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' REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Arizona Senate Bill 1457's Interpretation Policy broadly grants the same rights as people to fertilized eggs, embryos, and fetuses, and mandates that all state laws be "interpreted and construed to acknowledge" said rights, subject only to two ill-defined exceptions. A.R.S. § 1-219; *see* Pls.' Br. 14-15. While both parties agree that this sweeping provision alters the meaning of countless Arizona statutes, no one—including the Defendants—can explain how. That is because the Interpretation Policy on its face provides no notice of when or how the "acknowledgement mandate" is triggered, let alone what "acknowledge" means in any particular context. Nor does it provide any guidance for the enforcement of newly imposed criminal penalties, civil liability, heightened legal duties, or other legal consequences—where none would exist absent a pregnancy or a fertilized egg. This is the very definition of an unconstitutionally vague law.

Glaringly absent from Defendants' response is any real answer to Plaintiffs' arguments that the Interpretation Policy is unconstitutionally vague on its face: Defendants offer no narrowing construction, or even a single example of how the Interpretation Policy would be clearly and consistently applied to "acknowledge" the rights of fertilized eggs, embryos, or fetuses, let alone how law enforcement would clearly and consistently enforce those rights. Instead, Defendants attempt to sidestep the vagueness doctrine entirely, and these efforts fail.

First, Defendants suggest the Interpretation Policy is categorically exempt from the demands of the vagueness doctrine because it is a "non-substantive provision[.]" Defs.' Resp. Br. 46. Yet, as Defendants' own briefs and statements make clear, the Interpretation Policy *is* substantive. 2-ER-117; Defs.' Resp. Br. 51 n.8, 53. And, the Supreme Court has not shied away from applying the vagueness doctrine to similar statutes that serve interpretive functions but nevertheless have the effect of proscribing conduct without fair notice or encouraging arbitrary or discriminatory prosecution. *See, e.g.*, *Johnson v. United States*, 576 U.S. 591 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Accordingly, the Interpretation Policy is squarely subject to the vagueness doctrine.

Second, Defendants argue that *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) renders Plaintiffs' vagueness claim unripe. But, as Plaintiffs explained in their opening brief, *Webster*—which considered a different legal claim challenging a different statutory provision against a different factual background—simply does not control here, nor could it. Rather than grapple with this reality, Defendants double down on the district court's clear misreading of *Webster* untethered to the facts in this case or the law.

Plaintiffs are likely to succeed on their claim that the Interpretation Policy is unconstitutionally vague on its face. As a substantive matter, Defendants never challenge this conclusion, and the district court never reached this question, basing

its decision instead on Defendants' procedural arguments. Because the district court erred in deciding this claim on ripeness grounds—when it is clearly ripe—this Court must now consider Plaintiffs' substantive arguments. It is plain to see that the Interpretation Policy is unconstitutionally vague, and absent action from this Court, the Interpretation Policy will continue to violate the constitutional rights of Plaintiffs, who include health care providers, their pregnant patients, and their patients capable of becoming pregnant.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on Their Claim that the Interpretation Policy is Unconstitutionally Vague

A. The Interpretation Policy is Facially Void for Vagueness

The Interpretation Policy fails *on its face* because it provides no notice of the actions it proscribes—including actions that could result in criminal penalties—while allowing Defendants free rein to decide what the law means and enforce it according to their preferences. *See, e.g.*, *Johnson*, 576 U.S. at 598 (finding residual clause void for vagueness where it "produces more unpredictability and arbitrariness than the Due Process Clause tolerates"); *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (finding statutory provision void for vagueness because it applied a "standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences"). Defendants fail to present this Court with even one concrete example to the contrary.

By its own terms, the Interpretation Policy creates an "interpretive rule" that requires all Arizona state laws to be "interpreted and construed" to "acknowledge" that fertilized eggs, embryos, and fetuses (at any stage of development) have the same "rights, privileges and immunities" as people—including the people inside whose bodies said fertilized eggs, embryos, and fetuses are located. A.R.S. § 1-219(A). Accordingly, for any of the statutes "indicating the [Interpretation Policy] is triggered," 2-ER-117, the Interpretation Policy mandates that law enforcement, state actors, and other individuals, and subsequently courts, determine (1) what it means to "acknowledge" that fertilized eggs, embryos, and fetuses have "equal rights" to people; and (2) whether an exception applies. And, as explained in Plaintiffs' opening brief, the exceptions to the Interpretation Policy only exacerbate the lack of clarity regarding how these questions are to be answered. *See* Pls.' Br. 15, 61-62. The Interpretation Policy provides no standards, guidance, or test governing either of these threshold inquiries that would make its potential application to hundreds of Arizona statutes anything more than "guesswork and intuition." *Johnson*, 576 U.S. at 600.

Plaintiffs and their *amici* offered many concrete examples of how the Interpretation Policy's failure to provide this guidance leaves them guessing about how to conform their behavior to avoid criminal, civil, or professional penalties. *See* Pls.' Br. 65-66 (citing Plaintiff Physicians' declarations). Defendants neither address

these concerns nor provide this Court with a construction of the Interpretation Policy that is clear in *any* context. Rather, Defendants paradoxically refer to Plaintiffs' concerns as "outlandish," Defs.' Resp. Br. 51, while never contesting that the Interpretation Policy could lead to the criminalization or punishment of individuals for deciding to become pregnant, carry a pregnancy to term, or receive healthcare that may pose a risk to their pregnancy. Nor do Defendants disavow that the Interpretation Policy opens the door to prosecuting or taking licensing action against healthcare providers, including Plaintiff Physicians, for care they provide to pregnant people that may pose risks to a fertilized egg, embryo, or fetus.

Instead, Defendants claim that Plaintiffs "simply disfavor the substantive result that might be obtain [sic] through the combination of the Interpretation Policy and the other state statute." *Id.* at 51 n.8. But this response puts the cart before the horse. Plaintiffs' claim does not turn on the result of any particular application of the Interpretation Policy; it turns on the impossibility of determining *in advance* what the result of *any* such application "*might* be." *Id.* (emphasis added). While Defendants baldly claim that combining the Interpretation Policy with "the other state statute" would not "operate to render another statute vague," *id.*, Defendants fail to explain why that is or how the Interpretation Policy could be clearly applied in any of the highlighted contexts—or, indeed, in *any* context.

The Interpretation Policy thus fails for vagueness because it does not provide fair notice of what it requires, lacks clear guidance for when and how it will be "triggered," 2-ER-117, to amend existing laws, and accordingly "vests virtually complete discretion in the hands of the police[,]" prosecutors, and courts to decipher what actions fall within its scope, *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) (internal citation and quotation marks omitted); *see also Dimaya*, 138 S. Ct. at 1227 (Gorsuch, J., concurring) ("legislators may not 'abdicate their responsibilities for setting the standards of the criminal law'" in this way (quoting *Smith*, 415 U.S. at 575)). The Interpretation Policy fails for vagueness, and Defendants do not provide this Court with any reason to reach a contrary conclusion.

B. Defendants' Attempts to Escape the Vagueness Doctrine Fail

Because the Interpretation Policy clearly fails for vagueness, Defendants attempt to avoid judicial review altogether: First, by claiming the Interpretation Policy is categorically insulated from vagueness review, Defs.' Resp. Br. 46-49; and second, by claiming Plaintiffs' claim is not ripe, *id.* at 50-54. Both arguments lack merit.

1. The Interpretation Policy is Subject to the Vagueness Doctrine

Failing to articulate how the Interpretation Policy could be clearly applied in any context, Defendants instead contend that the Interpretation Policy is categorically exempt from the vagueness doctrine because it is a "non-substantive" rule of interpretation that does not prohibit any conduct or impose any penalties. Defs.' Resp. Br. 46. This is inaccurate.

To begin, contrary to Defendants' assertion, the Interpretation Policy *is* a substantive law that puts Plaintiffs at risk of both criminal and civil penalties. The Interpretation Policy *mandates* that all Arizona state laws be "interpreted and construed" to "acknowledge" that fertilized eggs, embryos, and fetuses (at any stage of development) have the same "rights, privileges and immunities" as people—including the people inside whose bodies said fertilized eggs, embryos, and fetuses are located. A.R.S. § 1-219(A).

Additionally, the Interpretation Policy's plain language demonstrates its substantive nature by anticipating its application to existing criminal and civil causes of action. Specifically, the Interpretation Policy contains two exceptions, providing that it "does not create a cause of action against" an individual who "performs in vitro fertilization procedures as authorized" under Arizona law or against a "woman for indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care." A.R.S. § 1-219(B). If the

Interpretation Policy had no substantive effect, its exception provisions would be superfluous. *See Premier Physicians Grp., PLLC v. Navarro*, 377 P.3d 988, 992 (Ariz. 2016) ("Statutes are to be given, whenever possible, such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." (quoting *State v. Deddens*, 542 P.2d 1124, 1128 (Ariz. 1975))). Plaintiffs raised this point in their opening brief, Pls.' Br. 61-62, but Defendants offer no rejoinder.

Indeed, Defendants do not contend that the Interpretation Policy is non-self-executing. Nor do they deny that the Interpretation Policy is intended to alter the meaning and application of other Arizona statutes. *See* 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 . . . statute is triggered"); Defs.' Resp. Br. 53 ("Arizona . . . has only expressed that '[the Interpretation Policy] *may* be used in interpreting other statutes[.]'" (emphasis in original)). While Defendants claim the Interpretation Policy is "nothing more than a directive" to the state's judiciary, Defs.' Resp. Br. 46, the Interpretation Policy, in fact, applies to any official with authority to enforce any provision of the Arizona Revised Statutes subject to the Interpretation Policy, which includes, *inter alia*, law

enforcement officers, prosecutors, and officials with regulatory and licensing enforcement authority. *See* A.R.S. § 1-211(A).

In particular, Defendants do not deny that the Interpretation Policy implicates Plaintiffs' activities and the activities of their patients and members. *See* Pls.' Br. 17 (citing 2-ER-218, 234–37 (questioning how the Interpretation Policy will be applied to A.R.S. § 13-1203 (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)); 3-ER-354–56 (same)). To the contrary, Defendants acknowledge that, in the many concrete examples provided by Plaintiffs and *amici*, "the combination of the Interpretation Policy and the other state statute[s]" "*might*" generate one or more different "substantive result[s]" under the law. Defs.' Resp. Br. 51 n.8 (emphasis added).

Furthermore, Defendants' claim that the Interpretation Policy is categorically insulated from the vagueness doctrine because it only serves an interpretive function and "contains no regulation, prohibits no conduct, and contains no penalty" *on its own*, *id.* at 47, is legally inaccurate. As the Supreme Court has repeatedly—and recently—recognized, laws like the Interpretation Policy that serve purely interpretive functions but nevertheless have the effect of proscribing conduct without fair notice or of encouraging arbitrary or discriminatory enforcement are subject to

challenge under the vagueness doctrine. *See, e.g.*, *Johnson*, 576 U.S. at 597; *Dimaya*, 138 S. Ct. at 1216.

For example, the criminal and civil residual clauses struck down as facially void for vagueness in *Johnson* and *Dimaya* did not independently prohibit any conduct or impose any penalty, but served the same interpretive function the Interpretation Policy serves here. Yet, the Supreme Court did not consider this a barrier to granting facial relief on vagueness grounds where it was clear that the challenged clauses would impact peoples' rights and liberty interests.

The provision of the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B), at issue in *Johnson* was a residual clause contained within a statutory definition of "violent felony." *Johnson*, 576 U.S. at 593-94 (defining "violent felony" to include *inter alia* any crime that "otherwise involve[d] conduct that present[ed] a serious potential risk of physical injury to another"). However, like the Interpretation Policy, the residual clause itself did not contain any substantive prohibition or penalty. Rather, it operated as an interpretive policy for determining whether and when the commission of previous crimes could be considered "violent felonies" that could ultimately result in a sentencing enhancement. *Id*.

In *Johnson*, the Court described ACCA's "categorical approach," under which courts "assess[ed] whether a crime qualifie[d] as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might

have committed it on a particular occasion.'" *Id.* at 596 (quoting *Begay v. United States*, 553 U.S. 137, 141 (2008)). The Court found the residual clause unconstitutionally vague because the categorical approach required courts to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* (quoting *James v. United States*, 550 U.S. 192, 208 (2007)). The Court concluded that the "indeterminacy of the wide-ranging inquiry required by the residual clause both denie[d] fair notice to defendants and invite[d] arbitrary enforcement[.]" *Id.* at 597.

The provision of the Immigration and Nationality Act ("INA"), 18 U.S.C. § 16(b), at issue in *Dimaya* was a nearly identical residual clause to that in *Johnson*, which was also located within a statutory definition. *Dimaya*, 138 S. Ct. at 1211-12. The provision at issue in *Dimaya* similarly did not independently render an alien ineligible for cancellation of removal or impose any other penalties. *Id.* at 1210-11. It served an interpretive function in determining whether any number of crimes constituted a "crime of violence" under the residual clause. *Id.* at 1211.

Defendants' argument that interpretive provisions are categorically exempt from the vagueness doctrine is, accordingly, squarely contrary to Supreme Court precedent. Neither of the residual clauses considered in *Johnson* or *Dimaya* independently prohibited any conduct or imposed penalties, and yet the Court found

them to be void for vagueness. As such, the Interpretation Policy is subject to the vagueness doctrine.

2. Plaintiffs' Facial Vagueness Claim is Justiciable

Defendants next echo the district court's erroneous reliance on *Webster*. Defs.' Resp. Br. 50-54; 1-ER-9–11. However, Defendants fail to explain why *Webster*—a case that considered a substantively different law against a different factual background and a distinct legal claim—dictates the result here or is otherwise persuasive.

First, Defendants continue to argue incorrectly that *Webster* is "[b]inding precedent," Defs.' Resp. Br. 50, while failing to counter Plaintiffs' clear demonstration that the Court's ripeness decision in *Webster* only concerned the *preamble* to Missouri Revised Statute § 1.205, which was neither substantively nor functionally similar to the Interpretation Policy at issue here.[1] The *Webster* Court

[1] Unlike Plaintiffs' challenge here, the *Webster* plaintiffs challenged only the preamble to the Missouri law, Mo. Rev. Stat. § 1.205.1. The *Webster* plaintiffs did not challenge any of the Missouri law's operative provisions—one of which, Mo. Rev. Stat. § 1.205.2, is similar, but not identical, to the Interpretation Policy. *See Reprod. Health Servs. v. Webster*, 662 F. Supp. 407, 413 (W.D. Mo. 1987) (declaring Mo. Rev. Stat. §§ 1.205.1(1) and (2) unconstitutional); *Reprod. Health Serv. v. Webster*, 851 F.2d 1071, 1075-77 (8th Cir. 1988) (finding plaintiffs had standing to challenge Mo. Rev. Stat. §§ 1.205.1(1) and (2) and affirming the district court's judgment that both provisions are invalid). The preamble, unlike the law's operative provision, merely set forth "findings" of the Missouri Legislature that "[t]he life of each human being begins at conception," and that "[u]nborn children have

repeatedly made clear that the challenge and the holdings of both the Court of Appeals and the Supreme Court focus only on the preamble:

- "In invalidating *the preamble*, the Court of Appeals . . ." 492 U.S. at 504-05 (emphasis added).
- "[The Court of Appeals] rejected Missouri's claim that *the preamble* was 'abortion-neutral[.]'" *Id.* at 505 (emphasis added).
- "The State contends that *the preamble itself* is precatory and imposes no substantive restrictions on abortions . . . Appellees, on the other hand, insist that *the preamble is an operative part of the Act* intended to guide the interpretation of other provisions of the Act." *Id.* (emphases added).
- "Certainly *the preamble* does not by its terms regulate abortion or any other aspect of appellees' medical practice." *Id.* at 506 (emphasis added).
- "We think the extent to which *the preamble's* language might be used to interpret other state statutes or regulations is something that only the courts of Missouri can definitively decide." *Id.* (emphasis added).
- "It will be time enough for federal courts to address the meaning of *the preamble* should it be applied to restrict the activities of appellees in some concrete way . . . We therefore need not pass on *the constitutionality of the Act's preamble*." *Id.* at 506-07 (emphases added).

In short, no other provision of the Missouri statute was the subject of the ripeness holding in *Webster*. *See id.* at 501 (defining the "preamble" as Mo. Rev. Stat. §§ 1.205.1(1), (2)); *id.* at 507 (holding that plaintiffs' claim challenging "the constitutionality of the Act's *preamble*" was unripe (emphasis added)).

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protectable interests in life, health, and well-being." Mo. Rev. Stat. §§ 1.205.1(1) & (2).

Defendants assert that the Court in *Webster* "*sua sponte*" considered the operative provision of the Missouri law, Mo. Rev. Stat. § 1.205.2, that largely mirrors the Interpretation Policy. Defs.' Resp. Br. 52. This more than stretches the truth. The Court briefly mentioned Mo. Rev. Stat. § 1.205.2 to explain why that operative provision of the statute did not automatically change the challenged preamble into a substantive law. *Webster*, 492 U.S. at 506. This reference contains no holding or even analysis about whether Mo. Rev. Stat. § 1.205.2 violates the vagueness doctrine or if such a challenge would have been ripe. *Webster*, 492 U.S. at 506.

Second, Defendants refuse to acknowledge that *Webster* presented vastly different factual circumstances than this case. In *Webster*, Missouri insisted that the plaintiffs did not have standing to challenge the preamble because it was "precatory" and did nothing. *See id.* at 505.[2] Here, Defendants have at no point asserted that the Interpretation Policy is precatory and has no legal effect. Quite the opposite, Defendants have admitted that they intend to interpret and enforce the Interpretation Policy to amend criminal and civil laws in Arizona

[2] *See also Webster*, 851 F.2d at 1075 (noting the state's argument that Mo. Rev. Stat. §§ 1.205.1(1) and (2) "have no substantive effect—they are merely statements of existing fact that cannot give rise to a cause of action in anyone").

whenever "the statute is triggered."[3] 2-ER-117; *see also supra* pages 4-5 (describing the Interpretation Policy's substantive nature and Defendants' failure to contest that the Interpretation Policy implicates Plaintiffs' activities and the activities of their patients and members). And, despite Defendants' baseless assertions to the contrary, Defs.' Resp. Br. 53, this factual background was essential to the Court's ripeness ruling in *Webster*.

The *Webster* opinion devotes an entire paragraph to this narrowing construction—that the preamble was a precatory value statement that imposed no substantive restrictions on abortion—and expressly recognized it as an alternative to Plaintiffs' reading of the preamble as a statutory directive that other state laws be interpreted in a manner that restricted abortion. *See Webster*, 492 U.S. at 506 (the "preamble can be read simply to express" the state's value judgment). Moreover, *Webster*'s holding itself shows that Missouri's narrowing construction was critical to the Court's ultimate disposition of the substantive due process claim against the preamble. *Id.* at 506-07. Had the *Webster* Court

[3] Arizona insinuates that Plaintiffs' fear of prosecution is not reasonable because they have not been prosecuted, or threatened with prosecution, since the Interpretation Policy took effect in September 2021. Defs.' Resp. Br. 8. As Plaintiffs explained in their opening brief, this is irrelevant. Pls.' Br. 64-69; *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 n.5 (9th Cir. 2013) (recognizing that this Court has "never held that a specific threat [of prosecution by enforcement authorities] is necessary to demonstrate standing").

not determined that the preamble was "fairly subject to an interpretation which will avoid or modify the federal constitutional question" at issue, *Baggett v. Bullitt*, 377 U.S. 360, 375 n.11 (1964) (citation omitted), the Court would have been bound by its own precedent to decide that question when it was presented rather than decline to pass upon it, *id.* Unlike the defendants in *Webster*, Defendants here offer no narrowing construction at all, or any reading of the Interpretation Policy that could avoid the constitutional vagueness questions it presents.

Third, Defendants fail to muster any persuasive arguments for why *Webster*'s ripeness analysis (regarding the *Webster* plaintiffs' substantive due process claim against the preamble) should dispose of Plaintiffs' facial vagueness challenge to the Interpretation Policy. Again seeking to obfuscate the material differences between *Webster* and this case, Defendants incorrectly assert that 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 [sic]." Defs.' Resp. Br. 52. This misapprehends the ripeness doctrine, which "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements," particularly where "the existence of the dispute itself hangs on future contingencies that may or may not occur." *Clinton v. Acequia, Inc.*, 94

F.3d 568, 572 (9th Cir. 1996) (citations omitted). Whether a claim is ripe depends on the nature of that particular cause of action. Accordingly, where multiple claims are brought with respect to the same issue, some may be ripe and others unripe. *See, e.g.*, *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320, 324-28 (9th Cir. 1996) (finding takings claim unripe but proceeding to the merits of First Amendment, equal protection, and vagueness claims); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 406-07 (9th Cir. 1996) (finding that of multiple constitutional claims, only one facial federal takings claim was ripe for adjudication).

The differences between Plaintiffs' vagueness claim here, and the *Webster* plaintiffs' substantive due process claims, are both material to this case and fatal to Defendants' ripeness arguments. In *Webster*, plaintiffs' substantive due process challenge to the Missouri statute's preamble was unripe because (1) the preamble was susceptible to a narrowing construction that nullified any federal constitutional question, and (2) the constitutional question of whether the preamble threatened plaintiffs' substantive due process rights could only arise if state courts did not adopt the narrowing construction. 492 U.S. at 506.

Here, Plaintiffs' challenge to the Interpretation Policy is ripe because it does not depend on any particular future application or construction of the Interpretation Policy, but instead can be rendered now based on this Court's

review of the statutory language alone. *See Johnson*, 576 U.S. at 596-98; *Dimaya*, 138 S. Ct. at 1215-16. As explained above, unlike in *Webster*, Defendants have never offered a narrowing construction of the Interpretation Policy that could render it constitutional or that could otherwise justify delaying adjudication of Plaintiffs' vagueness claim.

Accordingly, Defendants' attempts to salvage the district court's erroneous application of *Webster* to this case are as unpersuasive as they are unsupported. *Webster* considered a different law, different facts, and a different claim. *Webster* therefore does not dictate, or even shed light on, whether Plaintiffs' facial vagueness challenge to the Interpretation Policy is ripe.

II. Plaintiffs Have Satisfied The Remaining Requirements for Preliminary Injunction

If the Interpretation Policy remains in effect, Plaintiffs, their members, their patients, and countless other Arizonans—particularly those who are pregnant or have capacity to become pregnant—will be subjected to the ongoing threat of irreparable harm and constitutional injury. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); 2-ER-237–38. Deprivation of "constitutional rights 'unquestionably constitutes irreparable injury.'" *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). And, where, as here, the constitutional infringement may influence pregnancy decisions and medical care, the irreparable harm is especially

intolerable. *See Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *see also* Br. of Nat. Advocates for Pregnant Women as *Amici Curiae* Supporting Plaintiffs-Appellees 19-23.

So long as the Interpretation Policy remains in effect, Plaintiffs will continue to be exposed to uncertain legal obligations and the threat of arbitrary prosecution and punishment. *See supra* pages 7-9; *Valle del Sol Inc.*, 732 F.3d at 1029 (finding that a credible threat of prosecution under statute challenged as void for vagueness established likelihood of irreparable harm). Additionally, given these uncertainties, Plaintiffs' patients and others will continue to be at risk of severely curtailed medical care and state regulation based on their pregnancy status, as the Interpretation Policy on its face mandates the potential subordination of their interests to those of a fertilized egg, embryo, or fetus they may carry inside them.

Moreover, Defendants' own words confirm that the Interpretation Policy poses a real threat to Plaintiffs, their patients, and their members—contrary to Defendants' assertions, *see* Defs.' Resp. Br. 55. Indeed, Defendants agree that the Interpretation Policy alters the meaning of countless Arizona statutes, including in the "many . . . examples Plaintiffs and their amici give," *id.* at 51 n.8. At the same time, Defendants never disavow the likelihood of prosecution in any of these scenarios or elucidate how the Interpretation Policy would operate clearly in any circumstance, let alone the many concrete scenarios highlighted by Plaintiffs and

their *amici*. *See id.* at 53. Accordingly, the Interpretation Policy deprives Plaintiffs, their patients, and their members of any notice about how to conform their behavior to the law and every day threatens them with prosecution based on the personal preferences of law enforcement.

While Plaintiffs, their patients, and their members continue to suffer at the hand of this unconstitutional law, an injunction of the Interpretation Policy pending litigation would impose no irreparable harm on Defendants. At base, Defendants' sole claim to irreparable harm is that an injunction would prevent them from enforcing a democratically-enacted statute. But, a state does not automatically face irreparable injury when enjoined from enforcing an unconstitutional law, because seeking to enforce an unconstitutional law is not a valid exercise of state power. *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 159-60 (1908); *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.").[4]

[4] Defendants rely on *Abbott v. Perez*, 138 S. Ct. 2305 (2018), to suggest the contrary, but there, the Supreme Court clearly articulated that an injunction does not produce irreparable harm if the "statute is unconstitutional[.]" *Id.* at 2324. Defendants' citation to *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), is equally misplaced. There, the government showed concrete, ongoing harm beyond lack of enforcement of the statute. *Id.* at 1303-04. Defendants have never suggested such harms exist with respect to the Interpretation Policy. Defs.' Resp. Br. 55-58.

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 (citation omitted). The balance of hardships tips sharply toward Plaintiffs.

CONCLUSION

For the reasons set forth above, and in Plaintiffs' opening brief, Plaintiffs respectfully request that this Court reverse the district court's denial of the preliminary injunction against the Interpretation Policy.

Date: February 8, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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