IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHANDHINI RAIDOO, M.D., M.P.H.; BLISS KANESHIRO, M.D., M.P.H., on behalf of themselves and their patients, Plaintiffs-Appellees, v. LEEVIN TAITANO CAMACHO, *et al.*, Defendants-Appellants.	No. 21-16559 District Court Case No. 21-00009 (District Court of Guam)

PLAINTIFFS'-APPELLEES' OPPOSITION TO DEFENDANTS'-APPELLANTS' MOTION FOR SUMMARY REVERSAL[1]

This Court should deny Defendants'-Appellants' ("Defendants") request to summarily reverse and vacate the District Court's preliminary injunction blocking enforcement of Guam's state-mandated information law's in-person counseling requirement (the "In-Person Requirement") for two reasons. First, it is well-established that this Court "may affirm [a district court decision] on any basis the record supports, including one the district court did not reach." *Or. Short Line R.R. Co. v. Dep't of Revenue Or.*, 139 F.3d 1259, 1265 (9th Cir. 1998). Here, as set forth

[1] Unless otherwise noted all emphasis is added and all internal quotation marks and citations are omitted.

below, the record is sufficiently developed for this Court to affirm the preliminary injunction on the independent ground, unaffected by the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 2022 WL 2276808 (U.S. June 24, 2022) ("*Dobbs*"), that the In-Person Requirement is not rationally related to a legitimate government interest.

Second, even if this Court is inclined to remand to the District Court to reconsider the preliminary injunction in the first instance, vacatur of the preliminary injunction prior to remand is unnecessary and unwarranted, given the likelihood of Plaintiffs' success on their alternative claim and the undisputed irreparable harm that would result. *See generally Gerling Glob. Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001).

Accordingly, Plaintiffs-Appellees ("Plaintiffs") respectfully request that this Court deny Defendants' motion and either (1) move forward in setting a briefing schedule for the appeal that would permit the parties to brief whether the preliminary injunction should be affirmed on alternative grounds; or, alternatively, (2) leave the preliminary injunction in place while remanding to the District Court for further proceedings.

I. PROCEDURAL BACKGROUND

This appeal arises from Plaintiffs' as-applied challenge to Guam's state-mandated information law's In-Person Requirement, which requires that a physician

providing an abortion, or another person set forth by the statute, provide patients certain mandated information *in person* at least twenty-four hours prior to an abortion. 10 Guam Code Ann. § 3218.1(b).[2] Failure to comply with the state-mandated information law is a misdemeanor and could also result in professional disciplinary action (including loss of medical license), and other civil and administrative penalties. *Id.* at (f)-(g); *see also* 10 Guam Code Ann. § 12209(d)(3).

Plaintiffs, who are located in Hawai'i, are two Guam-licensed, board-certified OB-GYNs who provide medication abortion services to patients in Guam using telemedicine. Compl. ¶¶ 10-15, ECF No. 1. Plaintiffs challenged the In-Person Requirement to the extent it would prohibit them—the only physicians providing abortion services to patients in Guam—from satisfying the state-mandated information law via a live, face-to-face video conference. Compl. ¶¶ 61-62, 71, 208-216. Notably, Guam law does not prohibit Guam-licensed physicians or Guam-based patients from using telemedicine to actually obtain medication abortion, *see* Order

[2] Plaintiffs also originally challenged and sought preliminary injunctive relief against 9 Guam Code Ann. § 31.20(b)(2), to the extent that it required Guam-licensed physicians to be in the physical presence of a patient when they prescribe, dispense, and/or otherwise provide medication abortion to patients in Guam. Compl. ¶¶ 217-21, 225-26; Pls.' Mot. for Prelim. Inj., ECF No. 12. However, the parties settled that claim after Defendants took the position that Section 31.20 does not prohibit the provision of medication abortion via telemedicine. *See* Order re Joint Stipulation & Mot. for Entry Order Settlement & Partial Dismissal of Claims 2-3, ECF No. 27 ("Order on Joint Stipulation & Settlement").

on Joint Stipulation & Settlement 2-3, or to provide or obtain informed consent in any other context except abortion, Compl. ¶ 214.

Plaintiffs brought two separate claims against the In-Person Requirement. *See* Compl. ¶¶ 222-24, 227-29. The first was a claim that the In-Person Requirement imposes an undue burden on patients seeking pre-viability abortion in Guam in violation of their rights to privacy and liberty as guaranteed by the Fourteenth Amendment. *Id.* ¶¶ 222-224. The second was a claim that the In-Person Requirement violates patients' rights to due process and equal protection as guaranteed by the Fourteenth Amendment because it lacks a rational basis. *Id.* ¶¶ 227-229.

Shortly after Plaintiffs filed their complaint, they moved for a preliminary injunction. *See* Pls.' Mot. for Prelim. Inj., ECF No. 12; Mem. in Supp. Pls.' Mot. for Prelim. Inj., ECF No 13 ("PI Mem."). On September 3, 2021, after extensive briefing and argument on the motion, the District Court issued an order granting Plaintiffs' request for a preliminary injunction, finding Plaintiffs "likely to succeed on the merits of their claims that [the In-Person Requirement] is unconstitutional as applied to the use of telemedicine to provide medication abortion to patients in Guam; [and] that Plaintiffs and their patients will suffer irreparable harm if Defendants are not enjoined from enforcing it." Order re Pls.' Mot. for Prelim. Inj. 2, ECF No. 44. While the District Court's ruling was primarily based on the undue

burden test, as articulated by this Court in *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014), *see* Decision & Order re Pls.'Objs. to R. & R. on Pls.' Mot. for Prelim. Inj. 9-11, ECF No. 43 ("Decision & Order"), the District Court also recognized that Defendants had "fail[ed] to rebut Plaintiffs' argument that the in-person requirement serves no benefit to a legitimate state interest," *id.* at 9.

On September 22, 2021, Defendants filed a notice of appeal from the District Court's preliminary injunction, ECF No. 46, and the present appeal was docketed on September 23. *See* Dkt 1. On September 29, 2021, Defendants requested that this Court stay the briefing schedule of the appeal pending the Supreme Court's ruling in *Dobbs.* Defs.' Unopposed Mot. to Stay Briefing Schedule, Dkt 13. Plaintiffs did not agree that *Dobbs* warranted a stay of this appeal, but did not oppose Defendants' motion. *Id.* at 1. This Court granted the motion and stayed the appeal on October 1, 2021, and ordered Defendants to file a status report and/or motion for appropriate relief within 90 days after the date of the order, or 14 days after the Supreme Court's resolution of *Dobbs*, whichever occurred first. *See* Order, Dkt. 14.

On June 24, 2022, the Supreme Court issued its decision in *Dobbs*. *Dobbs*, 2022 WL 2276808. In its decision, the Court held that "rational-basis review is the appropriate standard" for challenges to state abortion regulations, *id.* at *42, applied this test to Mississippi's 15-week ban on abortion, and upheld the ban upon

determining that the government's "legitimate interests provide[d] a rational basis for [it]," *id.*

On June 28, 2022, Defendants filed the present motion, seeking summary reversal and vacatur of the District Court's preliminary injunction in light of the *Dobbs* decision. Defs.' Third Status Report & Mot. for Summ. Reversal 3, Dkt. 18.

II. THIS COURT SHOULD PROCEED WITH THE APPEAL BECAUSE REMAND IS UNNECESSARY TO CONSIDER WHETHER PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT THE IN-PERSON REQUIREMENT FAILS RATIONAL BASIS REVIEW.

It is well-established that this Court "may affirm [a district court decision] on any basis the record supports, including one the district court did not reach." *Herring v. FDIC*, 82 F.3d 282, 284 (9th Cir. 1995); *Price v. City of Stockton*, 390 F.3d 1105, 1109 (9th Cir. 2004) ("We may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning we adopt."); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1021 (9th Cir. 2013) (affirming preliminary injunction on ground not reached by district court and noting that "[w]e may affirm the district court on any ground supported by the record").

Here, the record is more than sufficiently developed to permit this Court to consider whether Plaintiffs are likely to succeed on their as-applied claim that the In-Person Requirement is irrational, *see* Compl. ¶¶ 227-229, and to affirm the

District Court's preliminary injunction on that basis. From the start, Defendants effectively urged the District Court to apply a rational basis test. *See, e.g.*, Defs.' Am. Opp'n to Pls.' Mot. Prelim. Inj. 16-20, ECF 29 (arguing that the In-Person Requirement survives what is effectively a rational basis test); *id.* at 16 (asserting that the applicable standard is a highly deferential one, requiring only that a court find that the Legislature had "a rational basis to act"); *see also* Decision & Order 9 ("Defendants appear to confuse the applicable balancing test for 'undue burden' with rational basis review."). Moreover, Plaintiffs argued *both* that: (1) the Supreme Court's undue burden test applied and the In-Person Requirement failed that test, *see* PI Mem. 21-24, 27-28; *id.* at 29-31; *and* (2) that the In-Person Requirement "is also simply irrational" because

> [t]he government cannot conceivably claim that it is necessary or even preferable to require patients to undertake an additional, separate trip just to get the information from a different clinician in Guam, when the physicians providing the abortion could deliver the exact same information, face-to-face, through a live, videoconference and answer any questions in real time.

Id. at 28. *See also* Reply in Supp. Pls.' Mot. for Prelim. Inj. 8, ECF No. 30 ("Reply") ("Indeed, Defendants cannot even show that the requirement could pass rational basis review in this context . . . . Defendants have thus failed to rebut Plaintiffs' showing under either test."); *id.* at 8-9.

For example, the state-mandated information law explicitly permits the statutorily required *medical* information about abortion[3] to be provided to the patient by a psychologist, licensed professional counselor, or licensed social worker without *any training* to provide abortion care, care to pregnant patients, or even medical care at all. *See* 10 Guam Code Ann. § 3218.1(a)(13). Thus, as Plaintiffs explained, as applied to telemedicine, the In-Person Requirement would irrationally "prevent[] highly qualified physicians who will actually provide the abortion from providing [the statutorily required medical] 'material' information to their own patients, in favor of people with no relevant training or experience." Reply at 2; *id.* at 9 ("[I]f a cardiologist could not be physically present to obtain informed consent at least 24-hours before performing open heart surgery, but offered to provide it over a live, face-to-face videoconference, it would be irrational to insist that a social worker do it in person instead"). And, as noted above, while the District Court's ruling was primarily based on the undue burden test, *see* Decision & Order 9, the

[3] Section 3218.1 requires the provision of "medically accurate information that a reasonable person would consider material to the decision of whether or not to undergo the abortion," including, "a description of the proposed abortion method," "the immediate and long-term medical risks associated with the proposed abortion method . . . and any potential effect upon future capability to conceive as well as to sustain a pregnancy to full term," "the probable gestational age of the unborn child," "the probable anatomical and physiological characteristics of the unborn child," "the medical risks associated with carrying the child to term," and "any need for anti-RH immune globulin therapy." 10 Guam Code Ann. § 3218.1(b)(1)(B); *see also* Reply 2.

District Court also concluded that "Plaintiffs are correct in their argument that '*forcing* the in-person visit, when a live, face-to-face video conference is available,' serves no benefit or advances any legitimate state interests." *Id.* In sum, because the record is already sufficiently developed to enable this Court to consider Plaintiffs' rational basis claim, it is well-within this Court's power—and would be the most efficient course of action—for this Court to set a briefing schedule to proceed with the appeal.

III. SHOULD THIS COURT FEEL REMAND IS MORE APPROPRIATE, THE PROPER COURSE IS TO KEEP THE PRELIMINARY INJUNCTION IN PLACE WHILE THE DISTRICT COURT RECONSIDERS THE BASIS FOR THE INJUNCTION GIVEN THE PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THEIR ALTERNATIVE CLAIM AND THE UNDISPUTED IRREPARABLE HARM.

If this Court is inclined to remand to permit the District Court an opportunity to reconsider the basis for its injunction in the first instance, it still should not vacate the preliminary injunction. This Court has discretion to keep a preliminary injunction in place *even after* determining it has been issued on legally erroneous grounds while the district court reconsiders the basis for the injunction. *See, e.g.*, *Gerling Glob. Reinsurance Corp. of Am.*, 240 F.3d at 754 (finding clear error in district court decision to grant injunction on certain claims but "leav[ing] the preliminary injunction in place in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits" of another claim); *Grace Schs.*

v. Burwell, 801 F.3d 788, 791 n.6, 808 (7th Cir. 2015), *cert. granted, judgment vacated on other grounds*, 578 U.S. 969 (2016) (reversing district court decision granting preliminary injunction but leaving injunction in place on remand for a limited period of time to allow the district court to consider additional claims for relief raised by the plaintiffs but not briefed or considered by district court prior to appeal).

This is especially warranted here where the record shows both that Plaintiffs are likely to succeed on the merits of their alternative claim and that irreparable harm would result if the injunction were lifted. *See Gerling Glob. Reinsurance Corp. of Am.*, 240 F.3d at 754 (leaving injunction in place despite district court's clear error where the record showed a possibility that plaintiffs would prevail on alternative claim and irreparable harm was undisputed).

First, Plaintiffs have already demonstrated sufficient likelihood of success on the merits of their rational basis claim to warrant preservation of the preliminary injunction, even if this Court deems that further development of those arguments is called for. While, under the rational basis test, challenged "legislation is entitled to a presumption of validity," it will fail to survive judicial scrutiny if "the varying treatment of different groups or persons is so unrelated to any legitimate purpose that the court can only conclude that the legislature's actions were irrational." *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986); *Alaska*

Cent. Express Inc. v. United States, 145 F. App'x 211, 212 (9th Cir. 2005) (reasoning that a classification that is "'malicious, irrational or plainly arbitrary' [] will not withstand rational basis review"); *see also Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (holding that pest control licensing scheme failed rational basis and violated equal protection where it irrationally provided exemption for non-pesticide pest controllers most likely to work with pesticides but not for those least likely to work with pesticides). Here, it is undisputed that Guam law does not prohibit Guam-licensed physicians or Guam patients from using telemedicine to actually obtain an abortion, *see* Order on Joint Stipulation & Settlement 2-3, or to provide or obtain informed consent in any other context outside of abortion, Compl. ¶ 214. And, notably, it is undisputed that Section 3218.1 explicitly permits the state-mandated *medical* information about an abortion to be provided to the patient by people without *any training* to provide abortion care, care to pregnant patients, or even medical care at all. *See* 10 Guam Code Ann. § 3218.1(a)(13). Plaintiffs have thus already shown a sufficient likelihood of success on the merits with respect to their claim that there is no rational basis for a law that requires abortion patients to make an in-person visit to obtain the state-mandated information from a person patently unqualified to provide it.

Second, Plaintiffs have made a strong—and uncontested—showing of the irreparable harm that will result absent an injunction. The record contains undisputed

evidence showing that—even if it were possible for patients on Guam to obtain the state-mandated information from a person in Guam, *see* Decision & Order 6—patients seeking abortions would experience significant harms. This includes not only financial and logistical harms associated with, *inter alia*, arranging time off work, child care, and travel to an extra appointment, but also serious harms to patient privacy and medical confidentiality that arise from being forced to disclose a private, personal abortion decision to still another person in a small community where anti-abortion stigma is prevalent solely in order to satisfy the In-Person Requirement. PI Mem. 29-31; Reply 15-16 (citing Compl. ¶¶ 65–70); *id.* at 19-20; *see also* Decl. of Mark D. Nichols, M.D. ¶ 76, ECF No. 13-2 (explaining that forcing patients to make an unnecessary in-person visit to a clinician to complete state-mandated abortion counseling imposes upon them logistical barriers associated with arranging time off work and child care and also potentially requires them to sacrifice their privacy); Decl. of Bliss Kaneshiro, M.D., M.P.H. ¶ 91, ECF No. 13-4 (explaining that the In-Person Requirement "forces [patients] to take the time to schedule and make a completely unnecessary trip to a health care provider," which only creates delay and increases risks to the patient); Decl. of Shandhini Raidoo, M.D., M.P.H. ¶ 87, ECF No. 13-5 (same). This risk of irreparable harm counsels in favor of keeping the preliminary injunction in place while the District Court reconsiders the basis for the injunction.

IV. CONCLUSION

For all the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' motion for summary reversal and either set a briefing schedule for the merits of the appeal or keep the preliminary injunction in place while remanding to the District Court for consideration as to whether alternative grounds for the injunction exist.

Dated: July 8, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(5), (6), and (7)(B) of the Federal Rules of Appellate Procedure, counsel certifies that the foregoing was prepared using Microsoft Word in 14-point Times New Roman font and that it contains 2,875 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

/s/ Meagan Burrows
Meagan Burrows

CERTIFICATE OF SERVICE

I certify that on July 8, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Meagan Burrows
Meagan Burrows