Nos. 21-16645, 21-16711

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A PARTIAL STAY PENDING APPEAL

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October 29, 2021

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INTRODUCTION

This case concerns Arizona Senate Bill 1457, 55th Leg., 1st Reg. Sess. (Ariz. 2021) ("S.B. 1457" or the "Act"). The Act contains a web of interlocking and internally inconsistent provisions that, among other things, criminalize the provision of abortion care if it is "know[n]" that care is sought due to a "genetic abnormality" of the fetus or embryo. Act §§ 2, 10, 11, 13, A.R.S. §§ 13-3603.02(A)(2), (B)(2), (D); 36-2157(A)(1); 36-2158(A)(2)(d); 36-2161(A)(25) (collectively, the "Reason Regulation Scheme" or "Scheme"). On September 28, 2021, the district court preliminarily enjoined the Scheme based on extensive record evidence and decades of binding precedent. The district court found the Scheme likely unconstitutional both because it violates the right to pre-viability abortion and because it is unconstitutionally vague. Defendants' Addendum ("State Add.") at 259, 287-88.

Defendants-Appellants (the "State" or "Arizona") now ask this Court for the extraordinary relief of a partial stay of the preliminary injunction with respect to just one provision of the Reason Regulation Scheme, A.R.S. § 13-3603.02(A)(2). The State has noticed an appeal that covers the entire preliminary injunction, but accepts that all other aspects of the Reason Regulation Scheme will remain enjoined pending appeal. Plaintiffs' Addendum ("Pls.' Add.") at 90-94. Arizona points to no aspect of Section 13-3603.02(A)(2) that warrants special treatment, and indeed there is none.

Arizona falls far short of establishing grounds for any stay. As a threshold matter, Arizona fails to establish that it will suffer irreparable harm absent the requested relief, which is "an *absolute prerequisite*" for a stay. *Ahlman v. Barnes*,

No. 20-55568, 2020 WL 3547960, at *2 (9th Cir. June 17, 2020) (emphasis added). Arizona has not articulated *any* concrete harm that it will suffer if Section 13-3603.02(A)(2) remains enjoined along with the rest of the Scheme. Moreover, any argument that Arizona's request is motivated by fidelity to the State's legislative process is severely undermined by Arizona's failure to seek relief with respect to the entire Scheme. Regardless, it is well-settled that such an abstract interest cannot on its own justify a stay. The State's motion can be denied on these grounds alone.

At the same time, maintaining the preliminary injunction is necessary to protect people across Arizona from losing access to time-sensitive and constitutionally-protected abortion care, and to protect health care providers who would otherwise face uncertain legal obligations and arbitrary prosecution. Thus, the balance of hardships also makes clear the stay should be denied.

Finally, the State does not identify a single flaw in the district court's well-reasoned and thorough decision as to Plaintiffs' likelihood of success. At best, their motion mischaracterizes relevant precedent and ignores Plaintiffs' extensive record evidence—all of which, along with Arizona's sole piece of evidence, supports the district court's decision to enjoin the Scheme in its entirety. Accordingly, on every factor, Arizona lacks support for a stay and its motion should be denied.

BACKGROUND

I. Statutory Background

In April 2021, Arizona enacted S.B. 1457. Its Reason Regulation Scheme, which was set to go into effect on September 29, 2021, would directly impede access

to abortion with interconnected new criminal provisions, notification requirements, and expanded reporting obligations. The Scheme imposes severe criminal penalties on violators, including imprisonment of at least four months and up to 8.75 years, A.R.S. §§ 13-3603.02(A)(2) & (B)(2), 13-702(D), as well as potential loss of medical licensure and professional censure, *id.* §§ 32-1401(27), -1403(A)(2), -1451(A), -1403(A)(5), -1403.01(A), -1451(D-E), (I), and (K).

The Scheme directly prohibits physicians from providing abortion care when the patient seeks to terminate their pregnancy due to a fetal condition:

- Section 13-3603.02(A)(2) makes any person who "[p]erforms an abortion knowing that the abortion is sought solely because of a genetic abnormality" of the fetus or embryo guilty of a class 6 felony;

- Section 13-3603.02(B)(2) makes any person who "solicits or accepts monies to finance . . . an abortion because of a genetic abnormality" of the fetus or embryo guilty of a class 3 felony; and

- Section 36-2157 adds the prohibition that no abortion can proceed unless a provider first executes an affidavit swearing "no knowledge that the" pregnancy is being terminated "because of a genetic abnormality" of the fetus or embryo.

The Act defines "genetic abnormality" as "the presence or presumed presence of an abnormal gene expression in an unborn child, including a chromosomal disorder or morphological malformation occurring as the result of abnormal gene expression." Act § 2, A.R.S. § 13-3603.02(G). This definition excludes a "lethal fetal condition," *id.*, which is defined as "a fetal condition that is diagnosed before birth and that will result, with reasonable certainty, in the death of the unborn [fetus] within three months after birth." A.R.S. § 36-2158(G)(1). The Act provides no

further information about which fetal conditions qualify as "lethal" nor how one would determine with "reasonable certainty" that the condition will result in death within three months after birth. The Act does not state whether potential medical interventions are to be considered, nor does it define the degree of certainty that constitutes "reasonable."

The Scheme also expands on Arizona's elaborate abortion reporting and notification requirements. Under existing regulations, providers must report to the Arizona Department of Health Services "[t]he reason for" each abortion they provide, including whether the abortion is "due to fetal health considerations." A.R.S. §§ 36-2161(A)(12)(c)(i)-(iii). The Scheme also adds a new reporting line item requiring providers to disclose: "[w]hether any genetic abnormality of the unborn [fetus] was detected at or before the time of the abortion by genetic testing, such as maternal serum tests, or by ultrasound, such as nuchal transparency screening, or by other forms of testing." Act § 13, A.R.S. § 36-2161(A)(25).

In addition, the Scheme requires physicians to inform a patient "seeking an abortion of her unborn [fetus] diagnosed with a nonlethal fetal condition" that the Act "prohibits abortion . . . because of" a fetal diagnosis. Act § 11, A.R.S. § 36-2158(A)(2)(d).

II. Procedural History

On August 17, 2021, Plaintiffs—who are individual physicians, the largest physicians' association in Arizona, and two organizations that support and educate Arizonans regarding the exercise of their constitutional rights—filed this lawsuit

against Arizona officials charged with implementing and enforcing the Act and sought a preliminary injunction. State Add. at 1, 59. The court preliminarily enjoined the Reason Regulation Scheme in its entirety on September 28, 2021, State Add. at 287-88, finding Plaintiffs "likely to succeed on their claims that the [Reason Regulation Scheme is] unconstitutionally vague and unduly burden[s] the rights of women to terminate pre-viability pregnancies." *Id.* at 267.[1]

As the court concluded, the Scheme was likely unconstitutionally vague because: (1) "Arizona law does not offer workable guidance about which fetal conditions bring abortion care within the scope" of the law's restrictions; and "[t]he evidence shows [] that there can be considerable uncertainty as to whether a fetal condition exists, has a genetic cause, or will result in death within three months after birth." *Id.* at 269-70; and (2) the law's *mens rea* requirement "injects an extra dose of vagueness because it applies to the subjective motivations of another individual [the patient], even if not directly expressed," and leaves unclear "[a]t what point" "a doctor [can] be deemed to 'know' or 'believe' what is in the mind of a patient[.]" *Id.* at 271-72. The court determined that the vagueness claims are ripe because, *inter alia*, their lack of clarity would "chill providers from offering abortions to patients who have received genetic testing results that reveal a fetal genetic abnormality,

[1] Plaintiffs also moved to preliminary enjoin another provision of S.B. 1457, the "Personhood Provision," which requires all Arizona Revised Statutes to be "interpreted and construed" in a manner that gives all fertilized eggs, embryos, and fetuses the same "rights, privileges and immunities available to other persons." Act. § 1, A.R.S. § 1-219; *see* State Add. at 66-68. The court denied the Preliminary Injunction Motion as to that provision, State Add. at 264-67, and Plaintiffs have appealed. Pls.' Add. at 117-20.

thereby making it appreciably more difficult for such patients to exercise their rights to terminate pre-viability pregnancies." *Id.* at 268.

The court also determined that the Scheme is likely unconstitutional on substantive due process grounds, because it "will have the effect of placing a substantial obstacle in the paths of a large fraction of women seeking pre-viability abortions." *Id.* at 280. The court rejected Arizona's argument that patients seeking an abortion for the prohibited reason can readily "get one so long as she does not disclose her motive to her doctor." *Id.* As the court explained, accessing abortion under the Scheme would "be a vexing task because such women are already choosing from a more limited pool of providers, and the chilling effect of the [Scheme] will only make that pool smaller." *Id.* at 281-83. The court also noted that patients who seek abortion because of fetal diagnoses often "are racing against a clock because Arizona law prohibits post-viability abortions." *Id.* at 283. Thus, "[t]he evidence, along with common sense, [led] the [c]ourt to find it likely that many [] providers in Arizona will be chilled from performing abortions whenever they have information from which they might infer that a fetal genetic abnormality is a reason why a patient is seeking to terminate a pregnancy." *Id.* at 282.

Applying a second variation of the substantive due process test, in an abundance of caution, the court also weighed these burdens against the State's purported interests in the law. *Id.* at 283-87. While the court acknowledged that the State's purported goals could be legitimate under other circumstances, it found those interests were not served by this Scheme such that they could save it. *Id.* at 284-86.

Finally, the court found the balance of harms favored an injunction because "the evidence suggests that the [Scheme] will visit concrete harms on Plaintiffs and their patients," whereas "Defendants stand only to lose the ability to immediately implement and enforce a likely unconstitutional set of laws." *Id.* at 287.

On October 4, 2021, Arizona appealed "the entirety of the district court's injunction." Defendants' Motion ("Mot.") at 4 n.5; *see* Pls.' Add. at 90-94.

The State then moved in the district court to stay the injunction only as it applies to Section 13-3603.02(A)(2) of the Scheme, State Add. at 289-305, raising arguments virtually identical to those presented here. The court, after full briefing, denied Arizona's partial stay motion, finding Arizona failed to show any concrete harm from the injunction and that the balance of harms tipped strongly in Plaintiffs' favor. State Add. at 317-19. The court noted that Arizona's arguments "overstate[] the injury to Arizona and minimize[] the harms to Plaintiffs and their patients by misconstruing the [c]ourt's preliminary injunction order." *Id.* at 318. And the court confirmed its prior determination that the Scheme would "make it substantially more difficult" for patients to access constitutionally-protected abortion care, and that Plaintiffs' concerns about the law's extremely indeterminant reach are "supported by the evidence, the plain language of the law, and common sense." *Id.* at 319.

On October 22, 2021, Arizona filed the instant Emergency Motion for a Partial Stay Pending Appeal, raising the same arguments that were rejected below.

LEGAL STANDARD

A "stay [pending appeal] is an 'intrusion into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 556 U.S. 418, 427, 433 (2009) (citations omitted). The Court must consider four factors, the first two of which are the "most critical:"

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

Id. at 434 (quotation and citation omitted). A "stay is not a matter of right," *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006 (9th Cir. 2020), and the movant bears a heavy burden to demonstrate that exceptional grounds justify deviating from standard judicial practice. *Nken*, 556 U.S. at 433-34.

ARGUMENT

The State cannot meet its heavy burden to establish that a partial stay is warranted. Arizona has not articulated any cognizable harm to the State, much less any harm that could outweigh the serious deprivation of constitutional rights that Plaintiffs and the public will suffer if Section 13-3603.02(A)(2) is allowed to take effect. Nor has Arizona demonstrated that it is likely to succeed on appeal.

I. DEFENDANTS WILL SUFFER NO IRREPARABLE HARM ABSENT A STAY

A "showing of irreparable injury is an *absolute prerequisite*" for a stay. *Ahlman*, 2020 WL 3547960, at *2 (emphasis added). "The absence of irreparable harm is alone sufficient reason to deny Defendants' motion" to stay the preliminary injunction. *Id.* at *3. Arizona has not identified a single concrete harm it will suffer

if Section 13-3603.02(A)(2) remains enjoined, along with the rest of the Scheme.

The State describes its alleged harm in a single sentence, arguing only that "enjoining the law injures the State and the public interest by preventing the enforcement of a statute 'enacted by representatives of its people.'" Mot. at 19 (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). That is insufficient. The law is clear that even though "a state may suffer an abstract form of harm whenever one of its acts is enjoined," that "is not dispositive of the balance of harms analysis. If it were, then the rule requiring balance of competing claims of injury would be eviscerated." *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012)) (internal quotation and citation omitted); *see also Latter v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014) (declining to adopt *Maryland v. King*, and noting that "[n]o opinion for the Court adopts [the] view" that "a state suffers irreparable injury when one of its laws is enjoined"); *Jordahl v. Brnovich*, No. 17-08263, 2018 WL 6422179, at *2 (D. Ariz. Oct. 19, 2018) ("We reject the . . . suggestion that, merely by enjoining a state legislative act, we create a per se harm trumping all other harms").[2]

Moreover, as the district court noted, "Defendants' argument about the harms to a state whenever it is enjoined from enforcing a democratically enacted law is

[2] Defendants' circumstances bear no resemblance to California's in *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997), Mot. at iii, where California had already prevailed on the full merits of its appeal, the State's citizens faced harm, and California's opponents had identified no basis on which the Supreme Court might grant certiorari.

[further] undermined by their decision to appeal only a portion of the Court's preliminary injunction order." State Add. at 319 n.1. The State has established no immediate need to implement this interlocking scheme, much less Section 13-3603.02(A)(2) specifically.

Because the State has failed to articulate any irreparable harm, its Motion for Partial Stay fails on its face and should be denied.

II. A STAY WOULD IRREPARABLY INJURE PLAINTIFFS AND THE PUBLIC INTEREST

By contrast, Plaintiffs and their patients will suffer manifest irreparable harm absent an injunction. If A.R.S. § 13-3603.02(A)(2) takes effect, Arizonans will be unduly impeded, and in some cases prevented altogether, from accessing pre-viability abortion; and healthcare providers will be exposed to uncertain legal obligations and arbitrary prosecution. *See* State Add. at 269-74, 280-83; *see also infra* Parts III.A & B (explaining how the law's vagueness will force providers to withhold abortion care, and how it would violate substantive due process by placing an undue burden on patients' constitutional right to pre-viability abortion).

Such "deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014) (internal quotations and citation omitted). And, because abortion is a time-sensitive form of medical care that "simply cannot be postponed," *Bellotti v. Baird*, 443 U.S. 622, 643 (1979), the presumption of irreparable harm applies with particular force, *Humble*, 753 F.3d at 911.

For the same reasons, the public interest warrants denying Arizona's stay

motion. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted). Where, as here, the balance of harms tips decisively in one direction, and the stay movant has failed to show irreparable harm from the injunction remaining in effect, a stay pending appeal must be denied. *See, e.g.*, *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) ("[I]f the petition has not made a certain threshold showing regarding irreparable harm . . . then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors.").

III. ARIZONA IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL

Arizona's motion additionally fails because it has not shown any likelihood of success on the merits of its appeal. Arizona has identified no error, much less a reversible error, in the court's order finding that Plaintiffs will likely succeed in proving unconstitutional vagueness and violation of patients' constitutional rights.

A. Defendants Have Identified No Error In The District Court's Vagueness Analysis

1. Plaintiffs' Vagueness Challenge is Ripe

The district court correctly found Plaintiffs' vagueness challenge ripe, and nothing in Arizona's motion calls that into question. Mot. at 14-15. While the State tries to make much about the "pre-enforcement nature" of this case, *id.* at 15, precedent makes clear that relief may be appropriate when "no state prosecution is pending and a [] plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute

on its face or as applied." *Steffel v. Thompson*, 415 U.S. 452, 475 (1974); *see also California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) (acknowledging "years of Ninth Circuit and Supreme Court precedent recognizing the validity of pre-enforcement challenges to statutes infringing upon constitutional rights"); *Doe v. Bolton*, 401 U.S. 179, 188 (1973) (holding that pre-enforcement vagueness challenge to Georgia abortion statute was properly before the Court because the providers "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief").[3]

2. The Reason Regulation Scheme is Unconstitutionally Vague

Arizona fails to demonstrate any flaw in the court's holding that the Scheme, including A.R.S. § 13-3603.02(A)(2), is likely to be found unconstitutionally vague. The court correctly found that "[g]iven Arizona's broad definition of knowledge and the vagueness of the [Scheme] . . . [t]he evidence, along with common sense" make it likely that providers "in Arizona will be chilled from performing abortions whenever they have information from which they might infer that a fetal genetic abnormality is a reason why a patient is seeking to terminate a pregnancy." State Add. at 282. Such chilling of constitutionally-protected conduct goes to the very core

[3] The cases Arizona cites are inapposite. *Gonzales v. Carhart* did not discuss ripeness at all; rather, it held on the merits that the challenged statute was not facially unconstitutional. 550 U.S. 124, 149 (2006); *see* State Add. at 271 (distinguishing *Gonzales*). And in *Alaska Right to Life Political Action Committee v. Feldman*, the court held that the plaintiffs' challenge to an Alaska law was not ripe because the factual record did not show any credible threat of enforcement. 504 F.3d 840, 853 (9th Cir. 2007). By contrast, Arizona has repeatedly asserted its intent to enforce the Scheme, which only is further evidenced by its request for emergency relief here.

of what the vagueness doctrine is designed to prevent. *See Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights."). The court's finding of multifaceted vagueness in the Scheme is consistent with the record and with applicable law, as further confirmed by the fact that the only Circuit Court to consider a vagueness challenge against a similar reason regulation reached the same conclusion. State Add. at 271 (citing *Memphis Ctr. for Reprod. Health, et al. v. Slatery*, No. 20-5969, 2021 WL 4127691, at *14-17 (6th Cir. Sept. 10, 2021)).

Arizona mounts three meritless arguments against the court's sound reasoning. First, Arizona disagrees with the court's finding that the Scheme "does not offer workable guidance" about "what amounts to a genetic abnormality" that triggers the Scheme's prohibitions. Mot. at 16. But, the court's conclusion was based on the text of the statute, including its definition of and exceptions from the term "genetic abnormality," as well as the detailed testimony Plaintiffs submitted about the inherent complexities and limitations of genetic screening and diagnosis (which the State neither disputes nor rebuts). State Add. at 270-71.

Second, Arizona argues that "in almost all cases, it will be obvious whether [A.R.S. § 13-3603.02(A)(2)] applies" because some patients report on state forms that their "primary reason for obtaining an abortion was due to fetal health/medical considerations." Mot. at 16. But, it is far from "obvious" how A.R.S. § 13-3603.02(A)(2) applies in those circumstances. Those forms provide no guidance

about whether the condition at issue is a "genetic abnormality" within the meaning of the Scheme. Moreover, a "primary reason" is not the same as a sole reason, particularly where—as the court found—many interrelated reasons may contribute to a patient's decision-making. *See* State Add. at 272-73. Arizona's implication that "primary" equates to "solely" only muddies things further, particularly given the Scheme's vacillating use of the phrases "solely because of" and "because of."

In any event, the evidence demonstrates that A.R.S. § 13-3603.02(A)(2)'s vagueness will force providers to withhold constitutionally-protected care in a wide array of cases, regardless of whether the patient directly reports a prohibited reason. As the court determined, Arizona's position that a provider would only be deemed to "know" a patient's prohibited reason when the patient explicitly discloses their motive, Mot. at 17, ignores the uncontroverted record evidence, including providers' testimony that "describe[d] many realistic scenarios" in which "it is often impossible [for doctors] to avoid inferring or believing that the patient is seeking to terminate the pregnancy" for a reason related to "abnormal genetic test results." State Add. at 272-73.

Finally, Arizona's assertion that "[A.R.S. § 13-3603.02(A)(2)] does not require a provider to know why someone is seeking an abortion" in order to avoid prosecution, Mot. at 17, ignores reality: Providers must conclusively rule out the Act's vague impermissible reasons or they cannot provide care. As the court noted, Arizona has a "broad[] definition of knowledge," which in "reality" "can [] and most often is proven through circumstantial, rather than direct, evidence." State Add. at

273. And the record contains extensive evidence "describ[ing] many realistic scenarios in which surrounding circumstances could provide evidence of a provider's 'knowledge' that a patient sought an abortion because of a fetal genetic abnormality—likely sufficient to establish a *prima facie* case for criminal or civil liability—even though a patient did not explicitly state that was her motive." *Id.* Thus, the Scheme forces providers into the untenable position of needing to parse patients' reasons for seeking care in order to determine if the Scheme's prohibitions apply.

Arizona's contention that this is no different from other statutes requiring knowledge of another's intent lacks merit, Mot. at 17-18 (citing examples of conspiracy, facilitation of a felony, assisted suicide, and sexual assault statutes). As the court determined, what makes the Scheme, including A.R.S. § 13-3603.02(A)(2), unique is the need to "know the *motivations* underlying the action of another person," State Add. at 271 (emphasis added). The examples Arizona cites only require a defendant to make a binary determination—does the person intend to commit a crime or not? Does a person consent or not? In contrast, the Scheme here requires a physician to know *the reasons why* a patient has decided to have an abortion—*not whether* the patient intends to have an abortion—and to try to disentangle whether a "genetic abnormality" played a sufficient role in the patient's decision-making to trigger the Scheme's prohibitions.

B. The State Has Not Shown Any Likelihood of Reversing the District Court's Assessment of Plaintiffs' Substantive Due Process Claims

The district court correctly determined that Plaintiffs are likely to succeed on the merits of their claim that the Scheme violates the constitutional right to pre-viability abortion. Arizona offers no serious basis for contesting that conclusion.

1. The District Court Followed Decades of Binding Precedent

Contrary to Arizona's assertions, Mot. at 7-8, the court's decision is aligned with long-standing binding precedent from the Supreme Court and the Ninth Circuit that "a State may not prohibit *any woman* from making the ultimate decision to terminate her pregnancy before viability." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 879 (1992); *Isaacson v. Horne*, 716 F.3d 1213, 1227 (9th Cir. 2013) ("*Isaacson I*") (holding "*Casey* is crystal clear" on this point). As the court explained—consistent with this precedent—"[a]ny woman means any woman, not any woman (except those who wish to terminate a pre-viability pregnancy for a reason the government finds objectionable)." State Add. at 275 n.11. (quoting *Casey*, 505 U.S. at 879); *see also Isaacson I*, 716 F.3d at 1228 (noting "significan[ce]" of the fact that the law created no exception for "abortions in cases of fetal anomaly.").

It is thus unsurprising that multiple circuit courts have enjoined reason regulations (like the Scheme challenged here) on substantive due process grounds. *See Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health ("PPINK")*, 888 F.3d 300, 307 (7th Cir. 2018), *cert. denied in part and granted in part, judgment rev'd in part on other grounds sub nom. Box v. PPINK*, 139 S. Ct. 1780 (2019) *("PPINK")* (state may not "invade the privacy realm to examine the

underlying basis for a woman's decision to terminate her pregnancy prior to viability");[4] *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021) (right to abortion cannot "exist[] if the State can eliminate this privacy right [when the patient] wants to terminate her pregnancy for a particular purpose").[5]

2. The State Fails to Identify Any Error in the District Court's Application of the Undue Burden Standard

Arizona incorrectly contends that the court was "not permitted" to apply the undue burden standard here. Mot. at 11. As a threshold matter, the court did not "*sua sponte* conduct[] an undue burden analysis," as Arizona suggests. *Id.* Rather, the State itself had been urging the court to apply the undue burden standard from the outset. State Add. at 187 n.8. Arizona thus had ample opportunity to brief and submit evidence in support of its argument. Plaintiffs likewise addressed the undue burden standard in their preliminary injunction briefing, explaining why their claims would succeed regardless of whether the Scheme was deemed an abortion ban, or alternatively, if it was considered as a restriction subject to the undue burden

[4] Arizona's reliance on the subsequent case history in *PPINK* (and, specifically, on Judge Easterbrook's dissent from the Seventh Circuit's denial of rehearing en banc and on Justice Thomas's dissent from denial of certiorari), Mot. at 8, is especially misplaced—since that history only shows that the Seventh Circuit and the Supreme Court have chosen to let the decision striking down that similar statute stand.

[5] By contrast, Arizona cites only the lone case in which a reason regulation was upheld, Mot. at 9-10 (citing *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 516 (6th Cir. 2021) (en banc)), but tellingly provides no further context about that case. This is because, as explained in Plaintiffs' preliminary injunction briefing, *Preterm* dealt with a much different law and record, in addition to making numerous unfounded assumptions. *See* State Add. at 248 n.2.

standard. State Add. at 76 n.6. And, at oral argument, Plaintiffs' counsel provided a detailed assessment of the benefits and burdens at stake, in response to the court's questions. Pls.' Add. at 19-27.

But, even assuming *arguendo* that neither party had raised the undue burden standard, Arizona's position still would fail as a matter of law. Both the Supreme Court and the Ninth Circuit have made clear that when "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see also Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013); *see also Amado v. Gonzalez*, 758 F.3d 1119, 1133 n.9 (9th Cir. 2014). Thus, the court clearly acted within its power in applying the undue burden standard here.

3. The State Fails to Identify Any Fault in the District Court's Application of the Undue Burden Test to the Evidentiary Record

Arizona's remaining disagreements with the court's substantive due process analysis boil down to dissatisfaction with the court's assessment of the evidence at this preliminary stage of the case. While Arizona contends that "Plaintiffs did not satisfy their heavy burden to prevail under the undue burden standard," Mot. at 11, that claim is belied by Plaintiffs' voluminous expert and factual evidence, which was laid out in six detailed declarations that were credited by the court. Meanwhile, Arizona submitted only a single exhibit in its opposition that in no way undermined Plaintiffs' evidentiary showing.

Arizona tries to take issue with the court's application of the "large fraction" test. Mot. at 12. But, the test of whether an abortion regulation is unconstitutional on its face is whether "'it will operate as a substantial obstacle to a woman's choice to undergo an abortion' in 'a large fraction of the cases *in which [it] is relevant*.'" State Add. at 277 (quoting *Casey*, 505 U.S. at 895) (emphasis added); *see also June Medical Services LLC v. Russo*, 140 S. Ct. 2103, 2132 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016). The district court sensibly determined that "[t]he denominator" for the purpose of the "large fraction" standard here "consists of women who wish to terminate a pre-viability pregnancy because of a fetal genetic abnormality" because "[t]hese are the women to whom the [Scheme] will operate as an actual, rather than irrelevant, restriction." State Add. at 280; *see also Isaacson I*, 716 F.3d at 1228 (quoting *Casey*, 505 U.S. at 894).

Arizona also claims that "the record below was devoid of evidence showing how many women fall into that category" of patients who seek abortion care due to a fetal diagnosis, and whether the Scheme will impede such patients' access. Mot. at 12. That is demonstrably false. The State's *own* evidence shows at least 191 Arizona patients identified fetal health/medical considerations as their primary reason *in a single year*, because of its preexisting reporting requirements. *See* State Add. at 280. And evidence further shows that providers also learn patients' reasons for seeking abortion in myriad other ways even if the patient does not disclose their reason. *See also, e.g.*, *id.* at 104, 111 ¶¶ 44, 73; *id.* at 126, 134-35 ¶¶ 18, 48-49. The court also relied on, *inter alia*, extensive other evidence to find a substantial obstacle:

- evidence showing very few Arizona providers offer abortion at later stages of pregnancy, when fetal conditions are likely to be detected, *id.* at 281;

- Arizona's requirement that providers collect and report information about abortions, including the "reason for the abortion," which will drive some patients to disclose their prohibited reason, *id.* at 282;

- evidence showing that patients' circumstances often make it difficult or impossible for providers to avoid the inference that they are seeking an abortion because of a fetal diagnosis, *id.*; and

- evidence showing that providers will be chilled from providing abortion care throughout Arizona, including because the state's "broad definition of knowledge and the vagueness of the Scheme's criminal and civil liability provisions" will force the Plaintiff providers to "stop performing abortions out of fear of prosecution if the [Scheme] take[s] effect." *Id.*

Finally, Arizona lists the state's purported interests and reasserts its view that the Scheme is "narrowly tailored" to serve them. Mot. at 14.[6] But, the court provided detailed consideration for each of the State's purported interests and, based on the evidence, held it likely that the Scheme does not advance those interests and/or that they are outweighed by the substantial burdens it imposes. State Add. at 284-87. Nothing in Arizona's motion calls the court's well-reasoned analysis into question.

CONCLUSION

Accordingly, Defendants-Appellants' Motion to stay the preliminary injunction as it applies to Section 13-3603.02(A)(2) should be denied.

[6]All eight benefits that Arizona purports the Scheme advances, Mot. at 13, are simply variations of the three interests set out in the law's statement of "legislative findings and intent"—which are the same interests that the State asserted in its preliminary injunction briefing, and that the court considered when it granted the preliminary injunction. These new variations hold no more logic or weight here. In addition, the State has offered no evidence to substantiate that the Scheme furthers such interests.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2021, I electronically transmitted the attached document to the Office of Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF System for filing. All counsel of record are registrants and are therefore served via this filing and transmittal.

/s/ Jen Samantha D. Rasay
/s/ Ruth E. Harlow