No. 21A222

IN THE
Supreme Court of the United States

MARK BRNOVICH, in his official capacity as Attorney General of Arizona,

Applicant,

v.

PAUL A. ISAACSON, M.D.; ERIC M. REUSS, M.D., M.P.H.; ARIZONA MEDICAL ASSOCIATION; NATIONAL COUNCIL OF JEWISH WOMEN (ARIZONA SECTION), INC.; and ARIZONA NATIONAL ORGANIZATION FOR WOMEN,

Respondents.

RESPONSE IN OPPOSITION TO APPLICATION FOR PARTIAL STAY

To the Honorable Elena Kagan, Associate Justice and Circuit Justice for the Ninth Circuit

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INTRODUCTION

TO THE HONORABLE ELENA KAGAN, CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Defendants-Applicants ("Defendants" or "Arizona") request that this Court grant the extraordinary relief of staying the district court's status quo injunction while their underlying appeal is still pending in the court of appeals. The law challenged in this case ('the Reason Scheme" or "Scheme") is complex, multifaceted, and internally inconsistent. It subjects Arizona physicians to felony prosecution for providing an abortion if they have some knowledge (the Scheme employs multiple standards) that the patient is to some degree motivated (again, the Scheme employs multiple standards) by a "genetic abnormality"—a nebulous term that, as statutorily defined, requires physicians to make difficult-to-impossible predictions about the origin and future course of potential fetal conditions.

Rather than defend the Reason Scheme as a whole, Defendants focus their request entirely on a single subsection, asking this Court to ignore the vast majority of the statute's interlocking operative terms, including its problematic definitions and internally inconsistent requirements—all of which were central to the district court's well-reasoned decision. But this Court cannot rewrite the statute in the course of a stay application. And granting a stay of one provision would only exacerbate the vagueness problems that plague the law, while imposing severe burdens on Plaintiffs, their patients, and their members' patients.

Defendants fail to satisfy any of the requirements necessary to show that a stay is warranted here. First, Defendants' claim of irreparable harm lacks any support. Nothing in the record indicates that Arizona would be harmed, in the absence of a stay, by a requirement that a status quo that has existed for decades be maintained pending appeal.

Second, Defendants' prediction that the court of appeals, when it decides the merits of the appeal, might create a circuit split on "multiple issues," Defendants' Application for Partial Stay ("Stay Pet.") 4, rests on rank speculation—not only as to how the court of appeals might rule in this case, but also how other cases pending in other circuits might be decided. Defendants are driven to such speculation because no circuit split currently exists.

Moreover, the district court invalidated the Reason Scheme on two independent bases—it concluded that Plaintiffs were likely to succeed both because the law imposes an undue burden in violation of substantive due process, and because its ill-defined and internally inconsistent prohibitions are unconstitutionally vague. Thus, unless the court of appeals' decision created a conflict with respect to *both* grounds, this case would be an inappropriate vehicle for certiorari, as review of one ground would not alter the result.

Finally, the decision below is correct. The district court correctly concluded that a preliminary injunction was warranted to maintain the status quo, where (1) the law imposes vague and internally inconsistent obligations on physicians, clinics, and their patients, rendering it unconstitutionally vague; (2) the law imposes

a substantial obstacle on pregnant patients seeking a pre-viability abortion based on the legislature's disapproval of their personal reasons for seeking one; and (3) Plaintiffs faced irreparable harm if the law were allowed to take effect, and the Defendants failed to demonstrate that they would suffer any irreparable harm.

This Court should deny Defendants' application.

BACKGROUND

I. Statutory Background

In April 2021, Arizona enacted S.B. 1457 ("the Act"). One aspect of the Act, the Reason Scheme, which was set to take effect on September 29, 2021, consists of several interdependent, inconsistent provisions that together ban the provision of abortion if a provider has some uncertain level of knowledge that the patient is to some uncertain degree motivated by a "genetic abnormality" in the fetus or embryo.[1] Act §§ 2, 10, 11, 13, A.R.S. §§ 13-3603.02(A)(2), (B)(2), (D), (E), 36-2157(A)(1), 36-2158(A)(2)(d), 36-2161(A)(25). The Scheme subjects violators to severe criminal penalties, including imprisonment (A.R.S. §§ 13-3603.02(A)(2), (B)(2), 13-702(D)), civil penalties (A.R.S. §§ 13-3603.02(D), (E)), and loss of medical licensure and professional censure (A.R.S. §§ 32-1401(27), 32-1403(A)(2), 32-1451(A), 32-1403(A)(5), 32-1403.01(A), 32-1451(D)-(E), (I), (K)).

In its stay application, Arizona quotes only one subsection of Section 2 of the Act, A.R.S. § 13-3603.02(A)(2) (referred to herein as "Subsection (A)(2)"), but fails to

[1] Where not directly quoting the language of the Scheme, Plaintiffs herein refer to the term "genetic abnormalities" as "fetal conditions" or "fetal diagnoses."

inform the Court about the ways the rest of Section 2, and the Scheme in its entirety—all of which are inextricably related—restrict abortion. As Arizona reports, Subsection (A)(2) makes it a class 6 felony for any person to "[p]erform[] an abortion *knowing* that the abortion is sought *solely because of* a genetic abnormality" of the fetus or embryo. Act § 2, A.R.S. § 13-3603.02(A)(2) (emphases added). But the interrelated aspects of Section 2 also make it a more serious, class 3 felony for any person, including physicians, to "solicit[] or accept[] monies to finance . . . an abortion *because of* a genetic abnormality." *Id.* § 13-3603.02(B)(2) (emphasis added) (referred to herein as "Subsection (B)(2)"). And, Section 2 also broadly imposes liability on any "physician, physician's assistant, nurse, counselor, or other medical or mental health professional" who "*knowingly* does not report *known* violations [of Section 2] . . . to appropriate law enforcement authorities[.]" *Id.* § 13-3603.02(E) (emphases added).

Other sections of the Reason Scheme also depend upon and incorporate Section 2. In Section 10, the Scheme prohibits an abortion unless the provider first executes an affidavit swearing "*no knowledge* that the" pregnancy is being terminated "*because of* a genetic abnormality" of the fetus or embryo. Act § 10, A.R.S. § 36-2157 (emphasis added).

In Section 11, the Scheme prohibits an abortion unless the provider first tells any patient "diagnosed with a non-lethal fetal condition" that Arizona law "prohibits abortion . . . *because of* a genetic abnormality." Act § 11, A.R.S. § 36-2158(A)(2)(d) (emphasis added).

Finally, in Section 13, the Scheme requires providers to report to the Arizona Department of Health Services (ADHS) "[w]hether any genetic abnormality . . . was detected at or before the time of the abortion by genetic testing, such as maternal serum tests, or by ultrasound, such as nuchal translucency screening, or by other forms of testing." Act § 13, A.R.S. § 36-2161(A)(25). This is in addition to the pre-existing requirement that providers ask and report to ADHS every patient's "reason for the abortion," including whether the "abortion is due to fetal health considerations." *Id.* § 36-2161(A)(12).

The Scheme 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)(2)(a). It does not provide any guidance about the level of certainty required for a fetal condition to be deemed "presen[t] or presumed presen[t]." *Id.*

Additionally, the Scheme exempts "lethal fetal conditions"—those "diagnosed before birth and that will result with reasonable certainty in the death of the unborn child within three months after birth"—from its prohibitions. Act § 2, A.R.S. § 13-3603.02(G)(2)(b), incorporating A.R.S. § 36-2158(G)(1). However, the Scheme provides no further information about which fetal conditions qualify as "lethal"; nor how one would predict with "reasonable certainty" that a condition will result in death within three months after birth or who must make this determination; nor

whether or how external factors, such as potential medical interventions, should be considered in assessing the potential timing of death.

All of the Scheme's interwoven prohibitions and regulations incorporate these defined terms.

II. Procedural History

On August 17, 2021, Plaintiffs-Respondents ("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. Dist. Ct. Dkts. 1; 10.[2]

The district court preliminarily enjoined the Reason Scheme in its entirety on September 28, 2021, Defendants' Appendix to Application for Partial Stay ("State App.") 29-30, finding Plaintiffs "likely to succeed on their claims that the [Reason Scheme is] unconstitutionally vague and unduly burden[s] the rights of women to terminate pre-viability pregnancies." *Id.* at 9.

The court concluded that the Scheme was likely unconstitutionally vague. First, "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."

[2] All references to the "Dist. Ct. Dkt." are citations to *Isaacson v. Brnovich*, No. 2:21-cv-01417-DLR (D. Ariz.). All references to the "COA Dkt." are to the Ninth Circuit record in *Isaacson v. Brnovich*, Nos. 21-16645, 21-16711 (9th Cir.).

Id. at 11-12. And second, while direct scienter requirements can mitigate vagueness, this 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 13-14.

The court rejected Arizona's argument that criminal liability was limited "to those who perform abortions knowing that the abortion is sought *solely* because of a fetal genetic abnormality," noting that "the word solely does not appear in [Subsection (B)(2)], which criminalizes the acceptance of money to finance such an abortion." *Id.* at 14. Because "many providers accept money for their services," the court found it "likely that liability under [Subsection (B)(2)] would eclipse liability under [Subsection (A)(2)] in most circumstances"—that is, that "solely because of" would not act as a limit on criminal liability. *Id.* at 14-15. Similarly, the court also rejected Arizona's argument that the knowledge provision would only be satisfied if a patient explicitly discloses the prohibited motive, finding this "irreconcilable with Arizona's much broader definition of knowledge, and with the reality that knowledge can be and most often is proven through circumstantial, rather than direct, evidence." *Id.* at 15. As the court explained, "[i]f Arizona wanted liability to attach only when the patient directly informs her provider that a fetal genetic abnormality is her sole motive . . . , it could and should have written that narrower language into the law." *Id.*

The district court further 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, thereby making it appreciably more difficult for such patients to exercise their rights to terminate pre-viability pregnancies." *Id.* at 10.

The court also determined that the Scheme is likely facially 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 22. The court rejected Arizona's argument that a patient seeking an abortion for a prohibited reason can readily "get one so long as she does not disclose her motive to her doctor." *Id.* As the court explained, finding a doctor who does not "know" the patient's reason is "easier said than done," *id.*, because there are "myriad ways" physicians "can and often do infer a patient's motive for terminating a pregnancy, even though the patient might not have explicitly disclosed that information." *Id.* at 13. And, because all these "realistic scenarios" are "likely sufficient to establish a *prima facia* case for criminal and civil liability," *id.* at 15, providers will "likely . . . be chilled from performing abortions" in all of them. *Id.* at 24. Thus, "[t]he evidence, along with common sense, [led] the [district court] 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.*

Moreover, the court found it unlikely that, once denied care from one provider, patients will understand they maintain any right to terminate. This is because the

Scheme itself requires providers to inform patients that Arizona law "prohibits abortion . . . because of a genetic abnormality," Act § 11, A.R.S. § 36-2158(A)(2)(d), effectively telling patients the abortion they seek is illegal, making it considerably "less likely that a woman, though desiring to terminate her pregnancy because of a fetal genetic abnormality, will successfully exercise her right to do so." State App. 23.

The court further found that even for patients not discouraged from seeking an abortion altogether, it will still be a "vexing task" to "find [another] provider who is both eligible and willing to perform the procedure" as such patients "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 23-25. And because fetal diagnoses regularly cannot be made until later in pregnancy, patients who seek abortion because of them often "are racing against a clock because Arizona law prohibits post-viability abortions." *Id.* at 25.

The district court found that the Reason Scheme failed both formulations of the undue burden test set forth in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020). First, the Scheme "place[s] a substantial obstacle in the paths of women seeking to terminate their pre-viability pregnancies because of a fetal genetic abnormality." State App. 25. Second, while the court acknowledged that Arizona's purported goals could be legitimate under other circumstances, it found those interests either were not served by this Scheme and/or that they did not outweigh the significant obstacles imposed by the Scheme. *Id.* at 26-28.

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 29.

On October 4, 2021, Arizona appealed "the entirety of the district court's injunction." COA Dkt. 14-1, 4 n.5; *see* Dist. Ct. Dkt. 56. It then moved in the district court to stay the injunction only as it applies to Subsection (A)(2), Dist. Ct. Dkt. 57, raising arguments virtually identical to those presented here. The court, after full briefing, denied the motion, finding Arizona failed to show any concrete harm and that the balance of harms tipped strongly in Plaintiffs' favor. Plaintiffs' Appendix to Response in Opposition to Application for Partial Stay ("Pls.' App.") 1-3.

On October 22, 2021, Arizona filed an Emergency Motion for a Partial Stay Pending Appeal in the Ninth Circuit, again seeking to stay the injunction only as it applies to Subsection (A)(2). COA Dkt. 14-1. On November 26, 2021, the Ninth Circuit denied Arizona's motion. State App. 31-32.

On December 14, 2021, Arizona filed the instant Application for Partial Stay with this Court, again seeking to stay the injunction only as it applies to Subsection (A)(2).

ARGUMENT

To succeed in obtaining a stay from the Supreme Court, an applicant must demonstrate:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable

> jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay.

Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (alteration in original) (internal citation and quotation marks omitted).

"[I]nterim determinations of the Court of Appeals in matters pending before it" should not be disturbed, "except upon the weightiest considerations." *O'Rourke v. Levine*, 80 S. Ct. 623, 624 (1960) (Harlan, J., in chambers). *Cf. Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (granting stay prior to decision from court of appeals where the application concerned a "primary and general election system facing a wide variety of challenges in the face of the pandemic" leading up to the 2020 general election). A "stay application to a Circuit Justice on a matter before a court of appeals is rarely granted" and is disfavored. *Heckler v. Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers) (internal citation omitted); *United States ex rel. Knauff v. McGrath*, 1 Rapp 36 (1950) (Jackson, J., in chambers). As a result, to obtain this "extraordinary relief," *Williams v. Zbaraz*, 442 U.S. 1309, 1316 (1979) (Stevens, J. in chambers), Defendants here bear "an especially heavy burden." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers).

Defendants fall far short. First, and dispositively, they have not shown irreparable harm. Second, Defendants' prediction of potential circuit splits relies on multiple layers of speculation about what the Ninth Circuit and several other circuit courts will do. Third, Defendants fail to provide any reason to disturb the district court's well-reasoned preliminary injunction maintaining the status quo, resting on

multiple grounds and the Reason Scheme as a whole. Finally, a partial stay will inflict significant irreparable harms on Plaintiffs, their patients, and their members.

I. Denying the Stay Will Not Impose Any Irreparable Harm on Arizona

Arizona has not demonstrated that it will suffer irreparable harm, a necessary prerequisite to obtaining a stay. As described *supra* at page 10 and *infra* Part I.B., in denying the request for a partial stay below, the district court found Defendants' alleged harms conclusory and abstract, whereas Plaintiffs' harms were grounded in fact and law, and far outweighed any purported harm to Defendants. Pls.' App. 2. This "decision is entitled to weight and should not lightly be disturbed." *Zbaraz*, 442 U.S. at 1312. Defendants fail to establish irreparable harm, much less provide any reason to disturb the district court's balancing of the harms. This failure alone should dispose of their application. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay.").

A. Seeking Partial Relief Undercuts Arizona's Claims of Irreparable Harm

At base, Arizona's sole claim to irreparable harm is that the injunction prevents it from enforcing a democratically-enacted statute. Stay Pet. 34. But that assertion is significantly undermined by Arizona's choice to seek a stay only with respect to Subsection (A)(2) rather than the entire Scheme. *Id.* at 4 n.1; *see also Ruckelshaus*, 463 U.S. at 1317. Arizona offers no justification for why its inability to enforce this single subsection *irreparably* harms its legislative authority, when the

remainder of the Scheme, also of course representing the legislature's will, would remain enjoined.

Moreover, the remainder of the Scheme—for which Arizona does not seek to stay the injunction—purports to vindicate the very same state interest: preventing so-called "discriminatory abortions" and physicians' participation in them. *See* Stay Pet. 2-3, 35. While Subsection (A)(2) forbids any person from providing an abortion "knowing that the abortion is sought solely because of a genetic abnormality," Act § 2, A.R.S. § 13-3603.02(A)(2), several of the Scheme's other provisions would ostensibly reach even more of the conduct Arizona seeks to curb, including those that criminalize the acceptance of money to finance an abortion if sought "because of" a "genetic abnormality," *id.* § 13-3603.02(B)(2); that require a provider to execute an affidavit swearing "no knowledge that the" pregnancy is being terminated "because of a genetic abnormality," Act § 10, A.R.S. § 36-2157; and that require the provider to inform any patient "diagnosed with a non-lethal fetal condition" that Arizona law "prohibits abortion . . . because of a genetic abnormality," Act § 11, A.R.S. § 36-2158(A)(2)(d). Arizona's decision to not seek a stay of the injunction related to any of these provisions of the Reason Scheme further undermines Arizona's claim of irreparable harm.

Arizona's request for a partial stay also effectively asks the Court to rewrite the law Arizona purports to defend. Stay Pet. 4 n.1. Even if this were the proper role of the judiciary—and it is not, *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006)—Arizona fails even to address how Subsection

(A)(2) would operate while the rest of the Scheme remains enjoined. Defendants' remarkable effort to have this Court rewrite Arizona's own law should be rejected.

B. None of Arizona's Purported Harms are Irreparable

Even if Arizona had sought a stay with respect to the Reason Scheme as a whole, the purported harms identified by Arizona do not constitute irreparable harm in this context. Nor do they warrant a mandatory stay that would disrupt the status quo while litigation is pending.

Preliminarily barring Arizona from "effectuating a statute enacted by the representatives of its people" pending litigation is not irreparable harm. Stay Pet. 36. A state does not automatically face irreparable injury when enjoined from enforcing an unconstitutional law, because seeking to enforce an unconstitutional law is not a valid exercise of state power. *See, e.g.*, *Ex parte Young*, 209 U.S. 123, 159-60 (1908). Indeed, in *Abbott v. Perez*, a case erroneously relied upon by Arizona, Stay Pet. 34, this Court clearly delineated that an injunction would not harm Arizona if the "statute is unconstitutional[.]"[3] 138 S. Ct. 2305, 2324 (2018); *see also* Pls.' App. 2 (citing *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing principle of judicial review, which necessarily authorizes courts to preclude the enforcement of laws enacted through the democratic process when courts determine that those laws violate the Constitution)).

[3] Arizona cites to *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), Stay Pet. 34, which is also distinguishable. There, the government showed concrete, ongoing harm *beyond* lack of enforcement of the statute. *Id.* at 1303-04. Here, as discussed below, none of Arizona's other purported harms are concrete or irreparable.

Furthermore, Arizona offers no evidence that the "safety and the health of the people" will be threatened if the status quo is preserved while the court of appeals considers the merits of the preliminary injunction appeal. Stay Pet. 34. Defendants' citation to *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring), Stay Pet. 34-35, is readily distinguishable. The "extraordinary health emergency" arising from the COVID-19 pandemic that was the subject of the executive order in *Newsom* in no way compares to Arizona's claimed public health interests here. Arizona's application to upend the status quo and enforce only one subsection of a multifaceted statutory scheme—while the rest of that scheme remains blocked—does not justify the kind of broad latitude granted to state legislatures when it comes to responding to an emergent, rapidly-evolving public health crisis.

Nor is Arizona's purported interest in non-discrimination irreparably harmed by the preliminary injunction. Stay Pet. 35. The district court rightly found, and uncontested record evidence shows, that Arizona is not impeded from advancing its stated anti-discrimination interests in myriad ways while the litigation is pending. "Arizona remains free to 'send an unambiguous message' about the 'equal dignity and value' of people born with genetic abnormalities through" other means, but it "may not further its interest by erecting a substantial obstacle in the paths of women who have chosen to terminate their pre-viability pregnancies." State App. 27. Indeed, Arizona may enact laws intended to promote childbirth over abortion, but such laws

must be "designed to *encourage* women [to] choose childbirth" and not to "*thwart* them from making any other choice." *Id.* (emphasis in original).

Arizona's claim that a stay of Subsection (A)(2) will "protect[ ] parents of unborn children from coercive abortion practices" is similarly baseless. Stay Pet. 36. Arizona presented no evidence that such coercive practices actually occur in Arizona. The undisputed evidence is that physicians, genetic counselors, and other health care professionals provide patients in Arizona with compassionate, nondirective options counseling. State App. 27 (citing Reuss Decl. ¶¶ 20-21, 43; Glaser Decl. ¶ 21, Isaacson Decl. ¶ 13); *see also* Dist. Ct. Dkt. 10-2 at 8, 12, 14. Thus, the district court found that "the evidence raises doubt about whether such coercive heath care practices are [a] problem in Arizona." State App. 27. In any event, the Reason Scheme is "too blunt an instrument to further this narrow goal." *Id.* at 28.

Nor will any of Arizona's other purported interests be *irreparably* harmed without a stay. The district court, upon reviewing extensive evidence, found that none of Arizona's purported interests were advanced by the Scheme. *Id.* at 25-29. And in any event, Arizona remains free to pass any number of other laws, or use myriad other means, to further its stated interests while this litigation is pending.[4] Arizona's preference to use Subsection (A)(2) as its exclusive means of doing so while the appeal

[4] *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (noting that State was free to inform women of its agenda "with a public-information campaign"); Br. of Illinois et al., as *Amici Curiae* Supporting Plaintiffs-Appellees at 18-25, *Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409 (2021) (discussing the many tools available to states for addressing discrimination against people with disabilities that do not come at the expense of reproductive rights).

is pending is not sufficient justification to stay the district court's status quo injunction. *Zbaraz*, 442 U.S. at 1313 (finding that the "state interest in encouraging childbirth" did not warrant a stay of district court's order enjoining State from enforcing abortion restriction).

II. The District Court's Decision Does Not Implicate a Circuit Split That Merits This Court's Review

Defendants are unable to identify a circuit split, as the court of appeals has not even ruled. Instead, they speculate that *if* the Ninth Circuit affirms the preliminary injunction, its decision *might* create a split warranting a grant of certiorari, depending on how it justifies its result. This is not only rank speculation, but unlikely given the number of unknown variables on which their argument rests.

A. Defendants' Invocation of a Circuit Split is Entirely Speculative

Arizona's prediction of potential circuit court splits rests on guesswork about how the Ninth Circuit and other circuits *may* rule, not on actual decisions.

According to Arizona, the Ninth Circuit *might*: (1) affirm the injunction, Stay Pet. 4, 11-13, 19; (2) do so on substantive due process grounds, *id.* at 11-13; (3) choose between different articulations of the undue burden standard, *id.* at 13-15; (4) "recognize a constitutional right to discriminatory abortion," *id.* at 19; and (5) affirm the injunction on vagueness grounds in a way that conflicts with other circuits, *id.* at 15-16.

Arizona further prognosticates that certain purported circuit splits will deepen because, "[b]y the time the Ninth Circuit addresses the preliminary injunction in this case, it is likely" that the Eighth Circuit "will have switched sides" regarding

substantive due process challenges to reason bans, *id.* at 13; that the Ninth Circuit might address Arizona's interests in a way that is inconsistent with some circuits, *id.* at 15; and that the Sixth Circuit sitting *en banc* might uphold a wholly different reason ban as not vague, *id.* at 16.

Such speculative predictions cannot demonstrate the "extraordinary circumstances" sufficient to justify a stay, Sup. Ct. R. 23.3, since they have *not actually occurred*. Even where a case may ultimately present "fundamental issues," prudence counsels against addressing such issues when they are as yet "hypothetical." *Padilla v. Hanft*, 547 U.S. 1062, 1062 (2006) (Kennedy, J., Roberts, C.J., and Stevens, J., concurring in denial of certiorari).

Even if the Court believes that this case may one day result in conflicts with other circuits, only the weightiest of concerns, none of which are present here, would justify issuing a stay *now*, before that conflict actually exists. Arizona's attempt to conjure circuit splits between a *future* Ninth Circuit decision and future decisions of other circuits is no basis for a stay.

B. A Ninth Circuit Decision Upholding the Injunction on Substantive Due Process Grounds Is Unlikely to Create a Circuit Split

1. Reason-Based Abortion Bans Have Been Uniformly Evaluated Under *Roe* and *Casey*

There is no disagreement among lower courts as to the standard that applies to substantive due process challenges to laws that prohibit abortion based on a patient's reason. Every court of appeals to consider such a challenge has applied *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and

Roe v. Wade, 410 U.S. 113 (1973). None of the decisions dispute that under *Casey* and *Roe*, a law restricting abortion cannot impose a substantial obstacle, whether it is characterized as a ban or a regulation, and regardless of the interest a state asserts. *See* Stay Pet. 10-13; *June Med. Servs.*, 140 S. Ct. at 2120 (plurality opinion), 2135 (Roberts, C.J., concurring in judgment). All three appellate decisions cited by Arizona agree that a law that prevents patients from accessing abortion based on their reasons for doing so is likely unconstitutional under *Casey* and *Roe*. *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 521-22 (6th Cir. 2021) (en banc); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health ("Box")*, 888 F.3d 300, 306 (7th Cir. 2018), *reh'g en banc granted, judgment vacated*, 727 F. App'x 208 (7th Cir. 2018), *vacated*, 917 F.3d 532 (7th Cir. 2018), *and opinion reinstated*, 917 F.3d 532 (7th Cir. 2018), *and cert. granted in part, judgment rev'd in part sub nom. Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019); *Little Rock Fam. Plan. Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021).

The Seventh and Eighth Circuits determined that the reason bans before them operated as prohibitions on abortion for some patients. The Seventh Circuit held that Indiana's reason bans were "absolute prohibitions on abortions[.]" *Box*, 888 F.3d at 306. The Eighth Circuit concluded that it was "undisputed that" Arkansas' reason ban was a "complete prohibition of abortions based on the pregnant woman's reason for exercising the right to terminate her pregnancy before viability." *Little Rock Fam. Plan. Servs.*, 984 F.3d at 690.

The Sixth Circuit concluded that Ohio's reason ban *did not* have such an effect, because under Ohio's law and in view of the record, patients "who do[] not want a child with Down syndrome may lawfully obtain an abortion solely for that reason" by keeping their reasons secret from their doctors. *Preterm-Cleveland*, 994 F.3d at 521. The Sixth Circuit acknowledged, however, that a law that prevents patients from obtaining an abortion would be a "different case." *Id.* at 522. The Seventh and Eighth Circuits adjudged Indiana's and Arkansas' laws, respectively, to be such different cases.

Here, the district court concluded that the extensive and undisputed record evidence showed that the law would "place a substantial obstacle in the paths of women seeking to terminate their pre-viability pregnancies because of a fetal genetic abnormality." State App. 25. As outlined above, this decision was based on facts regarding abortion access in Arizona in combination with the unique attributes of Arizona's law. *See supra* at pages 6-10. That decision is not contrary to the Sixth Circuit's, because it involves a different law and a different record. *Cf. Preterm-Cleveland*, 994 F.3d at 528 (applying the undue burden standard and holding that the record evidence did not demonstrate that Ohio's reason ban would impose a substantial obstacle). Both courts agree that a reason law that imposes a substantial obstacle violates due process; they simply found that different laws yield different results under the same standard. Thus, if the Ninth Circuit affirms the injunction on

these grounds, no circuit split would be presented.[5]

2. The Ninth Circuit Need Not Address a Purported Circuit Split Regarding the Undue Burden Standard

Defendants also invoke an alleged circuit split regarding the formulation of the undue burden standard after this Court's decision in *June Medical*. *See* Stay Pet. 13-15. But as the lower court found that Arizona's law fails under *both* formulations, State App. 22-29, there is no reason to believe this case provides a vehicle to address that split. Arizona contends that post-*June Medical*, courts differ in their application of the undue burden standard, with some circuits applying the benefits-burdens balancing test articulated in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) and used by the plurality in *June Medical*, and others adhering to Chief Justice Roberts's concurrence in *June Medical* that eschews consideration of benefits and holds that "[l]aws that do not pose a substantial obstacle to abortion access are permissible, so long as they are 'reasonably related' to a legitimate state interest," *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in judgment) (quoting *Casey*, 505 U.S. at 878 (plurality opinion)).

But that issue is academic here, because the district court evaluated Plaintiffs' substantive due process claim against Arizona's law using *both* articulations of the undue burden standard and reached the same result under both. State App. 22, 25,

[5] To the extent Arizona claims the Eighth Circuit is likely to "switch[ ] sides" because it recently decided to rehear *en banc* a case challenging a different, Missouri reason ban, that is just more rank speculation, Stay Pet. 13. Even if the panel opinion in that case were reversed, there is no reason to think that reversal would necessarily be on the grounds that *Roe* and *Casey* do not apply, as opposed to the application of that precedent to Missouri's specific statute and the record, as in *Preterm*.

28-29. *See* Stephen M. Shapiro, et al., Supreme Court Practice, § 4.4(F) (11th ed. 2019) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied."); *cf., e.g.*, *DeBacker v. Brainard*, 396 U.S. 28, 31 (1969) (per curiam) (holding that case was "not an appropriate vehicle for consideration of the standard of proof in juvenile proceedings" where counsel admitted that the evidence was sufficient "even under a" more stringent, "reasonable doubt standard").

In addition, the district court's conclusion that Arizona's law is likely unconstitutional rested on *two independent grounds*—substantive due process and vagueness. The vagueness holding is an independent basis for the injunction, rendering any conflict regarding undue burden even more academic here. *Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1159 (9th Cir. 2011) (a court of appeals may "affirm the district court on any ground supported by the record"). The Ninth Circuit can affirm or reverse the preliminary injunction without even reaching the substantive due process question.

Thus, this case is not remotely an "ideal vehicle" to address any distinctions in how lower courts have articulated the undue burden standard. Stay Pet. 15.

C. A Ninth Circuit Decision Upholding the Injunction on Vagueness Grounds Is Unlikely to Create a Circuit Split

1. Vagueness Analysis is Highly Case-Specific

Arizona's prediction of a split on the vagueness issue is even more speculative. It argues that *if* the Ninth Circuit affirms the injunction on vagueness grounds "it will . . . likely result in a circuit split on the vagueness of" abortion reason bans,

because it might conflict with a forthcoming *en banc* decision in *Memphis Center for Reproductive Health v. Slatery*, 14 F.4th 409, *vacated, reh'g en banc granted,* 18 F.4th 550 (6th Cir. 2021). Stay Pet. 15.

Regardless, a finding that Arizona's law is vague on its face would not constitute a split unless the laws were identical, and they are not, or if the courts chose to apply different legal standards. *See, e.g.*, *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982) (cautioning that vagueness analysis "should not . . . be mechanically applied").

Arizona's law differs from Tennessee's in material ways. In *Slatery*, plaintiffs challenged a Tennessee law criminalizing the performance of an abortion if the physician "knows" the abortion is sought "because of" fetal race, sex, or Down syndrome. 14 F.4th at 416. A panel of the Sixth Circuit held, in a now-vacated opinion, that plaintiffs were likely to succeed on claims that this Tennessee statute is unconstitutionally vague. *Id.* at 429-34. However, as Plaintiffs have explained, whereas Tennessee's scheme employs one, albeit vague, standard, the Reason Scheme features multiple vague standards that providers must navigate to assess whether a "genetic abnormality" played an impermissible role in their patient's decision-making. And whereas the Tennessee law exclusively concerns fetal Down syndrome, the Arizona law covers an unlimited range of fetal conditions that are "squish[ily]" defined—further obscuring its operation. State App. 14. Arizona offers no reason to predict that in assessing these different statutes, the courts of appeals will apply inconsistent vagueness standards.

2. There Is No Circuit Split on the Standard for Facial Vagueness Claims

Arizona cites *Planned Parenthood of Indiana & Kentucky, Inc. v. Marion County Prosecutor*, 7 F.4th 594, 606 (7th Cir. 2021), and predicts that a decision upholding a pre-enforcement facial vagueness challenge in this case will create a split of authority with the Seventh Circuit. Stay Pet. 16-17. But *Marion County Prosecutor* presented an entirely different case: there, the Seventh Circuit rejected a pre-enforcement facial vagueness challenge to a statute requiring physicians to report any one of the listed complications "arising from" an abortion, where "arising from" was the only contested provision. 7 F.4th at 596. The Seventh Circuit in *Marion County Prosecutor* found insufficient vagueness for a pre-enforcement, facial attack because the statute had a "discernable core"[6] that was "understandable by persons of ordinary intelligence and not subject to arbitrary enforcement." *Id.* at 604. In so doing, the Seventh Circuit was explicit that the "case as currently briefed does not directly implicate or 'inhibit the exercise of constitutionally protected rights[,]' which would heighten our concern about the vagueness of the statute." *Id.* at 606 (internal citation omitted). It thus "strictly limited" its analysis to "the facts as currently pled . . . which do not suggest that the Statute interferes with or chills a protected constitutional right." *Id.* Thus, by its own terms, the Seventh Circuit's analysis in

[6] In any event, Arizona has not even *attempted* to argue that the Scheme has a discernable core, instead insisting that the statute is clear by stating that it will not apply where there is no fetal indication, Stay Pet. 31-32, but utterly failing to address the situations where the statute is actually relevant.

Marion County Prosecutor has no bearing where, as the district court found here, the law at issue *does* chill constitutionally-protected conduct.

Given the stark differences between the laws at issue in *Marion County Prosecutor* and here, and the Seventh Circuit's own directive limiting its holding to the facts before it, affirming the injunction on facial vagueness grounds would not create a circuit split. *See, e.g.*, *Barnes v. Ahlman*, 140 S. Ct. 2620, 2623 (2020) (Sotomayor & Ginsburg, JJ., dissenting) (stating that "no circuit split exists" where the court considered a party's request "by applying established law to the facts and equities before it" and the court's decision turned on those specific facts and equities)

III. There Is No Fair Prospect This Court Will Reverse the Injunction Ruling

The district court granted the preliminary injunction against the Reason Scheme based on a straightforward application of this Court's precedent, and in accordance with the weight of authority of other courts that have addressed similar restrictions. Because the district court's preliminary injunction was well-supported by the law and evidence, Defendants cannot show a likelihood of a grant of certiorari and reversal.

A. The District Court's Ruling on Substantive Due Process is Consistent with this Court's Precedents

The district court decision applying *Roe* and *Casey* to the Reason Scheme is correct.[7] First, this Court's precedents do not permit Arizona to impose a substantial

[7] As discussed *supra* at 19-21, *every* court to consider a similar law has held that *Roe* and *Casey* govern, further undermining Arizona's request for a stay at this stage.

obstacle in the path of people seeking pre-viability abortions, simply because Arizona disapproves of their reasons, as Defendants suggest. Stay Pet. 17-19. As this Court has repeatedly affirmed, "the most central principle of *Roe v. Wade* [is] a woman's right to terminate her pregnancy before viability." *June Medical Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in judgment) (internal quotations omitted) (citing *Casey*, 505 U.S. at 871); *see also Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (declining to "revisit" holding that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870) (plurality opinion)); *Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade.*") (plurality opinion). Thus, "a State may not prohibit *any* woman from making the ultimate *decision* to terminate her pregnancy before viability," *Casey*, 505 U.S. at 879 (emphasis added), including by placing "a substantial obstacle in the path of a woman's choice," *id.* at 877.

Arizona's position that it can unduly burden access to pre-viability abortion if it disapproves of the reason for seeking the abortion strikes at the very heart of the decisional right described in *Roe* and *Casey*. *See Casey*, 505 U.S. at 851-53; *see also Bellotti v. Baird*, 443 U.S. 622, 655 (1979) ("It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.") (Stevens, J., concurring in judgment).

Arizona's attempts to argue that a different rule governs people who seek abortions for certain reasons but not others are without merit. For example, it is irrelevant that the plaintiffs in *Casey* did not challenge Pennsylvania's sex-selective abortion ban. Stay Pet. 18. *Casey* announced a "rule of law" meant to govern substantive due process claims for *all* abortion regulations. 505 U.S. at 871. And to the extent Arizona is suggesting that at the time of *Roe* and *Casey*, this Court did not contemplate that some patients may choose an abortion based on certain fetal conditions, Stay Pet. 19, it is wrong. In *Colautti v. Franklin*, for example, "[t]he plaintiffs-appellees introduced evidence that modern medical technology makes it possible to detect whether a fetus [has] . . . Tay-Sachs disease and Down's [sic] syndrome[.]" 439 U.S. 379, 389 n.8 (1979). The *Colautti* Court then invalidated the abortion restrictions challenged in that case precisely because they could be read to limit the right to abortion prior to viability, including in such cases. *Id.* at 389-90.[8]

Second, nothing in the district court's application of the undue burden framework to the Reason Scheme, or its well-supported factual findings, could warrant reversal, particularly at this preliminary stage of the case. State App. 22-29; *cf.* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the

[8] Other decisions underscore that this Court has long been aware that some people decide to have abortions under these circumstances. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 340 (1980) (Marshall, J., dissenting) ("Finally, federal funding [for abortion] is unavailable in cases in which it is known that the fetus will be unable to survive. In a number of situations, it is possible to determine that the fetus will suffer an early death if carried to term."); *Doe v. Bolton*, 410 U.S. 179, 205 (1973).

asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

As an initial matter, Arizona's suggestion that Plaintiffs did not pursue an undue burden claim is unfounded, Stay Pet. 25. Plaintiffs have argued consistently that their substantive due process claim would succeed regardless of whether the Reason Scheme was considered a *per se* ban or was subject to the undue burden standard. *See, e.g.*, Dist. Ct. Dkt. 10, 11 n.6. And, as discussed *supra*, the district court diligently applied both formulations of the undue burden test, State App. 18-22, so Arizona cannot—and does not—contend the proper test was not applied. Instead, Arizona can only quibble with the district court's *assessment* of the evidence at this preliminary stage of the case, Stay Pet. 25-27, but that is wholly insufficient to justify the extraordinary relief Arizona seeks—particularly where Arizona opted not to challenge the extensive evidence submitted by Plaintiffs in support of their motion *and* waived an evidentiary hearing, Dist Ct. Dkt. 46; Dist. Ct. Dkt. 18 ¶ 4(c).[9]

Moreover, the crux of Arizona's complaint appears to be that the district court issued a status quo injunction to prevent the Reason Scheme *as a whole* from taking effect while the litigation is pending. Stay Pet. 24-25 (discussing large fraction test). Yet, as discussed *supra*, Arizona is only asking this Court to lift the injunction with respect to Subsection (A)(2). Arizona cannot isolate a single provision from the enjoined law and then contend that that single provision on its own is not likely to

[9] Thus, if Arizona believes the district court's factual findings supporting the undue burden analysis lacked the "benefit" of "record development," Stay Pet. 25, which is not grounds for a stay in any event, it has only itself to blame.

impose a substantial obstacle, particularly where the provisions are inextricably interrelated. Given that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held" and that "[a] party thus is not required to prove his case in full at a preliminary-injunction hearing," *U. of Tex. v. Camenish*, 451 U.S. 390, 395 (1981), these grievances do not rise to the level that warrant a stay from this Court.

B. The District Court's Vagueness Ruling is Consistent with this Court's Precedents

Defendants also have no basis for their speculation that the Ninth Circuit's future affirmance of the Reason Scheme's likely vagueness "would also conflict with several of the Court's decisions" and present an important federal question for review. Stay Pet. 20, *see id.* 19-22. In fact, the district court's independent vagueness ground for the preliminary injunction represents a case-specific application of settled law that would not warrant certiorari, much less be likely to be reversed.

As a preliminary matter, Defendants' stay application paints a false and artificially cabined picture of Plaintiffs' vagueness claim. Defendants have extracted one isolated provision, Subsection (A)(2), from an inextricably interconnected statutory scheme. But the Reason Scheme operates as a whole and must be assessed as such. And as the district court properly found, the many inconsistencies between its multiple provisions exacerbate its vagueness. State App. 11-16.[10]

[10] In any event, Subsection (A)(2) is unconstitutionally vague even standing alone, because it requires physicians to guess at what is in the minds of their patients, and as to what constitutes a "genetic abnormality."

The district court found the Reason Scheme unconstitutionally vague because it requires physicians and enforcers to guess as to many of its operative terms. It leaves fundamentally ambiguous what "genetic abnormalit[ies]" are covered or not, requiring impossible predictions about the origin and future course of potential conditions of an unborn fetus. *Id.* at 11-12, 14. It employs several different standards to describe what role a "genetic abnormality" must play in a patients' subjective decision-making to be prohibited. *Id.* at 14-16. And, it leaves entirely unclear what doctors must know about their patient's decision-making to trigger the Scheme. *Id.* at 13-14.

To avoid legal liability under the Reason Scheme, physicians must try to apply three different motivation standards—not just the "solely because of" language in Subsection (A)(2), *cf.* Stay Pet. 33-34—and can provide an abortion only when they can swear they have "no knowledge" whatsoever that a particular patient is acting because of a "genetic abnormality," a term that itself lacks a cognizable definition. *See* State App. 11-16. Thus, contrary to Defendants' representations, the scheme *does* require providers to consider "why someone [else] is seeking an abortion," Stay Pet. 33-34, to weigh any existing clues to their subjective thought process, and to rule out any possible basis for knowing that a patient seeking an abortion might be impermissibly motivated by a covered condition. It is Defendants who are trying to "rewrite the statute," *id.* at 34, by referring in their stay application only to one isolated piece of the Reason Scheme as a whole.

The district court found that the Reason Scheme's vague and inconsistent terms will place physicians in jeopardy of felony prosecutions and the loss of their licenses, chilling them from providing constitutionally-protected abortions. *See* State App. 11. Correctly applying the "high bar" required by this Court's precedents where constitutional rights are chilled, the district court found this pre-enforcement challenge warranted in order to prevent the scheme's chilling effect on constitutionally-protected abortion rights and to guard against "deprivation of a doctor's liberty or property." *Id.*; *see, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (noting that regulated parties are not required to choose "between abandoning [their] rights or risking prosecution"); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979) (where provision is "truly vague," challenger should not be expected to pursue protected activities "at their peril"). If the Ninth Circuit affirms the district court's vagueness ruling, its decision will be fully consistent with this Court's precedent.

Citing a dissent, Defendants urge that, for a challenged law to be facially invalid, Plaintiffs "must show that the law cannot be constitutionally applied against *anyone* in *any* situation." Stay Pet. 20 (citing *June Med. Servs.*, 140 S. Ct. at 2175 (Gorsuch, J., dissenting)). They seek support for that proposition in snippets from decades-old decisions. *Id.*; *see also id.* at 30 (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

But Defendants ignore the Court's more recent facial vagueness precedents, which make clear that "our *holdings* squarely contradict the theory that a vague

provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 576 U.S. 591, 602 (2015); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018). Defendants' assertions that no facial vagueness challenge can succeed unless a statute lacks "any ascertainable standard" or "proscribe[s] no comprehensible course of conduct at all," Stay Pet. 20, 31 (internal citations omitted), cannot be squared with *Johnson* and *Dimaya*. Where constitutional rights are at stake, the Court has invalidated laws prohibiting grocers from charging "unjust or unreasonable rate[s] . . . even though one can easily envision rates so high that they are unreasonable by any measure" and prohibiting "people on sidewalks from 'conduct[ing] themselves in a manner annoying to persons passing by'—even though spitting in someone's face would surely be annoying." *Johnson*, 576 U.S. at 602-03 (citations omitted).

The Court has applied the same standard in previous facial vagueness challenges to laws restricting abortion. *See Colautti*, 439 U.S. at 391 (emphasizing that a vague law that chills the exercise of the right to abortion may succumb to a facial challenge even when the law could have some legitimate application); *see also Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027 (9th Cir. 1999) (following *Casey* and the "great weight of circuit authority" that rejects the application of *Salerno*'s no-set-of-circumstances test in the context of facial challenges to abortion statutes).

Nor do this Court's precedents establish that a scienter requirement always cures vagueness, as Defendants imply. Stay Pet. 21. That a particular scienter

requirement may have "alleviate[d]" or "reduce[d]" vagueness concerns in some situations, *id.* (internal citations omitted), does not mean that it suffices here, particularly where what one must "know" concerns someone else's subjective motives about an ill-defined condition. As this Court explained in *Screws v. United States*, 325 U.S. 91, 102 (1945), cited by Defendants, a scienter requirement "may not render certain, for all purposes, a statutory definition of a crime which is in some respects uncertain." *See also United States v. Williams*, 553 U.S. 285, 306 (2008) (emphasizing that what renders a statute vague is "the indeterminacy of precisely what" the fact is that must be known, as Plaintiffs' challenge relies upon here).

In short, Defendants' application fails to show that, if the court of appeals affirms the district court's conclusion that Plaintiffs are likely to succeed in showing that the Reason Scheme is unconstitutionally vague, that decision will create a reason for this Court to intervene.

IV. A Stay Would Inflict Significant Harms on Plaintiffs

Finally, the equities weigh heavily in Plaintiffs' favor. As noted above, Defendants have failed to demonstrate irreparable harm from the district court's preliminary maintenance of the status quo. Point I, *supra* at 12. By contrast, Plaintiffs have shown, through extensive, unrebutted record evidence, including expert declarations, that if the Scheme 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 App. 11-16, 22-25. That Defendants seek a stay with

respect to a single provision of the Scheme does not warrant a different result: Subsection (A)(2) is no less infected with unconstitutional vagueness as a result of the Scheme's unclear and indeterminate language and will, even standing alone, gravely obstruct physician-patient communications about the nature of fetal risks, possible genetic conditions, pregnancy options, and the patient's own thoughts—because such discussions might compromise physicians' ability to provide an abortion or to refer the patient elsewhere. *See id*. at 16, 28. And, while Subsection (A)(2) may narrow the *universe* of patients for whom the Scheme's burdens are relevant, the substantial obstacle it places in the path of those patients is just as unconstitutional.

Such deprivation of constitutional rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (2003). This is particularly true here, because abortion is a time-sensitive form of medical care and a decision that "simply cannot be postponed, or it will be made by default with far-reaching consequences." *Bellotti*, 443 U.S. at 643.

CONCLUSION

For these reasons, Defendants' application to this Court for a partial stay should be denied.

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Respectfully submitted,

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