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22 PAGE

23 **IN THE UNITED STATES DISTRICT COURT**  
24 **FOR THE DISTRICT OF ARIZONA**

25 Paul A. Isaacson, M.D., on behalf of  
26 himself and his patients, et al.,

27 Plaintiffs,

28 v.

Mark Brnovich, Attorney General of  
Arizona, in his official capacity; et al.,

Defendants.

Case No. 2:21-CV-01417-DLR

**PLAINTIFFS' OPPOSITION TO  
STATE DEFENDANTS' EMERGENCY  
MOTION TO STAY A PORTION OF  
THE COURT'S SEPTEMBER 28, 2021  
PARTIAL PRELIMINARY  
INJUNCTION PENDING APPEAL**

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1 Defendants have not met their heavy burden to justify a stay of this Court's  
2 preliminary injunction order. Following full briefing and two-plus hours of oral argument,  
3 this Court issued a detailed and well-reasoned explanation of its decision to preliminarily  
4 enjoin Defendants' Reason Regulation Scheme. ECF No. 52. The Court found the Reason  
5 Regulations unconstitutional on multiple grounds: both because they violate substantive  
6 due process by placing an undue burden on the right to pre-viability abortion *and* because  
7 they are unconstitutionally vague. Unsatisfied with this result, Defendants have lodged a  
8 last-ditch motion seeking to lift the injunction with respect to one provision of their scheme,  
9 A.R.S. § 13-3603.02(A)(2). Defendants do not explain why they seek a stay only as to that  
10 one provision of the Reason Regulation Scheme, which is unconstitutional for the same  
11 reasons as the rest. Indeed, Defendants have noticed an appeal that covers the entire  
12 injunction, ECF No. 56, but nonetheless accept that all other aspects of the Reason  
13 Regulation Scheme can remain enjoined pending appeal. Defendants have pointed to no  
14 aspect of Section 13-1603.02(A)(2) that warrants special treatment, and indeed there is  
15 none.

16 Defendants have failed to show any flaw in the Court's decision—much less a basis  
17 to justify the extraordinary relief of a stay. First, Defendants have not shown that they are  
18 likely to succeed on appeal. To secure a stay, Defendants would have to show that they are  
19 likely to succeed in reversing both the Court's holdings on the vagueness claims *and* on  
20 the substantive due process claims. Defendants' motion raises no serious doubt with respect  
21 to either. At best, their motion mischaracterizes relevant precedent and ignores extensive  
22 evidence submitted by Plaintiffs—all of which, along with Defendants' own evidence, only  
23 supports the Court's decision to enjoin the Reason Regulations.

24 Second, the balance of harms overwhelmingly favors leaving the injunction in place.  
25 A stay cannot be granted unless Defendants establish that they will face likely and actual  
26 irreparable harm during the pendency of an appeal. Defendants have not come close to  
27 meeting this high standard, and indeed have not articulated any concrete harm that they  
28 will suffer at all—*i.e.*, if Section 13-1603(A)(2) remains enjoined pending appeal, just like

1 the rest of the Reason Regulation Scheme. And, to the extent a state may have an abstract  
2 interest in implementing its laws, it is well-settled that any such interest must be balanced  
3 against competing harms to Plaintiffs and the public interest. As this Court already found,  
4 the Reason Regulations would cause immense harm to people across Arizona, including  
5 those who would lose access to time-sensitive and constitutionally-protected abortion care,  
6 and health care providers who would face uncertain legal obligations and arbitrary  
7 prosecution. The risk of those harms is now even starker based on Defendants’ motion to  
8 stay—since the State’s fervor in pursuing implementation of this law further evidences its  
9 intent to prosecute Plaintiffs for the provision of constitutionally-protected healthcare.

10 Accordingly, Defendants’ Emergency Motion to Stay should be denied.

### 11 **I. LEGAL STANDARD**

12 A “stay is an ‘intrusion into the ordinary processes of administration and judicial  
13 review’” and “‘an exercise of judicial discretion.’” *Nken v. Holder*, 556 U.S. 418, 427, 433  
14 (2009) (citations omitted). The movant bears the burden of convincing the Court that  
15 circumstances warrant such unusual intervention. *Id.* at 434. In determining whether to  
16 grant a stay, the Court considers:

17 (1) whether the stay applicant has made a strong showing that he is likely to  
18 succeed on the merits; (2) whether the applicant will be irreparably injured  
19 absent a stay; (3) whether the issuance of the stay will substantially injure the  
20 other parties interested in the proceeding; and (4) where the public interest  
lies.

21 *Id.* (internal quotation and citation omitted).

22 The first two factors “are the most critical.” *Id.* at 434. Moreover, a “showing of  
23 irreparable injury is an absolute prerequisite” for a stay. *Ahlman v. Barnes*, No. 20-55568,  
24 2020 WL 3547960, at \*2 (9th Cir. June 17, 2020); *Al Otro Lado v. Wolf*, 952 F.3d 999,  
25 1007 (9th Cir. 2020) (a stay applicant “must show that an irreparable injury is the more  
26 probable or likely outcome”). But, a “stay is not a matter of right, even if irreparable injury  
27 might otherwise result.” *Id.* at 1006.  
28

## 1 II. DEFENDANTS' APPEAL IS UNLIKELY TO SUCCEED ON THE MERITS

2 This Court correctly held that “the Reason Regulations [] are likely  
3 unconstitutional” both because they are impermissibly vague and because they “place a  
4 substantial obstacle in the paths of women seeking to terminate pre-viability pregnancies  
5 because of a fetal genetic abnormality.” Order on Motion for Preliminary Injunction  
6 (“Order”) at 28-29. Contrary to Defendants’ assertions, Defs.’ Mot. for Stay at 3-4 (“Defs.’  
7 Mot.”), the Court’s decision is aligned with binding Supreme Court precedent *and* the  
8 weight of authority from courts that have addressed similar laws that restrict abortion based  
9 on a patient’s reason. To the extent that “[c]ourts across the country have grappled with  
10 statutes similar to those challenged here,” *id.* at 3, any objective view of that case law only  
11 confirms that Plaintiffs’ claims are likely to succeed.

12 First, Defendants are quick to say that “the Ninth Circuit has not yet addressed a  
13 law of this nature.” *Id.* But, that ignores what this Court has correctly recognized:  
14 Defendants’ positions are “incompatible with both existing Supreme Court and Ninth  
15 Circuit precedent.” Order at 17 n.11. As the Court explained, “The Supreme Court clearly  
16 held in *Casey* that ‘a State may not prohibit *any* woman from making the ultimate decision  
17 to terminate her pregnancy before viability’” and “[a]ny woman means any woman, not  
18 any woman (except those who wish to terminate a pre-viability pregnancy for a reason the  
19 government finds objectionable).” *Id.* (quoting *Planned Parenthood of Southeastern Pa. v.*  
20 *Casey*, 505 U.S. 833, 879 (1992)). The Court further recognized that the Ninth Circuit  
21 confirmed this principle in *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013) (*Isaacson I*),  
22 when it “held unequivocally that a state may not proscribe abortion pre-viability.” *Id.*  
23 (citing *Isaacson I*, 716 F.3d at 1226); *see also Isaacson I*, 716 F.3d at 1228 (noting  
24 “significanc[e]” of the fact that the law created no exception for “abortions in cases of fetal  
25 anomaly.”).

26 Second, the *only* Circuit court to consider a vagueness challenge levied against a  
27 similar abortion reason regulation held it unconstitutionally vague. *See Memphis Ctr. for*  
28 *Reprod. Health, et al. v. Slatery*, No. 20-5969, 2021 WL 4127691, at \*14-17 (6th Cir. Sept.



1 10, 2021). For similar reasons, this Court was correct to decide that Plaintiffs’ vagueness  
2 claims are likely to succeed here.

3 Finally, multiple Circuit courts have enjoined similar reason regulations on  
4 substantive due process grounds. This Court’s Order is wholly consistent with that  
5 precedent, which makes plain that states cannot deprive people of their constitutional right  
6 to pre-viability abortion by eliminating that right (or else regulating it out of existence)  
7 because of the patient’s reason. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of*  
8 *Ind. State Dep’t of Health*, 888 F.3d 300, 307 (7th Cir. 2018), *reversed in part on other*  
9 *grounds (“PPINK”)*<sup>1</sup>; *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 690  
10 (8th Cir. 2021). Rather than address these on-point cases, Defendants rely only on the lone  
11 case in which a reason regulation was upheld, Defs.’ Mot. at 3 (citing *Preterm-Cleveland*  
12 *v. McCloud*, 994 F.3d 512, 516 (6th Cir. 2021) (en banc),<sup>2</sup> but tellingly provide no further  
13 context about that case. This is because, as explained in Plaintiffs’ preliminary injunction  
14 briefing, *Preterm* dealt with a much different law and record, in addition to making  
15 numerous unfounded assumptions. *See* ECF 48 at 2 n.2. By contrast, as this Court has  
16 already recognized, Order at 17 n.11, the Reason Regulations at issue here are far more  
17 similar to the Arkansas and Indiana laws that were enjoined by the Eighth and Seventh  
18 Circuits, and clearly support the Court’s order in this case.

19  
20  
21 <sup>1</sup> Following the Seventh Circuit’s decision in *PPINK*, the Supreme Court denied a petition  
22 for certiorari seeking to reinstate Indiana’s law barring knowing provision of abortion  
23 based on a patient’s prohibited reason. *See Box v. PPINK*, 139 S. Ct. 1780 (2019).  
24 Defendants’ reliance on *Box* (and in particular on Justice Thomas’s dissent in that case),  
25 Defs.’ Mot. at 4, is thus especially misplaced—since that case only highlights that the  
26 Supreme Court has expressly declined to consider this very issue and thereby chose to let  
27 the decision striking down that similar statute stand.

28 <sup>2</sup> Defendants also refer to pending matters at the Supreme Court and the Eighth Circuit,  
29 Defs.’ Mot. at 4, but that does not help them. Principles of *stare decisis* make clear that  
30 courts are bound by existing precedent, not some hypothetical outcome based on what  
31 courts might do in the future. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting  
32 *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)) (only the  
33 Supreme “Court [has] the prerogative of overruling its own decisions.”).

1 In sum, because this Court’s order is consistent with the overwhelming weight of  
2 authority addressing similar laws and related issues, and is further supported by the record  
3 evidence presented with the preliminary injunction briefing (*see infra*), Defendants are  
4 unlikely to succeed on the merits of their appeal. Defendants have offered no credible  
5 reason why this Court should have departed from that precedent, much less why an  
6 “intrusion into the ordinary processes of administration and judicial review” is justified  
7 under these circumstances. *Nken*, 556 U.S. at 427.

8 **A. The Court Correctly Determined that Plaintiffs are Likely to Succeed**  
9 **on their Vagueness Challenge**

10 1. Plaintiffs’ Vagueness Claims are Ripe

11 The Court correctly determined that Plaintiffs’ vagueness challenge is ripe, and  
12 nothing in Defendants’ motion calls that into question. While Defendants attempt to make  
13 much about the “pre-enforcement nature” of this case, Defs.’ Mot. at 9, precedent makes  
14 clear that relief may be appropriate when “no state prosecution is pending and a federal  
15 plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute,  
16 whether an attack is made on the constitutionality of the statute on its face or as applied.”  
17 *Steffel v. Thompson*, 415 U.S. 452, 475 (1974); *see also California Pro-Life Council, Inc.*  
18 *v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (acknowledging “years of Ninth Circuit  
19 and Supreme Court precedent recognizing the validity of pre-enforcement challenges to  
20 statutes infringing upon constitutional rights”).<sup>3</sup>

21 The Supreme Court’s decision in *Doe v. Bolton*, 401 U.S. 179 (1973) is instructive.  
22 In that case, abortion providers challenged Georgia’s criminal abortion statutes on  
23 constitutional grounds, including vagueness. The Court held that the physicians’ claims  
24 were properly before the Court “despite the fact that the record does not disclose that any  
25 one of them has been prosecuted, or threatened with prosecution, for violation of the State’s  
26 abortion statutes,” because the providers “should not be required to await and undergo a

27 \_\_\_\_\_  
28 <sup>3</sup> Tellingly, Defendants’ motion does not dispute that Plaintiffs’ substantive due process  
claims are ripe, and Plaintiffs’ vagueness claims are ripe for the same reasons.

1 criminal prosecution as the sole means of seeking relief.” *Id.* at 188; *see also Planned*  
2 *Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022 (9th Cir.), *opinion amended on denial*  
3 *of reh’g*, 193 F.3d 1042 (9th Cir. 1999) (allowing facial challenge to abortion statute). The  
4 same is true here.<sup>4</sup>

5 2. The Reason Regulations are Unconstitutionally Vague

6 Defendants fail to demonstrate any flaw in this Court’s holding that the Reason  
7 Regulations are likely to be found unconstitutionally vague—much less a reason that the  
8 decision would be reversed on appeal. As the Court explained in great detail, the challenged  
9 law is impermissibly vague because it: (1) “does not offer workable guidance about which  
10 fetal conditions bring abortion care within the scope of these provisions,” (2) does not make  
11 clear “at what point in the multidimensional screening and diagnostic process a doctor can  
12 be deemed to be ‘aware’ or ‘believe’ that a fetal genetic [condition] exists,” much less “[a]t  
13 what point can a doctor be deemed to ‘know’ or ‘believe’ what is in the mind of a patient,”  
14 and (3) uses “solely because of” in a way that does not account for the “reality that the  
15 decision to terminate a pregnancy is a complex one, and often is motivated by a variety of  
16 considerations, some of which are inextricably intertwined with the detection of a fetal  
17 genetic [condition].” Order at 11-14. Nothing in Defendants’ motion seriously calls these  
18 findings into question.

19 Defendants mount three arguments against this Court’s sound reasoning—none of  
20 which have merit. First, Defendants take issue with the “great weight” placed by this Court  
21 on the Reason Regulations’ lack of “workable guidance” about which fetal conditions  
22 trigger the law’s prohibition and “what amounts to a genetic abnormality.” Defs.’ Mot. at

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23  
24 <sup>4</sup> Defendants’ motion also takes issue with the fact that the Court “discusses” *Guerrero v.*  
25 *Whitaker*, 908 F.3d 541 (9th Cir. 2019) and *Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019).  
26 Defs.’ Mot. at 10. But, those cases do nothing to alter the well-settled principle that pre-  
27 enforcement challenges are proper in cases like this one. On the contrary, those cases  
28 merely build on that principle, by clarifying that plaintiffs may bring facial challenges  
under “exceptional circumstances” like those the Court found present here. Order at 10;  
*see also Johnson v. U.S.*, 576 U.S. 591 (2015); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).  
Defendants’ motion does not discuss, much less dispute, the Court’s finding that this case  
presents exceptional circumstances warranting facial relief. *See* Order at 10.

1 10 (quoting Order at 11, 13). But, Defendants’ only support for their disagreement on this  
2 point is a single conclusory statement—that they believe the statute’s definition of “genetic  
3 abnormality” [] allows doctors to apply the facts of each situation.” *Id.* at 11. This sentence  
4 merely assumes what Defendants already set out (and failed) to prove, and it is no match  
5 for this Court’s thoughtful analysis of this issue. The Court reviewed the text of the statute,  
6 including its definition of and exceptions to the term “genetic abnormality,” as well as the  
7 detailed testimony submitted by Plaintiffs about the inherent complexities and limitations  
8 of genetic screening and diagnosis (which Defendants have never attempted to dispute or  
9 rebut).<sup>5</sup> Order at 12-13. The Court also found that “[t]he evidence shows . . . that there can  
10 be considerable uncertainty as to whether a fetal condition exists, has a genetic cause, or  
11 will result in death within three months after birth.” *Id.* at 12. Under these circumstances,  
12 the Court aptly determined that the Reason Regulations “fail[] to give ordinary people fair  
13 notice of the conduct it punishes, or [are] so standardless that [they] invite[] arbitrary  
14 enforcement.” Defs.’ Mot. at 11 (quoting *Johnson*, 576, U.S. at 595); *see also Kolender v.*  
15 *Lawsom*, 461 U.S. 352, 353 (1983); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979).<sup>6</sup>

16 Second, there is no merit to Defendants’ argument that the Court ignored “well-  
17 established precedent” by finding that the Reason Regulations’ use of “knowingly”  
18 contributes to, rather than alleviates, vagueness concerns. Defs.’ Mot. at 11. Tellingly,

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19 <sup>5</sup> It is equally telling that Defendants only vaguely reference the law’s “one exception” for  
20 lethal fetal conditions, Defs.’ Mot. at 11, but otherwise conveniently omit from their  
21 discussion the Court’s finding that “there can be considerable uncertainty as to how long a  
22 child born with a genetic [condition] may live, making it difficult for a doctor to know  
23 whether a particular fetal genetic abnormality or condition qualifies as a ‘lethal fetal  
24 condition’ under Arizona law.” Order at 13.

24 <sup>6</sup> Defendants also seem to misapprehend what legal standard applies to this issue. Relying  
25 on *Guerrero*, 908 F.3d at 545, they assert that “a statute is not unconstitutionally vague just  
26 because it ‘provides an uncertain standard to be applied to a wide range of fact-specific  
27 scenarios.’” Defs.’ Motion at 10-11 (quoting). But, this misrepresents the holding in  
28 *Guerrero*—which was about when a facial challenge to a statute is appropriate on  
vagueness grounds, not the substantive standard for determining whether a law is vague in  
the first place. In any event, this Court already provided a careful analysis of *Guerrero* and  
correctly found that a facial challenge is appropriate here. *See supra* n.5.

1 Defendants cite no case law for this point.<sup>7</sup> Instead, Defendants merely bemoan the Court’s  
2 “characterization” of the challenged statute—specifically the Court’s finding that “the  
3 distinct wording of this law requires that a doctor know the motivations underlying the  
4 action of another person to avoid prosecution, while simultaneously evaluating whether the  
5 decision is because of that subjective knowledge.” *Id.* at 11 (quoting Order at 13). The  
6 Court’s finding was consistent with the record and with the applicable law, as confirmed  
7 by the fact that the only other Circuit to consider a vagueness challenge against a similar  
8 law struck it down for the same reason. Order at 13 (citing *Memphis Ctr. for Reprod.*  
9 *Health*, 2021 WL 4127691, at \*14).

10 By contrast, Defendants’ assertion that, under the Reason Regulations, “[a] doctor  
11 is not required to *know* anything to avoid prosecution” Defs.’ Mot. at 11 (emphasis in  
12 original), is incorrect and misses the point. A doctor must indeed try to rule out possession  
13 of any potentially incriminating information—*i.e.*, the patient’s motivations for seeking an  
14 abortion—under a subjective, undiscernible standard. As Defendants concede, prosecution  
15 “would [] be triggered if the doctor *knew* that a woman was seeking an abortion” for the  
16 prohibited reason. *Id.* That concession goes straight to the heart of the matter—the Reason  
17 Regulations are unconstitutionally vague precisely because doctors are unable to determine  
18 whether they meet the requisite level of knowledge to trigger that prosecution. As the Court  
19 explained, “[g]iven Arizona’s broad definition of knowledge and the vagueness of the  
20 Reason Regulations . . . [t]he evidence, along with common sense, [led] the Court to find

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22 <sup>7</sup> While Defendants do not specify what “precedent” they could be alluding to, it is  
23 significant that the Court considered and applied Supreme Court precedent on this issue.  
24 The Court correctly found that, while a scienter requirement may “*ordinarily* alleviate[]  
25 vagueness concerns” under some circumstances, Order at 13 (citing *Gonzalez v. Carhart*,  
26 550 U.S. 124, 149 (2006)) (emphasis added), no such clarity is provided by the “knowing”  
27 element of the statute at issue here. Unlike in this case, the law in *Gonzales* included “clear  
28 guidelines as to prohibited conduct” and “objective criteria” for enforcement—and the  
Court correctly found that neither are present here. *Id.* at 14. Thus, the Court aptly  
concluded that “[t]ogether, the squishy ‘genetic abnormality’ threshold and expansive  
scienter render [the Reason Regulations] vaguer than the challenged law in *Gonzales*.” *Id.*

1 it likely that many other providers in Arizona will be chilled from performing abortions  
2 *whenever they have information from which they might infer that a fetal genetic*  
3 *abnormality is a reason why a patient is seeking to terminate a pregnancy.”* Order at 24  
4 (emphasis added). Such chilling of constitutionally-protected conduct goes to the very core  
5 of what the vagueness doctrine is designed to prevent. *See Village of Hoffman Estates v.*  
6 *Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (“[P]erhaps the most important factor  
7 affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit  
8 the exercise of constitutionally protected rights.”).

9 Third, Defendants wrongly insist that the Reason Regulations cannot be  
10 unconstitutionally vague because it will be “obvious” that they do not apply in abortion  
11 cases that do not implicate fetal diagnosis. Defs.’ Mot. at 11. This is a red herring. It is  
12 completely beside the point that the statute’s application would be clear in situations where  
13 it is wholly irrelevant. *See Casey*, 505 U.S. at 894 (“The proper focus of constitutional  
14 inquiry is the group for whom the law is a restriction, not the group for whom the law is  
15 irrelevant.”).

16 Finally, to the extent Defendants insist the Reason Regulations are so clear that they  
17 will only impact the “small” number of cases in which patients directly report a fetal  
18 diagnosis as their reason, that is contrary to the record. The evidence and law clearly  
19 support the Court’s determination that the Reason Regulations’ vagueness will force  
20 providers to withhold constitutionally-protected care in a wide array of cases.<sup>8</sup> As the Court  
21 explained, Defendants’ “position is irreconcilable with Arizona’s much broader definition  
22 of knowledge, and with the reality that knowledge can be and most often is proven through  
23 circumstantial, rather than direct, evidence.” Order at 15. And the Court further recognized  
24 that provider declarants “describe[d] many realistic scenarios in which surrounding  
25 circumstances could provide evidence of a provider’s ‘knowledge’ that a patient sought an

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26 <sup>8</sup> While the law’s vagueness will force providers to withhold abortion care based on  
27 circumstantial evidence in many cases, it is also notable that the number of patients who  
28 directly report fetal diagnoses as their reason is actually not “small,” despite Defendants’  
repeated attempts to characterize it that way. *See infra* Part II.B.

1 abortion because of a fetal genetic abnormality—likely sufficient to establish a *prima facie*  
2 case for criminal or civil liability—even though a patient did not explicitly state that was  
3 her motive.” *Id.* By contrast, Defendants have not—and cannot—cite any evidence in  
4 support of their untenable position.<sup>9</sup>

5 **B. The Court Correctly Determined that Plaintiffs are Likely to Succeed**  
6 **on their Substantive Due Process Challenge**

7 The Court correctly determined that Plaintiffs are likely to succeed on their claim  
8 that the Reason Regulations violate the right to pre-viability abortion. Having concluded  
9 that the Reason Regulations “regulate the mode and manner of abortion by requiring that  
10 a woman seeking an abortion because of a fetal abnormality obtain the abortion from a  
11 provider who is unaware of her motive,” the Court turned to the “determinative question,”  
12 specifically “whether the Reason Regulations likely will have the effect of unduly  
13 burdening this right.” Order at 18. The Court applied this standard based on a detailed  
14 survey and analysis of fifty years of precedent. *Id.* at 18-22.

15 Defendants do not dispute the Court’s decision to apply the undue burden standard  
16 in this case—indeed, it is Defendants who pushed for the undue burden standard from the  
17 outset. *See* ECF 46 at 13.<sup>10</sup> Instead, Defendants’ motion boils down to their dissatisfaction

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18 <sup>9</sup> Defendants’ motion does not address or dispute the Court’s additional finding that the  
19 language “solely because of”—as used in the provision they ask the Court to reinstate—  
20 renders the law unconstitutionally vague. This perhaps is because, as the Court explained,  
21 the statute’s “squishy ‘genetic abnormality’ threshold and expansive scienter” alone are  
22 enough to render it unlawfully vague, although that problem also “is *exacerbated* by the  
23 reality that the decision to terminate a pregnancy is a complex one, and often is motivated  
24 by a variety of considerations, some of which are *inextricably intertwined* with the  
25 detection of a fetal genetic abnormality.” Order at 14 (emphasis added). Moreover,  
26 Defendants themselves have proved unable to identify what “solely” means for purposes  
27 of this statute, as evidenced by their treatment of “because of” and “solely because of” as  
28 interchangeable throughout the Reason Regulation Scheme. *See* Order at 14-15. For all the  
same reasons, Section 13-3602(A) and (A)(2) are just as vague as the rest of the Reason  
Regulation Scheme—notwithstanding that Defendants without explanation ask the Court  
to stay the injunction only as to that one provision.

<sup>10</sup> While it is not entirely clear based on Defendants’ motion, they seem to take issue with  
the fact that Plaintiffs’ preliminary injunction briefing did not primarily frame their claim  
under the undue burden standard. Defs.’ Mot. at 6-7. But, Defendants are incorrect to

1 with the Court’s assessment of the evidence at this preliminary stage of the case. But, while  
2 Defendants contend that “Plaintiffs did not satisfy their heavy burden to prevail under the  
3 undue burden standard,” Defs.’ Mot. at 6, they fail to recognize that “[d]ecisions on  
4 preliminary injunctions require the district court to assess the plaintiff’s *likelihood* of  
5 success on the merits, not whether the plaintiff has *actually succeeded* on the merits.” *S.*  
6 *Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2003) (emphasis  
7 added). In other words, the District Court “need[ed] only [to] find probabilities that the  
8 necessary facts can be proved.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d  
9 1415, 1422-23 (9th Cir. 1984). The evidence here, and the Court’s order, clearly meet that  
10 standard. None of Defendants’ complaints undermine this Court’s well-reasoned  
11 evaluation of Plaintiffs’ substantive due process claims at this preliminary stage, much less  
12 satisfy their heavy burden to justify the extraordinary relief of staying the injunction.

13 First, Defendants take issue with the Court’s application of the “large fraction test,”  
14 but lack any basis to do so. Defendants do not, and cannot, dispute that an abortion  
15 restriction is unlawful where it imposes a substantial obstacle for a large fraction of those  
16 patients *to whom it is relevant*. See Defs.’ Mot. at 6; Order at 22; *Casey*, 505 U.S. at 888-  
17 95; *June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2132 (2020); *Whole Woman’s*  
18 *Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016). The Court sensibly determined that  
19 “the denominator” for the purpose of the “large fraction” standard “consists of women who  
20 wish to terminate a pre-viability pregnancy because of a fetal genetic abnormality” as  
21 “[t]hese are the women to whom the Reason Regulations will operate as an actual, rather  
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23 suggest that Plaintiffs “did not assert an undue burden claim” at all. *Id.* at 6. On the  
24 contrary, Plaintiffs explained why their claims would succeed under *either* standard. ECF  
25 10 at 11 n.6. And, at oral argument, Plaintiffs’ counsel provided a detailed assessment of  
26 the benefits and burdens at stake, upon the Court’s request. Oral Argument Tr. at 19-27. In  
27 any event, both the Supreme Court and the Ninth Circuit have made clear that when “an  
28 issue or claim is properly before the court, the court is not limited to the particular legal  
theories advanced by the parties, but rather retains the independent power to identify and  
apply the proper construction of governing law.” *Kamen v. Kemper Fin. Servs., Inc.*, 500  
U.S. 90, 99 (1991); *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013). The Court  
clearly acted within its power to apply the undue burden standard here.



1 than irrelevant, restriction.” Order at 22; *see also Isaacson I*, 716 F.3d at 1228 (quoting  
2 *Casey*, 505 U.S. at 894). Yet, Defendants inexplicably insist that “the relevant group of  
3 women are those who know that their unborn child has a genetic abnormality.” Defs.’ Mot.  
4 at 6. Defendants offer no explanation as to why this *abortion* regulation would be relevant  
5 to any pregnant person who has no desire to terminate their pregnancy, and indeed there is  
6 none. Defendants’ argument defies common sense, finds no support in case law, and cannot  
7 be credited.

8 Second, Defendants claim that “the record is completely devoid of how many  
9 women fall into that category” of patients who seek abortion care due to a fetal diagnosis.  
10 Defs.’ Mot. at 6. That is demonstrably false. Defendants’ *own* evidence shows at least 191  
11 Arizona patients identified fetal health/medical considerations as their primary reason *in a*  
12 *single year*. *See* Order at 22.<sup>11</sup> The Court also relied on, *inter alia*:

- 13 • evidence in the record showing that very few Arizona providers offer abortion  
14 at later stages of pregnancy, when fetal conditions are likely to be detected, *id.*  
15 at 23-24;
- 16 • Arizona’s requirement that providers collect and report information about  
17 abortions, including the “reason for the abortion,” which will drive some patients  
18 to disclose their prohibited reason, *id.* at 24;
- 19 • evidence showing that patients’ circumstances often make it difficult or  
20 impossible for providers to avoid the inference that they are seeking an abortion  
21 because of a fetal diagnosis, *id.*; and
- 22 • evidence showing that providers will be chilled from providing abortion care  
23 throughout Arizona, including because the state’s “broad definition of  
24 knowledge and the vagueness of the Reason Regulations’ criminal and civil  
25 liability provisions” will force the Plaintiff providers to “stop performing  
26 abortions out of fear of prosecution if the Reason Regulations take effect.” *Id.*<sup>12</sup>

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25 <sup>11</sup> Defendants attempt to dismiss this statistic by stating that 191 pregnant patients is an  
26 “exceedingly small” number. Defs.’ Mot. at 7. It is both notable and concerning that the  
27 State considers the infringement of 191 people’s constitutional rights to be so insignificant.

28 <sup>12</sup> Defendants are wrong to take issue with the Court’s reliance on Plaintiffs’ affidavits.

1           Thus, the Court was not “left to guess,” as Defendants suggest, Defs.’ Mot. at 7, but  
2 rather properly relied on evidence available at the preliminary injunction stage of this case.  
3 *See Sierra On-Line, Inc.*, 739 F.2d at 1422-23 (To issue a preliminary injunction “[t]he  
4 district court is not required to make any binding findings of fact; it need only find  
5 probabilities that the necessary facts can be proved.”). Based on the record, the Court  
6 determined that accessing pre-viability abortion was likely to be a very burdensome task  
7 for patients affected by the Reason Regulations. Order at 23. Defendants have offered  
8 neither counter-evidence nor contrary authority that undermines the Court’s findings.

9           Third, Defendants claim the Court “erred in rejecting the benefits that the State will  
10 obtain from the Reason Regulation.” Defs.’ Mot. at 7. That characterization of the Court’s  
11 decision is again demonstrably false. The Court provided detailed consideration for each  
12 of the State’s purported interests and, based on the evidence at this stage, held it is likely  
13 that the Reason Regulations do not advance those interests and/or that they are outweighed  
14 by the substantial burdens the Reason Regulations impose. Order at 26-29.<sup>13</sup>

15           Finally, Defendants wrongly assert that the Court “erroneously collapsed the  
16 substantial obstacle and benefits analyses.” Defs.’ Mot. at 9. The Court evaluated the  
17 burdens that the Reason Regulations impose and weighed them against the State’s  
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20           Def.’ Mot. at 7. A “preliminary injunction may be granted upon affidavits.” *Ross-Whitney*  
21 *Corp. v. Smith Kline & French Lab’ys*, 207 F.2d 190, 198 (9th Cir. 1953); *K-2 Ski Co. v.*  
22 *Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir. 1972) (“A verified complaint or supporting  
23 affidavits may afford the basis for a preliminary injunction.”); *see also Nigro v. Sears,*  
24 *Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015) (“[D]eclarations are often self-serving,  
and this is properly so because the party submitting it would use the declaration to support  
his or her position.”).

25           <sup>13</sup>Defendants list eight purported benefits of the Reason Regulations. Defs.’ Mot. at 8. All  
26 of the items on this list are just variations of the three interests set out in the law’s legislative  
27 findings, and a repackaging of the arguments in the State’s prior briefs—all of which the  
28 Court has already considered. These new variations thus hold no more logic and weight  
than the interests the Court has already analyzed and rejected.

1 purported benefits. That is precisely the balancing test contemplated by the Supreme Court  
2 in *Whole Woman’s Health*, 136 S. Ct. 2309; *see also* Order at 20.<sup>14</sup>

### 3 **III. DEFENDANTS WILL NOT SUFFER IRREPARABLE HARM ABSENT A** 4 **STAY**

5 Defendants must demonstrate that they will suffer irreparable harm as “an absolute  
6 prerequisite” for a stay. *Ahlman*, 2020 WL 3547960, at \*2. A stay applicant must show that  
7 an irreparable injury is “the more probable or likely outcome.” *Al Otro Lado*, 952 F.2d at  
8 1007. Defendants have not—and cannot—meet this heavy burden. As this Court already  
9 explained, “Defendants stand only to lose the ability to immediately implement and enforce  
10 a likely unconstitutional set of laws.” Order at 29.

11 Defendants primarily rely on the general assertion that states “by definition suffer[]  
12 irreparable harm when [they] are precluded from carrying out the laws passed by [their]  
13 democratic processes.” Defs.’ Mot. at 12. That is insufficient. Even to the extent “a state  
14 may suffer an abstract form of harm whenever one of its acts is enjoined” that “is not  
15 dispositive of the balance of harms analysis. If it were, then the rule requiring ‘balance’ of  
16 ‘competing claims of injury’ would be eviscerated.” *Indep. Living Ctr. of S. Cal., Inc. v.*  
17 *Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009), *vacated and remanded on other grounds*  
18 *sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606 (2012); *see also*  
19 *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014) (noting that “[n]o opinion for the  
20 Court adopts [the] view” that “a state suffers irreparable injury when one of its laws is  
21 enjoined”); *Arizona Democratic Party v. Hobbs*, No. 20-01143-PHX-DLR, 2020 WL

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22 <sup>14</sup> To the extent Defendants dispute whether the *Whole Woman’s Health* balancing test  
23 applies here, that position only further undermines their reliance on any purported state  
24 interests. The State argues that Chief Justice Roberts’ concurrence in *June Medical*  
25 controls. Defs.’ Mot. at 7 n.5. Under that test “the only question for a court is whether [the]  
26 law has the effect of placing a substantial obstacle in the path of a woman seeking an  
27 abortion of a nonviable fetus.” *June Med.* 140 S. Ct. at 2138. Thus, under the standard  
28 urged by Defendants, the State’s purported interests would not factor into the analysis at  
all. For that additional reason, Defendants’ complaints about the Court’s evaluation of the  
State’s interests cannot be credited. In any event, the Court analyzed the Reason  
Regulations here under both tests “out of caution,” Order at 22, and correctly found that  
Plaintiffs were likely to succeed either way.

1 6555219, at \*1 (D. Ariz. Sept. 18, 2020) (explaining that a state’s loss of implementing its  
2 laws “alone does not support a stay when balanced against the harms a stay would impose  
3 on others”); *Jordahl v. Brnovich*, No. 17-08263, 2018 WL 6422179, at \*2 (D. Ariz. Oct.  
4 19, 2018) (“We reject the . . . suggestion that, merely by enjoining a state legislative act,  
5 we create a per se harm trumping all other harms”).<sup>15</sup>

6 And, to the extent Defendants also claim they will suffer from an inability “to send  
7 an unambiguous message that children with genetic abnormalities, whether born or unborn,  
8 are equal in dignity and value,” Defs.’ Mot. at 12, that harm is neither actual nor irreparable;  
9 the State remains free to articulate that message through other means that do not constrain  
10 the constitutional rights of its constituents. Defendants simply cannot convey their message  
11 through an unconstitutional law that subjects doctors to vague felonies and undue burdens  
12 Arizonans’ access to abortion.

#### 13 **IV. A STAY WOULD IRREPARABLY INJURE PLAINTIFFS AND THE** 14 **PUBLIC INTEREST**

15 The Court correctly determined that Plaintiffs and their patients will suffer manifest  
16 irreparable harm absent an injunction. Without an injunction, Arizonans will be unduly  
17 impeded, and in some cases prevented altogether, from accessing abortion; and health care  
18 providers will be exposed to uncertain legal obligations and arbitrary prosecution. *See* ECF  
19 No. 7 at 21. Thus, the Court found that “the evidence suggests that the Reason Regulations  
20 will visit concrete harms on Plaintiffs and their patients.” Order at 29. The Court also  
21 rightly recognized that “the deprivation of constitutional rights ‘unquestionably constitutes  
22 irreparable injury.’” *Id.* (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)).

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23 <sup>15</sup>Defendants’ claimed concern about “carrying out laws passed by its democratic  
24 processes,” Defs.’ Mot. at 12, is even less credible here, in light of the fact that they seek a  
25 stay of just one part of the overall legislative scheme that is enjoined. Because A.R.S. § 13-  
26 3603.02(A)(2) was not passed in isolation, but rather as part of an interlocking legislative  
27 scheme, a stay with respect to that one provision could not implement what the legislature  
28 intended. Having accepted that all other aspects of the Reason Regulation Scheme can  
remain enjoined pending appeal, Defendants cannot seriously claim that they are motivated  
by fidelity to the legislative process.

1 For these same reasons, the Court also found that the public interest favors  
2 maintaining the injunction here. *See Melandres*, 695 F.3d at 1002 (“[I]t is always in the  
3 public interest to prevent the violation of a party’s constitutional rights.”). Nothing in  
4 Defendants’ motion alters that sound analysis. Indeed, all four stay factors weigh against  
5 Defendants, and the balance of harms strongly tips in Plaintiffs’ favor to support retaining  
6 the injunction of the Reason Regulations just as this Court entered it.

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8 **V. CONCLUSION**

9 Accordingly, Defendants’ motion to stay the preliminarily injunction as it applies  
10 to Section 13-1603(A)(2) should be denied.  
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1 Dated: October 13, 2021

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION OF ARIZONA

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20  
21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on October 13, 2021, I electronically transmitted the attached  
23 document to the Clerk’s Office using the CM/ECF System for filing. All counsel of record  
24 are registrants and are therefore served via this filing and transmittal.

25  
26 /s/ Victoria Lopez  
Victoria Lopez