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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PAUL A. ISAACSON M.D., et al.

Plaintiffs

v.

KRIS MAYES, Attorney General of Arizona, in her official capacity, et al.,

Defendants,

WARREN PETERSON, President of the Arizona State Senate, in his official capacity; BEN TOM, Speaker of the Arizona House of Representatives, in his official capacity,

Defendant-Intervenors.

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

DEFENDANT-INTERVENORS' RESPONSE IN OPPOSITION TO RENEWED MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Arizona's Reason Regulation prevents an unborn child's disability "from becoming the sole criterion for deciding whether the child will live or die." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring); *see also* State Defs.' Response to Renewed Mot. for Prelim. Inj. 3–5, ECF No. 127 ("State's Br."). Just last summer, the Supreme Court confirmed the State's ability to prohibit discriminatory abortions. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 301 (2022). And shortly after, it lifted the injunction against Arizona's Reason Regulation. *Brnovich v. Isaacson*, 142 S. Ct. 2893 (2022). Yet Plaintiffs maintain that this Court should prevent Arizona from protecting unborn children with genetic abnormalities because they are unable "to determine whether the prohibition is triggered in a broad array of cases." Compl. for Decl. & Inj. Relief ¶ 82, ECF No. 1. Intervenors urge this Court to reject Plaintiffs' attempt to complicate Arizona's straightforward law, and instead allow Arizona to enforce its Reason Regulation, along with the ten other States currently enforcing similar statutes. *See infra* Part I.B.2.

BACKGROUND

I. Arizona's Reason Regulation

Since 2011, Arizona has "protect[ed] unborn children from prenatal discrimination" because "there is no place for such discrimination and inequality in human society." 2011 Ariz. Legis. Serv. Ch. 9, § 3. In 2021, the Arizona Legislature amended its pre-existing statutes, which protected unborn children from discrimination on the basis of race or sex,

to protect unborn children from discrimination on the basis of genetic abnormalities, such as Down syndrome. 2021 Ariz. Legis. Serv. Ch. 286 (the "Reason Regulation").

The Reason Regulation prevents any person from "knowingly . . . [p]erform[ing] an abortion knowing that the abortion is sought solely because of a genetic abnormality of the child," Ariz. Rev. Stat. § 13-3603.02(A)(2) (the "Performance Provision"), or "solicit[ing] or accept[ing] monies to finance . . . an abortion because of a genetic abnormality of the child," *id.* § 13-3603.02(B)(2) (the "Solicitation Provision"). The law also requires abortion providers to "complete[] an affidavit that . . . [s]tates that the person making the affidavit is not aborting the child . . . because of a genetic abnormality of the child and has no knowledge that the child to be aborted is being aborted . . . because of a genetic abnormality of the child." *Id.* § 36-2157 (the "Affidavit Provision"). It further requires the abortion provider to inform the woman that Arizona law "prohibits abortion . . . because of a genetic abnormality." *Id.* § 36-2158(A)(2)(d) (the "Informed Consent Provision"). Finally, it requires that the hospital or facility where the abortion was performed report to the Department of Health Services "[w]hether any genetic abnormality of the unborn child was detected at or before the time of the abortion by genetic testing . . . or by ultrasound . . . or by other forms of testing." *Id.* § 36-2161(A)(25) (the "Reporting Provision").

II. Procedural History

On August 17, 2021, two abortion providers—Dr. Paul Isaacson and Dr. Eric Reuss—and three advocacy organizations filed suit to enjoin the Reason Regulation, along with another provision of the same bill governing the interpretation of Arizona law as to the rights of unborn children, under the First and Fourteenth Amendments. Compl. ¶¶ 2, 9;

see also Ariz. Rev. Stat. § 1-219 (the "Interpretation Provision"). The attorney general defended the law, but this Court nevertheless enjoined the Reason Regulation, holding that it was "void for vagueness and impose[d] an undue burden on the rights of women to terminate pre-viability pregnancies." *Isaacson v. Brnovich* (*Isaacson I*), 563 F. Supp. 3d 1024, 1047 (D. Ariz. 2021). The State appealed the preliminary injunction and requested a stay of the injunction from the U.S. Supreme Court.

Then, on June 24, 2022, the Supreme Court held that the Constitution protects no right to abortion. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). The Court specifically stated that States have a legitimate interest in passing laws regulating abortion to "prevent[] . . . discrimination on the basis of race, sex, or disability." *Id.* at 301. Just two days after *Dobbs*, the Court (treating the State's motion to stay as a cert petition) vacated this Court's preliminary injunction and remanded the case. *Brnovich v. Isaacson* (*Isaacson II*), 142 S. Ct. 2893 (2022).

Shortly after, this Court issued a preliminary injunction against the Interpretation Provision on vagueness grounds. *Isaacson v. Brnovich* (*Isaacson III*), 610 F. Supp. 3d 1243, 1247 (D. Ariz. 2022). Plaintiffs then filed a renewed motion for preliminary injunction of the Reason Regulation, this time asserting only their vagueness claims. Pls.' Renewed Mot. for Prelim. Inj., ECF No. 125. Again, the State defended the Law, and this Court denied that motion, holding that Plaintiffs did not have standing to assert their vagueness claims. *Isaacson v. Mayes* (*Isaacson IV*), 651 F. Supp. 3d 1089, 1092 (D. Ariz. 2023). Plaintiffs appealed. While that appeal was pending, this Court allowed Arizona State Senate President Warren Peterson and Speaker of the Arizona House Ben Toma to

intervene, noting that newly-elected "Attorney General Mayes has notified this Court that she does not intend to defend the challenged laws." *Isaacson v. Mayes* (*Isaacson V)*, No. CV-21-01417-PHX-DLR, 2023 WL 2403519, at *2 (D. Ariz. Mar. 8, 2023).

On appeal, the Ninth Circuit reversed this Court's decision on standing and "remand[ed] for the district court to consider Plaintiffs' renewed motion for a preliminary injunction on the merits." *Isaacson v. Mayes* (*Isaacson VI*), 84 F.4th 1089, 1101–02 (9th Cir. 2023). Intervenors incorporate the arguments made in the State's prior briefing on the original motion for preliminary injunction and renewed motion for preliminary injunction. Intervenors file this brief making additional arguments in opposition to that motion.

LEGAL STANDARD

To succeed on their preliminary injunction motion, Plaintiffs "must establish (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities favors the plaintiff, and (4) that an injunction is in the public interest." *Geo Group, Inc. v. Newsom*, 50 F.4th 745, 753 (9th Cir. 2022) (en banc) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). Because Plaintiffs have failed to make that showing, this Court should deny their renewed motion for a preliminary injunction.

ARGUMENT

I. Plaintiffs are unlikely to succeed on the merits of their vagueness claim.

The Ninth Circuit's decision "express[ed] no opinion on the merits of Plaintiffs' claims." *Isaacson VI*, 84 F.4th at 1102 n.8. Instead, it "conclude[d] only that Plaintiffs have standing to pursue them." *Id.* Yet "[l]ikelihood of success on the merits 'is the most

important' *Winter* factor." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). To prevail on the merits of their vagueness challenge, Plaintiffs must show that the Reason Regulation "does not give a person of ordinary intelligence fair notice of what is prohibited" or that "it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Tingley v. Ferguson*, 47 F.4th 1055, 1089 (9th Cir. 2022) (cleaned up), *cert. denied,* No. 22-942, 2023 WL 8531854 (U.S. Dec. 11, 2023). Plaintiffs have not made that showing here.

A. The Reason Regulation is not subject to heightened vagueness review.

The Supreme Court and the Ninth Circuit have long held that "[t]he degree of vagueness the Due Process Clause will tolerate 'depends in part on the nature of the enactment.'" *Kashem v. Barr*, 941 F.3d 358, 370 (9th Cir. 2019) (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982)). "Relevant factors include whether the challenged provision involves only economic regulation, imposes civil rather than criminal penalties, contains a scienter requirement and threatens constitutionally protected rights." *Id.* (citing *Vill. of Hoffman Ests.*, 455 U.S. at 498–99; *Hanlester Network v. Shalala*, 51 F.3d 1390, 1398 (9th Cir. 1995)).

Because no "exceptional circumstances" apply requiring a lower standard of review, Plaintiffs must show that the Reason Regulation is vague in all its applications. *See* State's Br. 11–13; *see also Isaacson I*, 563 F. Supp. 3d at 1034 (explaining that "a plaintiff mounting a facial vagueness challenge must establish that no set of circumstances exists under which the statute would be valid" absent "exceptional circumstances").

First, the Reason Regulation "'implicates no constitutionally protected conduct.'" *Monarch Content Mgmt. LLC v. Ariz. Dep't of Gaming*, 971 F.3d 1021, 1030 (9th Cir. 2020) (citing *Vill. of Hoffman Ests.*, 455 U.S. at 494–95). This Court previously held that the "'no set of facts' test does not apply in the context of undue burden challenges to abortion regulations." *Isaacson I*, 563 F. Supp. 3d at 1034. But the Supreme Court held in *Dobbs* that the Constitution protects no right to abortion. *Dobbs*, 597 U.S. at 231; *see also* State's Br. 8–9. And as this Court previously explained, the Reason Regulation does not implicate the First Amendment. *Isaacson IV*, 651 F. Supp. 3d 1089, 1097 (D. Ariz.) ("Nothing in the Reason Regulations penalizes Plaintiffs for their counseling or related speech."). The Ninth Circuit's decision did not disturb that holding. Instead, it simply clarified that a plaintiff need not assert a First Amendment claim to have standing to assert a vagueness challenge. *Isaacson VI*, 84 F.4th at 1096.

Second, although this Court previously held that "'[c]riminal laws receive the most exacting scrutiny,'" *Isaacson III*, 610 F. Supp. 3d at 1249–50, some of the challenged provisions "do not, themselves, impose criminal penalties." *Isaacson I*, 563 F. Supp. 3d at 1035. More importantly, both the civil and criminal portions of the Reason Regulation include a scienter requirement. *See* Ariz. Rev. Stat. §§ 13-3603.02(A)–(B) ("knowingly"), 36-2157 ("knowingly"), 36-2158(C) ("knowingly"), 36-2163 ("willfully"); *see also State v. Burke*, 360 P.3d 118, 123 (Ariz. Ct. App. 2015) ("The definition of 'wilfully' . . . is equivalent to the definition of 'knowingly.'").

The Reason Regulation's "[i]nclusion of a scienter requirement 'mitigates [any] vagueness, especially with respect to the adequacy of notice to the complainant that his

conduct is proscribed.'" *United States v. Wanland*, 830 F.3d 947, 954 (9th Cir. 2016) (quoting *United States v. Guo*, 634 F.3d 1119, 1123 (9th Cir. 2011)). In its previous preliminary injunction order, this Court relied on a Sixth Circuit panel's decision in *Memphis Ctr. for Reprod. Health v. Slatery* (*Slatery I*), 14 F.4th 409, 430 (6th Cir. 2021), to hold that "the 'knowingly' *mens rea* requirement . . . present[s] special difficulties here" because it "requires that a doctor know the motivations underlying the action of another person to avoid prosecution." *See Isaacson I*, 563 F. Supp. 3d at 1036. But the full Sixth Circuit later vacated that opinion and granted rehearing en banc. *Memphis Ctr. for Reprod. Health v. Slatery* (*Slatery II*), 18 F.4th 550 (6th Cir. 2021). After *Dobbs*, the en banc Sixth Circuit vacated and remanded the district court's preliminary injunction against Tennessee's discriminatory abortion law. *Memphis Ctr. for Reprod. Health v. Slatery* (*Slatery III*), No. 20-5969, 2022 WL 2570275, at *1 (6th Cir. June 28, 2022). The district court ultimately dismissed the case. Order, *Memphis Ctr. for Reprod. Health v. Slatery* (*Slatery IV*), No. 3:20-cv-00501 (M.D. Tenn. July 28, 2022), ECF No. 110.

As Judge Thapar recognized in his partial dissent to the now-vacated Sixth Circuit panel opinion, the Reason Regulation "is hardly alone in requiring proof that a defendant knew another person's state of mind." *Slatery I*, 14 F.4th at 460 (Thapar, J., concurring in part and dissenting in part). In fact, Arizona regularly employs the same standard in other criminal statutes. *See, e.g.*, Ariz. Rev. Stat. § 13-1004(A) (providing that a defendant must "act[] with *knowledge* that the other person is committing or intends to commit an offense" to be guilty of facilitation); *State v. Bolivar*, 477 P.3d 672, 686–87 (Ariz. Ct. App. 2020) (holding that Arizona's sexual abuse and assault statutes require the State to prove "that

the defendant knew [his sexual] conduct was without the consent of the victim" and finding that circumstantial evidence was sufficient to prove that knowledge).

As Judge Thapar observed, "'scienter requirements alleviate vagueness concerns'; they don't create them." *Slatery I*, 14 F.4th at 459 (Thapar, J., concurring in part and dissenting in part) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007)). Because the Reason Regulation neither implicates fundamental rights nor imposes criminal penalties without a scienter requirement, Plaintiffs must show that it is vague in *all* its applications.

B. Regardless, Plaintiffs have not shown that the Reason Regulation is vague in the vast majority of its intended applications.

Ultimately, this Court "need not decide whether this case calls for the most exacting vagueness standard" because "[P]laintiffs' vagueness challenges . . . fail" regardless. *Kashem*, 941 F.3d at 370. Even under "a strict standard," *id.*, the Due Process Clause "tolerate[s] uncertainty at the margins." *Tingley*, 47 F.4th at 1089. Thus, the Reason Regulation "just needs to be clear in the vast majority of its intended applications." *Id.* (cleaned up).

1. The Reason Regulation provides fair notice of prohibited conduct.

First, the Reason Regulation provides Plaintiffs with fair notice of what conduct is forbidden. "The operative question under the fair notice theory is whether a reasonable person would know what is prohibited by the law." *Tingley*, 47 F.4th at 1089.

The Supreme Court has rejected vagueness challenges, for example, where a statute's prohibitions are defined "in explicit terms." *See Gonzales*, 550 U.S. at 147. "Indeed, criminal statutes that prohibit 'providing' something typically survive vagueness

challenges where legislatures explicitly define the object being provided." *Ariz. All. for Retired Ams. v. Hobbs*, 630 F. Supp. 3d 1180, 1188 (D. Ariz. 2022).

Here, the Reason Regulation explicitly defines what procedure a physician (or other health care provider) is prohibited from providing: an "abortion . . . sought solely because of a genetic abnormality." Ariz. Rev. Stat. § 13.3603.02(A)(2). The statute 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." *Id.* § 13-3603.02(G)(2)(a). That definition explicitly excludes a "lethal fetal condition," *id.* § 13-3603.02(G)(2)(b), 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 child within three months after birth" *Id.* § 36-2158(G)(1). In contrast, a "nonlethal fetal condition" is "a fetal condition that is diagnosed before birth and that will not result in death of the unborn child within three months after birth but may result in physical or mental disability or abnormality" *Id.* § 36-2158(G)(2).

This Court previously held 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." *Isaacson I*, 563 F. Supp. 3d at 1035. But nothing in the Reason Regulation requires a physician to know whether a genetic abnormality actually exists. The Performance, Solicitation, and Affidavit provisions require only that a physician "know that the abortion is *sought*" due to "a genetic abnormality of the child," not whether the woman is correct in believing that a genetic abnormality exists. Ariz. Rev. Stat. §§ 13-3603.02(A)–(B), 36-2157(1). And the Reporting Provision requires only that the physician knows whether "any

genetic abnormality of the unborn child was detected at or before the time of abortion by genetic testing . . . or ultrasound . . . or by other forms of testing," not whether those tests were accurate. *Id.* § 36-2161(A)(25).

Similarly, the Informed Consent Provision requires only that the physician know whether the "unborn child" has been "diagnosed with a nonlethal fetal condition," not whether that diagnosis is accurate. *Id.* § 36-2158(A)(2). And the definition of "lethal fetal condition" builds in the physician's reasonable medical judgment: If the condition will "result, *with reasonable certainty*, in the death of the unborn child within three months after birth," *id.* § 36-2158(G)(1) (emphasis added), then the Reason Regulation does not apply.

In determining whether an undefined term is vague, courts "[u]sually . . . look to a term's common meaning, but if the law regulates the conduct of a select group of persons having specialized knowledge, then the standard is lowered for terms with a technical or special meaning." *Tingley*, 47 F.4th at 1090 (cleaned up); *see also* State's Br. 14. Here, physicians have the "specialized knowledge" required to know the difference between screening and diagnosis, which conditions result from "abnormal gene expression," and whether a condition is "reasonably certain" to result in the death of the child within three months after birth. Indeed, physicians may be held liable for "failure to properly diagnose a patient" or "misdiagnosis" of a patient. *Stanley v. McCarver*, 92 P.3d 849, 851 (2004). Requiring a doctor to use reasonable medical judgment to interpret a "technical provision" does not render a statute vague. *See Planned Parenthood of the Great Nw. & the Hawaiian Islands v. Wasden*, 350 F. Supp. 3d 925, 931 (D. Idaho 2018).

As explained above, *see supra* Part I.A, the Reason Regulation's "knowledge" requirement mitigates any alleged vagueness. Arizona law defines "knowingly" to mean "with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission." Ariz. Rev. Stat. § 13-105(10)(b). And the Arizona Court of Appeals has upheld the definition of "knowingly" against a vagueness challenge. *See Burke*, 360 P.3d at 123 (explaining that "[t]he definition of 'wilfully' . . . is equivalent to the definition of 'knowingly'" and holding that the definition is "not so indefinite as to be considered constitutionally invalid").

The phrases "because of" and "solely because of" also have readily ascertainable meanings. The Supreme Court has explained that the phrase "because of" denotes "but-for causation." *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020); *see also Slatery I*, 14 F.4th at 459 (Thapar, J, concurring in part and dissenting in part). Far from being an "amorphous term[]" without a "settled legal meeting," *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 820 (9th Cir. 2016), "but-for causation" is "textbook tort law," *Comcast Corp.*, 140 S. Ct. at 1014. Thus, the Reason Regulation prohibits soliciting or accepting money to finance an abortion that "would not have occurred" "but for" a genetic abnormality. *See id.*; Ariz. Rev. Stat. § 13-3603.02(B)(2).

The phrase "solely because of," on the other hand, means that the genetic abnormality must be the *only* reason for the abortion. *See Terry v. United Parcel Serv., Inc.*, 508 P.3d 1137, 1141 (Ariz. Ct. App. 2022) (holding that Arizona's Medical Marijuana

Act, which "provides that an employee holding a medical marijuana card" cannot be fired "'*solely because of*' a positive drug test," did not apply when the employer had an independent basis—aside from the drug test itself—for firing the employee); *see also Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 1 F.4th 552, 565 (8th Cir. 2021) (Stras, J., concurring in part and dissenting in part) (explaining that Missouri's discriminatory abortion law does not apply "when providers know that the diagnosis is one reason for the abortion but remain in the dark about whether there are others"), *reh'g en banc granted, opinion vacated* (July 13, 2021). Thus, the Reason Regulation prohibits abortion only where the physician knows or believes that the patient has no independent basis for seeking an abortion aside from the unborn child's genetic abnormality. *See* Ariz. Rev. Stat. § 13-3603.02(A)(2).

Applying these definitions to this Court's hypothetical, *Isaacson I*, 563 F. Supp. 3d at 1037, a physician who performs an abortion knowing that the patient is "terminating a pregnancy because they lack the financial, emotional, family, or community support to raise a child with special and sometimes challenging needs," *id.*, would violate the Solicitation Provision's "because of" language but not the Performance Provision's "solely because of" language. Thus, a physician could avoid criminal (but not civil) liability by performing the abortion free of charge. The Arizona legislature could have rationally concluded that profiting off disability discrimination warrants more severe punishment than performing discriminatory abortions for free. Regardless, the legislature's choice to employ different standards in different provisions of the Reason Regulation does not render it unconstitutionally vague.

2. The Reason Regulation provides ascertainable standards for determining what conduct violates the statute.

The Reason Regulation is not "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). Under this theory, "[a] law is void for vagueness if it lack[s] any ascertainable standard for inclusion and exclusion." *Tingley*, 47 F.4th at 1090 (cleaned up). As explained above, *see supra* Part I.B.1, the Reason Regulation provides doctors with ascertainable standards for determining what qualifies as an abortion sought "solely because of," Ariz. Rev. Stat. § 13-3603.02(A)(2), or "because of," *id.* § 13-3603.02(B)(2), a "genetic abnormality." And as this Court previously recognized, "Plaintiffs have identified no instances of arbitrary enforcement." *Isaacson I*, 563 F. Supp. 3d at 1038 n.10.

Moreover, ten other States have statutes currently in effect prohibiting abortion on the basis of Down syndrome or other genetic abnormalities, many of which have similar language to the Arizona statute challenged here.[1] Since the Supreme Court's decision in

[1] *See* Ark. Code Ann. § 20-16-2103 (prohibiting physicians from performing an abortion "with the *knowledge* that a pregnant woman is seeking an abortion *solely* on the basis of . . . Down Syndrome" (emphasis added)); Ind. Code § 16-34-4-7 (prohibiting physicians from performing an abortion if the physician "*knows* that the pregnant woman is seeking the abortion *solely because* the fetus has been diagnosed with [a] disability" (emphasis added)); Ky. Rev. Stat. Ann. § 311.731 (prohibiting abortion if the physician "has *knowledge* that the pregnant woman is seeking the abortion, in whole or in part, *because of* . . . [t]he diagnosis . . . of Down syndrome or any other disability" (emphasis added)); La. Rev. Stat. Ann. § 1061.1.4 (prohibiting abortion after 20-weeks post-fertilization if the physician has "*knowledge* that the pregnant woman is seeking the abortion *solely because* the unborn child has been diagnosed with . . . a *genetic abnormality*" (emphasis added)); Mo. Rev. Stat. § 41-41-407 (prohibiting physicians from "*knowingly* perform[ing] . . . an abortion . . . if the abortion is being sought *because of* . . . a genetic abnormality" (emphasis added)); N.C. Gen. Stat. § 90-21.121 (prohibiting physicians from performing an abortion

Dobbs, *not one* of these laws has been enjoined, and federal courts have lifted *all* the pre-*Dobbs* injunctions,[2] including the injunction against Tennessee's law on vagueness grounds, *Slatery III*, 2022 WL 2570275. Yet Plaintiffs have presented no evidence of arbitrary and discriminatory enforcement under these laws either.

Absent *any evidence whatsoever* that the Reason Regulation is subject to arbitrary and discriminatory enforcement, this Court should hold that Plaintiffs have failed to show a likelihood of success on the merits of their vagueness claim against the Reason Regulation.

II. Plaintiffs have not met the remaining preliminary injunction factors.

This Court "need not consider the remaining *Winter* factors because [P]laintiffs fail to show a likelihood of success on the merits." *Babaria v. Blinken*, No. 22-16700, 2023

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if the physician "has *knowledge* that the pregnant woman is seeking the abortion, in whole or in part, *because of* any of . . . Down syndrome" (emphasis added)); Ohio Rev. Code Ann. § 2919.10 (prohibiting physicians from performing an abortion if the physician "has *knowledge* that the pregnant woman is seeking the abortion, in whole or in part, *because of* any of . . . Down syndrome" (emphasis added)); S.D. Codified Laws § 34-23A-90 (prohibiting abortion if the physician has "*knowledge* that the pregnant woman is seeking the abortion *because* the unborn child . . . has been diagnosed with Down syndrome" (emphasis added)); Tenn. Code Ann. § 39-15-217 (prohibiting abortion if the physician "*knows* that the woman is seeking the abortion *because of* . . . Down syndrome" (emphasis added)); Utah Code Ann. § 76-7-302.4 (prohibiting abortion "if the pregnant mother's *sole* reason for the abortion is that the unborn child has or may have Down syndrome" (emphasis added)).

[2] *Rutledge v. Little Rock Fam. Plan. Servs.*, 142 S. Ct. 2894 (2022) (Arkansas); Judgment, *Reprod. Health Servs. v. Parson*, No. 19-2882 (8th Cir. July 8, 2022) (Missouri); Final J. Pursuant to Fed. R. Civ. P. 58, *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dep't of Health*, No. 1:16-cv-00763 (S.D. Ind. July 18, 2022), ECF No. 150 (Indiana); Order, *EMW Women's Surgical Ctr. v. Sec'y of Ky.'s Cabinet for Health & Family Servs.*, No. 3:19-cv-00178 (W.D. Ky. June 30, 2022), ECF No. 94 (Kentucky); *see also Preterm-Cleveland v. McCloud*, 994 F.3d 512 (6th Cir. 2021) (vacating injunction against Ohio's law before *Dobbs*).

WL 8291303, at *9 (9th Cir. Dec. 1, 2023). Regardless, the remaining factors also weigh against granting the injunction.

A. Plaintiffs will suffer no irreparable harm absent an injunction.

To succeed on their motion for a preliminary injunction, "[P]laintiffs must establish that irreparable harm is *likely*, not just possible." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "[T]he Ninth Circuit has cautioned that the irreparable harm requirement does not 'collapse into the merits question,' even where a plaintiff demonstrates a likelihood of success on the merits of a constitutional claim." *Apt. Assoc. of L.A. v. City of L.A.*, 500 F. Supp.3d 1088, 1100 (C.D. Cal. 2020) (*quoting Cuviello v. City of Vallejo*, 944 F.3d 816, 831 (9th Cir. 2019)). On the contrary, Plaintiffs must show irreparable harm "even when the economic injury at issue stemmed from an alleged constitutional violation." *Id.* at 1101 (finding no irreparable harm in due process and other constitutional challenges to COVID-19 era ordinance prohibiting eviction of tenants).

After *Dobbs*, Plaintiffs may not rely on any alleged harms to the supposed constitutional right of their patients to previability abortion. 597 U.S. at 231. Nor can they rely on any alleged "chilling effect" imposed by the Reason Regulation. Compl. ¶ 112; *Isaacson IV*, 651 F. Supp. 3d at 1097 ("Nothing in the Reason Regulations penalizes Plaintiffs for their counseling or related speech."); *see also Isaacson VI*, 84 F.4th at 1098 ("Under our Circuit precedent, a chilling effect is only a cognizable injury in overbreadth facial challenges involving protected speech under the First Amendment." (cleaned up)). Thus, Plaintiffs are left with the allegation "that their coerced over-compliance has already caused them economic injury." *Isaacson VI*, 84 F.4th at 1096.

Economic injury does not constitute irreparable harm for purposes of a preliminary injunction. Indeed, in *Amwest Surety Ins. Co. v. Reno*, the Ninth Circuit explained that "[e]conomic injury, by itself, does not constitute irreparable harm" because "it is . . . fully compensable by recovery of damages." 1995 WL 230357, at *1 n. 1 (9th Cir.1995) (unpublished); *see also Keyoni Enters., LLC v. Cnty. of Maui*, No. 15-00086, 2015 WL 1470847, at *8 (D. Hi. Mar. 30, 2015) (no irreparable harm where "the only concrete harm [plaintiffs] cite is purely economic"). And while "violating the statute could result in imprisonment," *Isaacson VI*, 84 F.4th at 1099, Plaintiffs have chosen to avoid that result by instead "turn[ing] away patients in need of banned care," Compl. ¶ 109.

Plaintiffs may argue that damages for their economic harm are unavailable in federal court under the Eleventh Amendment. *See, e.g.*, *Cali. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009), *vacated and remanded*, *Douglas Indep. Living Ctr. Of South. Cal.*, 565 U.S. 606 (2012). But Plaintiffs could have sued Defendants in their individual capacities to avoid the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 21 (1991). And Plaintiffs can always sue for damages in state court. *Howlett v. Rose*, 496 U.S. 356 (1990); *see also Apt. Assoc. of L.A.*, 500 F. Supp. 3d at 1101 (finding that an inability to collect damages did not result in irreparable harm due in part to the fact that the plaintiff "seeks only declaratory and injunctive relief, not monetary damages"). Thus, this Court should deny the preliminary injunction because Plaintiffs have failed to show irreparable harm.

B. A preliminary injunction would not serve the public interest.

Finally, Plaintiffs have failed to show that the balance of the equities and the public interest favor an injunction. "Where the government is a party to a case in which a

preliminary injunction is sought, the balance of the equities and public interest factors merge." *Roman v. Wolf*, 977 F.3d 935, 940–41 (9th Cir. 2020). And "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Feldman v. Ariz. Sec. of State's Office*, 843 F.3d 366, 394 (9th Cir. 2016) (citation omitted); *see also* State's Br. 17. More importantly, Plaintiffs alleged economic harms do not outweigh the "State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring); *see also Dobbs*, 597 U.S. at 301. Thus, the balance of the equities and public interest weigh against the injunction.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 18th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2023, I electronically filed this paper with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record.

s/Kevin H. Theriot
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