No. _____

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.; ARIZONA MEDICAL ASSOCIATION; NATIONAL COUNCIL OF JEWISH WOMEN, INC., ARIZONA SECTION; and ARIZONA NATIONAL ORGANIZATION FOR WOMEN,
Respondents.

APPLICATION FOR PARTIAL STAY

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

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Applicant is Mark Brnovich, in his official capacity as Attorney General of Arizona ("Applicant").

Respondents are Paul A. Isaacson, M.D.; Eric M. Reuss, M.D.; the Arizona Medical Association; the National Council of Jewish Women, Inc., Arizona Section; and Arizona National Organization for Women (collectively, "Respondents").

The proceedings below were:

1. *Isaacson v. Brnovich*, No. 21-16645 (9th Cir.) – stay denied November 26, 2021
2. *Isaacson v. Brnovich*, No. 2:21-cv-01417-DLR (D. Ariz.) – judgment entered September 28, 2021

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. § 1651, Applicant, Arizona Attorney General Mark Brnovich, respectfully applies for a partial stay of a preliminary injunction issued on September 28, 2021, by the United States District Court for the District of Arizona (App. 1-30), pending the completion of further proceedings in the court of appeals and, if necessary, this Court.

Even assuming the continued viability of *Roe* and *Casey*, the Arizona law at issue in this Application—which prohibits abortion providers from performing genetic-abnormality-selective abortions—does not violate any Fourteenth Amendment right for a woman to obtain an abortion. In *Roe*, the Court rejected the argument that a right to abortion "is absolute and that [a woman] is entitled to terminate her pregnancy . . . for whatever reason she alone chooses." *Roe v. Wade*, 410 U.S. 113, 153 (1973). While the Pennsylvania statute at issue in *Casey* contained a restriction on sex-selective abortion, the plaintiffs there did not challenge that provision, and no provision challenged there is remotely analogous to the provision at issue here. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring).

This Court has never otherwise recognized the purported right at issue—a right to race-, sex-, or genetic-selective abortions. As the Sixth Circuit explained in

recently upholding a similar law regulating Down-syndrome-selective abortions, "the 'right' at issue would be the woman's right to a specific doctor (one with knowledge of her specific Down-syndrome-selective reason for the abortion). One would be hard pressed to find that right established anywhere." *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 522-23 (6th Cir. 2021) (en banc). The right to perform an abortion based solely on the results of genetic testing is novel, with no basis in the Constitution's text or the Nation's history and traditions, and therefore undeserving of heightened judicial scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (analyzing for due process purposes "whether this asserted right has any place in our Nation's traditions"). And Respondents' proposed right has no limiting principle—it would apply equally to decisions to abort when genetics predicts low IQ, lack of athletic prowess, or any other characteristic that the medical profession finds undesirable. *See Whole Woman's Health v. Jackson*, —S. Ct.—, No. 21-463, 2021 WL 5855551, at *6 (U.S. Dec. 10, 2021) ("Troubling, too, the petitioners have not offered any meaningful limiting principles for their theory.").

For over a decade, Arizona, in furtherance of its compelling interest in avoiding the practice of discriminatory or eugenic abortion, has prohibited abortion providers from "[p]erform[ing] an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child." A.R.S. § 13-3603.02(A)(1). Similar to other states, Arizona recently extended this ban on

discriminatory abortions to include genetic abnormalities, such as Down syndrome. Thus, Arizona law now also prohibits—with broad exception for the health or life of the mother—abortion providers from "[p]erform[ing] an abortion knowing that the abortion is sought solely because of a genetic abnormality of the child." *Id.* § 13-3603.02(A)(2) (the "Reason Regulation"). Arizona law expressly acknowledges that a woman on whom a sex-, race-, or genetic-selective abortion is performed is not subject to penalties or liability. *Id.* § 13-3603.02(F). In passing this regulation, the Arizona Legislature expressly found that, among other state interests, the provision will "protect[] the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortions." S.B. 1457 § 15.

Plaintiffs—two abortion providers, two non-profit corporations, and the Arizona Medical Association—brought a facial, pre-enforcement challenge to the Reason Regulation in the District of Arizona, seeking a preliminary injunction. Plaintiffs assert that the Reason Regulation imposes a ban on pre-viability abortion and is unconstitutionally vague in violation of the Fourteenth Amendment. Despite concluding that the Reason Regulation is not a ban on abortion, the district court preliminarily enjoined the Reason Regulation. App. 17, 30. In a one-sentence order,

the court of appeals declined a partial stay[1] of that injunction, thereby allowing genetic-abnormality-selective abortions to continue unimpeded in Arizona. App. 31-32.

In deciding whether to grant a stay in this posture, this Court considers whether an eventual petition for a writ of certiorari in the case would likely be granted, whether there is a fair prospect that the Court would rule for the moving party, and whether irreparable harm is likely to occur if a stay is not granted. Those criteria are met here.

First, this Court likely would grant review of a decision affirming the preliminary injunction. Such a decision would further deepen an existing circuit split on multiple issues. The circuits are currently split on whether state statutes regulating the reason for performing an abortion, including bans on performing abortion because of genetic makeup, are constitutional under *Roe* and *Casey*. That split is likely to deepen in the coming months. The circuits are also split on the standard to be utilized in determining whether a law imposes an undue burden under *Casey*. As to vagueness, the circuits are split on the applicable standard to apply to facial vagueness challenges in general. And an affirmance of the preliminary injunction on vagueness grounds will likely create a split on whether state statutes

[1] Although Applicant and other state entities and officials appealed the entirety of the district court's preliminary injunction, Applicant seeks only a stay of that portion enjoining the Reason Regulation (S.B. 1457 § 2).

regulating the reason for performing an abortion are unconstitutionally vague. Finally, an affirmance of the preliminary injunction would decide an important federal question in a way that conflicts with multiple decisions from this Court.

Second, this Court likely would vacate the injunction as to the Reason Regulation. Neither *Roe* nor *Casey* apply to the Reason Regulation. Even if they do, the district court correctly concluded that the Reason Regulation does not constitute a ban on pre-viability abortion and, because Respondents did not even attempt to establish that an undue burden exists, the district court erred in finding that the Reason Regulation will create such a burden. As to vagueness, the Reason Regulation is more than sufficiently clear to notify doctors what conduct it prohibits. Moreover, the Court has repeatedly held that scienter requirements—like that contained in the Reason Regulation—alleviate vagueness concerns.

Finally, allowing the district court's injunction as to the Reason Regulation to remain in effect until this Court has been able to undertake plenary review would irreparably harm Arizona and the unborn children it has sought to protect from discriminatory abortion. As a result of the injunction, Arizona cannot achieve its multiple compelling sovereign interests in enforcing Arizona law to regulate medical ethics and eliminate discriminatory medical practices. Not only does the district court's ruling enjoin the Reason Regulation, it calls into question the continued validity of Arizona's decade-long regulation of race- and sex-selective abortions.

OPINIONS BELOW

The Ninth Circuit's order denying a stay is reproduced at App. 31-32. The district court's opinion entering a preliminary injunction is reported at *Isaacson v. Brnovich*, —F. Supp. 3d—, 2021 WL 4439443 (D. Ariz. Sept. 28, 2021), and is reproduced at App. 1-30.

JURISDICTION

The district court granted a preliminary injunction. On interlocutory appeal, a panel of the Ninth Circuit denied an emergency motion to stay that injunction. This Court has jurisdiction to stay the preliminary injunction pending appeal and certiorari. 28 U.S.C. § 1254(1); § 1651(a); § 2101(f).

STATEMENT

1. In 2011, the Arizona Legislature enacted A.R.S. § 13-3603.02 in order to combat discriminatory abortion. *See* 2011 Ariz. Legis. Serv. Ch. 9. Since then, § 13-3603.02 has prohibited persons from "knowingly" "[p]erform[ing] an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child." A.R.S. § 13-3603.02(A)(1). In its findings, the Legislature recognized that "[t]he purpose of [the statute] is to protect unborn children from prenatal discrimination in the form of being subjected to abortion based on the child's sex or race by prohibiting sex-selection or race-selection abortions." 2011 Ariz. Legis. Serv. Ch. 9, § 3. It reasoned that "[t]here is no place for such

discrimination and inequality in human society," especially where such "abortions are elective procedures that do not in any way implicate a woman's health." *Id.*

2. The Arizona Legislature enacted Senate Bill 1457 ("S.B. 1457" or "the Act") earlier this year based on at least three compelling state interests (although there are more than three). First, the Legislature found "that in the United States and abroad fetuses with Down syndrome are disproportionately targeted for abortions." S.B. 1457 § 15. The Reason Regulation sends "an unambiguous message that children with genetic abnormalities, whether born or unborn, are equal in dignity and value to their peers without genetic abnormalities, born or unborn." *Id.* Second, the Legislature adopted the Sixth Circuit's finding that parents of children with Down syndrome "attest that their doctors explicitly encouraged abortion or emphasized the challenges of raising children with Down syndrome." *Id.* Thus, the Reason Regulation "protects against coercive health care practices that encourage selective abortions of persons with genetic abnormalities." *Id.* Finally, the Reason Regulation "protects the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortions." *Id.*

3. S.B. 1457 includes several provisions intended to "protect[] the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions." S.B. 1457 § 15. In particular, Section 2 of S.B. 1457

adds to the pre-existing prohibitions of A.R.S. § 13-3603.02 with a new provision prohibiting a person from performing an abortion if that person knows "that the abortion is sought solely because of a genetic abnormality of the child." ("Reason Regulation"). 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." A.R.S. § 13-3603.02(G)(2)(a). A knowing violation of this provision is a class 6 felony. A.R.S. § 13-3603.02(A).

The Act, however, contains three broad exceptions. First, the Act explicitly exempts "[a] woman on whom . . . an abortion because of a child's genetic abnormality is performed" from all criminal or civil liability. A.R.S. § 13-3603.02(F). Second, a "genetic abnormality" for purposes of this section does not include "a lethal fetal condition," which is "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." A.R.S. § 13-3603.02(G)(2)(b); § 36-2158(G)(1). Finally, the Act adds a "medical emergency" exception (including to the race- and sex-selective abortion regulations) that allows a physician to use "good faith clinical judgment" to terminate a woman's pregnancy "to avert her death" or to protect her from "substantial and irreversible impairment of a major bodily function," even if the abortion would otherwise be prohibited. *See* A.R.S. § 13-3603.02(A), (G)(3); §

36-2151(9).

4. Just weeks before S.B. 1457 would go into effect, Respondents sued Applicant and others, seeking a preliminary injunction to stop the Act's enforcement. Respondents alleged that the Reason Regulation violates the abortion rights of their patients by banning pre-viability abortions and violates the void-for-vagueness doctrine. Just one day before S.B. 1457 was to become effective, the district court enjoined enforcement of the Reason Regulation and several other provisions contained in S.B. 1457. App. 30. The court rejected Respondents' argument that the Reason Regulation imposes a ban on pre-viability abortion, but without briefing from the parties concluded that it instead imposes an undue burden on abortion. App. 17-18, 25. The court also concluded that the Reason Regulation is unconstitutionally vague. App. 16. The court further determined that the threatened harm from enforcement of the Reason Regulation outweighed any potential harm to the State or the public. App. 29. Applicant filed a notice of appeal of the district court's preliminary injunction.[2]

Applicant moved in the district court for a stay of the injunction pending appeal, which the district court denied on October 18, 2021. Applicant then sought a stay of the district court's preliminary injunction from the Ninth Circuit, which

[2] Respondents cross-appealed the district court's refusal to preliminarily enjoin a different provision of S.B. 1457. That provision is not relevant here.

denied that request on November 26, 2021. App. 32.

ARGUMENT

Applicant respectfully requests that this Court grant a stay of the district court's preliminary injunction pending completion of further proceedings in the court of appeals and, if necessary, this Court. A stay pending the disposition of a petition for a writ of certiorari is appropriate if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Each of those requirements is met here.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WOULD GRANT A WRIT OF CERTIORARI IF THE COURT OF APPEALS UPHOLDS THE DISTRICT COURT'S PRELIMINARY INJUNCTION.

If the court of appeals ultimately affirms the preliminary injunction in this case, there is a reasonable probability that this Court will grant a writ of certiorari. That is true for at least two reasons.

A. First, in multiple ways, such a decision would "conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

1. As to due process, the decision would further deepen an existing split

between the Sixth Circuit, on one hand, and the Seventh and Eighth Circuits, on the other. The Sixth Circuit, sitting en banc, upheld Ohio's law aimed at preventing physicians from performing an abortion with knowledge that one reason for the abortion is that the fetus has Down syndrome. *See Preterm-Cleveland*, 994 F.3d at 529-31. In so doing, the Sixth Circuit concluded that "the right at issue is not even the right to obtain an abortion," and, in any event, the law did not impose an undue burden in a large fraction of relevant cases. *Id.* at 529, 530.

The en banc Sixth Circuit expressly disagreed with a prior Seventh Circuit holding that a similar law violated the right to abortion because it constituted a complete ban on abortion. *Id.* at 530 (disagreeing with *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of Indiana State Department of Health* ("PPINK"), 888 F.3d 300 (7th Cir. 2018)). In *PPINK*, a Seventh Circuit panel struck down an Indiana law prohibiting abortion "because of the fetus's . . . diagnosis or potential diagnosis of the fetus having Down syndrome or any other disability"—what the court referred to as the "non-discrimination provisions." 888 F.3d at 303. The court also struck down a provision regulating the disposition of fetal remains. *Id.* at 307-09. As to the non-discrimination provisions, the court concluded that the "provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State." *Id.* at 306; *see also id.* at 310 ("Only a majority of the

Supreme Court or a constitutional amendment can permit the States to place some limits on abortion.") (Manion, J., concurring in the judgment in part and dissenting in part).

The Seventh Circuit denied Indiana's subsequent en banc petition, but that denial drew a dissent from four circuit judges, including Justice Barrett. *See PPINK v. Comm'r of Ind. State Dep't of Health*, 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J., dissenting from the denial of rehearing en banc) ("Using abortion to promote eugenic goals is morally and prudentially debatable on grounds different from those that underlay the statutes *Casey* considered."). This Court granted certiorari to determine the constitutionality of Indiana's fetal remains provision, but Justice Thomas concurred to explain why "[g]iven the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana's." *Box v. Planned Parenthood of Ind. & Ky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring).

In the Eighth Circuit, a panel upheld a decision enjoining an Arkansas law prohibiting performing an abortion with knowledge the abortion is sought solely on a prenatal diagnosis of Down syndrome. *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 690 (8th Cir. 2021) ("[T]he Supreme Court may of course decide to revisit how Casey should apply to purpose-based bans on pre-viability abortions[.]"). But a majority of the panel lamented that decision. Judge Shepherd,

joined by Judge Erickson, reluctantly concluded that "*Casey* directs that we resolve this inquiry by considering viability alone," but noted that the case "present[ed] yet another reason why the viability standard is unsatisfactory and worthy of reconsideration." *Id.* at 692 (Shepherd, J., concurring). Arkansas filed a petition for certiorari, which this Court conferenced on September 27, 2021. But as of the date of this filing, the Court has not issued any further orders relating to that petition. *See Rutledge v. Little Rock Family Planning Servs.*, U.S. Supreme Court, No. 20-1434.

By the time the Ninth Circuit addresses the preliminary injunction in this case, it is likely, however, that the Eighth Circuit will have switched sides in the split and joined the Sixth Circuit, but a split will still remain. After *Little Rock*, in a split decision, a separate Eighth Circuit panel upheld a decision enjoining Missouri's Down syndrome discrimination law. *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Parson*, 1 F.4th 552 (8th Cir. 2021); *see id.* at 569 (Stras, J., concurring in the judgment in part and dissenting in part) ("The statute is, in other words, a regulation, not a ban."). But the Eighth Circuit recently *sua sponte* granted en banc review, vacated the panel opinion, and held oral argument on September 21, 2021 (no opinion has yet issued). *Reprod. Health Servs. v. Parson*, No. 19-3134 (8th Cir. July 13, 2021).

2. If the court of appeals affirms the injunction here, it will also deepen another circuit split. In 2016, this Court stated that *Casey* "requires that courts

consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016). A plurality of the Court repeated *Whole Women's Health*'s iteration of *Casey* four years later in *June Medical Services, L.L.C. v. Russo*. 140 S. Ct. 2103, 2112 (2020). While Chief Justice Roberts concurred in *June Medical*'s judgment based on principles of stare decisis, he disavowed *Whole Women's Health*'s interpretation of *Casey*. *Id.* at 2136 (Roberts, C.J., concurring) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.").

Since *June Medical*, circuits have split on whether Chief Justice Roberts' concurrence controls or whether the benefits/burdens analysis from *Whole Women's Health* remains a part of the undue burden standard. Three circuits have held that the Chief Justice's concurrence controls and there is therefore no benefits/burdens analysis required. *See Whole Woman's Health v. Paxton*, 10 F.4th 430, 441 (5th Cir. 2021) ("[T]he Chief Justice's concurrence controls and we do not balance the benefits and burdens in assessing an abortion regulation."); *EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 434 (6th Cir. 2020) (same); *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (same). But two circuits have concluded otherwise. *See Reprod. Health Servs. v. Strange*, 3 F.4th 1240, 1259 n.6 (11th Cir. 2021) ("The benefits-burdens approach to the undue burden analysis from *Whole*

Woman's Health . . . continues to bind us."); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 748 (7th Cir. 2021) ("*Whole Woman's Health* remains precedent binding on lower courts.").

Here, the district court conducted its undue burden analysis using both tests. App. 21-22. But the force of Arizona's interests will leave the Ninth Circuit with only two choices: holding that compelling state interests count or that they do not. Even if the Ninth Circuit somehow decides that Arizona's interests are not compelling, the case will nevertheless force a decision on the threshold question of whether burden alone is dispositive. Thus, this case will present an ideal vehicle for resolving a question that has deeply divided the lower courts.

3. If the Ninth Circuit affirms the preliminary injunction, it will also likely result in a circuit split on the vagueness of regulations on discriminatory abortion. The Sixth Circuit recently considered a similar Tennessee statute making it illegal for a physician to perform an abortion knowing that it is being sought because of the sex or race of the fetus or because of a prenatal diagnosis of Down syndrome. *See Memphis Ctr. for Reprod. Health v. Slatery*, 14 F.4th 409, 416 (6th Cir. 2021). The Sixth Circuit majority held that plaintiffs were likely to prevail on their claim that the statute is unconstitutionally vague, based in part on Tennessee's definition of "knowledge." *Id.* at 434. Judge Thapar dissented, commenting that "[i]n striking down the Tennessee provision as void for vagueness, the majority reveals that

abortion exceptionalism knows no bounds." *Id.* at 457 (Thapar, J., concurring in judgment in part and dissenting in part). Just last week, however, the Sixth Circuit granted en banc rehearing in *Memphis* and vacated the panel opinion. —F.4th—, No. 20-5969, 2021 WL 5630038, at *1 (6th Cir. Dec. 1, 2021) (en banc). Given the en banc Sixth Circuit's statement in *Preterm-Cleveland* that "Ohio's broad definition of knowledge does not alter the reality that the woman remains in control of who knows, and who does not know, the reason for her abortion," 994 F.3d at 529, it is likely that Judge Thapar's dissenting opinion in *Memphis* will soon be the law in the Sixth Circuit, resulting in a split if the Ninth Circuit affirms the district court's injunction.[3]

4. An affirmance will also further a split on the standard to determine when a facial, pre-enforcement vagueness challenge should succeed. The district court here analyzed Respondents' facial, pre-enforcement vagueness challenge under Ninth Circuit precedent it understood to allow such challenges "when a statute is 'plagued by such indeterminacy that [it] might be vague even as applied to the challengers.'" App. 10 (quoting *Kashem v. Barr*, 941 F.3d 358, 377 (9th Cir. 2019). The Seventh Circuit reviews facial, pre-enforcement challenges from the opposite perspective, rejecting them where the defendant "demonstrate[s] that the [s]tatute

[3] Notably, the district court's vagueness analysis here was based in large part on the now-vacated opinion in *Memphis*. App. 13, 16.

has a discernible core." *PPINK v. Marion Cnty. Prosecutor*, 7 F.4th 594, 605 (7th Cir. 2021). Thus, the Seventh Circuit recently rejected a claim that "an Indiana statute that requires medical providers to report complications 'arising from' abortions to the state is unconstitutionally vague on its face." *Id.* at 595. The court concluded that the statute was not facially vague because "[t]he complications that a reasonable doctor would find to have arisen from an abortion constitute a core of the Complications Statute." *Id.* at 604. The Ninth Circuit cannot affirm the preliminary injunction without using a standard different than the Seventh Circuit's standard for facial, pre-enforcement vagueness challenges.

B. Second, a decision affirming the preliminary injunction in this case would resolve "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

1. The Reason Regulation is consistent with the language and reasoning in *Roe* and *Casey*. *Roe* expressly rejected the argument that a right to abortion "is absolute and that [a woman] is entitled to terminate her pregnancy . . . for whatever reason she alone chooses." 410 U.S. at 153. Thus, *Roe* did not close the door to states restricting abortion for prohibited reasons. *See id.* Citing this same language in *Roe*, *Casey* stated that a state may not prohibit a woman from making the "ultimate decision" to terminate a pre-viability pregnancy, and it held that prior decisions "striking down . . . abortion regulations which in no real sense deprived women of

the ultimate decision" had gone "too far." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875 (1992) (plurality op.). *Casey* does not protect the decision whether to bear or beget a particular child with potentially disfavored characteristics. *See id.*

Casey's framework does not apply because *Casey* did not consider or address the validity of any similar anti-discrimination provision. Instead, "the very first paragraph of the respondents' brief in *Casey* made it clear to the Court that Pennsylvania's prohibition on sex-selective abortions was not being challenged." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring) (internal punctuation omitted). "*Casey* did not consider the validity of an anti-eugenics law." *PPINK*, 917 F.3d at 536 (Easterbrook, J., dissenting from the denial of rehearing en banc, joined by Barrett, J.). "[T]he constitutionality of other laws like [Arizona's] thus remains an open question." *Box*, 139 S. Ct. at 1792 (Thomas, J., concurring).

Further, in *Casey* and *Gonzales*, the Court upheld prohibitions against certain kinds of pre-viability abortions that were at least as restrictive as the Reason Regulation. *Casey* upheld a complete restriction on pre-viability abortions where the patient is a minor who does not obtain parental consent or judicial bypass. 505 U.S. at 899. *Gonzales* upheld a complete prohibition on pre-viability abortions performed through the "partial-birth" abortion procedure. *Gonzales v. Carhart*, 550 U.S. 124, 135-38 (2007).

In rejecting *Roe*'s trimester framework, *Casey* recognized that "time ha[d] overtaken some of *Roe*'s factual assumptions." 505 U.S. at 860. Likewise, *Casey* could not have considered critical factual developments relevant to the Reason Regulation, because they had not yet occurred. *Casey* was decided as the transformation of societal attitudes toward persons with disabilities was still occurring, as reflected in the contemporaneous passage of the Americans with Disabilities Act. Moreover, the technology and science necessary to perform accurate testing for a genetic abnormality on a widespread basis were not yet in existence. And the adverse impact of abortion on the integrity of the medical profession—which became evident to the Court at the time of *Gonzales*—was neither available nor considered in *Roe* or *Casey*. Like the technology underlying it, the right Respondents assert—the right to perform an abortion based solely on the results of genetic testing—is novel, and therefore undeserving of heightened judicial scrutiny. *See Glucksberg*, 521 U.S. at 723 (analyzing for due process purposes "whether this asserted right has any place in our Nation's traditions").

To uphold the preliminary injunction, the court of appeals would have to recognize a constitutional right to discriminatory abortion and apply *Casey*'s undue burden framework. It is at least reasonably probable that this Court would grant a writ of certiorari to review such a decision.

2. A decision affirming the preliminary injunction as to Respondents' pre-

enforcement, facial vagueness challenge would also conflict with several of the Court's decisions. "Generally, courts decide the constitutionality of statutes as applied to specific people in specific situations and disfavor facial challenges seeking to forestall a law's application in every circumstance." *June Med.*, 140 S. Ct. at 2175 (Gorsuch, J. dissenting). "Typically, a plaintiff seeking to render a law unenforceable in all of its applications must show that the law cannot be constitutionally applied against *anyone* in *any* situation." *Id.* Thus, a statute is not facially vague unless there is an "absence of any ascertainable standard for inclusion and exclusion." *Smith v. Goguen*, 415 U.S. 566, 578 (1974); *United States v. Powell*, 423 U.S. 87, 92 (1975) (explaining that a facial vagueness challenge cannot succeed unless the statute "proscribe[s] no comprehensible course of conduct at all").

The district court here concluded that the term "genetic abnormality" in the Reason Regulation helps render the statute vague. App. 11-13. The Arizona Legislature, however, defined the term "genetic abnormality" in a manner that includes a "comprehensible course of conduct" and "an ascertainable standard for inclusion and exclusion." *See* A.R.S. § 13-3603.02(G)(2) (defining "genetic abnormality" as "[t]he presence or presumed presence of an abnormal gene expression in an unborn child, including a chromosomal disorder . . . ."). There is nothing vague about the definition—the Reason Regulation applies when an abortion is sought solely because of the presence (or presumed presence) of an

abnormal gene expression, including, for example, abnormal gene expressions that can cause Down syndrome, cystic fibrosis, or hemophilia. Respondents' facial challenge, therefore, fails, and Arizona courts should be permitted to apply the Reason Regulation in concrete factual situations, with any remaining vagueness issues being resolved through as-applied challenges. *See Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 n.5 (1982) ("[A] federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.").

The district court also faulted the Arizona Legislature for including a "knowing" scienter requirement. As Justice Thomas has observed, "we have never held that, in the abortion context, a scienter requirement is mandated by the Constitution." *Voinovich v. Women's Med. Prof. Corp.*, 118 S. Ct. 1347, 1349 (1998) (Thomas, J., dissenting from the denial of certiorari). But the Court has repeatedly emphasized that including a scienter requirement—including a "knowing" intent requirement—*alleviates* vagueness concerns. *See Gonzales*, 550 U.S. at 150 ("The Court has made clear that scienter requirements alleviate vagueness concerns."); *Harris v. McRae*, 448 U.S. 297, 311 n.17 (1980) ("[T]he Hyde Amendment is not void for vagueness because . . . the sanction provision in the Medicaid Act contains a clear scienter requirement under which good-faith errors are not penalized[.]"); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010) ("[T]he knowledge requirement of the statute further reduces any potential for

vagueness[.]"). An affirmance of the preliminary injunction will conflict with each of those decisions.

II. THERE IS AT LEAST A FAIR PROSPECT THAT THE COURT WOULD VACATE THE INJUNCTION.

There is also at least a fair prospect that if this Court granted a writ of certiorari, it would vacate the preliminary injunction. That is true because Respondents' claims are unlikely to succeed.

A. Respondents first claim that the Reason Regulation violates a right to abortion under the Fourteenth Amendment. Not only do Respondents rely on a right to discriminatory abortion that is nowhere found in the text, history, or tradition of the Constitution or this country, but even if the undue burden standard in *Casey* applies, Respondents failed badly to meet that standard as to the Reason Regulation.

1. As explained *supra*, neither the Constitution itself, nor *Roe* or *Casey*, nor any other of this Court's precedents establishes or supports the right to perform an abortion for eugenic or discriminatory reasons. Thus, Respondents' claim that the Reason Regulation violates a right to abortion is without merit.

2. Even if *Casey* applies, this Court has made clear that a law affecting access to abortion does not violate substantive-due-process rights under *Casey* unless it poses a substantial obstacle to abortion access. Respondents cannot show that enforcement of the Reason Regulation creates such an obstacle.

a. Respondents' sole argument to the district court about why the Reason

Regulation violates substantive due process is that it constitutes a *ban* on pre-viability abortion. The district court correctly rejected that argument, instead concluding that "[t]he Reason Regulations do not ban women from terminating pre-viability pregnancies because of a fetal genetic abnormality; they prohibit providers from performing such abortions if they know the patient's motive." App. 17. The district court reasoned that rather than impose a ban, S.B. 1457 "regulate[s] the mode and manner of abortion[.]" App. 18.

The district court was correct in concluding that the Reason Regulations do not impose a ban on pre-viability abortion. *See Preterm-Cleveland*, 994 F.3d at 521 ("Even under the full force of [the challenged statute], a woman in Ohio who does not want a child with Down syndrome may lawfully obtain an abortion solely for that reason."). There are myriad situations where the Reason Regulation will not apply to a pre-viability abortion. For example, the Reason Regulation will not apply when a pregnant woman does not undergo pre-viability genetic testing. Similarly, it will not apply when a pregnant woman undergoes a pre-viability genetic test, but the results show no genetic abnormality or are inconclusive. Or when a pregnant woman undergoes a pre-viability genetic test and it shows a genetic abnormality, but that has no bearing on her decision to obtain an abortion. Or when a pregnant woman undergoes a genetic test showing a genetic abnormality and that is the sole reason why the woman decides to obtain an abortion, but that information is not known by

the performing physician.

It is only in the circumstances when a doctor knows—most likely because the doctor has been informed—that the woman's sole reason for an abortion is a genetic abnormality, and neither statutory exception applies, that the Reason Regulation will apply to the doctor. Respondents admit that their patients do not typically disclose the reasons why they are choosing to terminate a pregnancy and, even when they do, there are multiple reasons. *See* ECF No. 7-2 at 34-35 (Decl. of Paul A. Isaacson, M.D. ¶ 13).[4] Respondents also admit "that they are not arguing there are women in Arizona who want to terminate their pre-viability pregnancies because of a fetal genetic abnormality but will do so only if they can also tell their doctors about their motives." App. 18 n.13. And the district court correctly recognized that "[i]t strains credulity to believe that a woman who wants to terminate her pregnancy because of a fetal genetic abnormality would nonetheless choose to carry her unwanted pregnancy to term because the procedure cannot be performed by a doctor who knows of her motive for seeking the abortion." *Id.*

b. The undue burden standard is otherwise met only if Respondents prove that "in a large fraction of the cases in which [the regulation is] relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."

[4] ECF citations are to the district court record in *Isaacson v. Brnovich*, No. 2:21-cv-01417-DLR (D. Ariz.).

Casey, 505 U.S. at 895. When plaintiffs raise a broad facial challenge to an abortion regulation—as Respondents do here—plaintiffs have a "heavy burden" in "maintaining the suit." *Gonzales*, 550 U.S. at 167. Otherwise, the law is permissible as long as it is "'reasonably related' to a legitimate state interest." *June Med.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (quoting *Casey*, 505 U.S. at 878).

In the district court, Plaintiffs argued only that the Reason Regulation imposes a ban on pre-viability abortion. ECF. No. 7 at 9-11. The district court, nonetheless, conducted an undue burden analysis and concluded that the Reason Regulation will impose such a burden. App. 22-25. Without the benefit of adversarial briefing and record development on the issue, it is no surprise that the district court erred badly.

The following are just a few examples. The court did not make any finding regarding the number of women who decide to terminate their pregnancies solely because of a genetic abnormality. To the contrary, the record shows that abortions based on genetic abnormality are only a small fraction of abortions performed and women often have multiple reasons for terminating a pregnancy. *See* ECF No. 46-1 at 3-4 (Decl. of Steven Robert Bailey ¶ 10); ECF No. 7-2 at 14 (Decl. of Eric M. Reuss, M.D., M.P.H. ¶ 47) ("In my experience, patients seek abortion for a wide range of personal reasons, including familial, medical, and financial, and often do not specifically delineate each one."); *see also* ECF No. 7-2 at 34-35 (Decl. of Paul A. Isaacson, M.D. ¶ 13) ("But only the patient can ultimately know all of the reasons

why they decided to have an abortion, or where there was a 'sole' reason as opposed to several concurrent reasons."). The district court's conclusion ignores this evidence and reads "solely" completely out of the Reason Regulation's prohibition.

Within the unknown, but clearly small, fraction of women who decide to terminate their pregnancies solely because of a genetic abnormality, Respondents submitted no evidence regarding how many of those women would be regulated because circumstances exist where a doctor would know that she is seeking an abortion solely because of the genetic abnormality. The record indicates that relatively few women officially report that one of the reasons for an abortion is "fetal health/medical considerations" or "genetic risk/fetal abnormality." ECF No. 46-1 at 3-4 (Decl. of Steven Robert Bailey ¶ 10). And the district court recognized that a woman "may choose not to answer" when asked the reason for the abortion. App. 24. There is nothing in the record indicating that a woman must tell the doctor the sole reason for the abortion. Nor did Respondents submit evidence showing how many women reveal that their sole reason is the unborn child's diagnosis or even that knowing the reason for an abortion is medically relevant.

And if that were not enough missing evidence, Respondents also submitted no evidence showing how many women, within the unknown but small fraction of women who seek an abortion solely because of a genetic abnormality and further have informed their doctor of that fact, will subsequently struggle to find a doctor to

perform the desired abortion (or why they would do so). At most, the district court could assume that in these circumstances, one doctor will be eliminated from the "pool of doctors" available to perform the abortion. And Respondents offered no evidence (certainly no quantifiable evidence) establishing that eliminating one doctor from the pool of doctors will create a substantial obstacle. *See* App. 23 (noting Plaintiffs/Physicians' statements regarding "few" abortion providers and a "handful" of doctors).

In *Casey*, this Court held that "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." 505 U.S. at 874. The court of appeals cannot affirm the preliminary injunction here without running afoul of that statement.

c. The Reason Regulation is unquestionably "'reasonably related' to a legitimate state interest." *June Med.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring).

The Legislature expressly found that the Reason Regulation will serve at least three compelling interests. *First*, the Act "protects the disability community from discriminatory abortions, including for example Down-syndrome-selective abortions." S.B. 1457 § 15. The Legislature found that between 61% and 91% of all fetuses diagnosed with Down syndrome are aborted. *Id.* The Legislature enacted S.B. 1457 in order "to send an unambiguous message that children with genetic

abnormalities, whether born or unborn, are equal in dignity and value to their peers without genetic abnormalities, born or unborn." *Id.* The Reason Regulation and "other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

Second, the Legislature sought to "protect[] against coercive health care practices that encourage selective abortions of persons with genetic abnormalities." S.B. 1457 § 15. The Legislature recognized the Sixth Circuit's recent finding "that empirical reports from parents of children with Down syndrome attest that their doctors explicitly encouraged abortion or emphasized the challenges of raising children with Down syndrome[.]" *Id.*; *see also Preterm-Cleveland*, 994 F.3d at 518 (discussing "examples of health professionals who gave families 'inaccurate and overly negative information,' perceivably 'intended to coerce a woman into a decision to terminate her pregnancy if the fetus is diagnosed with Down syndrome.'").

Third, the Legislature sought to "protect[] the integrity and ethics of the medical profession by preventing doctors from becoming witting participants in genetic-abnormality-selective abortions." S.B. 1457 § 15. "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales*, 550 U.S. at 157 (quoting *Glucksberg*, 521 U.S. at 731

(1997)); *see also Barsky v. Bd. of Regents of Univ. of N.Y.*, 347 U.S. 442, 451 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine).

The Reason Regulation is narrowly tailored—let alone reasonably related—to serve the State's compelling interests. The law regulates abortion only if the discriminatory purpose is the sole reason for the abortion. The law also requires the provider to actually know the discriminatory purpose. S.B. 1457 § 2. Thus, "it is hard to imagine legislation more narrowly tailored to promote this interest than the [Reason Regulation]." *PPINK*, 888 F.3d at 316 (Manion, J., concurring in the judgment in part and dissenting in part). The Reason Regulation "appl[ies] only to very specific situations and carefully avoid[s] targeting the purported general right to pre-viability abortion." *Id.* It "will not affect the vast majority of women who choose to have an abortion without considering the characteristics of the child. Indeed, [it] will not even affect women who consider the protected characteristics along with other considerations." *Id.* "If it is at all possible to narrowly tailor abortion regulations, [Arizona] has done so." *Id.*

B. Respondents also claim that the Reason Regulation is unconstitutionally vague. For a number of reasons, however, Respondents cannot satisfy the high standard to succeed on a pre-enforcement, facial vagueness challenge.

1. The Respondents have an exceedingly high burden to succeed on a facial vagueness challenge. A plaintiff seeking to render a law unenforceable in all of its applications must show that there is no set of circumstances under which a law would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, the Court has explained that a court "should uphold [a facial vagueness] challenge only if the enactment is impermissibly vague in all of its applications." *Vill. of Hoffman Estates*, 455 U.S. at 495.

Respondents' vagueness challenge here faces the additional obstacle of being a pre-enforcement challenge. Ordinarily, when considering whether statutory terms are too vague, a federal court must consider how they have been interpreted and applied. Thus, the Court has turned away vagueness challenges where the terms had been, or likely would be, narrowed through adjudication. *See, e.g.*, *Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 574-75 (1973); *Rose v. Locke*, 423 U.S. 48, 52 (1975); *see also Bauer v. Shepard*, 620 F.3d 704, 716 (7th Cir. 2010) ("When a statute is accompanied by [a] system that can flesh out details, the due process clause permits those details to be left to that system."). By bringing a pre-enforcement vagueness claim, Respondents have deprived the federal courts of the ability to "consider any limiting construction that a state court or enforcement agency has proffered." *Vill. of Hoffman Estates*, 455 U.S. at 494 n.5.

2. Due to the pitfalls with facial vagueness challenges, this Court has explained that such challenges will only succeed when the statutory restriction at issue "proscribe[s] no comprehensible course of conduct at all." *Powell*, 423 U.S. at 92; *see also Smith*, 415 U.S. at 578 (explaining that a facial challenge to a statutory restriction will only succeed where the statute exhibits an "absence of any ascertainable standard for inclusion and exclusion"); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (examining whether the ordinance at issue was facially vague "in the sense that no standard of conduct is specified at all"). If "it is clear what the [law] as a whole prohibits," a facial vagueness challenge fails. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

Similarly, when considering a facial vagueness challenge, the Court has commented that "perfect clarity and precise guidance have never been required," even for criminal laws that implicate constitutional rights. *United States v. Williams*, 553 U.S. 285, 304 (2008). "[T]he mere fact that close cases can be envisioned" will not "render[] a statute vague" because "[c]lose cases can be imagined under virtually any statute." *Id.* at 305, 306.

3. The Reason Regulation proscribes a comprehensible course of conduct and contains an ascertainable standard for inclusion and exclusion. As explained above (at 20-21), the Reason Regulation provides a definition of "genetic abnormality" that allows doctors to apply the applicable standard to the facts of each

situation and that clearly applies when a genetic test exhibits the presence of the most prevalent genetic abnormalities. S.B. 1457 § 2 (defining "genetic abnormality").

In concluding otherwise and granting a preliminary injunction on vagueness grounds, the district court disregarded that in almost all cases, it will be obvious whether the Reason Regulation applies. In 2019, out of approximately 13,000 abortions reported in Arizona, only 161 women "reported that their primary reason for obtaining an abortion was due to fetal health/medical considerations." ECF No. 46-1 at 3-4 (Decl. of Steven Robert Bailey ¶ 10). An additional 30 women who reported "other" as their primary reason included "genetic risk/fetal abnormality" as a detailed reason. *Id.* Thus, in over 98% of cases in 2019, the Reason Regulation's inapplicability would have been obvious. Even among the very small percentage of cases when the Reason Regulation might apply, the statute's applicability will remain obvious. *See supra* at 23-24. When less than 191 out of 13,000 instances might result in application of a law, and otherwise the law's application is clear, the law cannot be facially invalid for vagueness. *See Smith*, 415 U.S. at 578.

4. Curiously, the district court also concluded that the Arizona Legislature's decision to include a "knowing" scienter requirement rendered the Reason Regulation unconstitutionally vague. This Court has held the opposite—that including such a scienter requirement *alleviates* vagueness concerns. In *Gonzales*,

the Court rejected a vagueness challenge to an abortion regulation, in part, because the statute at issue included a scienter requirement. 550 U.S. at 149 ("The Court has made clear that scienter requirements alleviate vagueness concerns."); *Harris*, 448 U.S. at 311 n.17 (holding that the Hyde Amendment is not unconstitutionally vague because "the sanction provision in the Medicaid Act contains a clear scienter requirement"). In fact, the Court has held that inclusion of a "knowing" scienter requirement, in particular, alleviates vagueness concerns. *See Humanitarian Law Project*, 561 U.S. at 21 ("[T]he knowledge requirement of the statute further reduces any potential for vagueness[.]"); *Screws v. United States*, 325 U.S. 91, 102 (1945) ("[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law.").

The district court, therefore, erred by holding that the Reason Regulation's knowledge requirement creates—rather than alleviates—vagueness concerns. As explained, the Reason Regulation applies only when a provider has actual knowledge that the abortion is being sought solely because of a genetic abnormality. Although the district court acknowledged that "scienter requirements ordinarily alleviate vagueness concerns," it refused to follow that rule by incorrectly concluding that "this law requires that a doctor know the motivations underlying the action of another person to avoid prosecution." App. 13. In doing so, the district

court quoted only the recently-vacated decision of the Sixth Circuit in *Memphis Center for Reproductive Health*. App. 13.

In reality, the Reason Regulation does not require a provider to know why someone is seeking an abortion. The Reason Regulation instead applies only when the provider actually knows that the abortion is being sought solely because of a genetic abnormality. If the provider does not know, or knows of more than one reason for the abortion, then the Reason Regulation does not apply. The district court and Respondents cannot rewrite the statute and then use their version to claim that the actual, enacted version is impermissibly vague. Applicant is likely to succeed in having the district court's injunction set aside by this Court, even if the court of appeals affirms the preliminary injunction.

III. THERE IS A LIKELIHOOD THAT IRREPARABLE HARM WILL RESULT FROM THE DENIAL OF A STAY.

Applicant, and the State of Arizona, will likely suffer irreparable harm if a stay is denied. "Any time a state is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (brackets and citation omitted); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State"). And that is especially true when the injunction subjects the decisions of public officials entrusted with "'the safety and the health of the people'" in "'areas

fraught with medical and scientific uncertainties'" to "second-guessing by an unelected federal judiciary." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring) (brackets and citations omitted); *see Gonzales*, 550 U.S at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").

Here, the protection of public health falls within the traditional scope of the State's police power. *Hillsborough County v. Automated Med. Lab'y, Inc.*, 471 U.S. 707, 719 (1985). States similarly have an interest in remedying discriminatory practices towards those with mental or physical disabilities. *See Tennessee v. Lane*, 541 U.S 509, 534 (2004) (Souter, J., concurring); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (States have a "compelling interest in eliminating discrimination"). States also have a legitimate interest "in promoting the life or potential life of the unborn." *Casey*, 505 U.S. at 870; *Gonzales*, 550 U.S. at 163 (explaining that state "law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community"). And "[t]here can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales*, 550 U.S. at 157.

The preliminary injunction prevents Arizona from (1) effectuating a statute enacted by the representatives of its people; (2) exercising its police power to protect public health by regulating abortions performed solely for eugenic or discriminatory reasons; (3) remedying discriminatory practices—here, the termination of life or potential life—towards those with disabilities; (4) promoting the life or potential life of the unborn; (5) protecting parents of unborn children from coercive abortion practices; and (6) protecting the integrity and ethics of the medical profession. The preliminary injunction also calls into question the continued validity of Arizona's decade-long regulation of race- and sex-selective abortions.

On the other hand, because the Reason Regulation is likely constitutional, a stay of the preliminary injunction will not substantially injure any parties. *See Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 909 (8th Cir. 2020). Similarly, because the Reason Regulation is likely constitutional, "staying the injunction is 'where the public interest lies.'" *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) (harm and the public interest "merge when the Government is the opposing party"). Respondents do not allege that they have ever actually performed an abortion solely because an unborn child has been diagnosed with a genetic abnormality. Respondents also do not allege that knowing the reason why an abortion is sought is medically necessary. They have established only that the Reason Regulation

prevents an expectant mother from telling her performing physician that an abortion is based solely on an abnormal fetal gene expression. Respondents have failed to establish that the Reason Regulation is a ban on pre-viability abortion, or that the Reason Regulation imposes an undue burden under *Casey*.

CONCLUSION

For all of these reasons, Applicant respectfully asks this Court to enter a partial stay of the district court's preliminary injunction pending the completion of further proceedings in the court of appeals and, if necessary, this Court.

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