No. 21-16559

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHANDHINI RAIDOO, M.D., M.P.H., and BLISS KANESHIRO, M.D., M.P.H., on behalf of themselves and their patients,

Plaintiffs-Appellees,

v.

LEEVIN TAITANO CAMACHO, in his official capacity as Attorney General of Guam, NATHANIEL BERG, M.D., in his official capacity as Chair of the Guam Board of Medical Examiners, PHILIP FLORES, in his official capacity as Vice-Chair of the Guam Board of Medical Examiners, ARANIA ADOLPHSON, M.D.; ANNETTE DAVID, M.D., M.P.H.; and ANNIE BORDALLO, M.D.; LUIS CRUZ, M.D.; and SCOTT SHAY, M.D., in their official capacities as members of the Guam Board of Medical Examiners,

Defendants-Appellants.

On Appeal from the United States District Court of Guam
No. 1:21-cv-00009
Hon. Frances Tydingco-Gatewood

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INTRODUCTION

Plaintiffs-Appellees do not dispute that, in light of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the undue burden standard no longer governs substantive due process challenges to abortion restrictions, and the analysis conducted by the District Court below is no longer applicable. However, this Court can affirm the preliminary injunction against Guam's in-person consent requirement, 10 G.C.A. § 3218.1(b)(1), (b)(2), which prohibits the use of a live, face-to-face videoconference to provide informed consent for abortion, on any ground supported by the record. Here, the record supports affirmance of the injunction on the grounds that, as applied to Plaintiffs and their patients, the requirement violates both the Due Process and Equal Protection clauses because it cannot survive even rational basis review.

As set forth more fully below, whether the challenged requirement—the sole component of Guam's broader abortion informed consent law challenged here—was rational when it was enacted, in 2012, is not the question before this Court. At that time, abortion services were still locally available in Guam, the legal status of providing medical care

using telemedicine was unclear, and telemedicine abortion services were nonexistent. Thus, by including a requirement that certain information be provided in person prior to an abortion, the Legislature was effectively requiring that physicians who already provided in-person abortion services, or another qualified person under the statute, also obtain informed consent from their patients in person and face-to-face, rather than over the telephone.

Guam does not require in-person informed consent for any other medical care. But even assuming it was rational to single out abortion and impose such a requirement a decade ago, circumstances in Guam are vastly different today. The Attorney General clarified in 2017 that Guam-licensed physicians located off-island can provide medical care to patients in Guam using telemedicine, and, in 2021, recognized that medication abortion, specifically, can be provided in Guam via telemedicine. Moreover, for the past several years, there have been no physicians located in Guam providing abortion services. Instead, the only way for a patient in Guam to access abortion care today is via telemedicine and the only Guam-licensed physicians providing that care—Plaintiffs—are located nearly four thousand miles away, in

Hawai‘i. As such, the only way for Plaintiffs to obtain informed consent from their patients in Guam is the same way they provide the care itself: via a live, face-to-face videoconference.

As applied to Plaintiffs and their patients, the challenged requirement therefore makes it impossible for the sole physicians who provide this particular medical service to people in Guam to obtain legally valid informed consent from their own patients. Yet, at the same time, the abortion informed consent law permits Plaintiffs to delegate responsibility for obtaining that consent to someone else, *see* 10 G.C.A. § 3218.1(a)(13), (b)(1), (b)(2), so long as they are physically located in Guam—even though there is no longer anyone in Guam who actually provides abortion services or works at a health center where abortion services are provided. In fact, while Plaintiffs—highly experienced OB/GYNs who have decades of combined experience providing abortion, pre-natal care, and delivering babies—are prevented from obtaining informed consent from their abortion patients in Guam, the law permits a psychologist, social worker, or licensed professional counselor in Guam, 10 G.C.A. § 3218.1(a)(13), to counsel patients on the medical risks, benefits, and alternatives to abortion even though they do not

provide any pregnancy-related care, or even any medical care at all. Even under a deferential standard of review, this is not rationally related to any legitimate government interest. Accordingly, this Court should affirm the preliminary injunction.

STATUTORY AND REGULATORY AUTHORITIES

Except for 10 G.C.A. § 3218.1, which already appears in the Addendum submitted by Defendants-Appellants, all relevant statutory, constitutional, and regulatory authorities appear in the addendum to this brief.

ISSUE PRESENTED

Whether the Court should affirm the preliminary injunction against those provisions of Guam law, 10 G.C.A. § 3218.1(b)(1), (b)(2), which prevent Plaintiffs—the sole physicians who provide abortion services to patients in Guam—from obtaining informed consent from their own patients, as violative of the Due Process and/or Equal Protection clause because, as applied to Plaintiffs and their patients, these provisions are not rationally connected to any legitimate government interest.

STATEMENT OF THE CASE

I. Factual Background[1]

A. Medication Abortion and Telemedicine

Abortion is a safe, common, and fundamental component of comprehensive reproductive health care. In the United States, approximately 1 in 4 women will have an abortion by the age of 45. SER-019 (Nichols ¶ 11). A robust analysis of abortion conducted by the National Academies of Sciences, Engineering, and Medicine ("NASEM") confirms that legal abortion is one of the safest medical procedures or treatments provided in the United States today. SER-019–20 (Nichols ¶ 14); *see also* SER-049 (Washington ¶ 23); SER-107 (Raidoo ¶ 9); SER-081–82 (Kaneshiro ¶ 10).[2] Serious complications occur in less than one percent of abortions. ER-008. Moreover, abortion is significantly safer than its only alternative—carrying a pregnancy to term and giving birth.

[1] The record in this case is undisputed. Defendants neither introduced any evidence of their own nor attempted to refute Plaintiffs' extensive evidence.

[2] The NASEM was established by Congress in 1863 to provide independent, objective expert analysis and advice to the nation to inform public policy. SER-019–20 (Nichols ¶ 14).

SER-020–21 (Nichols ¶¶ 15–17); SER-062–67 (Washington ¶¶ 62–75); SER-107 (Raidoo ¶ 9); SER-081–82 (Kaneshiro ¶ 10).

There are two main methods of abortion: procedural (sometimes referred to as "surgical") and medication abortion. SER-049 (Washington ¶ 25); SER-108 (Raidoo ¶ 12); SER-82 (Kaneshiro ¶ 13). As the district court found, "medication abortion is different from other abortion procedures performed in clinics by a doctor because it is entirely self-administered by the patient herself." ER-008. In 2000, the U.S. Food and Drug Administration ("FDA") approved a two-drug regimen—mifepristone and misoprostol—for medication abortion. SER-027 (Nichols ¶ 37); SER-056 (Washington ¶ 44). Medication abortion is typically available up to 10–11 weeks of pregnancy. ER-009.

Medication abortion is routinely provided to patients in a variety of settings, including via telemedicine, SER-051–55 (Washington ¶¶ 31–40); SER 035–37 (Nichols, ¶¶ 62–69), and there is an extensive body of evidence demonstrating its safety and efficacy via telemedicine, SER-032–35 (Nichols ¶¶ 55–61); SER-075–76 (Washington ¶ 98). Indeed, telemedicine—the use of electronic information and telecommunications technologies to support the delivery of health care services remotely—is

regularly used the world over to counsel patients, obtain informed consent, and provide a wide range of medical care, including OB/GYN care. SER-029–32 (Nichols ¶¶ 42–52). As this case illustrates, telemedicine medication abortion has also been incredibly important in expanding patient access, especially in remote and/or underserved areas. SER-030–31, 035–38 (Nichols ¶¶ 49, 62–65, 67, 71); SER-114–15 (Raidoo ¶¶ 38, 44–45); SER-089–90 (Kaneshiro ¶¶ 39, 45–46). More recently, the COVID-19 pandemic has accelerated an increase in the use of telemedicine for OB/GYN care, including abortion, because it ensures patients can continue to access time-sensitive, comprehensive and also preventive care, while eliminating unnecessary in-person interactions for both patients and clinicians. *See, e.g.*, ER-093 (Compl. ¶ 154); SER-031–32 (Nichols ¶ 52); SER-116 (Raidoo ¶ 48); SER-090 (Kaneshiro ¶ 49); *see also* SER-054, 073 (Washington ¶¶ 38, 91–92).

B. Plaintiffs' Telemedicine Protocols

Plaintiffs—Drs. Shandhini Raidoo and Bliss Kaneshiro—are two highly qualified OB/GYNs licensed in Hawai‘i and Guam, and based in O‘ahu, Hawai‘i, with three decades of combined experience providing comprehensive reproductive health care, including pre-natal care, labor

and delivery, and abortion. SER-105–06, 114 (Raidoo ¶¶ 1–6, 38); SER-079–81, 089 (Kaneshiro ¶¶ 1–6, 39).[3] Plaintiffs have extensive experience with obtaining informed consent for and providing medication abortion through telemedicine, via a live, face-to-face videoconference. Since 2016, Plaintiffs have used telemedicine to obtain informed consent for and prescribe medication abortion to hundreds of eligible patients in Hawai‘i—the majority of whom lived on islands other than O‘ahu where there were no abortion providers—and Guam. SER-089 (Kaneshiro ¶ 39); SER-114 (Raidoo ¶ 38).[4]

Plaintiffs assess eligibility for medication abortion via telemedicine the same way they would if the patient was physically present at their clinic—by taking an oral medical history from the patient and, where relevant, reviewing and discussing any pre-abortion test results previously obtained by the patient (e.g., ultrasound, blood test). SER-116–18 (Raidoo ¶¶ 49–55); SER-090–92 (Kaneshiro ¶¶ 50–

[3] Both Plaintiffs are on faculty at the University of Hawai‘i at Manoa, however sue in their personal capacities. SER-105–06 (Raidoo ¶ 2); SER-079–80 (Kaneshiro ¶ 2).

[4] Plaintiffs have only been able to provide such care to patients in Guam by virtue of this lawsuit. SER-012–15; *see also infra* Section III, Procedural Background.

56); ER-008. This sort of dialogue with patients and review of records by telemedicine is extremely common for all manner of treatments and procedures. SER-029–32, 037 (Nichols ¶¶ 46–52, 66, 68–69); SER-072–73 (Washington ¶¶ 90–92). Similarly, all of Plaintiffs' medication abortion patients—whether they obtain care by telemedicine or in person—are given the same oral instructions concerning how to take the medications and are scheduled for two telephonic follow-up appointments (at one week and one month following the completion of the medication regimen, respectively). SER-118–20 (Raidoo ¶¶ 56, 61–65); SER-093–95 (Kaneshiro ¶¶ 57, 62–66). The only difference is that telemedicine patients may receive the prescribed medications by mail, as opposed to picking them up in person. *See* SER-119 (Raidoo ¶ 59); SER-093–94 (Kaneshiro ¶ 60).[5]

[5] At the time this lawsuit was filed, the FDA generally required that mifepristone (but not misoprostol) be dispensed in person at a medical office, clinic, or hospital, even if the rest of the medication abortion process took place via telemedicine; however, Plaintiffs were exempt from the mifepristone in-person dispensing requirement and permitted to mail both mifepristone and misoprostol directly to patients as part of an FDA-approved clinical study. ER-008. The FDA mailing restrictions for mifepristone were lifted for all certified prescribers in December 2021, rendering the clinical study obsolete. *See Questions and Answers on Mifeprex,* FDA (Dec. 16, 2021), *https://www.fda.gov/drugs/postmarket-*

Plaintiffs' counseling and informed consent conversations also occur over telemedicine just as they do in person; they provide the same information that they would during an in-person visit, and patients have the same opportunity to ask questions and receive answers in real time. SER-118–19 (Raidoo ¶¶ 56–58); SER-093 (Kaneshiro ¶¶ 57–59); *see also* SER-030–31, 036, 039 (Nichols ¶¶ 48, 51, 64, 74); SER-003–05 (Nichols Rebuttal ¶¶ 2–7). For example, regardless of whether the patient is in the same physical location as their health care provider, to obtain informed consent for medication abortion, Plaintiffs counsel the patient about the risks, benefits, and alternatives to abortion generally, and to the medication abortion regimen specifically, including reviewing certain information regarding mifepristone that is currently required by the FDA. SER-118–19 (Raidoo ¶¶ 56–58); SER-093 (Kaneshiro ¶¶ 57–59; *see also* SER-031, 037, 039–40 (Nichols ¶¶ 50–51, 66, 68–69, 74–76); SER-054, 073–74 (Washington ¶¶ 37–38, 93–94). As noted above, such counseling includes a discussion of the patient's medical history, including any relevant test results and, where appropriate, the rationale

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drug-safety-information-patients-and-providers/questions-and-answers-mifeprex.

for Rh-testing and the risks and benefits of receiving an RhD immunoglobulin injection if the patient is Rh-negative. SER-117–18 (Raidoo ¶¶ 54–55); SER-092 (Kaneshiro ¶¶ 55–66). It also entails a discussion of, e.g., the expected symptoms and side effects, the availability of additional medications to treat minor side effects (i.e., cramping, nausea, or mild fever), what symptoms and complications warrant additional or emergency medical attention, and the rare possibility that the medication abortion regimen does not end the pregnancy and possible teratogenic effects of mifepristone and misoprostol on an ongoing pregnancy, as well as answering any questions and taking any other necessary steps to ensure that the patient's consent is both informed and voluntary. SER-118–19 (Raidoo ¶¶ 56–58); SER-093 (Kaneshiro ¶¶ 57–59); *see also* SER-054, 073–74 (Washington ¶¶ 37, 94). Although the vast majority of abortion patients are certain of their decision by the time of their appointment, Plaintiffs provide nondirective counseling, consistent with well-established principles of informed consent, to enable their patients to make the decision that is best for them and their circumstances, including deciding not to have an abortion after all. SER-118–19 (Raidoo ¶ 58);

SER-093 (Kaneshiro ¶ 59); SER-073 (Washington ¶ 94); SER-004 (Nichols Rebuttal ¶ 4).

C. Availability of Abortion in Guam

In 1978, the Guam legislature amended its penal code to legalize abortion. ER-007.[6] Between 2008 to 2017, approximately 200 to 300 people obtained abortions in Guam each year. ER-007.[7] In 2016, one of the only two physicians known to provide abortions in Guam retired. ER-076 (Compl. ¶ 61). In 2018, the last known doctor who provided abortions in Guam retired and, as the District Court found, no physicians in Guam have taken his place. ER-007, 015; *see also* ER-076–78 (Compl. ¶¶ 61–71); SER-106–07, 121, 123 (Raidoo ¶¶ 8, 68–70, 78); SER-081, 096, 098–99 (Kaneshiro ¶¶ 9, 70–71, 81). Anti-abortion stigma in Guam has discouraged even supportive local doctors from incorporating abortion

[6] In 1990, the Guam Legislature enacted a near-total ban on abortion that was declared unconstitutional and permanently enjoined by this Court. *Id.* The Attorney General recently concluded that the 1990 abortion ban was void *ab initio*, and therefore cannot be enforced even if this Court's earlier decision and injunction were vacated. *See* Guam Att'y Gen. Op. No. 22-0324 (July 6, 2022). Accordingly, the 1978 law legalizing abortion in Guam remains the operative law. *Id.* at 7.

[7] By law, all abortions provided in Guam must be reported. *See* 10 G.C.A. § 3218(a), (c), (e), (k)–(l).

services into their practice. ER-077 (Compl. ¶¶ 65–67); SER-121 (Raidoo ¶ 70). Indeed, Guam laws requiring the reporting and publication of abortion statistics, which include the name of every facility where abortions are performed, *see* 10 G.C.A. § 3218(a), (c), (e), (k)–(l), make it impossible for local doctors who provide any abortions to protect their identity. When Guam Governor Lou Leon Guerrero attempted (unsuccessfully) to recruit a physician from outside of Guam to come to the island to provide abortions, her attempts were met with public protests. ER-078 (Compl. ¶¶ 69–70). Plaintiffs themselves were willing to fly to Guam to provide abortions in person but, due to the fear other physicians had of being associated with them, could not find a clinical site where they could provide in-person care. SER-123 (Raidoo ¶ 78); SER-098–99 (Kaneshiro ¶ 81). Currently, the only abortion services available for patients in Guam are the telemedicine abortion services Plaintiffs are providing in Guam as a result of this lawsuit.

II. Statutory Background

In 2017, the Guam Attorney General recognized that Guam-licensed physicians located off-island, in another jurisdiction, can provide medical care to patients in Guam using telemedicine. *See* Guam

Att'y Gen. Op. No. 17-0531, 2–3 (Nov. 6, 2017). As set forth further below, in 2021, the Guam Attorney General recognized that Guam law permits the use of telemedicine to provide medication abortion, specifically. SER-012–15; *see also infra* Section III, Procedural Background.

The only provisions still at issue in this lawsuit are 10 G.C.A. § 3218.1(b)(1) and (b)(2), but only to the extent they prohibit the use of telemedicine to provide informed consent for abortion. These provisions are part of "The Women's Reproductive Health Information Act of 2012" ("Informed Consent Law"), 10 G.C.A. § 3218.1. By providing that informed consent for abortion is valid "if and only if," its statutory prerequisites are satisfied, 10 G.C.A. § 3218.1(b), the Informed Consent Law appears to supersede Guam's general informed consent law, which applies to all other forms of medical care, 10 G.C.A. § 11104. The general informed consent law contains no requirement that any information relating to informed consent be provided in person. *Id.*

The Informed Consent Law's Legislative Findings and Intent state in full:

> *I Liheslautran Guåhan* finds that it is essential to the psychological and physical well-being of a woman

> considering an abortion that she receives complete and accurate information material to her decision of whether to undergo an abortion including information concerning abortion alternatives. *I Liheslautran Guåhan* further finds that every woman submitting to an abortion should do so only after giving her voluntary and informed consent in writing to the abortion procedure.

Guam Pub. L. No. 31-235 § 1 (2012).

The Informed Consent Law states that informed consent for abortion is valid "if and only if," at least twenty-four hours before, *inter alia*, prescribing medications for the purpose of terminating a pregnancy, the physician who will prescribe the medications—or another physician, registered nurse, psychologist, licensed social worker, or licensed professional counselor who is an agent of that physician ("qualified person")—provides the patient with the following information, orally *and in person*:

- The name of the physician who will perform the abortion;
- The following medically accurate information that a reasonable person would consider material to the decision of whether or not to undergo the abortion:
  - A description of the proposed abortion method and the immediate and long-term medical risks associated with the proposed

abortion method, including but not limited to any risks of infection, hemorrhage, cervical or uterine perforation, 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 at the time the abortion is to be performed;

- The probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

- The medical risks associated with carrying the child to term;

- Any need for anti-Rh immune globulin therapy if she is Rh negative, the likely consequences of refusing such therapy, and the cost of the therapy;

- That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

- That public assistance may be available to provide medical insurance and other support for her child while he or she is a dependent;

- That public services exist which will help to facilitate the adoption of her child;

- That the father of the unborn child is liable to assist in the support of this child, even in instances where he has offered to pay for the

> abortion. (In the case of rape or incest, this information may be omitted.);
>
> - That she is free to withhold or withdraw her consent to the abortion at any time without affecting her right to future care or treatment and without the loss of any locally or federally funded benefits to which she might otherwise be entitled.

See 10 G.C.A. § 3218.1(a)(13), (b)(1)–(2).

The Informed Consent Law further requires that the physician who will provide the abortion, or a qualified person under the statute, provide the patient, at least twenty-four hours before the abortion, with a copy of materials produced by the Guam Department for Public Health and Social Services containing largely the same information as set forth above, along with pictures of the anatomical and physiological development of embryos and fetuses at two week gestational increments and the names and contact information for entities that provide social and financial assistance during pregnancy and after childbirth. *See id.* at § 3218.1(b)(3), (c).

The Informed Consent Law explicitly requires that the oral information and copy of the printed materials be provided "individually and in a private room to protect her privacy and maintain the

confidentiality of her decision and to ensure that the information focuses on her individual circumstances and that she has an adequate opportunity to ask questions." *Id.* § 3218.1(b)(4).

The Informed Consent Law also contains a severability clause, providing that,

> [a]ny provision of this Act held to be invalid *or* unenforceable by its terms or as applied to any person or circumstance . . . *shall* be deemed severable here from and *shall* not affect the remainder hereof *or* the application of such provision to other persons *not* similarly situated *or* to other dissimilar circumstances.

Guam Pub. L. No. 31-235 § 3 (emphasis in original).

III. Procedural Background

On January 28, 2021, Plaintiffs filed the instant lawsuit on behalf of themselves and their patients seeking declaratory and injunctive relief against (1) Guam's 1978 abortion law, 9 G.C.A. § 31.20(b)(2), to the extent it appeared to prohibit the use of telemedicine, through a live, face-to-face videoconference, to provide medication abortion; and (2) the in-person requirement within the Informed Consent Law, 10 G.C.A. § 3218.1(b)(1), (b)(2), to the extent it prohibited the use of telemedicine, through a live, face-to-face videoconference, to obtain informed consent

for abortion. ER-100–07 (Compl. ¶¶ 193–233).[8] Plaintiffs did not challenge the content of the information required to be provided under the Informed Consent Law, or the timing of when that information must be provided. The lawsuit raised vagueness, substantive due process (undue burden and rational basis), and equal protection (rational basis) claims. ER-101–06 (Compl. ¶¶ 194–229).[9]

On February 5, 2021, Plaintiffs moved for a preliminary injunction against 9 G.C.A. § 31.20(b)(2) and 10 G.C.A. § 3218.1(b)(1) and (b)(2), on the basis of their vagueness and undue burden claims. ER-060. The motion was referred to a Magistrate Judge. ECF Doc. 17. On March 5, 2021, the parties settled the claims against 9 G.C.A. § 31.20(b)(2), after Defendants stipulated that Guam law did not prohibit the provision of medication abortion in Guam via telemedicine. SER-012–15.

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[8] Plaintiffs also challenged the Informed Consent Law's requirement that certain mandated information be provided to patients in a "private setting," to the extent that requirement could be read to preclude patients from including a support person in the informed consent process, or otherwise obtaining the information in a safe and supportive setting of their choosing. ER-105–06 (Compl. ¶¶ 224, 229).

[9] The vagueness claim was only against 9 G.C.A. § 31.20(b)(2). ER-104 (Compl. ¶ 218).

On April 23, 2021, the Magistrate Judge issued a Report and Recommendation that recommended denial of the preliminary injunction against the restriction on using telemedicine to provide informed consent, holding that it was a "close call," but "the court cannot conclude that the justification for the law is outweighed by the burdens . . . ." ER-036. Plaintiffs timely objected. ECF Doc. 33. On September 3, 2021, the District Court sustained Plaintiffs' objections and granted the motion for a preliminary injunction. ER-022. Applying the undue burden test, as set forth in then-binding precedent, the court concluded the in-person requirement likely unconstitutional because "forcing [an] in-person visit, when a live, face-to-face video conference is available, serves no benefit or advances any legitimate state interests," and so "the burdens the statute imposes are unjustified." ER-014–15 (internal quotations omitted). The court thus preliminarily enjoined Defendants from enforcing the Informed Consent Law to require a patient obtaining medication abortion via telemedicine to receive the information required under that statute in person. ER-004.[10]

[10] Consistent with the Defendants' concessions, *see* SER-009–11, the court also enjoined enforcement of the private setting requirement to

Defendants timely appealed, ER-108, and all further proceedings in the district court were suspended pending the outcome of the appeal, ECF Doc. 56. Shortly thereafter, Defendants filed an unopposed motion to stay briefing in the appeal pending the resolution of *Dobbs*, CA9 ECF Doc. 13, which this Court granted, CA9 ECF Doc. 14. On June 24, 2022, the Supreme Court decided *Dobbs*, holding the federal constitution does not "confer" a right to abortion, and overruling the undue burden framework. 142 S. Ct. at 2279. On June 28, 2022, Defendant moved for summary reversal and vacatur of the preliminary injunction, CA9 ECF Doc. 18, which Plaintiffs opposed on the grounds, *inter alia*, that remand was unnecessary, and the record was sufficiently developed for this Court to consider whether prohibiting the use of telemedicine to provide informed consent for abortion failed rational basis review as applied to Plaintiffs and their patients, CA9 ECF Doc. 19. On August 18, 2022, this Court denied Defendants' motion without prejudice and set a briefing schedule for the appeal. CA9 ECF Doc. 21. Defendants filed their

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prevent a patient from including another person (or persons) in the consent process, if the patient chooses, but clarified that "[n]othing in this Order shall be construed to permit physicians or qualified persons . . . to provide the required information . . . to more than one patient at a time." ER-004.

Opening Brief on September 14, 2022, CA9 ECF Doc. 24 ("Defs.' Br."), and Plaintiffs now submit this Answering Brief.

SUMMARY OF THE ARGUMENT

Plaintiffs are likely to succeed on the merits of their claims that the Due Process and Equal Protection clauses provide independent bases for affirming the injunction against the in-person requirement, as applied to Plaintiffs and their patients, and plainly satisfy the remaining injunctive relief factors. *See Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

Plaintiffs agree that rational basis is the appropriate test for their claims.[11] However, while rational basis review is deferential, it is not "toothless." *Matthews v. De Castro*, 429 U.S. 181, 185 (1976) (internal quotations omitted). As this Court has recognized, even under rational

[11] While Plaintiffs do not concede that *Dobbs* means heightened scrutiny can never be appropriate in a challenge to an abortion regulation or restriction, Plaintiffs agree that rational basis is the appropriate test for their remaining due process and equal protection claims. *See* ER-106 (Compl. ¶¶ 225–29).

basis review "it is nevertheless our duty to scrutinize the connection, if any, between the goal of a legislative act and the way in which individuals are classified in order to achieve that goal." *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002), *as amended* (Jan. 27, 2003), *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008). Thus, under rational basis review, courts must invalidate those laws "whose relationship to an asserted goal is so attenuated as to render [them] arbitrary or irrational." *See Gallinger v. Becerra*, 898 F.3d 1012, 1019 (9th Cir. 2018) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985)). As discussed below, that is the case here.

First, the "touchstone" of due process is the requirement that governmental power be exercised rationally. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (citing cases). And, as this Court has recognized, even if a law is rational in some contexts or as applied to some individuals, it can still be irrational as applied in dissimilar contexts or to other individuals who are not similarly situated. *See Merrifield v. Lockyer*, 547 F.3d 978, 985–86 (9th Cir. 2008); *see also O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976) (holding double bond requirement for appeals satisfied rational basis review in cases with

small damages awards, but irrational in cases with large damages awards). Here, the only way to access an abortion in Guam is via telemedicine; and the only known providers of this care—Plaintiffs—are located several thousand miles away. As such, whatever the merits of imposing an in-person consent requirement when physicians who provided abortions were still located in Guam, by imposing such a requirement on Plaintiffs and their patients, the law prevents a treating physician from obtaining informed consent from their own patients altogether. Yet, at the same time, the law permits individuals who do not provide abortion services, medical care to pregnant people, or even medical care at all to provide informed consent for abortion instead, so long as they are physically present in Guam. 10 G.C.A. § 3218.1(a)(13), (b)(1), (b)(2). Far from advancing any legitimate interest in informed consent, applying the in-person requirement to Plaintiffs and their patients only undermines it. Nor is it rationally connected to any other legitimate government interest.

Second, as this Court has also recognized, a law violates equal protection when it irrationally "treat[s] similarly situated persons disparately." *Silveira*, 312 F.3d at 1088. Here, Plaintiffs and their

patients are similarly situated to other Guam-licensed physicians who provide medical care via telemedicine and their patients. Yet only Plaintiffs and their patients are prohibited from using a live, face-to-face videoconference to obtain and provide informed consent for the underlying medical care. As above, there is no rational link between this distinction and a legitimate government interest. Indeed, any attempt by Defendants to distinguish abortion from other forms of medical care provided by telemedicine just undermines their own argument—if Defendants contend abortion requires "more" informed consent than other forms of medical care, then it is wholly irrational to impose *only* on Plaintiffs and their patients a requirement that undermines informed consent. Moreover, particularly where there is no challenge to the content or timing of the information provided, it seems difficult to defend that abortion patients alone must receive information in person, in order to fully understand and appreciate it, without relying on impermissible gender stereotypes. That can never be a legitimate government interest.

Accordingly, as applied to Plaintiffs and their patients, Plaintiffs are likely to succeed on their argument that prohibiting them from using a live, face-to-face videoconference to provide informed consent for

abortion violates both the Due Process and Equal Protection clauses. As such, Plaintiffs plainly satisfy the remaining preliminary injunctive relief factors. It is well-established that the violation of Plaintiffs' and their patients' rights to due process and equal protection constitutes irreparable harm. That abortion itself is no longer federally constitutionally protected is irrelevant, as the relevant constitutional right at issue here is not the right to abortion itself, but the right to be free from the irrational, arbitrary, and discriminatory exercise of governmental power. Moreover, the balance of equities and public interest always weigh in favor of enjoining the unconstitutional application of a statute.

Finally, while remand is not necessary, should this Court remand for the District Court to reconsider the basis for its injunction in the first instance, this Court should exercise its discretion to leave the preliminary injunction in place.

STANDARD OF REVIEW

This Court reviews "the district court's issuance of a preliminary injunction for an abuse of discretion," *Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 753 (9th Cir. 2018), and it is well-settled this Court

"may affirm 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) (internal quotations omitted); *see also 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." (internal quotations omitted)); *accord Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1021 (9th Cir. 2013). In such cases, this Court necessarily considers legal questions de novo. *See Valle del Sol, Inc.*, 732 F.3d at 1019–21. Factual findings are reviewed for clear error. *Adidas Am., Inc.*, 890 F.3d at 753.

ARGUMENT

I. Plaintiffs are Likely to Succeed on the Merits of Their Claims that As Applied to Plaintiffs and Their Patients the In-Person Requirement is Not Rationally Connected to a Legitimate Government Interest.

Where a fundamental right or suspect class is not implicated, "[the general rule is that legislation is presumed to be valid," if the statute is "rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. at 439. But even in the ordinary case "calling for the most deferential of standards," a law still must bear a *logical* relationship to the legitimate

purpose it purports to advance. *Romer v. Evans*, 517 U.S. 620, 632–33 (1996); *see also Silveira*, 312 F.3d at 1088. And while "rational speculation" linking a law to a legitimate purpose need not be supported by evidence or empirical data, the connection must still be "*reasonably* conceivable." *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 315 (1993) (emphasis added); *see also Merrifield*, 547 F.3d at 989 ("The State is not compelled to verify *logical* assumptions with statistical evidence.") (internal quotations omitted). Put another way, "[a]lthough the government is relieved of providing a justification for a statute challenged under the rational-basis test, such a justification must nevertheless exist, or the standard of review would have no meaning at all." *Silveira*, 312 F.3d at 1089. Thus, whether under the Due Process or Equal Protection clauses (or both), courts must invalidate those laws "whose relationship to an asserted goal is so attenuated as to render [them] arbitrary or irrational." *Gallinger*, 889 F.3d at 1019; *see, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535–36 (1973) (holding restrictions on benefits for unrelated households irrational because "even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated'

households we still could not agree with the Government's conclusion that the denial of essential federal food assistance . . . constitutes a rational effort to deal with these concerns"); *Merrifield*, 547 F.3d at 991–92 (holding the exemption of some non-pesticide-using pest controllers from licensing requirement irrational where "it does not logically follow from the legislative assumptions that removing the licensing requirement for non-pesticide control of less common pests . . . would pose a lesser risk to public welfare" and where "those exempted under the current scheme are more likely to be exposed to pesticides than [those not exempted]"); *Silveira*, 312 F.3d at 1089–91 (holding exemption for retired peace officers from law prohibiting sale or transfer of assault weapons for non-law enforcement purposes irrational where doing so is "directly contrary to the [law's] basic purpose" and "wholly unconnected to any [other] legitimate state interest").

As set forth below, as applied to Plaintiffs and their patients, the relationship between the in-person requirement and any legitimate

government interest is not merely attenuated, but non-existent and therefore fails even this deferential standard of review.[12]

[12] Plaintiffs sue on behalf of themselves, and also on behalf of their patients. Any argument about whether Plaintiffs have third-party standing to raise the rights of their patients is prudential, not jurisdictional, and Defendants have waived it by not raising it in their opening brief. *See Alaska Ctr. For Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 n. 4 (9th Cir. 1999) (holding argument not raised in opening brief waived even if raised in reply brief); *see also Kowalski v. Tesmer*, 543 U.S. 125, 128–129 (2004) (holding that "whether [plaintiffs] have standing to raise the rights of others" is prudential, not jurisdictional); *Craig v. Boren*, 429 U.S. 190, 192–94 (1976) (holding third-party standing is prudential, not jurisdictional, and subject to waiver).

But even if it were jurisdictional, Plaintiffs readily satisfy the elements of third-party standing here: As the Supreme Court has recognized, third-party standing is appropriate where "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Kowalski*, 543 U.S. at 130 (internal quotations omitted). In such cases, "the obvious claimant" and "the least awkward challenger" is the person upon whom the challenged law imposes "legal duties and disabilities." *Craig*, 429 U.S. at 196–97. Here, Plaintiffs may be the parties who are most directly regulated by the in-person requirement, *see* 10 G.C.A. § 3218.1(f), (g), but there is no doubt that their patients are also affected to the extent the provision determines the conditions under which they can access lawful medical care. And their patients have the same rights as they do under the Due Process and Equal Protection clauses to be protected from the irrational and discriminatory exercise of government power. *See infra* Sections I(A), I(B).

A. The In-Person Requirement Violates Due Process As Applied to Plaintiffs and Their Patients Because It Irrationally Prevents the Treating Physician From Obtaining Informed Consent From Their Own Patients.

Plaintiffs are likely to succeed on their due process claim. "[T]he touchstone of due process is protection of the individual against arbitrary action of government," including "the exercise of [legislative] power without any reasonable justification in the service of a legitimate governmental objective." *Cnty. of Sacramento*, 523 U.S. at 845–46 (internal citations and quotations omitted). This means that even if a law is rational in one context or as applied to one group of people, it can still be irrational in another context or as applied to a different group of people. *See, e.g.*, *Merrifield*, 547 F.3d at 985 (recognizing rational basis due process claim where plaintiffs "argued that their business was so *different* from [others] that the government's interest in public health and safety in regulating [them] was not implicated") (discussing *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002)); *cf. City of Cleburne*, 473 U.S. at 448 (recognizing that, while special permitting requirement for group home for people with developmental disabilities may be rational in some cases, holding "the record does not reveal any rational basis for believing that the Featherston home would pose any

special threat to the city's legitimate interests," and affirming "the judgment below insofar as it holds the ordinance invalid as applied in this case"); *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 38 (1928) ("[C]lassification good for one purpose may be bad for another.").

For example, in *O'Day*, this Court considered a federal statute that required putative appellants to post a bond in double the amount of damages awarded against the appellant in order to perfect the appeal. 536 F.2d at 858.[13] This Court recognized that "the state may properly condition the right to appeal upon posting security sufficient to protect appellee from loss of damages already awarded, interest, and . . . costs on appeal, including a reasonable attorney's fee," and that Congress had "clearly manifested its intention to require a bond sufficient to secure [such] payment." *Id.* at 860–61. This Court further recognized that, in some cases, depending on the amount of damages awarded, a double bond

[13] Although articulated as both a due process and equal protection rational basis claim at the time, 536 F.2 at 858, under this Court's modern jurisprudence the claim in *O'Day* is probably more appropriately considered a due process claim because the rationale for this Court's holding was that appellants subject to large damage awards were *different* from those subject to small damages awards and therefore should not be treated the same, *see Merrifield*, 547 F.3d at 984–86 (explaining difference between rational basis equal protection and due process claims).

"might well approximate the security required to protect the prior award." *Id.* However, where the damages award was already substantial, as in the underlying case, this Court held requiring a double bond was "grossly excessive" and did not "bear[] a rational relationship to securing such costs." *Id.* Accordingly, this Court upheld the double bond requirement only as applied to those cases where it was rationally connected to securing payment of the damages award, and invalidated it in all others, including as applied to the appellant in that case. *Id.* at 861–62.[14]

Similarly, in *Craigmiles*, cited approvingly by this Court, *see Merrifield*, 547 F.3d at 985–92, the Sixth Circuit rejected Tennessee's argument that including casket retailers within the licensing requirement for funeral directors was rationally related to legitimate interests in public health and safety and consumer protection—not because those interests were not legitimate, but because, in light of their current business model, there was no rational connection between those

[14] In so doing, this Court noted that Congress had included a severability clause expressly providing "the statute is to be upheld in any application in which it is valid." *Id.* The Informed Consent Law contains a similar clause. *See* Guam Pub. L. No. 31-235 § 3.

interests and requiring the plaintiff casket retailers to obtain funeral licenses. 312 F.3d at 225–28. The Sixth Circuit was careful to point out that even under rational basis review it is not enough that a legitimate government interest might be served by a differently worded statute. In order to satisfy rational basis review, as applied to the plaintiffs in the case, the statute must actually require regulated individuals to undertake behavior that could rationally be expected to advance that interest. *Id.* at 225–26 (holding that where licensing requirement did not actually require licensees to counsel their customers on the harms of low-quality caskets or even to sell high-quality caskets, "restricting the retailing of caskets to licensed funeral directors bears no rational relationship" to those legitimate interests). The Court also underscored that a statute cannot satisfy rational basis review when, as applied to the plaintiffs in the case, it *undermines* the very interests the statute is purported to serve. *Id.* at 228 (recognizing that plaintiffs' existing business model was to sell only caskets, not bundled service packages, and so preventing them from selling caskets without a license was "both inapposite and counterproductive" to any legitimate interest in protecting consumers from bundled service packages). Accordingly, the

Sixth Circuit affirmed the preliminary injunction as applied to "plaintiffs' businesses, with respect to the way they operated" but not "the operation of the entire Act, its application to other parties, or even to the plaintiffs if their business activities changed." *Id.* at 223.

Here too, the question before this Court is whether an in-person consent requirement for abortion is rationally related to a legitimate government interest as applied to the specific circumstances of this case. Whether it would be rational as applied to other, hypothetical providers of abortion care, under dissimilar circumstances, is irrelevant.[15] Today, the only way for a person in Guam to access lawful abortion care is via telemedicine, and the only Guam-licensed physicians known to be

[15] Though this Court need not resolve this issue, Plaintiffs note that the Supreme Court never considered an in-person abortion consent requirement for abortion, let alone upheld one under any standard of review. In *Planned Parenthood of Se. Pa. v. Casey*, the Supreme Court considered a Pennsylvania statute that merely required certain information be provided "orally." 505 U.S. 833, 902 (1992) (citing 18 P.A. Const. Stat § 3205), *overruled by Dobbs*, 142 S. Ct. 2228. The two-trip requirement for abortion patients upheld in *Casey* stemmed not from a statutory in-person consent requirement, but from the statutory 24-hour delay and the fact that it was the plaintiffs' practices to obtain informed consent in-person, on the same day as the procedure, rather than over the phone. *See* 505 U.S. at 968 (Rehnquist, C.J., concurring in part and dissenting in part); *Planned Parenthood of Se. Pa. v. Casey,* 947 F.2d 682, 704–05 (3d Cir. 1991).

providing that care—Plaintiffs—are in Hawai'i, several thousand miles away. ER-007–08; *see also* SER-123 (Raidoo ¶ 78); SER-098–99 (Kaneshiro ¶ 81). As such, the only way for Plaintiffs to obtain informed consent from their patients in Guam is the same way they provide the care itself: via a live, face-to-face videoconference. Thus, as applied to Plaintiffs and their patients, prohibiting the use of telemedicine to provide informed consent for abortion prevents the only physicians who provide abortions in Guam from obtaining legally valid informed consent from their patients altogether. Yet, while Plaintiffs cannot provide informed consent to their own patients, the law permits individuals in Guam who do not provide or assist in the provision of abortion services, do not provide medical care to pregnant patients, or even have any medical training or provide any medical care at all, to instead obtain informed consent from abortion patients—solely by virtue of their physical location. *See* 10 G.C.A. § 3218.1(a)(13), (b) (permitting, *inter alia*, psychologists, licensed social workers, or licensed professional counselors to satisfy informed consent requirements). In *this* context—the sole context in which abortion services are provided in Guam—the

in-person requirement plainly is not rationally connected to any legitimate government interest.

1. *Preventing Plaintiffs from obtaining informed consent from their patients is not rationally connected to any interest in informed consent.*

Start with the stated and self-evident purpose of the Informed Consent Law: To ensure that a person seeking an abortion receives "complete and accurate information material to her decision of whether to undergo an abortion." Guam Pub. L. No. 31-235 § 1; *see also* 10 G.C.A. § 3218.1(b); Defs.' Br. at 22–25. This Court does not need "evidence or empirical data," *Beach Commc'ns, Inc.*, 508 U.S. at 315, to see that, far from advancing any legitimate interest in informed consent, in this context the challenged provisions turn the very notion of informed consent on its head.

"[T]he requirement that a physician obtain informed consent to [provide medical care] is 'firmly entrenched in American tort law,'" as are the general principles of informed consent. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373–74 (2018) ("*NIFLA*") (quoting *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269 (1990)). "Traditional informed consent requirements derive from the principle of

patient autonomy in medical treatment." *Stuart v. Camnitz*, 774 F.3d 238, 251 (4th Cir. 2014); *see also Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) ("True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each."). "The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision." *Canterbury*, 464 F.2d at 780.

"As the term suggests, informed consent consists of two essential elements: comprehension and free consent." *Stuart*, 774 F.3d at 251. "Comprehension requires that the physician convey adequate information about the diagnosis, the prognosis, alternative treatment options (including no treatment), and the risks and likely results of each option." *Id.* As such, "[a]n integral component of the practice of medicine is the communication between a doctor and a patient." *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002); *see also Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 524 (9th Cir. 1984) ("The doctrine of informed consent does not exist to tell health care providers whether or not to offer certain

treatment. . . . It seeks to allow a competent patient to weigh the value of the treatment against the risks posed. The goal is to make the patient an active participant in the decisionmaking process.") (internal citations omitted).

To be sure, like other aspects of the practice of medicine, informed consent is subject to "*reasonable* . . . regulation by the State." *NIFLA*, 138 S.Ct. at 2373 (internal quotations omitted) (emphasis added). And there is nothing intrinsically unreasonable about a physician delegating the responsibility for the informed consent conversation to another physician or health care professional who is sufficiently knowledgeable about the relevant treatment or procedure to facilitate the informed consent process. But a requirement that "markedly depart[s] from standard medical practice" is not "a reasonable regulation of the medical profession," and preventing the treating physician from providing informed consent—in favor of someone who does not even provide or assist in the provision of the relevant care—"look[s] nothing like traditional informed consent." *Stuart*, 774 F.3d at 254. For example, from both the physician's and patient's perspective, it would be irrational, and undermine well-established principles of informed consent to, e.g.,

prevent a cardiologist from obtaining informed consent from their patient prior to performing open heart surgery, but to allow a social worker who does not work in a facility where cardiac care is provided to explain the risks, benefits, and alternatives of a coronary artery bypass graft to the patient instead. Additionally, if a cardiologist could not be physically present to obtain informed consent at least 24-hours before performing open-heart surgery, but offered to obtain it over a live, face-to-face videoconference, it would be irrational to insist that a social worker who does not work in a facility where cardiac care is provided do it in person instead.

The same is true here. *See Stuart*, 774 F.3d at 255–56 ("Abortion may well be a special case . . . but it cannot be so special a case that all other professional rights and medical norms go out the window."). One need only look at the content of the mandated information—which is overwhelmingly medical information about abortion methods, fetal development, and the risks and alternatives to abortion and continuing a pregnancy, *see* 10 G.C.A. § 3218.1(b)—to see that "walling off patients and physicians in a manner antithetical to the very communication that lies at the heart of the informed consent process," *Stuart*, 774 F.3d at 253,

cannot be rationally connected to any legitimate interest in "'protecting the integrity and ethics of the medical profession,' and more generally . . . in the psychological and physical well-being of the affected women," *id.* at 254 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)). Plaintiffs are not aware of any case, nor have Defendants cited any, that has considered—let alone upheld—a law that bars physicians who perform abortions from satisfying an informed consent requirement by providing information directly to their own patients. Even *Casey* concerned a challenge by physicians to a law that prohibited them from delegating the provision of certain information to other health care providers who were already trained to do so, not the other way around. 505 U.S. at 884–85.

Defendants may counter that Plaintiffs are still free to talk to their patients via telemedicine and supplement the statutory in-person consent process, even if doing so has no legal effect. But forcing Plaintiffs and their patients to engage in a shadow informed consent process because the in-person requirement renders the existing informed consent law inadequate only proves Plaintiffs' point. There is no exception to the requirement that legislative power be exercised rationally just because

private citizens could take it upon themselves to mitigate the harms to themselves and others when that power is exercised irrationally. And if anything exceeds the bounds of "rational speculation," *Beach Commc'ns, Inc.*, 508 U.S. at 315, it is the idea that whatever conceivable benefit there may be to speaking to your physician in person prior to an abortion extends to speaking to someone who does not provide abortions, medical care for pregnant people, or even medical care at all instead. *Cf. Moreno*, 413 U.S. at 535–36; *Merrifield*, 547 F.3d at 990–92; *Silveira*, 312 F.3d at 1089–91; *Lewis v. Thompson*, 252 F.3d 567, 590 (2d. Cir. 2001) ("Although it is arguably rational to think that some pregnant women will be deterred from crossing our borders by the unavailability of welfare benefits (despite the certainty of citizenship for their children), the limits of 'rational speculation,' are surely approached by thinking that they are deterred by the disadvantage of obtaining for their children automatically the coverage that they can obtain by application." (internal citations omitted)). "[W]hile a government need not provide a perfectly logically solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Merrifield*, 547 F.3d at 991 (emphasis in original).

2. *Preventing Plaintiffs from obtaining informed consent from their patients is not rationally connected to any other legitimate governmental interest.*

The other interests identified by Defendants fare no better under rational basis review. *See* Defs.' Br. at 22–24. As in *Craigmiles*, in attempting to rationalize the in-person requirement in this context, Defendants vastly overstate what the Informed Consent Law actually requires and what the in-person requirement actually does. *See* 312 F.3d at 225–26; *see also Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 816, 819 (9th Cir. 2016) (reversing dismissal of rational basis claim where state's justifications for classification did not align with statutory language). For example, even if they are sitting in the same room, nothing in the Informed Consent Law requires physicians or qualified persons to deliver the mandated information to abortion patients in a "solemn setting," with a "level of formality," and in a "pensive tone." Defs.' Br. at 23. There is simply nothing about the Informed Consent Law that transforms the ordinary atmosphere in a doctor's office to the formal, austere, almost courtroom-like atmosphere Defendants describe. Indeed, to read Defendants' brief is to get the distinct impression that they view requiring a patient to make an in-person visit to a physician as on par

with being called to the principal's office before being sent home to "appreciate the gravity and apprehend the full consequences of" what you have done. Defs.' Br. at 24. That is neither rational, nor the law the Guam Legislature wrote.

Quite the opposite, the Informed Consent Law, as written, would be satisfied if a pediatrician delivered the government-mandated information to an abortion patient with neither judgment, solemnity, nor gravity, while both are sitting in an office filled with toys, balloons, and lollipops. To require anything else would raise significant, additional constitutional concerns, for while "the state may certainly express a preference for childbirth over abortion, and use its agents and written materials to convey that message," it "cannot commandeer the doctor-patient relationship to compel a physician to express its preference to the patient" or to "deliver the state's preferred message in [the physician's] own voice." *Stuart*, 774 F.3d at 253 (internal citations omitted); *accord Conant*, 309 F.3d at 636–637; *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1327–30 (11th Cir. 2017) (Pryor, J., concurring).

By the same token, even if they are sitting in the same room, nothing in the Informed Consent Law charges physicians or qualified

persons with *persuading* their patients to choose childbirth over abortion. *See Stuart*, 774 F.3d at 253–54; *Harbeson*, 746 F.2d at 52. Consistent with constitutional limitations, the Informed Consent Law, as written, relies on the *content* of the information provided to have any persuasive effect and Plaintiffs have not challenged that content, or even the timing of its delivery, here. Thus, whether direct persuasion is more effective in person is irrelevant—the law does not require the person providing the information to attempt to persuade the patient not to have an abortion if that is the patient's decision.[16]

Nor does it logically follow that the in-person requirement "creates a setting free from distractions," Defs.' Br. at 23, as anyone who has visited a busy doctor's office knows. The *individual, private setting*

[16] Further, as Defendants themselves maintain, the Informed Consent Law does not actually reduce the number of abortions. *See, e.g.*, Defs.' Br. at 31 ("The [Informed Consent Law] remained unchallenged for nine years since its passage until now, and it has proven not to have caused any notable decrease in reported abortions."). At a certain point, it will no longer be rational to continue to believe that any aspect of these laws is logically connected to persuading patients to choose childbirth over abortion. *Cf. U.S. v. Blewett*, 746 F.3d 647, 667 (6th Cir. 2013) (Moore, J., concurring) (recognizing 100-to-1 crack cocaine ratio "may have been rational and constitutional in 1986 or 1996 but history makes clear that constitutional principles of equality . . . and due process, evolve over time") (internal citations and quotations omitted), *superseded by statute*.

requirement within the Informed Consent Law, *see* 10 G.C.A. § 3218.1(b)(4) , could reasonably be expected to advance that interest, but the preliminary injunction did not remove this requirement. And, in any event, Defendants themselves read this provision to permit a patient to bring "whomever she wants" into an in-person visit, regardless of the distractions that could create. SER-010; *see also* ER-021–22.

Finally, Defendants' reliance on "the virtues of in-person witness testimony in the courtroom" misses the mark. Defs.' Br. at 25–26. As an initial matter, this Court need not hold there are *no* qualitative differences between an in-person interaction and a live, face-to-face videoconference *in any context* to affirm the preliminary injunction. The question before this Court is simply whether, in view of the particular context in which abortion services are provided in Guam, prohibiting Plaintiffs from using a live, face-to-face videoconference to provide their patients with informed consent is rationally connected to any legitimate government interest. As the foregoing demonstrates, it is not.

Even so, the cases Defendants rely on hardly bolster their argument. The interests underlying the Confrontation Clause and informed consent are not comparable, and even if they were, Defendants

are relying on judicial observations about the limits of video testimony that are over twenty years old, if not much older. *See id.* What is more, the case Defendants appear to rely on most heavily did not even concern *live* video testimony. *See Stoner v. Sowders*, 997 F.2d 209, 213–14 (6th Cir. 1993) (holding defendant's confrontation rights violated when witness was not unavailable but recorded video deposition testimony was still introduced in lieu of live testimony at trial). Whatever differences there may be between in-person and live, face-to-face videoconference *interactions*, the passive viewing by a jury of a previously recorded encounter obviously is not comparable to a live interaction—on video or otherwise. Another case relied on by Defendants does not even address the use of video at all. *See U.S. v. Int'l Bus. Machines Corp.*, 90 F.R.D. 377, 385 (S.D.N.Y. 1981) (addressing use of written deposition testimony in lieu of live trial testimony under the federal rules). This is plainly insufficient to overcome the patent irrationality of preventing a treating physician from obtaining informed consent from their own patient, solely because they must use a live, face-to-face videoconference to do so.

In sum, as applied to Plaintiffs and their patients, the in-person requirement is not rationally connected to any legitimate government

interest, and Plaintiffs therefore are likely to succeed on the merits of their due process claim.

B. The In-Person Requirement Violates Equal Protection Because It Irrationally Treats Plaintiffs and Their Patients Differently Than Similarly Situated Telemedicine Providers and Users.

Plaintiffs are also likely to succeed on their equal protection claim. The Equal Protection clause is implicated when state action "treat[s] similarly situated persons disparately." *Silveira*, 312 F.3d at 1088. As above, "if a legislative act neither affects the exercise of a fundamental right, nor classifies persons based on protected characteristics, then that statute will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* (internal citations and quotations omitted). However, as also set forth above, even where rational basis review applies, courts must "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632; *see also Cleburne*, 473 U.S. at 448–50; *Moreno*, 413 U.S. at 534–38; *Merrifield*, 547 F.3d at 990–92; *Silveira*, 312 F.3d at 1089–91. "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [Equal Protection Clause]." *Louisville Gas & Electric Co.*, 277 U.S. at 37–38. The

in-person requirement warrants just such careful consideration: Even though it does not directly implicate a fundamental right or suspect class, it "has the peculiar property of imposing a broad and undifferentiated disability on a single named group," *Romer*, 517 U.S. at 632; namely, physicians who provide abortion services via telemedicine and their patients.

"The first step in equal protection analysis is to identify the state's classification of groups." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017) (internal quotations omitted) ("*Brewer I*"). Here, Plaintiffs and their patients are similarly situated to other telemedicine providers and patients "in respects that are relevant to the [] challenged [law]." *Gallinger*, 898 F.3d at 1016 (internal citations omitted). Both groups are comprised of Guam-licensed physicians who utilize telemedicine to provide healthcare to Guam patients. *See Brewer I*, 855 F.3d at 966. ("DACA recipients do not need to be similar in all respects to other noncitizens who are eligible for drivers' licenses, but they must be similar in those respects that are relevant to Arizona's own interests and its policy."); *accord Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886) ("[N]o greater burdens should be laid upon one than are laid upon others

in the same calling and condition."). However, while all Guam-licensed physicians—including Plaintiffs—are permitted to use telemedicine to provide medical care to Guam patients, *see supra* Guam Att'y Gen. Op. No. 17-0531, only Plaintiffs and their patients are prohibited from using that same method of communication to obtain and provide informed consent for the underlying care itself, 10 G.C.A § 3218.1(b).

Under these circumstances, "[t]he search for the link between classification and objective" reveals no "rational relationship to an independent and *legitimate* legislative end." *Romer*, 517 U.S. at 632–33 (emphasis added). As set forth above, *preventing* a treating physician from obtaining informed consent from their own patients is not rationally related to any legitimate government interest, and thus there is no rational reason to permit all other telemedicine providers and patients to obtain and provide informed consent via telemedicine, except for Plaintiffs and their patients. *See supra* 37–48; *cf. Merrifield*, 547 F.3d at 991 ("[T]his type of singling out, in connection with a rationale so weak

that it undercuts the principle of non-contradiction, fails to meet the relatively easy standard of rational basis review.").[17]

Indeed, any argument that there are differences between abortion and other medical procedures that justify this differential treatment is just a strawman. Plaintiffs are not challenging the content of the mandated information under the Informed Consent Law, or that the mandated information be provided at least twenty-four hours prior to the abortion. Those are both elements of the Informed Consent Law that the Supreme Court previously recognized in *Casey* as bearing a rational relationship to legitimate government interests; a holding that turned, at least in part, on the nature of the abortion procedure itself. 505 U.S.

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[17] This is precisely what distinguishes Plaintiffs' as-applied claim from a facial one: An in-person requirement in the context of locally provided abortion services doesn't categorically bar the treating physician from obtaining informed consent from their own patient. Thus, even though the justification for singling out only physicians who provide abortions and their patients for such a requirement is "tenuous," at best, *Romer*, 517 U.S. at 632, Defendants could still argue that the legislature was entitled, under rational basis review, to take an incremental approach to regulating in-person informed consent, *see Merrifield*, 547 F.3d at 989 (recognizing "legislatures may implement their program step by step . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations"). That is no longer the case where, as discussed *infra*, Guam "has undercut its own rational basis" by imposing a requirement that enhances the very evils it purports to cure. *See Merrifield*, 547 F.3d at 992.

at 881–83, 885 ("[I]mportant interest in potential life" allows requiring "the giving of truthful, nonmisleading information" to ensure abortion decision is "fully informed"), ("[T]he waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn . . ." and ensure abortion decision is "informed and deliberate").

Instead, Plaintiffs are challenging only those provisions that require the mandated information be provided *in person*, and the Supreme Court in *Casey* did not consider whether an in-person consent requirement was reasonably related to these government interests. *See supra* n.15. Although Defendants argue that those same interests apply to the in-person requirement, such an argument fails—not because the law does not recognize such legitimate interests, but because, as set forth above, applying the in-person requirement in this context only *undermines* those interests. *See supra* 37–42. This Court has not hesitated to find irrational a classification that, as here, undermines its purported purpose. *See Merrifield* 547 F.3d at 992 ("[T]he government has undercut its own rational basis for the licensing scheme . . . The exemption from the license is given to those non-pesticide pest controllers who are most likely to interact with pesticides. Additionally, the non-

pesticide pest controllers who are least likely to interact with pesticides must remain part of the licensing scheme. Therefore, the exemption scheme is not supported by a rational basis review."); *see also Silveira*, 312 F.3d at 1090 (striking classification "wholly contrary to the legislature's stated reasons for enacting restrictions on assault weapons").

Further, Guam has singled out a form of health care predominantly sought by women; imposed an in-person consent requirement solely on that form of health care; and now defends that differential treatment on the grounds that Guam rationally and legitimately fears women will not fully understand what it means to have an abortion if they do not receive the information in person and provide informed consent via telemedicine instead. Defs.' Br. at 24–25. Even allowing that the legislature may choose to address issues incrementally, *Merrifield*, 547 F.3d at 989, this sort of singling out smacks of gender stereotypes. *See, e.g.*, Defs.' Br. 24 ("[O]nly a direct, face-to-face meeting with the person providing information 'material to the decision of whether or not to undergo an abortion' . . . can best assure the woman will firmly understand the significance of the act of abortion and take

that information to heart.") (internal citations omitted). Similarly, the suggestion that there is any rational and legitimate government interest in "physical touch," Defs.' Br. at 25, during the informed consent process would be alarming enough, but is even more so when apparently this interest exists solely for a form of health care predominantly sought by women. Such an "attitude of 'romantic paternalism,'" *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), "reflect[s] outmoded notions of the relative capabilities of men and women," *Cleburne*, 473 U.S. at 441. And "[c]ommunicating such archaic gender-role stereotypes . . . is not a legitimate governmental interest." *Latta v. Otter*, 771 F.3d 456, 492 (9th Cir. 2014) (Brezon, J., concurring).[18] Because an impermissible government purpose is *per se* an irrational one, *see, e.g.*, *Romer*, 517 U.S. at 632–35; *Cleburne*, 473 U.S. at 446–47, 448; *Merrifield*, 547 F.3d at 991,

[18] That some transgender men and gender nonbinary people also seek and obtain abortion care is no defense. *Cf. Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731, 1742–43 (2020) (rejecting argument that it is "a defense" to sex discrimination that an employer "is equally happy" to "fire[] both Hannah and Bob for failing to fulfill traditional sex stereotypes"); *Hunter v. Underwood*, 471 U.S. 222 (1985) (law disenfranchising all voters convicted of crimes of moral turpitude violated equal protection when enacted with racially discriminatory intent against Black voters, even though white voters were also disenfranchised).

n.15; *Fowler Packing Co., Inc.*, 844 F.3d at 815, Defendants cannot rely on such stereotypes to justify singling out abortion patients and barring them *alone* from providing informed consent by telemedicine.

In sum, as applied to Plaintiffs and their patients, the in-person requirement is not rationally connected to any legitimate government interest, and Plaintiffs are therefore likely to succeed on the merits of their equal protection claim.

II. Plaintiffs Satisfy the Remaining Preliminary Injunction Factors.

Plaintiffs plainly satisfy the remaining injunctive relief factors. Contrary to what Defendants argue, Defs.' Br. at 29–32, whether the District Court's analysis of these factors is still correct after *Dobbs* is not the relevant question. The record amply supports that, absent injunctive relief, Plaintiffs and their patients will suffer irreparable harm and that the equities and public interest weigh in favor of injunctive relief. *See Winter*, 555 U.S. at 20.[19]

First, as set forth above, absent injunctive relief, Plaintiffs and their patients will still suffer a deprivation of their constitutional rights

[19] Plaintiffs also satisfy this Court's "alternate formulation of

to due process and equal protection that "'unquestionably constitutes irreparable injury.'" *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."), *rev'd on other grounds*, 562 U.S. 134 (2011). This alone is sufficient to establish irreparable harm, and Defendants' argument that Plaintiffs can no longer show irreparable harm to their federal constitutional right to abortion specifically, Defs.' Br. at 29, is irrelevant.

The undisputed evidence also shows the in-person requirement threatens additional "harm[s] for which there is no adequate legal remedy." *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th

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the *Winter* test, under which serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (internal citations and quotations omitted).

Cir. 2014) ("*Brewer II*").[20] Forcing patients to disclose their abortion decision to another person in Guam, solely to satisfy this irrational and unnecessary requirement, forces patients to disclose their personal medical information for no legitimate reason. *See generally Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 551–53 (9th Cir. 2004) (recognizing privacy interests in personal medical decisions). It also increases the risk that still others will find out about their decision. It is common sense that having to take the time off from work or other responsibilities and make the necessary arrangements to make a separate in-person visit to receive the informed consent material, and to be seen in the waiting room of another clinician, or visiting the office of a psychologist, social worker, or licensed professional counselor—particularly in a small community—jeopardizes patients' ability to keep

[20] While the record certainly suggests it could be difficult to find a "qualified person" in Guam willing to associate themselves with an abortion provider, *see* ER-007, 015, 076–78 (Compl. ¶¶ 61–71); SER-106–07, 121, 123 (Raidoo ¶¶ 8, 68–70, 78); SER-081, 096, 098–99 (Kaneshiro ¶¶ 9, 70-71, 81), Plaintiffs are not arguing that the in-person requirement causes irreparable harm because it will force them to stop providing abortions altogether. Thus, Defendants' suggestion that "Plaintiffs' claim of irreparable harm is wholly within their own control, based on their desire to not associate with local providers," is without merit. Defs.' Br. at 30.

their abortion decision private. These risks, and any ensuing harm, are heightened for patients who are at risk of retaliation, abuse, or violence from a partner or family member if their abortion decision is discovered. SER-036 (Nichols ¶ 65). Certainly, "[n]o remedy at law could adequately compensate [Plaintiffs' patients] for any physical, psychological, or emotional trauma they might suffer at the hands of one obtaining this personal information." *See Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069 (6th Cir. 1998).

Second, "by establishing a likelihood that [the in-person requirement] violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction." *See Brewer II*, 757 F.3d at 1069; *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) ("When the government is a party, these last two factors merge."). As this Court has repeatedly held, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (internal quotations and citations omitted). Defendants, by contrast, "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127,

1145 (9th Cir. 2013) (internal quotations and citations omitted), *reversed on other grounds*.

Moreover, Plaintiffs are only seeking an as-applied injunction against one component of the otherwise comprehensive Informed Consent Law, which further tilts these factors in their favor. Even while the preliminary injunction is in place, Plaintiffs continue to comply with the rest of the statute. Such narrow relief is also consistent with the Informed Consent Law's severability clause, as it does not "affect the remainder" of that law "*or* the application of such provision to other persons *not* similarly situated *or* to other, dissimilar circumstances." Guam Pub. L. No. 31-235 § 3; *see also O'Day*, 536 F.2d at 861–62. And given, as demonstrated above, that enforcing the in-person requirement against Plaintiffs and their patients only *undermines* any legitimate interest in informed consent, it is difficult to see the public interest in lifting the injunction.

Defendants' arguments to the contrary are unavailing. That the Informed Consent Law has been in effect since 2012 is irrelevant. In *McCormack v. Hiedeman*, cited by Defendants, this Court affirmed an injunction against a longstanding criminal abortion law that prohibited

the state defendants from any *future* enforcement of the law against the plaintiff. 694 F.3d 1004, 1019–20 (9th Cir. 2012). This Court has repeatedly held that such relief constitutes a status quo (or prohibitory) injunction, not a mandatory injunction. *See Hernandez v. Sessions*, 872 F.3d 976, 998–1000 (9th Cir. 2017) (citing cases); *see also id.* at 998 ("An injunction is considered prohibitory [as opposed to mandatory] when the thing complained of results from present and continuing affirmative acts and the injunction merely orders the defendant to refrain from doing those acts.") (quoting 42 Am. Jur. 2d *Injunctions* § 5 (2017)).

Accordingly, Plaintiffs satisfy the remaining requirements for preliminary injunctive relief.

III. This Court Should Not Vacate the Injunction if It Remands to the District Court for Reconsideration of Plaintiffs' Rational Basis Claims.

Both the record and the legal arguments with respect to Plaintiffs' rational basis claims are sufficiently developed before this Court to allow this Court to affirm the injunction. *See Or. Short Line R.R. Co.*, 139 F.3d at 1265; *Price*, 390 F.3d at 1109; *Valle del Sol Inc.*, 732 F.3d at 1021. However, 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. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001) (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, 793 n.6, 808 (7th Cir. 2015) (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), *cert. granted, judgment vacated on other grounds*, 578 U.S. 969 (2016). The exercise of such discretion is warranted here where the record shows both that Plaintiffs are likely to succeed on the merits of their alternative claims and that irreparable harm would result if the injunction were lifted.

CONCLUSION

For the reasons set forth above, the Court should affirm the preliminary injunction, or, in the alternative, leave the injunction in place and remand the case for consideration of Plaintiffs' rational basis claims.

Dated: October 19, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES

On behalf of Appellees, the undersigned is aware of no related cases currently pending before this Court.

/s/Alexa Kolbi-Molinas
Alexa Kolbi-Molinas

Dated: October 19, 2022

ADDENDUM

TABLE OF CONTENTS

U.S. Const. amend. XIV, § 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

I MINA'TRENTAI UNU NA LIHESLATURAN GUÅHAN
2012 (FIFTH) Special Session

CERTIFICATION OF PASSAGE OF AN ACT TO *I MAGA'LAHEN GUÅHAN*

This is to certify that Substitute Bill No. 52-31 (COR), "AN ACT TO ADD A *NEW* § 3218.1 TO CHAPTER 3, ARTICLE 2, TITLE 10 OF THE GUAM CODE ANNOTATED, RELATIVE TO WOMEN'S INFORMED CONSENT FOR ABORTION; AND TO CITE THE ACT AS "*THE WOMEN'S REPRODUCTIVE HEALTH INFORMATION ACT OF 2012.*" was on the 24th day of October, 2012, duly and regularly passed.

Judith T. Won Pat, Ed.D.
Speaker

Attested:

Tina Rose Muña Barnes
Legislative Secretary

This Act was received by *I Maga'lahen Guåhan* this 25th day of Oct., 2012, at 11:45 o'clock A.M.

Assistant Staff Officer
Maga'lahi's Office

APPROVED:

EDWARD J.B. CALVO
I Maga'lahen Guåhan

Date: NOV 0 1 2012

Public Law No. 31-235

I MINA'TRENTAI UNU NA LIHESLATURAN GUÅHAN
2011 (FIRST) Regular Session

Bill No. 52-31 (COR)
As substituted by the Committee on Health & Human Services,
Economic Development, Senior Citizens, and Election Reform;
and **further substituted** by the Committee on Rules;
and referred back to Committee after rising from the Committee of the Whole;
and **further substituted** by Committee on Health & Human Services,
Economic Development, Senior Citizens, and Election Reform; and amended on the floor.

Introduced by:

Committee on Rules, Federal, Foreign & Micronesian Affairs and Human & Natural Resources
by request of *I Maga'lahen Guåhan*
in accordance with the Organic Act of Guam

AN ACT TO ADD A *NEW* § 3218.1 TO CHAPTER 3, ARTICLE 2, TITLE 10 OF THE GUAM CODE ANNOTATED, RELATIVE TO WOMEN'S INFORMED CONSENT FOR ABORTION; AND TO CITE THE ACT AS *"THE WOMEN'S REPRODUCTIVE HEALTH INFORMATION ACT OF 2012."*

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. Legislative Findings and Intent. *I Liheslaturan Guåhan* finds that it is essential to the psychological and physical well-being of a woman considering an abortion that she receives complete and accurate information material to her decision of whether to undergo an abortion including information concerning abortion alternatives. *I Liheslaturan Guåhan* further finds that every woman submitting to an abortion should do so only after giving her voluntary and informed consent in writing to the abortion procedure.

Section 2. A New § 3218.1. A new § 3218.1 is hereby added to Chapter 3, Article 2, Title 10 of the Guam Code Annotated to read, as follows:

"§ 3218.1. The Women's Reproductive Health Information Act of 2012.

(a) Definitions. For the purposes of this § 3218.1, the following words and phrases are defined to mean:

(1) *Abortion* means the use or prescription of any instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to act upon an ectopic pregnancy, or to remove a dead unborn child who died as the result of natural causes *in utero*, accidental trauma, or a criminal assault on a pregnant woman or her unborn child, and which causes the premature termination of the pregnancy;

(2) *Act* means the Women's Reproductive Health Information Act of 2012 codified at Title 10 GCA § 3218.1;

(3) *Complication* means that condition which includes but is not limited to hemorrhage, infection, uterine perforation, cervical laceration, pelvic inflammatory disease, endometriosis, and retained products. The Department may further define the term "complication" as necessary and in a manner not inconsistent with this § 3218.1;

(4) *Conception* means the fusion of a human spermatozoon with a human ovum;

(5) *Department* means the Department of Public Health and Social Services;

(6) *Facility* or *medical facility* means any public or private hospital, clinic, center, medical school, medical training institution, health care facility, physician's office, infirmary, dispensary, ambulatory surgical

treatment center, or other institution or location wherein medical care is provided to any person;

(7) *First trimester* means the first twelve (12) weeks of gestation;

(8) *Gestational age* means the time that has elapsed since the first day of the woman's last occurring menstruation;

(9) *Hospital* means any building, structure, institution or place, public or private, whether organized for profit or not, devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment and provision of medical or surgical care for three (3) or more non-related individuals, admitted for overnight stay or longer in order to obtain medical, including obstetric, psychiatric and nursing care of illness, disease, injury or deformity, whether physical or mental and regularly making available at least clinical laboratory services and diagnostic x-ray services and treatment facilities for surgery or obstetrical care or other definitive medical treatment;

(10) *Medical emergency* means a condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate termination of her pregnancy to avert her death or for which a delay will create a serious risk of substantial and irreversible physical impairment of a major bodily function. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function;

(11) *Physician* means any person licensed to practice medicine or surgery or osteopathic medicine under the Physicians Practice Act (Title 10 GCA § 12201, *et seq.*) or in another jurisdiction of the United States;

(12) *Pregnant* or *pregnancy* means that female reproductive condition of having an unborn child in the mother's uterus;

(13) *Qualified person* means an agent of a physician who is a psychologist, licensed social worker, licensed professional counselor, registered nurse, or physician;

(14) *Records Section* means the Guam Memorial Hospital Medical Records Section;

(15) *Unborn child* or *fetus* each means an individual organism of the species *homo sapiens* from conception until live birth;

(16) *Viability* means the state of fetal development when, in the reasonable judgment of a physician based on the particular facts of the case before him or her and in light of the most advanced medical technology and information available to him or her, there is a reasonable likelihood of sustained survival of the unborn child outside the body of his or her mother, with or without artificial support; and

(17) *Woman* means a female human being whether or not she has reached the age of majority.

(b) Informed Consent Requirement. No abortion shall be performed or induced without the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

(1) at least twenty-four (24) hours before the abortion, the physician who is to perform the abortion or a qualified person has informed the woman in person of the following:

(i) the name of the physician who will perform the abortion;

(ii) the following medically accurate information that a reasonable person would consider material to the decision of whether or not to undergo the abortion: (a) a description of the proposed abortion method and (b) the immediate and long-term medical risks

associated with the proposed abortion method, including but not limited to any risks of infection, hemorrhage, cervical or uterine perforation, and any potential effect upon future capability to conceive as well as to sustain a pregnancy to full term;

(iii) the probable gestational age of the unborn child at the time the abortion is to be performed;

(iv) the probable anatomical and physiological characteristics of the unborn child at the time the abortion is to be performed;

(v) the medical risks associated with carrying the child to term;

(vi) any need for anti-Rh immune globulin therapy if she is Rh negative, the likely consequences of refusing such therapy, and the cost of the therapy;

(2) at least twenty-four (24) hours before the abortion, the physician who is to perform the abortion or a qualified person has informed the woman in person, that:

(i) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care and that more detailed information on the availability of such assistance is contained in the printed materials given to her and described in Subsection (c) of this § 3218.1;

(ii) public assistance may be available to provide medical insurance and other support for her child while he or she is a dependent and that more detailed information on the availability of such assistance is contained in the printed materials given to her and described in Subsection (c) of this § 3218.1;

(iii) public services exist which will help to facilitate the adoption of her child and that more detailed information on the availability of such services is contained in the printed materials given to her and described in Subsection (c) of this § 3218.1;

(iv) the printed materials in Subsection (c) of this Section 3218.1 describe the unborn child;

(v) the father of the unborn child is liable to assist in the support of this child, even in instances where he has offered to pay for the abortion. In the case of rape or incest, this information may be omitted; and

(vi) she is free to withhold or withdraw her consent to the abortion at any time without affecting her right to future care or treatment and without the loss of any locally or federally funded benefits to which she might otherwise be entitled.

(3) At least twenty-four (24) hours before the abortion, the physician who is to perform the abortion or a qualified person has given the woman a copy of the printed materials described in Subsection (c) of this § 3218.1. If the woman is unable to read the materials, they shall be read to her. If the woman asks questions concerning any of the information or materials, answers shall be provided to her in a language she can understand.

(4) The information in Subsections (b)(l), (b)(2) and (b)(3) of this § 3218.1 is provided to the woman individually and in a private room to protect her privacy and maintain the confidentiality of her decision and to ensure that the information focuses on her individual circumstances and that she has an adequate opportunity to ask questions.

(5) Prior to the abortion, the woman certifies in writing on a checklist certification provided by the Department that the information

required to be provided under Subsections (b)(1), (b)(2) and (b)(3) of this § 3218.1 has been provided. All physicians who perform abortions shall report the total number of certifications received monthly to the Records Section. The Records Section shall make the number of certifications received available to the public on an annual basis.

(6) Except in the case of a medical emergency, the physician who is to perform the abortion shall receive and sign a copy of the written checklist certification prescribed in Subsection (b)(5) of this § 3218.1 prior to performing the abortion. The physician shall retain a copy of the checklist certification in the woman's medical record.

(7) In the event of a medical emergency requiring an immediate termination of the pregnancy, the physician who performed the abortion shall clearly certify in writing the nature of the medical emergency and the circumstances which necessitated the waiving of the informed consent requirements of this § 3218.1. This certification shall be signed by the physician who performed the emergency termination of pregnancy, and shall be permanently filed in both the patient records maintained by the physician performing the emergency procedure and the records maintained by the facility where the emergency procedure occurred.

(8) A physician shall not require or obtain payment from anyone for providing the information and certification required by this § 3218.1 until the expiration of the twenty-four (24) hour reflection period required by this § 3218.1.

(c) Publication of Materials. The Department shall cause to be published printed materials in English and any other culturally sensitive languages which the Department deems appropriate within one hundred eighty (180) days after this Act becomes law. The printed materials shall be printed in a typeface

large enough to be clearly legible and shall be presented in an objective, unbiased manner designed to convey only accurate scientific information. On an annual basis, the Department shall review and update, if necessary, the following easily comprehensible printed materials:

(1) Printed materials that inform the woman of any entities available to assist a woman through pregnancy, upon childbirth and while her child is dependent, including but not limited to adoption services.

The printed materials shall include a list of the entities, a description of the services they offer, and the telephone numbers of the entities, and shall inform the woman about available medical assistance benefits for prenatal care, childbirth, and neonatal care. The Department shall ensure that the materials described in this § 3218.1 are comprehensive and do not directly or indirectly promote, exclude, or discourage the use of any entity described in this § 3218.1.

These printed materials shall state that it is unlawful for any individual to coerce a woman to undergo an abortion. The printed materials shall also state that any physician who performs an abortion upon a woman without her informed consent may be liable to her for damages in a civil action and that the law permits adoptive parents to pay costs of prenatal care, childbirth, and neonatal care. The printed materials shall include the following statement:

"The Territory of Guam strongly urges you to contact the resources provided in this booklet before making a final decision about abortion. The law requires that your physician or his or her agent give you the opportunity to call agencies and service providers like these before you undergo an abortion."

(2) Printed materials that include information on the support obligations of the father of a child who is born alive, including but not limited to the father's legal duty to support his child, which may include child support payments and health insurance, and the fact that paternity may be established by written declaration of paternity or by court action. The printed material shall also state that more information concerning paternity establishment and child support services and enforcement may be obtained by calling the Office of the Attorney General of Guam, Child Support Enforcement Division.

(3) Printed materials that inform the pregnant woman of the probable anatomical and physiological characteristics of an unborn child at two (2)-week gestational increments from fertilization to full term, including color photographs of the developing unborn child at two (2)-week gestational increments. The descriptions shall include information about brain and heart functions, the presence of external members and internal organs during the applicable stages of development, and any relevant information on the possibility of the child's survival at several and equidistant increments throughout a full term pregnancy. If a photograph is not available, a picture must contain the dimensions of the unborn child and must be anatomically accurate and realistic. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages.

(4) Printed materials which contain objective information describing the various surgical and drug-induced methods of abortion, as well as the immediate and long-term medical risks commonly associated with each abortion method including but not limited to the risks of infection, hemorrhage, cervical or uterine perforation or rupture, any potential effect

upon future capability to conceive as well as to sustain a pregnancy to full term, the possible adverse psychological effects associated with an abortion, and the medical risks associated with carrying a child to term.

(5) A checklist certification to be used by the physician or a qualified person under Subsection (b)(5) of this § 3218.1, which will list all the items of information which are to be given to the woman by the physician or a qualified person under this § 3218.1.

(d) Cost of Materials. The Department shall make available the materials enumerated in Subsection (c) of this § 3218.1 for purchase by the physician or qualified person who is required to provide these materials to women pursuant to Subsection (b)(3) of this § 3218.1 at such cost as reasonably determined by the Department. No claim of inability to pay the cost charged by the Department for these materials will excuse any party from complying with the requirements set forth in this § 3218.1.

(e) Emergencies. When a medical emergency compels the performance of an abortion or termination of pregnancy, the physician shall inform the woman, before the abortion if possible, of the medical indications supporting the physician's judgment that an immediate abortion or termination of pregnancy is necessary to avert her death or that a twenty-four (24) hour delay would cause substantial and irreversible impairment of a major bodily function.

(f) Criminal Penalties. Any person who intentionally, knowingly, or recklessly violates this Act is guilty of a misdemeanor.

(g) Civil and Administrative Claims. In addition to whatever remedies are available under the common law or statutory laws of Guam, failure to comply with the requirements of this Act shall:

(1) in the case of an intentional violation of the Act, constitute *prima facie* evidence of a failure to obtain informed consent. When

requested, the court shall allow a woman upon whom an abortion was performed or attempted to be performed allegedly in violation of this Act to be identified in any action brought pursuant to this Act using solely her initials or the pseudonym "Jane Doe." Further, with or without a request, the court may close any proceedings in the case from public attendance, and the court may enter other protective orders in its discretion to preserve the privacy of the woman upon whom the abortion was performed or attempted to be performed allegedly in violation of this Act.

(2) Provide a basis for professional disciplinary action under 10 GCA § 11110.

(3) Provide a basis for recovery for the woman for the wrongful death of her unborn child under Title 7 GCA § 12109, whether or not the unborn child was born alive or was viable at the time the abortion was performed.

Section 3. Severability. Any provision of this Act held to be invalid *or* unenforceable by its terms or as applied to any person or circumstance, *shall* be construed so as to give it the maximum effect permitted by law unless such holding shall be one of utter invalidity or unenforceability, in which event, such provision *shall* be deemed severable here from and *shall* not affect the remainder hereof *or* the application of such provision to other persons *not* similarly situated *or* to other dissimilar circumstances.

Section 4. Effective Date. This Act *shall* take effect sixty (60) days after the "printed materials" described in proposed § 3218.1(c) and the "checklist certification" described in proposed § 3218.1(c)(5) have been approved by the Department and, pursuant to its rule making process set forth in Title 5, Chapter 9, Article 3 of the Guam Code Annotated.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) 21-16559

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