortions may incidentally impact a woman's ability to disclose medically irrelevant information about her internal motives does not reduce the benefit to the State of preventing doctors from becoming witting participants in discriminatory abortion. The Reason Regulations do not fail any balancing test.

II. The District Court Erred By Determining That Plaintiffs Are Likely To Succeed On Their Vagueness Challenge To The Reason Regulations.

A. Plaintiffs' Pre-Enforcement Vagueness Challenge Is Not Ripe.

The district court lacked jurisdiction over Plaintiffs' pre-enforcement, facial challenge to the Reason Regulations because that challenge is not ripe under this Court's precedents. Under those precedents, Plaintiffs were required to provide "a concrete factual situation" to the district court to allow it to "delineate the boundaries of what conduct the government may or may not regulate." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007) (quoting *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996)). This is consistent with the U.S. Supreme Court's admonition that pre-enforcement challenges should be viewed with caution. *See Gonzales v. Carhart*, 550 U.S. 124, 150 (2007). The Plaintiffs failed entirely to provide the district court with any concrete factual situation where the law would be unduly vague, leaving it to engage in a guessing game about how the Reason Regulations might apply in hypothetical future situations and depriving Arizona state

courts of the ability to provide a narrowing construction in future as-applied challenges.

In response, Plaintiffs still fail to provide the Court with a single concrete factual scenario where the Reason Regulations would be unconstitutionally vague. The "realistic scenarios" the district court referred to and Plaintiffs rely upon (at 66) are those where physicians might be deemed to have knowledge that an abortion is sought solely because of a genetic abnormality even where a patient does not directly inform the physician of that fact. 1-ER-17. In other words, Plaintiffs' ripeness response is based on situations where they will have actual knowledge in the legal sense (which is all that is ever legally required) that the restriction in the Reason Regulations applies. Plaintiffs also attempt to flip the ripeness standard on its head, arguing (at 65) that State Defendants are "[u]nable to provide a non-vague reading of the Reason [Regulations'] provisions[.]" This is nonsense. Here is just one non-vague reading: the Reason Regulations prohibit physicians from performing an abortion with actual knowledge that the sole reason for doing so is the presence of the most common genetic abnormalities,

including Down syndrome, hemophilia, and cystic fibrosis, each of which is easily detectible and non-lethal.

Plaintiffs also argue that they have established a threat of enforcement. Their sole proof of such threat is State Defendants' continued efforts in defending against Plaintiffs' own claims, including seeking a partial stay of the district court's injunction from the U.S. Supreme Court, No. 21A222. Plaintiffs cannot self-generate justiciability by asserting a pre-enforcement vagueness claim, forcing State Defendants to defend. Plaintiffs nowhere allege that they presently intend to perform abortions knowing the sole reason for doing so is the presence of a genetic abnormality. There are no past instances of enforcement of the Reason Regulations against anyone, and the Reason Regulations do not implicate the First Amendment (*see infra* 35–37). Thus, the justiciability factors discussed in the cases Plaintiffs rely upon (at 67) are missing. *See LSO Ltd. v. Stroh*, 205 F.3d 1146, 1155–56 (9th Cir. 2000); *Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (justiciability requires (1) "a 'concrete plan' to violate the law in question," (2) prosecutorial communication of a specific threat or warning to initiate proceedings, and (3) "history of past prosecution or

enforcement"). The district court should have, thus, rejected Plaintiffs' vagueness challenge to the Reason Regulations for lack of justiciability.

B. The Reason Regulations Do Not Regulate Or Limit Speech.

Plaintiffs also argue (at 64–65) that the Reason Regulations limit constitutionally protected speech. But the Reason Regulations regulate conduct—the performance of discriminatory abortions—and not speech. The Reason Regulations do not impose civil or criminal liability on women who seek to obtain an abortion and do not otherwise regulate a woman's ability to disclose her reasons for doing so. *See* A.R.S. § 13-3603.02(F). The Reason Regulations do not regulate physician speech—all medical professionals in Arizona remain free to advise their patients about their medical options, including obtaining an abortion. At most, as it pertains to speech, the Reason Regulations do not allow a physician or other third party to perform an abortion (*i.e.*, engage in certain conduct) if a patient has disclosed that the sole reason for obtaining an abortion is the presence of a genetic abnormality.[5] But Plaintiffs admit that does not

[5] Requiring medical or mental health professionals to report known violations of law to appropriate law enforcement authorities, *see* A.R.S.

happen often, *see* 2-ER-276 (Decl. of Paul A. Isaacson, M.D. ¶ 13), and their medical community *amici* admit that such information "is not clinically required." Br. of *Amici Curiae* American College of Obstetricians and Gynecologists, et al., Dkt. 48-2 at 20. If such disclosure occurs, a patient is permitted to find a physician who can conduct an abortion without discriminatory intent.

The U.S. Supreme Court and this Court have repeatedly held that state regulation of professional conduct does not implicate the First Amendment, even where speech is incidentally involved. *See Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) ("The fact that [an anti-discrimination regulation] will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct."); *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("*NIFLA*") ("[T]his Court has upheld regulations of professional conduct that incidentally burden speech."); *Pickup v. Brown*,

§ 13-3603.02(E), does not implicate the First Amendment any more than requirements—common throughout the United States—like those requiring lawyers to report known violations of ethical rules to enforcement authorities.

740 F.3d 1208, 1229 (9th Cir. 2014), *abrogated on other grounds by NIFLA*, 138 S. Ct. at 2371–72 ("At the other end of the continuum . . . is the regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech."). The U.S. Supreme Court has explained that even "words can in some circumstances violate laws directed not against speech but against conduct." *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992). Thus, contrary to Plaintiffs' citation to *Grayned v. City of Rockford* (*see* Pls.' Br. at 56), the Reason Regulations do not "abut[] upon sensitive areas of basic First Amendment freedoms." 408 U.S. 104, 109 (1972).

C. The Reason Regulations Are Not Void For Vagueness.

The Reason Regulations are not unconstitutionally vague because they "provide a [physician] of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304 (2008). If "it is clear what the [law] as a whole prohibits," a vagueness challenge should be rejected. *Grayned*, 408 U.S. at 110. As this Court has explained, "so long as [statutory] standards are applied to real-world facts, the statutes are almost certainly constitutional." *Guerrero v. Whitaker*, 908 F.3d 541, 545 (9th Cir. 2018). It is patently obvious what the Reason Regulations

as a whole prohibit. The statutory standards contained therein apply to real-world facts, and, in most every instance, it will be clear whether the Reason Regulations apply. In 2019, for example, less than 191 out of 13,000 instances might have resulted in application of the Reason Regulations. *See* Defs.' Br. at 68. A statute cannot be unconstitutionally vague when its actual application is obvious in over 98% of situations where it might apply.

The district court did not conclude that the actual terms used in the Reason Regulations are inherently vague. How could it when the words used are terms like "knowingly," "solely because of," and "genetic abnormality"? Each of those terms is widely used and easily understandable to persons of ordinary intelligence, let alone physicians of ordinary intelligence. Instead, at Plaintiffs prompting, the district court engaged in a brainstorming session about hypothetical situations where it might be unclear whether the Reason Regulations apply. But that is not how the vagueness analysis works. *See Williams*, 553 U.S. at 305 ("[T]he mere fact that close cases can be envisioned" will not "render[] a statute vague.").

The district court also relied in significant part on the Sixth Circuit's decision in *Memphis Center for Reproductive Health v. Slatery*, 14 F.4th 409 (6th Cir. 2021), including for the false proposition that the Reason Regulations will require a physician to know what is in the mind of a patient. *See* 1-ER-15, -18. Plaintiffs continue to press that concept here, but they do not cite to the *Memphis* panel decision because the Sixth Circuit recently voted to grant en banc rehearing in *Memphis*, thereby vacating the panel opinion. *Memphis Ctr. for Reprod. Health v. Slatery*, 18 F.4th 550 (6th Cir. 2021) (en banc) (mem.). The district court's reliance on *Memphis*, therefore, was misplaced.

For their part, Plaintiffs assert (at 56–57) that their vagueness claim is entitled to heightened review because the Reason Regulations implicate the First Amendment. As explained already, the Reason Regulations do not implicate speech, they regulate conduct (*i.e.*, the performance of abortions). Thus, due to the facial nature of Plaintiffs' vagueness challenge, the Reason Regulations are subject to a deferential vagueness review. The Supreme Court only sustains facial vagueness challenges when there is an "absence of any ascertainable standard for inclusion and exclusion." *Smith v. Goguen*, 415 U.S. 566, 578 (1974);

Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (examining whether the ordinance at issue was facially vague "in the sense that no standard of conduct is specified at all"). By providing a definition of "genetic abnormality" that allows physicians to apply the defined standard to the facts of each case, the Reason Regulations easily satisfy the Supreme Court's facial vagueness standard.

Plaintiffs next argue, and as the district court concluded, that "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." Pls.' Br. at 58 (quoting 1-ER-14). The fact that genetic testing is imprecise or, worse, inaccurate reflects poorly on those tests;[6] it does not render unconstitutionally vague a statute that attempts to regulate those imprecise or inaccurate tests from being used as a means to perform discriminatory abortions. Plaintiffs' argument is like saying that states cannot enact speed limits because of the uncertainties inherent in speedometers, rendering

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[6] As explained, the New York Times recently reported that genetic testing can be quite inaccurate. *See* Bhatia, *supra* note 1. The fact that the Reason Regulations prevent such testing from being used to perform a discriminatory abortion is a feature of the Reason Regulations, not a bug.

motorists incapable of knowing whether they are breaking the law. While the uncertainties in genetic testing could make mens rea more difficult (which is why that requirement further alleviates vagueness concerns), it does not further Plaintiffs' vagueness argument.

Plaintiffs also echo the district court's statement that "there can be considerable uncertainty as to how long a child born with a genetic anomaly may live[.]" Pls.' Br. at 58 (quoting 1-ER-15). But neither the district court nor Plaintiffs square their vagueness statements with the fact that the Reason Regulations simply incorporate by reference the definition of "lethal fetal condition" used in Arizona's informed consent statute—A.R.S. § 36-2158(G)(1). *See* A.R.S. § 13-3603.02(G)(2)(b) (referencing "section 36-2158"). That statute carries penalties for non-compliance and potentially applies whenever an abortion is obtained. That statute has also been on the books in Arizona since 2012. And yet Plaintiffs did not come forward with any instances in the last nine years where the definition of "lethal fetal condition" was used to penalize a doctor, let alone in an arbitrary or capricious manner. At base, Plaintiffs' claim is that Arizona physicians, on a grand scale, cannot know with reasonable certainty whether an unborn child will pass away within

three months of birth. This is inconsistent with the reality that a routine component of a physician's work is to give prognoses to clients. Plaintiffs' assertion that physicians will suddenly be unable to do so in the context of whether to perform an abortion is unserious.

Plaintiffs also make the odd claim that they cannot understand what the term "solely because of" means. The Supreme Court has explained, however, that the term "because of" indicates a "but-for" relationship between one thing and another. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007) (noting that "because of" means "based on" and that "'based on' indicates a but-for causal relationship"); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 265–66 (1992) (equating "by reason of" with "'but for' cause"). Adding the term "solely" to the term "because of" "indicate[s] that actions taken 'because of' the confluence of multiple factors do not violate the law." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020). Thus, if more than one factor contributes to a woman's decision to obtain an abortion, the Reason Regulations do not apply. Put another way, the only way the Reason Regulations apply is when no factor other than the presence of a genetic abnormality drives

an abortion, and the physician knows as much. There is nothing unconstitutionally vague about the term "solely because of."

Finally, Plaintiffs continue to press the astonishing argument that the Reason Regulations are vague because they include a "knowing" mens rea requirement. The Supreme Court has held the opposite—that including a scienter requirement alleviates vagueness concerns. *See Gonzales*, 550 U.S. at 149 ("The Court has made clear that scienter requirements alleviate vagueness concerns."); *Harris v. McRae*, 448 U.S. 297, 311 n.17 (1980) (holding that the Hyde Amendment is not unconstitutionally vague because "the sanction provision in the Medicaid Act contains a clear scienter requirement"). In fact, the Supreme Court has held that inclusion of a "knowing" scienter requirement, in particular, alleviates vagueness concerns. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010) ("[T]he knowledge requirement of the statute further reduces any potential for vagueness[.]"); *Screws v. United States*, 325 U.S. 91, 102 (1945) ("[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law.").

Of course, Plaintiffs do not suggest what mens rea would suffice. And neither the district court nor Plaintiffs cite a single decision—not one—supporting the argument that including a scienter requirement *increases* vagueness. The district court's analysis, if affirmed, will call into question every law—there are numerous of them[7]—requiring proof that an individual knew another individual's motives, if not all statutes containing a scienter requirement.

The Arizona Legislature went out of its way to fill the Reason Regulations with objective standards that can easily be applied by physicians in the overwhelmingly majority of cases. The Legislature used "solely because of" in the criminal liability provision, utilized a heightened "knowing" mens rea requirement, incorporated the definition of "lethal fetal condition" in common use for almost a decade, and

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[7] For example, federal conspiracy laws require proof of a "meeting of the minds." *United States v. Johnston*, 789 F.3d 934, 940 n.1 (9th Cir. 2015). In Arizona, the offense of facilitation of a felony requires proof that the defendant acted "with knowledge that another person is committing or intends to commit an offense," A.R.S. § 13-1004(A); assisted suicide requires proof of "knowledge that the person intends to die by suicide," A.R.S. § 13-1103(A)(3); encouragement of minor suicide requires proof of "knowledge that the minor intends to die by suicide," A.R.S. § 13-1103(B); and sexual assault requires proof that "the defendant knew [the defined sexual] contact was without the victim's consent," *State v. Witwer*, 175 Ariz. 305, 308 (App. 1993).

provided a simple definition of "genetic abnormality." Plaintiffs and the district court would require unattainable perfection in statutory standards, meaning if there is any situation where a physician might not know if conduct qualifies in advance, then the statute is facially unconstitutional.

Even in *Johnson* and *Dimaya*, which Plaintiffs rely heavily upon, the Court came nowhere close to adopting such a standard. Quite the opposite actually. In *Johnson*, the Court emphasized that "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree.'" *Johnson v. United States*, 576 U.S. 591, 603–04 (2015). The Court again endorsed that concept in *Dimaya*. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 (2018). Plaintiffs' arguments, and the district court's preliminary injunction, squarely conflict with these statements. Thus, Plaintiffs' arguments should be rejected and the preliminary injunction reversed.

III. The District Court Correctly Concluded That Plaintiffs Are Not Likely To Succeed On Their Vagueness Challenge To The Interpretation Policy.

A. The Interpretation Policy Is Not Subject To Plaintiffs' Facial, Pre-Enforcement Vagueness Challenge.

The Interpretation Policy on its own is no more than that—a policy. It is included, along with other non-substantive provisions, in an introductory article of the Arizona Revised Statutes titled "General Rules of Statutory Construction." By its very terms, the Interpretation Policy is nothing more than a directive, primarily to state courts, that Arizona laws "be interpreted and construed to acknowledge" the rights of unborn children. A.R.S. § 1-219(A); *see also* 1-ER-9 (district court recognizing that the Interpretation Policy "is a directive that all other provisions of Arizona law be interpreted in a certain manner").

Accordingly, the nature of the Interpretation Policy prohibits it from even being subject to a facial, pre-enforcement vagueness challenge like the one Plaintiffs try here. As explained, a criminal law, which the Interpretation Policy is not, violates due process on vagueness grounds only when it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595. As this Court has put it, to

avoid being struck down for vagueness, a regulation "must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner." *McCormack v. Herzog*, 788 F.3d 1017, 1031 (9th Cir. 2015). This standard simply cannot be applied to the Interpretation Policy, which contains no regulation, prohibits no conduct, and contains no penalty. *See* 1-ER-9 (district court recognizing that "[t]he Interpretation Policy is neither a penal statute nor a civil regulatory provision.").

Because the Interpretation Policy lacks the fundamental characteristics of a law that could be subject to a facial, pre-enforcement vagueness challenge, Plaintiffs can only hypothesize about how *other* Arizona statutes may be rendered vague. But none of those statutes are before the Court. As the district court put it, "Plaintiffs do not challenge the specific statutes that they believe will become vague; they challenge the interpretive rule that would, in their view, render vast swaths of Arizona law vague if applied by law enforcement agencies, prosecutors, courts, juries, and regulators." 1-ER-9. Plaintiffs effectively ask the Court to consider endless hypothetical situations in a vacuum—an

approach this Court has disavowed. *See San Diego Cnty. Gun Rts. Comm.*, 98 F.3d at 1132.

Plaintiffs make two arguments to try to avoid this conclusion, both of which are unavailing. *First*, Plaintiffs rely (at 75) on *Johnson* and *Dimaya* for the proposition that "both civil and criminal statutes directing the way other laws are to be interpreted can be challenged *and struck down* on facial vagueness grounds." But the statutes challenged in *Johnson* and *Dimaya* are not at all analogous to the statute challenged here. At issue in *Johnson* was an actual criminal provision, nothing like the Interpretation Policy. The Court struck down as vague a portion of a federal sentencing statute which increased sentencing time when the defendant had three or more convictions for a "violent felony," a defined term that included "any felony that 'involves conduct that presents a serious potential risk of physical injury to another.'" *Johnson*, 576 U.S. at 593. The Court held that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process." *Id.* at 602. *Dimaya* addressed a similar challenge to terms in a removal statute within the Immigration and Nationality Act. 138 S. Ct. at 1210–11.

Unlike here, then, both *Johnson* and *Dimaya* dealt with challenges to independent, substantive provisions imposing actual penalties—prison time in *Johnson*, removal in *Dimaya*. The challenges before the Court in those cases did not require it to look to any other statutes in making its vagueness determination. Rather, the Court held that requiring criminal defendants to analyze a multitude of imaginary crimes to determine whether the statute's penalty is triggered is problematic. *See Guerrero*, 908 F.3d at 545 ("The problem in *Johnson* and *Dimaya* was not that the terms were uncertain in isolation; the problem was that the uncertainty had to be applied to an idealized crime[.]"). That is not the case here, and *Johnson* and *Dimaya* in no way support Plaintiffs' attempt to have the Court scour the Arizona statute books to determine what impact the Interpretation Policy might have if state court judges apply it in imaginary future cases.

Second, Plaintiffs argue (at 75–76) that a "stringent vagueness review" should have been conducted because the Interpretation Policy "is at minimum quasi-criminal" or "carries a prohibitory and stigmatizing effect." Plaintiffs are incorrect again. Plaintiffs cite to *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019), and *Village of Hoffman Estates v. Flipside*,

455 U.S. 489 (1982), to support their argument, but those cases both dealt with regulations that prohibited conduct and carried penalties. Again, nothing in *Kashem* or *Village of Hoffman Estates* supports review of Plaintiffs' challenge to an interpretive provision that on its own does nothing more than provide a rule of statutory construction.

B. *Webster* Further Confirms That Plaintiffs' Vagueness Challenge Will Fail.

Binding precedent also compelled the district court's denial of Plaintiffs' preliminary injunction request. The district court correctly followed the Supreme Court's lead in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), in refusing to adjudicate Plaintiffs' challenge. 1-ER-9 (finding *Webster* to be "[t]he most useful guidance for addressing Plaintiffs' challenge to the Interpretation [Policy]"). Indeed, *Webster* addressed a Missouri statute that contained language "substantially and materially similar" to that in the Interpretation Policy. 1-ER-10.

Like here, the interpretive statute in *Webster* had not yet been applied by Missouri state courts. The Court thus declined to weigh in on "the extent to which the [statute's] language might be used to interpret other state statutes." *Webster*, 492 U.S. at 506. The Court reasoned that

it should be state courts that first decide how the statute is used to interpret other state statutes. *Id.*

Following *Webster*'s approach, the district court correctly concluded as follows:

> Whether and to what extent the Interpretation Policy might be used to interpret other provisions of Arizona law is something that Arizona courts must decide in the first instance. And if a particular application of the Interpretation Policy restricts Plaintiffs' activities "in some concrete way," the federal courts stand ready to address any constitutional challenges as to that specific application. But this Court is not positioned to decide "abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

1-ER-10 (quoting *Webster*, 492 U.S. at 507). This conclusion not only accords with *Webster*, but it is the only viable approach given Plaintiffs' guesses—some of which are outlandish—about how the Interpretation Policy might apply to various Arizona statutes in future imaginary cases.[8]

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[8] In many of the examples Plaintiffs and their amici give, the Interpretation Policy would not even operate to render another statute vague. Rather, Plaintiffs and their amici simply disfavor the substantive

Plaintiffs attempt (at 70–74) to find error with the district court's reliance on *Webster*, but their arguments fall flat. They assert that the section of the Missouri statute with language similar to A.R.S. § 1-219 was not challenged in *Webster*. But even if the Court *sua sponte* considered the provision, that does not negate the Supreme Court's discussion, nor its clear guidance on how such a challenge must be handled. *See Webster*, 492 U.S. at 506–07. Similarly, it is immaterial if the specific claim brought in *Webster* was a substantive due process claim as opposed to a vagueness challenge because the Supreme Court did not reach its conclusion in *Webster* using substantive due process principals.

Plaintiffs also contend (at 71) that "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[.]'" They say this is so because Missouri, unlike Arizona, offered the Supreme Court a

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result that might be obtain through the combination of the Interpretation Policy and the other state statute. But Plaintiffs realize that they lack standing to substantively challenge all state statutes that might be interpreted using the Interpretation Policy, so they instead are making an awkward attempt to stop any potential operation of the Interpretation Policy through a vagueness challenge.

"narrowing construction" of their statute—indicating that the statute was merely "precatory" and "impose[d] no substantive restrictions on abortions"—and that "[t]his narrowing construction was essential to the ruling in *Webster*." Pls.' Br. at 71. To begin, there is no indication that this "narrowing construction" informed any part of the Court's analysis in *Webster*. Further, if it did, it would only bolster the district court's reliance on *Webster*. Just like Missouri, and contrary to Plaintiffs' selectively misleading quotations from oral argument below, Arizona has consistently maintained that the Interpretation Policy is "not in a substantive statute" and has only expressed that "[i]t *may* be used in interpreting other statutes[.]" 2-ER-117 (emphasis added).[9]

The numerous unanswered hypotheticals Plaintiffs pose demonstrate why it would be troublesome for federal courts to decide the constitutionality of the Interpretation Policy at this juncture. As discussed above, the Interpretation Policy is an introductory policy of interpretation to the Arizona Revised Statutes. Any potential future application of the Policy would need to be examined in the context with which it is to be applied. Each title of the A.R.S. includes its own separate

[9] Plaintiffs' "Fourth" argument (at 73) fails for the same reason.

definitions and interpretations, and thus, any application of the Interpretation Policy would need to be analyzed under the lens of Arizona's rules of statutory interpretation, as well as the context within which the application arises. *See, e.g.*, A.R.S. § 1-211(A) ("The rules and the definitions set forth in this chapter shall be observed in the construction of the laws of the state unless such construction would be inconsistent with the manifest intent of the legislature."). The district court did not abuse its discretion in refusing to enjoin a state law rule of statutory construction in an analytical vacuum.

IV. Plaintiffs Have Not Demonstrated That The Remaining Factors Support Injunctive Relief.

Plaintiffs failed to demonstrate that they will likely suffer irreparable harm if either the Reason Regulations or the Interpretation Policy remain in force for the remainder of this litigation. Boiled down, Plaintiffs' only argument (at 80–81) is that irreparable harm will occur because the Reason Regulations and the Interpretation Policy are unconstitutional. But as already explained, Plaintiffs cannot establish that the Reason Regulations impose a substantial obstacle on a large fraction of relevant women, or that either provision is impermissibly vague. Plaintiffs do not allege that they have ever actually performed an

abortion solely because an unborn child has been diagnosed with a genetic abnormality. Nor do Plaintiffs allege that knowing the reason why an abortion is sought is medically necessary (their *amici* admit it is not "clinically" necessary). And Plaintiffs have not provided anything indicating that the Interpretation Policy has been used (or has been threatened to be used) against them in any way, let alone in an unanticipated manner.

Plaintiffs have established only that the Reason Regulations prevent an expectant mother from telling her performing physician that the abortion is based solely on an abnormal fetal gene expression. But Plaintiffs admit that pregnant women seek abortions for a myriad of reasons and often do not disclose those reasons to their physician. *See, e.g.*, Defs.' Br. at 41. Plaintiffs have also disclaimed any argument that there are women in Arizona who will only obtain a pre-viability abortion if they are able to disclose their motives for doing so to a physician. Plaintiffs have not shown that they, or even their patients, are likely to suffer irreparable harm.

To the contrary, it is the State of Arizona that will suffer irreparable harm if either statutory provision is enjoined. "Any time a state is

enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (brackets and citation omitted); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). And that is especially true when the injunction subjects the decisions of public officials entrusted with "'the safety and the health of the people'" in "'areas fraught with medical and scientific uncertainties'" to "second-guessing by an unelected federal judiciary." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) (brackets and citations omitted); *see Gonzales*, 550 U.S at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."). Here, the protection of public health falls within the traditional scope of the State's police power. *Hillsborough County v. Automated Med. Lab'y, Inc.*, 471 U.S. 707, 719 (1985).

States similarly have an interest in remedying discriminatory practices towards those with mental or physical disabilities. *See*

Tennessee v. Lane, 541 U.S 509, 534 (2004) (Souter, J., concurring); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (States have a "compelling interest in eliminating discrimination"). States also have a legitimate interest "in promoting the life or potential life of the unborn." *Casey*, 505 U.S. at 870; *Gonzales*, 550 U.S. at 163 (explaining that state "law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community"). And "[t]here can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales*, 550 U.S. at 157.

The preliminary injunction prevents Arizona from (1) effectuating a statute enacted by the representatives of its people; (2) exercising its police power to protect public health by regulating abortions performed solely for eugenic or discriminatory reasons; (3) remedying discriminatory practices—here, the termination of life or potential life—towards those with disabilities; (4) promoting the life or potential life of the unborn; (5) protecting parents of unborn children from coercive abortion practices; and (6) protecting the integrity and ethics of the

medical profession. The preliminary injunction also calls into question the continued validity of Arizona's decade-long regulation of race- and sex-selective abortions.

Plaintiffs have not satisfied that irreparable harm will occur if either the Reason Regulations or the Interpretation Policy are not enjoined. And the equities tip sharply in favor of State Defendants.

CONCLUSION

State Defendants respectfully request that the Court lift the district court's preliminary injunction as to the Reason Regulations and affirm the district court's refusal to preliminarily enjoin the Interpretation Policy.

January 14, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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