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ON NEXT PAGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Paul A. Isaacson, M.D., on behalf of himself and his patients, et al.,
Plaintiffs,
v.
Mark Brnovich, Attorney General of Arizona, in his official capacity; et al.,
Defendants.

Case No. 2:21-CV-1417-DLR

PLAINTIFFS' REPLY IN SUPPORT OF THEIR RENEWED MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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INTRODUCTION

Defendants offer this Court no reason to alter its prior well-supported and well-reasoned opinion preliminarily enjoining the Reason Scheme. Rather than contend with the Reason Scheme's pervasive vagueness, Defendants attempt to change the subject through their misinterpretation of the significance of the Supreme Court's grant, vacate, and remand order ("GVR Order"), *Brnovich v. Isaacson*, 142 S. Ct. 2893 (2022), and their misguided insistence that Plaintiffs' claims are unripe and must meet a standard for facial relief that neither the Supreme Court nor the Ninth Circuit commands in these circumstances. But Defendants' strained efforts to avoid discussion of the Reason Scheme's provisions and the myriad "real and concrete" circumstances presented by Plaintiffs, merely seek to hide what is plain: the Reason Scheme is unconstitutionally and indefensibly vague and perpetuates tremendous harms on Plaintiffs, Plaintiffs' members and patients, and others throughout Arizona.

ARGUMENT

I. Defendants Misrepresent the Significance of the Supreme Court's Grant, Vacate, and Remand Order

The GVR Order in this case has no determinative effect on Plaintiffs' claim that the Reason Scheme is unconstitutionally vague. Defendants' erroneous assertion that the Supreme Court "necessarily disagreed with this Court's conclusion that Plaintiffs are likely to succeed on their vagueness challenge" to the Reason Scheme, Resp. at 9 (ECF No. 127), is an overreaching interpretation that is unsupported by the record and precedent.

First, the Supreme Court's GVR Order merely indicates that *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), is "potentially relevant" to some of Plaintiffs' claims. *See Stutson v. United States*, 516 U.S. 193, 197 (1996) (finding that GVR orders do not represent any conclusion as to whether a new case is determinative, only that it is "potentially relevant"); *see also Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (A "GVR order . . . assists the court below by flagging a

particular issue that it does not appear to have fully considered [and] assists this Court by procuring the benefit of the lower court's insight *before we rule on the merits*." (emphasis added)). The Supreme Court has consistently noted that GVR orders are not a final determination on the merits and should not be treated as such by lower courts. *See, e.g.*, *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). Accordingly, a litigant may not use a GVR order as precedent or to support its position. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001).

Second, when considering the relevance of *Dobbs* to this case, as the GVR Order requires, it is clear that *Dobbs* did not defeat Plaintiffs' vagueness claim (as opposed to its undue burden claim). Vagueness is an entirely distinct and independent basis upon which to enjoin the Reason Scheme, separate and apart from Plaintiffs' undue burden claim. *See Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 951 (9th Cir. 1997) (explaining that vagueness and substantive due process are "independent bas[e]s" for concluding a statute is unconstitutional). In fact, there was no vagueness claim before the Court in *Dobbs*, and the *Dobbs* majority opinion said nothing about the vagueness doctrine at all, let alone issued any determinative guidance.

Third, Defendants' contention that Plaintiffs seek a mandatory, rather than prohibitory, injunction because the GVR Order allowed the Reason Scheme to go into effect is incorrect. "A mandatory injunction orders a responsible party to take action," while a "prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878–79 (9th Cir. 2009) (internal quotation marks omitted). The relevant status quo for a prohibitory injunction is that "between the parties pending a resolution of a case on the merits." *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012). The "'status quo' refers to the legally relevant relationship between the parties before the controversy arose." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014). Here, Plaintiffs seek to prohibit Defendants from enforcing the Reason Scheme, and the status quo relevant to the current

dispute is the regulatory regime governing abortion care *before* the Reason Scheme's enactment. Indeed, the Reason Scheme is before the Court in exactly the same posture as the Interpretation Policy was earlier this summer when Plaintiffs sought—and successfully obtained—an emergency prohibitory injunction of that law. *See* Emergency Mot. at 17 (ECF No. 107); Prelim. Inj. Order (ECF No. 121) ("Second PI Order").

Accordingly, the GVR Order casts no doubt on this Court's prior ruling on Plaintiffs' vagueness claim, nor did it alter the status quo and convert this request into one for a mandatory injunction.

II. Plaintiffs' Vagueness Challenge is Ripe

Under Ninth Circuit precedent, to establish the ripeness of their vagueness claim Plaintiffs must provide "concrete factual situation[s]." *Alaska Right to Life Pol. Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007). Plaintiffs have more than met this standard.

Plaintiffs have submitted undisputed evidence, *see* Pls.' Renewed Mot. at 6–8 (ECF No. 125) ("Pls.' Mot.")—already credited by this Court—that detail "concrete factual situation[s]" and "many realistic scenarios," *see* Prelim. Inj. Order at 11–15 (ECF No. 52) ("First PI Order"), in which they do not know how to conform their behavior to the law and reasonably fear arbitrary prosecution. In stark contrast, Defendants pretend this evidence does not exist. *See* Resp. at 19–20 (ECF No. 46) ("First Resp."); Resp. at 11.

Moreover, as the Court previously held when enjoining the Interpretation Policy, Defendants' "wait-and-see approach," *see* Resp. at 11, "is a mismatch in a case about vagueness, where the injury stems from the *uncertainty* surrounding how the law might apply." Second PI Order at 7–8; *see also Dream Defs. v. DeSantis*, 559 F. Supp. 3d 1238, 1265 (N.D. Fla. 2021) (whether a statute "is facially vague or overbroad requires no factual development; rather, it is a purely legal question and is, therefore, presumptively ripe for judicial review" (citing *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380 (11th Cir. 2019)); *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir.

1992) ("Further factual development will not assist our consideration of" a facial challenge where the "relevant facts are clear").

Furthermore, enjoining the Reason Scheme in no way "deprive[s] the federal courts of the ability to 'consider any limiting construction that a state court or enforcement agency has proffered.'" Resp. at 10. But, so far, Defendants—those charged with enforcing the law—have failed to offer this Court a *reasonable* limiting construction, *see* First PI Order at 14–16 & n.9; *see also* Resp. at 16 n.11 (urging severance without any explanation regarding what to sever, why severance would be permissible, or how it would remedy the Scheme's vagueness). *See also Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (a court may accept a narrowing construction where the statute is "readily susceptible" to it, but may not "rewrite a state law to conform it to constitutional requirements").

In short, Plaintiffs' vagueness claim against the Reason Scheme is plainly ripe.

III. *Salerno*'s "No Set of Circumstances" Test Does Not Apply

Defendants do not dispute that *Salerno*'s "no set of circumstances" rule for facial relief does not apply in "exceptional circumstances." *See* Resp. at 11–12 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). As this Court previously explained, the Ninth Circuit has held such "exceptional circumstances" exist where, as here, "a statute is 'plagued by such indeterminacy that [it] might be vague even as applied to the challengers.'" First PI Order at 10 (citing *Kashem v. Barr*, 941 F.3d 358, 377 (2019)); *see also* Pls.' Mot. at 6–8. To evade the Court's prior holding, Defendants contend the Court only found "'exceptional circumstances' because Plaintiffs also raised an 'intertwined' undue burden claim," thereby linking their vagueness and substantive due process arguments. Resp. at 12. This is incorrect. Rather, as the Court clearly explained, "the Criminal Liability, Affidavit, and Reporting Provisions are so plagued" by indeterminacy that they alone triggered the exception to *Salerno*. First PI Order at 10; *see also id.* (noting, in a separate paragraph, that the then-applicable undue burden analysis constituted an *additional* "exceptional circumstance"). As Plaintiffs explained in their

opening brief, *see* Pls.' Mot. at 6–8, and as Defendants do not even attempt to refute, *see infra* Section IV, the Reason Scheme is vague in innumerable scenarios as applied to Plaintiffs.

Additionally, Defendants concede that vague laws that chill constitutionally protected speech are also exempt from the "no set of circumstances" test. *See* Resp. at 12–13; *see also Kashem*, 941 F.3d at 375 n.9 (requirements governing facial challenges "are relaxed in the First Amendment context"). Such constitutionally protected speech is implicated here. "An integral component of the practice of medicine is the communication between a doctor and a patient." *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002). Courts have recognized that "[p]hysicians must be able to speak frankly and openly to patients," *id.*, because "[h]ealth-related information is more important than most topics." *Wollschlaeger v. Gov. of Fla.*, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc) (W. Pryor, J., concurring). Consequently, the "doctor-patient relationship provides more justification for free speech, not less." *Id.*

Defendants' argument that the Reason Scheme *only* "regulate[s] conduct—the performance of discriminatory abortions—not speech" is beside the point. Resp. at 12. As Plaintiffs have explained, the Scheme's penalties and vague provisions work together to inhibit constitutionally protected speech that occurs entirely apart from the abortion procedure and state-mandated informed consent process, "regardless of whether a medical procedure is ever sought, offered, or performed." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018); *see also* Pls.' Mot. at 9–10; First PI Order at 16 (referencing both the Scheme's requirement to report "known" violations and Arizona's accomplice and facilitation statutes). For example, due to the Scheme's vague and inconsistent terms, and fear of criminal liability under the statute, even physicians who do not provide abortions are afraid to talk to their patients about genetic testing and diagnoses. *See, e.g.*, Supplemental Declaration of Dr. Katherine B. Glaser, ECF No. 125-2 ("Suppl. Glaser Decl.") ¶ 6 (describing Arizona physicians "who have expressed significant concerns about how honest they can be with their patients when discussing

pregnancy options in the context of fetal anomalies"). Similarly, the Scheme inhibits conversations between physicians, to the detriment of patient care. *See, e.g.*, Supplemental Declaration of Dr. Paul A. Isaacson, ECF No. 125-2 ("Suppl. Isaacson Decl.") ¶¶ 5–6 (describing how the Scheme has forced Dr. Isaacson to no longer accept *any* referrals from maternal-fetal medicine specialists or genetic counselors regardless of the particular condition or the role that the diagnosis may have played in the patient's decision-making). The Reason Scheme's vagueness impinges on critical physician-patient and physician-physician communications in situations far beyond the provision of abortion care.

Thus, Plaintiffs are not required to satisfy *Salerno*'s "no set of circumstances" test both because, as the Court previously found, the Reason Scheme is "so plagued" by indeterminacy that it is vague even as applied to Plaintiffs, First PI Order at 10, and, separately, because it "abut[s] upon sensitive areas of basic First Amendment freedoms," *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

IV. Defendants Offer *No* Defense for the Reason Scheme's Vague Terms

When Defendants' efforts to evade the Reason Scheme's vague terms are appropriately cast aside, it is clear the Reason Scheme is unconstitutionally vague on its face. As already discussed, *supra* Section III, the fact that the Reason Scheme *may* be clear in one instance (which is all Defendants offer), Resp. at 13, is simply not sufficient to defeat facial relief. As the Supreme Court made clear in *Johnson v. United States*, "[the Court's] *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U.S. 591, 602 (2015). Defendants' citations to a series of cases from the 1970s articulating a *general* standard for facial relief, Resp. at 14—that cannot be assigned the meaning ascribed by Defendants in light of *Johnson*—do nothing to move the needle.

Further, Defendants' assertion that the Reason Scheme's application is "obvious" in "almost all cases" because only 191 individuals in 2019 (out of approximately 13,000 seeking abortion care in Arizona) disclosed on state-mandated forms that they sought

termination due to "fetal health/medical considerations" or "genetic risk/fetal abnormality," Resp. at 14, is a red herring.

To start, this argument skirts the reality that even in these instances of self-disclosure, the Reason Scheme's application is anything but clear. First PI Order at 13–15; Pls.' Mot. at 12–13. Under the Scheme, providers must ask their patients—on state-mandated forms—their patient's "reason for the abortion." A.R.S. § 36-2161(12). Patients then may check a box that indicates the abortion is sought "due to fetal health considerations, including being diagnosed with at least one of the following: (i) A lethal anomaly. (ii) A central nervous system anomaly. (iii) Other." A.R.S. § 36-2161(12)(c). Should patients check this box, whether the Reason Scheme prohibits care is still unclear. Does the condition constitute a "genetic abnormality" under the Scheme? Must the "fetal health consideration" be the "sole reason" for the patient seeking care? Or, are the Scheme's prohibitions triggered if the "fetal health consideration" played *any* role in the patient's decision-making? Need the condition be a but-for cause? A proximate cause? Regardless, under any of these interpretations, providers are still left to decipher the subjective motivations of their patients. Furthermore, as this Court already correctly recognized, the Reason Scheme implicates care far beyond those who make these disclosures. First PI Order at 13–14.

In the end, Defendants offer no clarification of the Reason Scheme's vague terms. Nowhere do Defendants clarify the Scheme's "squishy" definition of "genetic abnormality." First PI Order at 14. Instead—without any support or rationale from the statutory text or otherwise[1]—Defendants assert that where there is "considerable

[1] Notably, in contrast to the Reason Scheme's definition of "medical emergency," the definition of "lethal fetal condition" is not defined in terms of a physician's "good faith" medical judgment. *Compare* A.R.S. § 36-2158 (defining a "lethal fetal condition" as one "that is diagnosed before birth and that will result, with reasonable certainty, in the death of the unborn child within three months after birth), *with id.* § 36-2151 (defining "medical emergency" as "a condition that, *on the basis of the physician's good faith clinical judgment*, so complicates the medical condition of the pregnant woman . . ." (emphasis added)).

uncertainty" regarding "whether a fetal condition exists, has a genetic cause, or will result in death within three months after birth," the Scheme simply does not apply. Resp. at 15 (quoting First PI Order at 12, 14).

Likewise, rather than address the Reason Scheme's multiple motivation standards, Defendants repeatedly argue that the Reason Scheme only prohibits abortion when a "genetic abnormality" is the "sole" reason the patient seeks care. *See* Resp. at 15 ("The [Reason Scheme does] not prohibit an abortion when multiple reasons are expressed."); *id.* at 16 ("the [Reason Scheme applies] only when the provider in fact knows that the abortion is being sought solely because of a genetic abnormality"). But this ignores the Reason Scheme's plain language: as the Court has appropriately recognized, "the word solely does not appear" in several of the Reason Scheme's provisions, and reading it into those provisions is unreasonable. First PI Order at 15 & n.9.

Nor do Defendants anywhere grapple with the inherent subjectivity of assessing patients' motivation for seeking abortion care, already recognized by this Court. First PI Order at 14. Instead, Defendants attempt to obfuscate the Scheme's subjectivity by pretending the Reason Scheme only imposes liability when a patient "directly informs her provider that a fetal genetic abnormality is her sole motive." First PI Order at 15; Resp. at 13–16. But, again, as the Court already found, the Reason Scheme's language does not support such a narrow reading both because 1) the Scheme seemingly threatens liability even where a "genetic abnormality" is not the "sole" reason, *see supra*; and 2) a provider may be deemed to "know" a patient's reason absent such disclosure. First PI Order at 15. While theoretically such a narrow law could provide an objective, "true-or-false determination," to guide its application, Resp. at 16 (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)), that is not the law before this Court. *See* First PI Order at 15 (holding that "[i]f Arizona wanted liability to attach only when the patient directly informs her provider that a fetal genetic abnormality is her sole motive . . . it could and should have written that narrower language into the law").

Rather, as the Court already found, under the Scheme's actual language, providers must parse "the subjective motivations of another individual, even if not directly expressed" to determine whether the contemplated care is prohibited. First PI Order at 14. This is particularly problematic here because "the decision to terminate a pregnancy is a complex one, and often is motivated by a variety of considerations, some of which are inextricably intertwined with the detection of a fetal genetic abnormality." *Id.* Imposing severe criminal and civil liability based on such a "subjective judgment"—very much akin to "whether conduct is 'annoying' or 'indecent'"—is plainly unconstitutional. *Williams*, 553 U.S. at 306.

This is precisely why the Scheme's infirmities cannot be resolved "by the requirement of proof beyond a reasonable doubt," Resp. at 16 (quoting *Williams*, 553 U.S. at 305–06): the difficulty here stems from "the indeterminacy of precisely what . . . fact" must be proved. *Williams*, 553 U.S. at 306. It is also why the Scheme's knowledge requirement does not alleviate vagueness concerns, as Defendants contend. Resp. at 16. Knowledge requirements do not (and cannot) alleviate vagueness concerns when, as here, they modify inherently vague descriptions of what activity is proscribed. *See Colautti v. Franklin*, 439 U.S. 379, 395–97 & n.13 (1979), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (quoting *Screws v. United States*, 325 U.S. 91, 101–02 (1945) (plurality opinion)); *see also R.I. Med. Soc'y v. Whitehouse*, 66 F. Supp. 2d 288, 310–12 (D.R.I. 1999) (scienter requirement did not cure vagueness where it modified vague "legal standard"), *aff'd*, 239 F.3d 104 (1st Cir. 2001).

In short, Defendants' Response offers the Court no reason to doubt its prior holding and only confirms that the Reason Scheme is likely facially unconstitutionally vague.

V. Plaintiffs Meet All Other Factors for Preliminary Relief

As articulated *supra* Sections II-IV, and contrary to Defendants' assertions, Resp. at 17, Plaintiffs are likely to establish that they are currently suffering constitutional injury that is *per se* irreparable harm. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir.

2012). Moreover, Defendants do not even attempt to challenge Plaintiffs' other sources of irreparable harm, which include the chilling of constitutionally protected speech and the denial of time-sensitive abortion care, *see* Pls.' Mot. at 15–17.

At the same time, Defendants fail to show that Arizona will suffer any irreparable harm if the Reason Scheme is preliminarily enjoined. 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). Furthermore, Arizona offers no evidence that "the safety and the health of the people" will be threatened, Resp. at 17, if the status quo is preserved pending litigation on the merits. As the Court already concluded, "the evidence raises doubt about whether" the "coercive health care practices" cited by Defendants, *see* Resp. at 3–5, "are [a] problem in Arizona." First PI Order at 27. Moreover, Arizona remains free to advance its stated anti-discrimination interests in myriad other *constitutional* ways while the litigation is pending. *See* First PI Order at 27; *see also Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2376 (noting that State was free to inform women of its agenda "with a public-information campaign"). And, indeed, contrary to Defendants' claim, it is "always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002. Accordingly, the balance of hardships and public interest strongly favor Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a preliminary injunction against the Reason Scheme and waive the bond requirement under Federal Rule of Civil Procedure 65(c).

Dated: September 23, 2022

By: /s/ Jessica Leah Sklarsky

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing. All counsel of record are registrants and are therefore served via this filing and transmittal.

/s/ Jessica Leah Sklarsky