

Nos. 21-16645, 21-16711

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PAUL A. ISAACSON, M.D., ET AL.,

Plaintiffs-Appellees,

v.

MARK BRNOVICH, ATTORNEY GENERAL OF ARIZONA, IN HIS
OFFICIAL CAPACITY, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the
District of Arizona
Hon. Douglas L. Rayes
Case No. 2:21-cv-01417

**BRIEF OF DISABILITY RIGHTS ADVOCATES AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Autistic Self Advocacy Network and Disability Rights Education and Defense Fund state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: December 27, 2021

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STATEMENT OF INTEREST¹

Amici curiae are people with disabilities, parents of children with disabilities, and disability rights organizations who work to improve the lives of people with disabilities. *Amici* seek to describe the negative impact that Arizona’s S.B. 1457’s “Reason Scheme” will have on the lives of people with disabilities.²

The Autistic Self Advocacy Network (“ASAN”) is a national nonprofit run by and for autistic people that advances civil rights, supports self-advocacy, and improves public perceptions of autism. Through public policy advocacy, leadership training, and public communications and organizing, ASAN works to create a world in which autistic people enjoy the same access, rights, and opportunities as everyone else.

Disability Rights Education and Defense Fund (“DREDF”) is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy, and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with

¹ Pursuant to Fed. R. App. P. 26(c), *amici* certify that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. All parties consent to the filing of this amicus brief.

² Affiliations of *amici* are provided for purposes of identification only.

disabilities. DREDF is committed to increasing accessible and equally effective health care for people with disabilities and eliminating persistent health disparities that affect the length and quality of their lives.

Kara B. Ayers is Assistant Professor in the Department of Pediatrics and Associate Director of the Center for Excellence in Developmental Disabilities at the University of Cincinnati. She is the co-founder of the Disabled Parenting Project, a peer-to-peer support network for parents with disabilities.

Ashley Barlow is an attorney and the mother of two sons, one of whom has Down syndrome. Her legal practice focuses on serving families with children with disabilities. She is a past President of the Down Syndrome Association of Greater Cincinnati and an advocate with the National Down Syndrome Congress.

David M. Perry is a history professor and freelance journalist and the father of two children, one of whom has Down syndrome. He advocates for improved education and employment opportunities for persons with disabilities and has written extensively about disability issues.

Jennifer Longdon is a State Representative in Arizona. After becoming paralyzed in a random drive-by shooting in 2004, she began working to raise awareness and improve the lives of people with disabilities. Before joining the Arizona legislature, she served on the Phoenix Mayor's Commission on Disability Issues and multiple other boards and commissions.

Robyn Michelle Powell is a law professor at Stetson University College of Law and a disabled woman whose scholarship focuses on disability law, including the intersection of disability justice and reproductive justice. She served for nearly five years as an Attorney-Advisor at the National Council on Disability, an independent federal agency that advises the President and Congress on matters concerning people with disabilities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the guise of protecting the rights of people with disabilities, Arizona’s “Reason Scheme” embodied in S.B. 1457 will sharply and unlawfully curtail reproductive rights and harm people with disabilities if allowed to take effect.

The Reason Scheme criminalizes abortion if the provider performing the abortion knows the pregnancy is being terminated due to an indication of a “genetic abnormality.” Act § 2, A.R.S. § 13-3603.02(A)(2). It prohibits abortion care unless the provider both swears they have “no knowledge” that the pregnancy is being terminated “because of a genetic abnormality,” Act § 10, A.R.S. § 36-2157(1)-(2), and reports “[t]he reason for” the abortion, including whether it is “due to fetal health considerations.” *Id.* § 36-2161(A)(12)(c)(i)-(iii). The Reason Scheme also makes it a felony to “solicit[] or accept[] monies to finance . . . an abortion because of a genetic abnormality,” and imposes a fine of up to \$10,000 on any “physician, physician’s assistant, nurse, counselor or other medical or mental health professional who knowingly does not report known violations . . . to appropriate law enforcement authorities.” *Id.* § 13-3603.02(B)(2), (E). Any person who “[a]ids, counsels, agrees to aid or attempts to aid another person in planning or [performing]” a prohibited abortion is subject to criminal liability as an accomplice. A.R.S. § 13-301.

The State contends that the Reason Scheme is an effective means of countering anti-disability eugenics and coercion of pregnant people. But the law

does not further those aims. It instead takes bodily control away from pregnant people, including those with disabilities, and jeopardizes their rights and health. Nor does the Reason Scheme improve the lives of, or strengthen respect for, people with disabilities. To the contrary, the law undermines its purported anti-discrimination purpose by stifling open communication between health care providers and pregnant patients about parenting children with disabilities. Its criminal penalties force providers to ignore patients' questions regarding fetal testing and diagnoses, and require patients to stay silent about their questions or concerns about disability, or even lie out of fear that they will be denied access to reproductive care if they speak honestly. This forced silence hinders the ability of providers to share accurate information about raising a child with a disability, leaving pregnant people to make their decisions based on information they may obtain from outside the physician-patient relationship, which may well be inaccurate and based on stereotype. By *increasing* the likelihood that pregnant people who receive a fetal diagnosis will fall back on harmful stereotypes and misinformation in deciding whether to continue their pregnancy, the law further burdens and stigmatizes people with disabilities.

The harms that result from the Reason Scheme's interference with personal autonomy and communication between health care providers and patients will fall disproportionately on pregnant people with heritable disabilities, despite the law's claim to protect them. These patients will be denied important information about

the health impacts of their pregnancies by providers fearful of aiding a prohibited termination. They also will be denied abortion care due to an assumption that termination is based on the likelihood that the fetus has the same disability.

Although the Reason Scheme will not improve—but instead will harm—the lives of people with disabilities, other measures, such as pro-information campaigns about disabilities, improving the quality of education for children with disabilities, strengthening the State’s support for people with disabilities, and ending forced institutionalization, all would advance the lives of people with disabilities without coercion. Arizona, however, has declined to adopt many such measures. Instead, it seeks through the Reason Scheme to co-opt the notion of disability rights to dismantle reproductive rights. But in invoking disability rights for this end, the State fails to recognize that both the disability rights movement and the reproductive justice movement are united in the pursuit of autonomy, dignity, equality, and self-determination. The Reason Scheme is contrary to the key tenets of both movements.

The District Court correctly issued a preliminary injunction against the Reason Scheme and that ruling should be affirmed.

ARGUMENT

I. Arizona’s Reason Scheme Does Not Protect People with Disabilities or Advance Any Claimed State Interest in Opposing Eugenics.

The State seeks to justify the Reason Scheme by claiming it advances the interests of people with disabilities. *See* Defendants-Appellants’ Opening Brief,

Dkt. No. 27 at 14 (“OB”) (citing Act § 15 (stating that the law is intended to “protect[] the disability community from discriminatory abortions”)). It does not. Rather, it uses the pretense of disability rights to restrict abortion, to the detriment of people with disabilities. It also serves no legitimate anti-eugenics interest.

A. The Reason Scheme Contravenes Fundamental Principles of the Disability Rights Movement and Does Not Protect People with Disabilities.

Barring a group of pregnant people, including people with disabilities, from exercising their right to a pre-viability abortion does not advance the interests of “the disability community,” as the State contends. Rather, the Reason Scheme conflicts with core tenets of the disability rights movement, including bodily autonomy and reproductive freedom. As leading disability rights activist Rebecca Cokley has aptly observed, “The right to decide what happens to our bodies is a fundamental principle in the disability community, and with good reason.” Rebecca Cokley, *The Anti-Abortion Bill You Aren’t Hearing About*, Rewire.News (May 20, 2019), <https://tinyurl.com/2p96zt4k>; see also Autistic Self Advocacy Network, *Access, Autonomy, and Dignity: Abortion Care for People with Disabilities* at 4 (Sept. 2021), <https://tinyurl.com/2485pke4> (“ASAN, *Abortion Care*”) (“People with disabilities understand all too well how society, the medical establishment, other systems, and even other individuals feel ownership over their own bodies . . . [and] are frequently told how to live, whether they can or should have children, whether they can or

should have sex, what interventions they ‘need’ for their bodies or minds, among other intrusions.”).

As scholars and disability rights advocates have underscored, paternalistic justifications for infringing on the autonomy and self-determination of people with disabilities are patronizing and dehumanizing. See Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 Vand. L. Rev. 745, 795 (2007) (“[P]aternalism has historically been one of the most significant contributors to the disadvantages people with disabilities experience. Non-disabled parents, teachers, doctors, rehabilitation counselors, employers, and others have arrogated to themselves the prerogative to decide what is best for people with disabilities.”). This was well-put in a 2018 *New York Times* opinion piece by a woman who is neuroatypical and has a child with Down syndrome: “Anti-abortion legislation and rhetoric often circulates stereotypical, infantilizing imagery about people with cognitive disabilities as innocents in need of protection from nondisabled saviors.” Laura Dorwart, *The Ohio Abortion Ban’s Distortion of Disability Rights*, N.Y. Times (Jan. 31, 2018), <https://tinyurl.com/yvye36kb>.

This country’s troubling history of denying bodily autonomy to people with disabilities makes legal protection for self-determination in this context especially important. For instance, in 1927, the Supreme Court allowed forced sterilization of the “feeble-minded.” *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927). Following *Buck*,

over 70,000 Americans were forcibly sterilized. *See* NPR, *The Supreme Court Ruling That Led To 70,000 Forced Sterilizations* (Mar. 7, 2016), <https://tinyurl.com/25pxf8p2>. Sterilizations occurred in Arizona, including at the Arizona State Hospital, from 1932 through at least the mid-twentieth century. *See* Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States—Arizona*, Univ. of Vermont (2012), <https://tinyurl.com/2p877stb>; *see also* Luke Kersten, *Arizona Passes Sexual Sterilization Legislation*, Eugenics Archive (Mar. 14, 2014), <https://tinyurl.com/2p9dxz9a> (in 1929, Arizona passed a law allowing for the sterilization of inmates who were “insane, idiotic, imbecilic, feebleminded, or epileptic”). The Reason Scheme does not counter the harms of this wrongful history. It instead continues them by seeking to control reproductive decision-making, including of people with disabilities.

Far from supporting and empowering individuals with disabilities and families with children with disabilities, the Reason Scheme’s actual purpose and effect is to curtail reproductive freedom. Indeed, when signing the law, Arizona’s Governor made clear that the Reason Scheme was enacted as part of an anti-abortion bill, not disability rights legislation. *See* Office of the Governor Doug Ducey, *Governor Ducey Signs Legislation to Protect Preborn Children* (Apr. 27, 2021), <https://tinyurl.com/86zwdjdxm> (“Governor Doug Ducey today reaffirmed Arizona’s commitment to pro-life policies by signing legislation that expands protections for

unborn children with a genetic abnormality.” (emphasis added)); *see also* Nancy Barto, *2021 Barto Bills* (2021), <https://tinyurl.com/2p9xm943> (Senator Barto, lead sponsor of S.B. 1457, describes the law as “*Major Pro-life Legislation* ending abortions based solely on a child’s genetic-abnormality (aka Down Syndrome)” (emphasis added)). As amicus David M. Perry, a disability rights advocate and father of a child with Down syndrome, has observed: “The cynical use of my son’s disability as a wedge issue hasn’t made the world any better for him.” David M. Perry, *How Ohio Is Using Down Syndrome to Criminalize Abortion*, Pacific Standard (Oct. 3, 2017), <https://tinyurl.com/2p98u9rz>.

B. Arizona Claims an Anti-Eugenics Interest, but the Reason Scheme Does Not Advance That Interest.

The State claims an anti-eugenics justification for the Reason Scheme, *see* OB at 3-4, relying heavily on Justice Clarence Thomas’s recent concurrence in the denial of certiorari in *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). Writing alone in *Box*, Justice Thomas took assessed an Indiana law similar to the Reason Scheme, seeking to draw a through-line from Margaret Sanger—the founder of the precursor organization to Planned Parenthood, who associated with eugenicists³—to present day abortion care, and

³ Planned Parenthood has squarely denounced Sanger’s belief in eugenics. *See, e.g.*, Planned Parenthood, *Opposition Claims About Margaret Sanger* (Apr. 2021), <https://tinyurl.com/y9cuuky6>.

pointing to what he called the “State’s compelling interest in preventing abortion from becoming a tool of modern-day eugenics.” *Id.* at 1783-84.

Justice Thomas’s separate writing fails to justify the Reason Scheme. To the contrary, in seeking to link the eugenics movement and abortion, the *Box* concurrence conflates programmatic efforts by third parties, typically the state, to control people’s reproductive lives in service of a particular vision of how society should look with a personal decision over one’s bodily autonomy. *See* Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, *The Atlantic* (May 29, 2019), <https://tinyurl.com/yc4pdzc2> (“Between eugenic sterilization and abortion lie two crucial differences: who is making the decision, and why they are making it. In eugenic sterilization, the state decides who may not reproduce, and acts with the goal of ‘improving’ the population. In abortion, a woman decides not to reproduce, for personal reasons related to a specific pregnancy.”). For example, at the height of the eugenics movement, over half of the states had passed laws allowing the State “to sterilize people it deemed unworthy of reproducing because of physical or mental deficiencies.” *Id.*; *see also* Eli Rosenberg, *Clarence Thomas Tried to Link Abortion to Eugenics. Seven Historians Told the Post He’s Wrong*, *Wash. Post* (May 30, 2019), <https://tinyurl.com/4r4ab537> (explaining that leading eugenicists did not support abortion).

Far from being connected with abortion in any way that would justify the Reason Scheme, eugenics laws instead have more in common with modern-day efforts to restrict abortion and thus pregnant people’s bodily autonomy. As Judge Julia Gibbons recently explained, the eugenics movement and laws like the Reason Scheme “both seek to control a woman’s reproductive decisions.” *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 568 (6th Cir. 2021) (*en banc*) (Gibbons, J., dissenting) (collecting sources on how “eugenicists focused their sterilization efforts on women who bore children out of wedlock” and were “determined to be promiscuous”); *see also* Dorothy Roberts, *Dorothy Roberts Argues that Justice Clarence Thomas’s Box v. Planned Parenthood Concurrence Distorts History*, Univ. of Pa. Casey Sch. of Law (June 6, 2019), <https://tinyurl.com/2p95p6tv> (observing that early twentieth century eugenics laws and today’s abortion bans “both seek to control reproductive decision making for repressive political ends” and that those who oppose eugenics “should also oppose abortion bans as forms of reproductive oppression”).

The State’s approach of invoking an inpat interest in anti-eugenics to *limit* reproductive autonomy should not be permitted to obscure the actual aim of the Reason Scheme: restricting access to abortion care. *See* Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 Harv. L. Rev. 2025, 2063 (Apr. 2021) (“[W]hen framed as antidiscrimination measures,

rather than as efforts to promote maternal health or the potentiality of life, abortion restrictions may be more likely to be upheld as legitimate exercises of state authority.”). As scholars have observed, the attempt to associate abortion with eugenics is an “effort to splinter the various constituents of the reproductive rights coalition.” *Id.*; see also Mary Ziegler, *Bad Effects: The Misuses of History in Box v. Planned Parenthood*, Cornell L. Rev. Online 165, 201 (2020) (“Thomas’s narrative requires a massive oversimplification not only of the work of those who demanded legal abortion but also of the relationship between their movement and others with somewhat related objectives.”).

In sum, and as elaborated further in the following sections, the Reason Scheme is an effort to erode reproductive freedom while denying self-determination to people with disabilities and failing to advance their rights. Although individuals may have anti-disability biases, the Reason Scheme does nothing to counteract such biases, instead limiting the very conversations that could correct it. *See infra* Section II. It does not make it easier for people with disabilities to have children or for people to raise children with disabilities by providing resources or information, *see infra* Section II; it does not address the distinct barriers people with disabilities face when accessing reproductive health care, *see infra* Section III; and it does not expand access to necessary community-based services or protect persons with disabilities

from discrimination, *see infra* Section IV. It therefore cannot be sustained in the name of protecting the “disability community,” OB at 14.

II. Arizona’s Reason Scheme Interferes with the Doctor-Patient Relationship and Adversely Impacts Medical Care.

As the District Court correctly observed, “[t]he doctor-patient relationship is an active partnership that is dependent on trust and open communication.” 1-ER-30 (quoting 2-ER-247); *see also* American Medical Association, Code of Medical Ethics: Opinions on Patient-Physician Relationships § 1.1.1, <https://tinyurl.com/28nt3eyt> (“Am. Medical Ass’n”) (explaining the physician-patient relationship “is based on trust”). Arizona’s Reason Scheme will fundamentally interfere with this relationship by deterring, through threat of criminal penalty, open and honest conversations and the exchange of accurate information between health care providers and patients regarding topics connected with fetal testing and conditions. Such topics include the characteristics of particular disabilities, parenting a child with disabilities, and available community-based disability supports. To avoid criminal liability, health care providers will avoid patients’ questions and concerns about these issues. And, as the District Court recognized, to ensure access to abortion care, patients will have no choice but to withhold questions and information from their providers or even feel compelled to lie. 1-ER-30. As a result, people will be left to make their decisions based on information that may be inaccurate and based on stereotype.

Notably, the Reason Scheme will constrain dialogue between patients and a range of health care providers, not just abortion providers. The law imposes a \$10,000 fine on *any* health care professional who does not report a known violation of the Reason Scheme. *See* A.R.S. § 13-3603.02(E). And because “Arizona law provides for both accomplice and facilitation liability,” the Reason Scheme imposes criminal penalties on any person who knowingly performs an abortion sought because of a “genetic abnormality” *or who aids that activity*—a sweeping category that could include any provider who refers patients for, or provides information about, abortion care in connection with fetal testing or diagnosis. *See* 1-ER-18.

Impeding the open dialogue that is the foundation of a physician-patient relationship will “adversely impact the quality of care” patients receive in multiple respects. 1-ER-30; *see also* Am. Medical Ass’n, *supra*, §§ 1.1.3-1.1.4 (observing that “[t]he health and well-being of patients depends on a collaborative effort between patient and physician,” which involves “truthful and forthcoming” dialogue).

First, the Reason Scheme will make it harder for pregnant patients—including those with disabilities—to obtain accurate information about raising a child with a given fetal condition. Pregnant people who wish to obtain medical information about fetal testing or a fetal condition and discuss that information openly with their provider will be constrained from doing so because providers will fear being swept

up in the Reason Scheme's broad net of liability. *See* ASAN, *Abortion Care* at 11 (“[Reason] bans may have a chilling effect on patients who wish to obtain relevant medical information about a pregnancy and discuss that information openly with their doctor.”).

The Reason Scheme also prevents providers from countering misinformation about raising a child with disabilities with “accurate, stigma-free information about prenatally diagnosed disabilities, including information about self-reported quality of life and life outcomes for people with the same disability.” *Id.* Because it stifles honest communication between provider and patient and prevents people from obtaining accurate information from their provider about raising a child with a disability, Arizona's law will force pregnant patients to make a choice about whether to continue or terminate their pregnancy without full information about the disability and available disability resources (including where full information might lead them to choose to continue the pregnancy).

Second, the Reason Scheme will chill providers and pregnant patients with heritable disabilities from speaking openly about those disabilities and their impact on pregnancy and delivery. Pregnant people with heritable disabilities will be deterred from disclosing their conditions or seeking information about the impact of those conditions on their pregnancy for fear that if they later seek to terminate, they could be presumed to be acting based on a fetal condition and thus refused care.

Similarly, physicians seeking to avoid liability may be hesitant to offer information about the risks of pregnancy to people with disabilities.

Hampering such conversations will create serious health risks for people with disabilities, particularly because certain disabilities are associated with significantly more complicated and riskier pregnancies. *See infra* Section III. It is essential that pregnant people with disabilities are able to have honest, open, and accurate conversations with their providers about the medical considerations involved with their pregnancies. Pregnant people with intellectual and developmental disabilities also have a heightened need for honest, extensive consultation with their providers about their options so they can make their own decisions while getting support from people they trust. *See, e.g.,* The Arc of Northern Virginia, *Working With Your Supported Decision Making Team* (Nov. 2020), <https://tinyurl.com/2p9xp7fb> (discussing Supported Decision Making, a model designed to help individuals with disabilities make and communicate decisions about their lives). By silencing these conversations, the Reason Scheme puts people with disabilities at risk of negative health outcomes and *increases* stigma against them.

Third, the Reason Scheme's broad sweep, combined with Arizona's accomplice liability scheme, risks cutting off honest dialogue about fetal testing and conditions not just between pregnant patients and their health care providers, but with *anyone* who could offer relevant information about their options—including

social workers, counselors, health aids, clergy, and family. The Reason Scheme thus further isolates pregnant people with disabilities and pregnant people who receive a fetal diagnosis from their communities of support at the time open dialogue is most needed.

The State seeks to justify the Reason Scheme as a response to purported pressure from abortion providers to terminate following prenatal testing. *See* OB at 11-12. *But see* 1-ER-30 (finding a “lack of evidence that coercive medical practices are prevalent in Arizona”). *Amici* share the view that no person should be pressured to terminate under any circumstances, including following a prenatal diagnosis. But stigma, misinformation, and any resulting pressure are not effectively countered by policies that, like the Reason Scheme, constrain honest dialogue. Rather, such prejudices, stigma, and stereotypes are effectively overcome by pro-information campaigns and policies requiring health care professionals to provide patients with accurate, evidence-based, current information about a given diagnosis, together with relevant community-based resources available to support people with disabilities and those parenting them.⁴

⁴ *See, e.g.*, National Down Syndrome Society, *Pro-Information Laws & Toolkit* (Jan. 2021), <https://tinyurl.com/y98wkd32> (listing 20 states that have passed Down syndrome information laws); Kate Ryan, *Law Could Change How Parents Are Told about Down Syndrome*, WTOP News (May 4, 2014), <https://tinyurl.com/yzfvu9uc> (discussing Maryland’s bill supported by Maryland parent Heather Sachs, who testified that “[t]he receipt of outdated and inaccurate information upon receiving a diagnosis of Down Syndrome is pervasive nationally and in Maryland,” and

The Reason Scheme interferes with the free exchange of information between doctors and patients, to the detriment of people with disabilities. By obstructing the dissemination of accurate, comprehensive information, the Reason Scheme undermines the important work the disability rights community has been doing across the country to counter stereotypes with accurate information.

III. Arizona’s Reason Scheme Imposes Especially Severe Harms on People with Disabilities, Who Already Face Widespread Discrimination, Including in Health Care.

Individuals with disabilities are generally underserved by health care providers due to “a lack of provider competency on the needs of people with disabilities, lack of accommodations in the facility, lack of transportation accessibility, and centuries of abuse and ill treatment by the medical establishment that has undermined trust.” ASAN, *Abortion Care* at 12 (citing U.S. Centers for Medicare & Medicaid Services, *Improving Health Care for Adults with Disabilities: An Overview of Federal Data Sources* at 1 (Dec. 2020), <https://tinyurl.com/yckj4dnh> (“Adults with disabilities are almost twice as likely to report unmet health care needs due to barriers they face in accessing care.”)).⁵ The Reason Scheme will only

described her experience in 2006 being handed a pamphlet entitled “So You’ve Had a Mongoloid: Now What?”).

⁵ The inadequacy of health care for patients with disabilities disparately impacts BIPOC (Black, Indigenous, People of Color) and LGBTQ people with disabilities,

compound the discrimination and harms faced by individuals with disabilities who seek health care.

People with disabilities receive particularly inadequate care when it comes to reproductive health. They encounter “frequent discrimination from providers who are ignorant of the specific challenges they face,” particularly in the context of maternal and prenatal health care. ASAN, *Right to Parent* at 9. Providers routinely are unwilling to provide reproductive health care to people with disabilities or are unable to competently do so, including because they are “ill equipped to offer high-quality, culturally responsive care” and do not dedicate the resources necessary to understand disability-specific concerns related to pregnancy and childbirth. *Id.*; Lesley A. Tarasoff, “*We don’t know. We’ve never had anybody like you before*”: *Barriers to Perinatal Care for Women with Physical Disabilities*, 10(3) *Disability Health J.* 426, 426-33 (July 2017), <https://tinyurl.com/2p9bv5ec>; *see also* National Council on Disability, *The Current State of Health Care for People with Disabilities*

who face additional barriers in accessing health care stemming from “a history and current practice of abuse, systemic racism, and bias in health care that also undermines trust in providers.” ASAN, *Abortion Care* at 12. For instance, BIPOC people with disabilities endure “lack of language access, [] not having their symptoms taken seriously, [] having their expressed health goals ignored,” and much more. *Id.* at 10; ASAN, *Access, Autonomy & Dignity: People with Disabilities and the Right to Parent* at 8 (Sept. 2021), <https://tinyurl.com/4wdpkp29> (“ASAN, *Right to Parent*”) (noting the lack of access to high-quality, culturally responsive prenatal health care is “further exacerbated by the structural racism driving the crisis in maternal health outcomes in the United States and the disproportionate harm to BIPOC birthing people”).

(2009), <https://tinyurl.com/yckv89e9>. Providers also lack accessible office equipment like adjustable exam tables, and express “negative attitudes” about people with disabilities being pregnant and becoming parents. ASAN, *Right to Parent* at 8; see also Robyn Powell, *Disabled People Still Don’t Have Reproductive Freedom*, DAME (July 26, 2021), <https://tinyurl.com/y3rht6au> (reporting the experience, as a person with disability, of being offered multiple hysterectomies by doctors on “an assumption that [she] should not have children” and discussing the “enduring belief that disabled people . . . are unfit to raise children”). As a result, people with disabilities often “are deterred from accessing prenatal care” and other forms of reproductive health care. ASAN, *Right to Parent* at 8.⁶

The Reason Scheme exacerbates the discrimination and challenges that people with disabilities face in accessing reproductive health care. Due to the law’s severe penalties, doctors will be forced to assume or suspect that a pregnant person with a heritable disability (or a pregnant person who has a partner with a heritable disability) is seeking an abortion based on the increased likelihood that the fetus also has that disability, and refuse to provide the procedure.⁷

⁶ Some people with disabilities report “that they avoid regular visits to the gynecologist because services are so difficult to obtain. In a telling example, one study reported that a gynecologist caring for a woman who uses a wheelchair assumed she was not sexually active and, therefore, saw no need to test for STDs.” See *The Current State of Health Care for People with Disabilities*, *supra*.

⁷ For example, certain populations have a known likelihood of passing on their condition to their children. See, e.g., Royal National Institute For Deaf People,

The consequences of being forced to carry a pregnancy to term may be especially severe for people with disabilities, who in addition to lacking adequate access to care, may be at higher risk of complications during pregnancy or childbirth due to their disabilities and related socioeconomic factors.⁸ See Willi Horner-Johnson, et al., *Pregnancy among U.S. Women: Differences by Presence, Type, and Complexity of Disability*, 214(4) Am. J. Obstet. & Gynecol. 529e.1, 529e.8 (Apr. 2016) (describing evidence that people with disabilities face increased risks of health problems during pregnancy and poorer pregnancy outcomes). For example:

- People with sensory, intellectual, and developmental disabilities face increased risk of gestational diabetes and hypertensive disorders, as well as significant risk for cesarean delivery. Lesley A. Tarasoff, et al., *Maternal Disability & Risk for Pregnancy, Delivery, and Postpartum Complications: A Systematic Review & Meta-Analysis*, Am. J. Obstet. & Gynecol. (Jan. 2020), <https://tinyurl.com/h45fexs7>.
- People with physical disabilities may experience “more caesarean complications than nondisabled [people], because they are more prone to

Types and Causes of Hearing Loss and Deafness (2021), <https://tinyurl.com/3xtbkd34> (50% chance of passing on genetic hearing loss and deafness); Boston Children’s Hospital, *Achondroplasia* (2021), <https://tinyurl.com/4juu63uh> (50% chance of passing on achondroplasia, a common type of dwarfism); Osteogenesis Imperfecta Foundation, *Facts About Osteogenesis Imperfecta* (Feb. 2015), <https://tinyurl.com/yjxr2p2z> (“about 60%” chance of passing on osteogenesis imperfecta); Luciano Bovicelli, et al., *Reproduction in Down Syndrome*, 59 Obstet. & Gynecol. 13S, 14S (1982) (up to a 50% chance of passing on Down syndrome).

⁸ The heightened risks pregnant people with disabilities face are inextricably linked to poor access to quality health care, ableism, and the related “social and economic stress that [people with disabilities] must consistently deal with.” ASAN, *Right to Parent* at 9.

infections and poor reactions to anesthesia, more likely to have prior abdominal operations, and less able to perform the tasks necessary to recover from surgery or adapt to the resulting loss of function.” Sonja Sharp, *Disabled Mothers-to-Be Face Indignity: ‘Do you have a man? Can you have sex?’*, L.A. Times (Sept. 30, 2021), <https://tinyurl.com/2y3ccnen> (noting that, despite these risks, “the reflexive thing [for health care providers] to do is deliver by C-section”).

- Epilepsy is linked to complications including increased risk of death, preeclampsia, premature delivery or rupture of membrane, and chorioamnionitis, an infection of the placenta and the amniotic fluid. Sima I. Patel & Page B. Pennel, *Mgmt. of Epilepsy During Pregnancy: An Update*, 9(2) *Therapeutic Advances in Neurological Disorders* 118, 124 (2016).
- People with psychiatric disabilities are often advised or required to avoid or discontinue psychiatric medication for the duration of pregnancy due to the risk of harm to the fetus. But many of these medications cannot be discontinued immediately without risking severe withdrawal side-effects. For example, abrupt cessation of benzodiazepines, which are commonly used to treat severe anxiety, can cause “life-threatening” symptoms, and therefore most patients are required to taper the medication over eight to 12 weeks. Jonathan Brett & Bridin Murnion, *Mgmt. of Benzodiazepine Misuse & Dependence*, 38(5) *Australian Prescriber* 152, 154 (Oct. 2015) (risk of seizures); Jennifer Pruskowski, et al., *Deprescribing & Tapering Benzodiazepines #355*, 21(7) *J. Palliative Med.* 1040, 1040 (2018).

The Reason Scheme will jeopardize the health of pregnant people with these and other heritable disabilities because it will inhibit physician-patient conversations about the risks of pregnancy and delivery associated with these disabilities. *See* Section II *supra*.

The Reason Scheme also ignores that access to safe and legal abortion is crucial for people with disabilities because they are particularly vulnerable to sexual

abuse. See, e.g., *In re Guardianship of J.D.S. v. Dep't of Children and Families*, 864 So. 2d 534, 536 (Fla. Dist. Ct. App. 2004); Deborah W. Denno, *Sexuality, Rape & Mental Retardation*, U. Ill. L. Rev. 315, 316 (1997). Studies show that people with disabilities are at least three-and-a-half times more likely than people without disabilities to experience sexual assault. Erika Harrell, *Crime Against Persons with Disabilities, 2009–2015: Statistical Tables*, U.S. Dep't of Justice, Bureau of Justice Statistics (July 2017), <https://tinyurl.com/2p94a4r4>; see also NPR, *The Sexual Assault Epidemic No One Talks About* (Jan. 8, 2018), <https://tinyurl.com/3bbz39j2> (people with intellectual disabilities are nearly seven times more likely to experience sexual assault than people without disabilities). Because the Reason Scheme chills the provision of abortion care to people with disabilities, it risks forcing persons with disabilities to carry unwanted pregnancies resulting from traumatic assault, thereby compounding their trauma. See ASAN, *Abortion Care* at 14 (“[T]he risk of sexual abuse and assault invokes bodily autonomy concerns for people with disabilities in multiple ways, and exposes them to compounded trauma.”).

Notably, the harms imposed on individuals with disabilities who are denied the choice to terminate unwanted pregnancies do not end after pregnancy. Studies have demonstrated that, in general, denying a wanted abortion “creates an economic hardship and insecurity which lasts for years.” Advancing New Standards in Reproductive Health, *The Harms of Denying a Woman a Wanted Abortion: Findings*

from the *Turnaway Study* (2021), <https://tinyurl.com/3ambf4t3> (“ANSIRH, *Findings from the Turnaway Study*”); ANSIRH, *Turnaway Study: Long-Term Study Shows that Restricting Abortion Harms Women*, <https://tinyurl.com/y4vf9vyu> (those denied abortions have “almost 4 times greater odds of a household income below the federal poverty level and 3 times greater odds of being unemployed”).⁹ People denied an abortion also are more likely to stay in contact with a violent partner, exacerbating the risk of further violence. ANSIRH, *Findings from the Turnaway Study*.

Compounding all these harms are the systemic misconceptions about the capabilities of individuals with disabilities, which have led to present-day discriminatory policies and practices that presume parental unfitness of parents with disabilities. An estimated 5 to 10% of parents in the United States have disabilities. See Henan Li, et al., *Health of US Parents With and Without Disabilities*, 10(2) *Disab. Health J.* 303, 305 (Apr. 2017); Rajan Sonik, et al., *Parents With and Without Disabilities: Demographics, Material Hardship, and Program Participation*, 14(4)

⁹ The financial harm experienced by those denied abortions also directly impacts their children. Studies show that “[c]hildren born as a result of abortion denial are more likely to live below the federal poverty level than children born from a subsequent pregnancy to [people] who received the abortion” and that carrying an unwanted pregnancy to term is associated with “poorer maternal bonding . . . with the child born after abortion denial, compared to the next child born to a [person] who received an abortion.” ANSIRH, *Findings from the Turnaway Study*.

Rev. of Disabil. Studies 1, 7 (2018). Yet, despite this reality, parents with disabilities are “scarcely imagined to exist.” *Id.* (doctor noting that “people always assume . . . parents can only be able-bodied” and that “[t]he assumption is that a person cannot have a disability and take care of someone else”). Parents with disabilities also often lack crucial support services (including adapted services, public benefits, and peer support) and face disproportionate rates of child welfare system involvement and termination of parental rights. See National Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities & Their Children* 15–37 (2012); Robyn M. Powell & Michael Ashley Stein, *Persons with Disabilities and their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis*, 11(1) *Frontiers L. China* 53, 60–68 (Mar. 2016). Indeed, although there is no evidence that people with disabilities are more likely to be unfit parents or pose a significant risk of child maltreatment, 35 states include disability as grounds for terminating parental rights. ASAN, *Right to Parent* at 11 (discussing study finding a 22% higher risk of the state terminating the parental rights of people with disabilities compared to parents without disabilities); see also A.R.S. § 8-533(B)(3) (permitting termination if the parent “is unable to discharge parental responsibilities because of mental illness” or “mental deficiency”); Parental Rights Foundation, *Parental Rights & Disabilities* (2018), <https://tinyurl.com/bdfxwum7>

(noting that nine states and D.C. “allow physical disability as the sole grounds for terminating parental rights, even without evidence of abuse or neglect”).¹⁰

IV. Arizona’s Reason Scheme Does Nothing To Help People with Disabilities in Arizona, Who Are Already Underserved.

In Arizona, individuals with disabilities are already “treated as second class, shunned, and segregated by physical barriers and social stereotypes. They are discriminated against in employment, schools, and housing, robbed of their personal autonomy, sometimes even hidden away and forgotten by the larger society.” American Civil Liberties Union of Arizona, *Disability Rights* (2021), <https://tinyurl.com/2p9cx78d>. The Reason Scheme would only worsen this devastating divide.

Though “[p]assed under the guise of ‘protecting people with disabilities,’” laws like Arizona’s “do nothing to help the communities they purport to serve.”

¹⁰ For parents with disabilities who are also people of color, the discrimination is particularly acute. ASAN, *Abortion Care* at 11. Black mothers are “especially likely to be monitored, regulated, and punished by the child welfare system[,]” and lose custody of their children—often permanently—at disproportionately high rates, even though most calls to Child Protective Services involving Black people do not involve issues of child abuse. *Id.* at 12. In Arizona, “the number of Black and Native American children in the child-welfare system has always outstripped their share of the state population.” Mary Jo Pitzl, *In Phoenix Area, 2 Out of 5 Kids Risk a DCS Call. It’s Worse for Black and Native Kids*, Ariz. Republic (Nov. 30, 2021), <https://tinyurl.com/yc3e5uv3> (reporting that Black and Indigenous children represented 24.4% of the children in foster care but only 11.5% of the child population in Arizona).

ASAN, *Abortion Care* at 11. In particular, “[a]bortion bans based on a fetal diagnosis do not address the discrimination of people with disabilities, nor do they respond to the needs of people with disabilities, such as access to health care, economic security, housing, or other supports.” *Id.*

Disability-based discrimination impacts a substantial proportion of Arizona’s community. As of 2016, approximately 12.6% of Arizonans had a disability. Making Action Possible for South Arizona, *Disability in Arizona* (Apr. 16, 2018), <https://tinyurl.com/2n792trv>. This makes individuals with disabilities the second-largest minority group in Arizona after Latinos. Erica McFadden, *Disability Issues Among AZ Policy Challenges*, Morrison Inst. for Public Policy (Jan. 21, 2016), <https://tinyurl.com/2p83mwfx>. Moreover, only about a third of working-age adults with disabilities in Arizona are employed and nearly a quarter live in poverty. *Id.*

Arizonans with disabilities regularly face discrimination in numerous contexts. For example, Arizona voters with disabilities were recently denied reasonable accommodation to access polling places, a practice being challenged by the Arizona Center for Disability Law. Arizona Center for Disability Law, *Federal District Court Judge Rules ACDL Voting Rights Litigation Will Continue* (July 14, 2021), <https://tinyurl.com/5n9b3ary>. And students with disabilities in Arizona are regularly denied the “free and appropriate” public education that they are guaranteed under federal law until the age of 22, by being forced to graduate early due to staffing

and funding issues. Amanda Glass, *Graduation of Students with Disabilities – Common but Invalid Reasons Schools Give for Forcing Students with Disabilities to Graduate*, Arizona Center for Disability Law (May 27, 2021), <https://tinyurl.com/ycytwtw>.

Individuals with disabilities in Arizona are also frequent victims of violence, including by state actors. In 2016, for example, an autistic transgender man was killed by police responding to a suicide call following a therapist’s refusal to provide transition-related medication until his autism was “cured.” American Civil Liberties Union, *Joint Statement on the Death of Kayden Clarke* (Feb. 8, 2016), <https://tinyurl.com/2p87sjeh>. In 2019, a Tucson boy who is a quadruple amputee in foster care was assaulted by a police officer, who faced no disciplinary action. Alexis Fernández Campbell, *Disturbing Video Shows an Arizona Sheriff’s Deputy Body Slam a Quadruple Amputee*, Vox (Nov. 15, 2019), <https://tinyurl.com/2p9hxxud>. There is no specific hate crime in Arizona that protects individuals with disabilities targeted as a result of their disability. EJ Montini, *Hate Crime Is on the Rise in Arizona and We’re Not Prepared to Fight it*, Ariz. Republic (Nov. 18, 2020), <https://tinyurl.com/msc42uct>.

The Reason Scheme does nothing to address any of these actual challenges faced by individuals with disabilities in Arizona. At the same time, in just the last

three years, the Legislature has declined to pass at least eight bills that would have directly advanced the interests of Arizonans with disabilities. These include:

- S.B. 1172: A 2019 bill that would have provided funding for caregivers for people with developmental disabilities;
- S.B. 1088: A 2019 bill that would have provided dental health care coverage to pregnant people, including those with disabilities, who often require a special approach to dental care;
- H.B. 2540: A 2021 bill that would have added spina bifida to the list of conditions qualifying for certain forms of state support;
- H.B. 2538: A 2021 bill that would have advanced Supported Decision Making, enabling individuals with disabilities to retain decision-making capacity;
- H.B. 2273: A 2021 bill that would have increased Child Health Insurance Program funding by \$2 million, which is critical for parents raising children with disabilities; and
- S.B. 1603: A 2020 bill addressing family leave, which is particularly important for people with disabilities who experience complicated pregnancies and/or deliveries, and people who give birth to children with disabilities who require more complex care.

Each of these pieces of legislation would have made a meaningful difference in the lives of Arizona's residents with disabilities. Arizona passed none of them. Instead, it passed the Reason Scheme—a law that is fundamentally at odds with the interests of the disability community, and a law that cannot be justified in its name.

CONCLUSION

The District Court's preliminary injunction should be affirmed.

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I hereby certify that on this December 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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