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., 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

APPELLANTS' OPENING BRIEF

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INTRODUCTION

The Supreme Court overruled *Roe v. Wade*, upending nearly fifty years of constitutional law that protected certain personal privacy rights, including reproductive freedom, and leaves the issue of how to address the profound moral question of abortion to the people and their elected representatives. *Dobbs v. Jackson Women's Health Org*., 142 S.Ct. 2228 (2022).

The challenged law in this case, which does not outright prohibit abortion, regulates the medical procedure of abortion by requiring a physician to certify that a patient seeking to undergo an abortion has received informed consent through an in-person consultation. The in-person consultation, which must occur at least 24 hours before the abortion, may be conducted personally by the attending physician or may be conducted by any number of other qualified persons.

The only question this Court must answer is whether this in-person informed consent regulation likely violates the Fourteenth Amendment in a manner warranting entry of a preliminary injunction. It does not. After *Dobbs*, a state's regulation of abortion must simply survive rational-basis review and is entitled to a strong presumption of validity.

Guam's informed consent requirement passes this standard as it serves a variety of legitimate state interests recognized by the Supreme Court. These interests include respect for and preservation of prenatal life, the protection of maternal health

and safety, and the preservation of the integrity of the medical profession. *Dobbs*, 142 S.Ct. at 2284. The Guam Legislature could reasonably have thought that the in-person informed consent requirement promotes these and other interests by providing a solemn setting, free from distractions, in which a patient may receive information regarding the medical procedure or event they are about to undergo. The information provided to the patient includes material about alternatives to abortion, including adoption, which provides the state the opportunity to engage in persuasive measures that favor childbirth over abortion. The in-person requirement provides an effective way of ensuring the patient's engagement with the state-mandated information.

Under the standard announced in *Dobbs*, there is a rational basis on which the Guam Legislature could have thought the in-person informed consent requirement serves legitimate state interests. The question, here, is not whether the legislature made the best policy choice. The question is whether the choice is rational in any way. The Plaintiffs are asking this federal courts to step into a question regarding abortion regulations that the United States Supreme Court has returned to "the people and their elected representatives." The Fourteenth Amendment imposes no barrier to enforcement of 10 GCA §3218.1. The relief Plaintiffs seek may ultimately be found only in an appeal to the Guam Legislature.

JURISDICTIONAL STATEMENT

The District Court of Guam had jurisdiction under 48 U.S.C. § 1424(b) and 28 U.S.C. §§ 1331 and 1343, because the Plaintiffs alleged a federal question and a civil rights action under 42 U.S.C § 1983. While the Government defendants assert that no valid cause of action has been alleged, the federal courts have jurisdiction under these provisions to determine whether a federal cause of action exists.

This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1), which provides for court of appeal jurisdiction over "[i]nterlocutory orders of . . . the District Court of Guam . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." Jurisdiction is also proper in this Court as appeals from the District Court of Guam are heard in the Ninth Circuit Court of Appeals. 28 U.S.C. § 1294.

The *Order Re Plaintiffs' Motion for a Preliminary Injunction Pursuant to Fed. R. Civ. P. 65(a)*—the order being appealed—was entered on the docket September 7, 2021. ER-7. The *Notice of Appeal (Form 1)* was filed in the District Court of Guam on September 22, 2021. ER-6.

The notice of appeal was timely under 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), because it was filed within thirty (30) days after entry of the order being appealed.

The District Court's September 7, 2021 order being appealed is an order granting an injunction, which is an appealable interlocutory order.

STATUTORY AUTHORITIES

All relevant statutory, constitutional, and regulatory authorities appear in the addendum to this brief.

ISSUE PRESENTED

Whether section 3218.1(b) of Title 10, Chapter 3 of the Guam Code Annotated, which requires a physician or other qualified person to provide a patient seeking an abortion with informed consent information during an in-person consultation at least 24 hours before an abortion occurs, passes rational basis review under the Fourteenth Amendment.

STATEMENT OF THE CASE

This appeal concerns an order from the District Court of Guam granting a preliminary injunction and enjoining certain government officials in Guam from enforcing specific portions of 10 GCA § 3218.1. Specifically, the officials were enjoined from: (1) "requir[ing] a patient obtaining medication abortion via telemedicine to receive the information required under that statute in person," 10 GCA § 3218.1(b), and (2) enforcing "10 G.C.A § 3218.1(b)(4)'s individual, private setting requirement to prevent a patient obtaining a medication abortion via telemedicine from receiving the information required under that statute while located

in the setting of the patient's choosing, including with another person (or persons) present if the patient chooses." ER-8. (*Raidoo v. Camacho*, Civ. Case No. 21-00009, 2021 WL 4392252 at *1-2 (D. Guam, Sept. 7, 2021)).

Guam law does not contain an outright prohibition on abortion. Instead, abortion in Guam is legal, but regulated. It is regulated, in part, by 10 GCA § 3218.1, which requires a treating physician or other "qualified person"[1] to inform the patient *in person* of certain specified information 24 hours before the abortion, individually, and in a private room. 10 GCA §§ 3218.1(b). The information to be provided includes (1) information regarding the abortion and its risks, 10 GCA § 3218.1(b)(1), and (2) information regarding public and private assistance or alternatives, including child support and adoption, 10 GCA § 3128.1(b)(2). This law has existed on Guam since 2012. *See* Guam P.L. 31-235 (Nov. 1, 2012).

In 2018, the last abortion physician on Guam retired. and no doctor is known to have performed abortions on Guam since that time. ER-11. (*Raidoo v. Camacho*, Civ. Case No. 21-00009, 2021 WL 4076772 at *2 (D. Guam, Sept. 3, 2021) ["Decision & Order"]).

Shandhini Raidoo, M.D., M.P.H., and Bliss Kaneshiro, M.D., M.P.H., are two Guam-licensed OB-GYN physicians located in Hawaii who have experience in

[1] The statute defines "qualified" person to include: "an agent of the physician who is a psychologist, licensed social worker, licensed professional counselor, registered nurse, or physician." 10 GCA § 3218.1(a)(13).

providing abortion services. ER-11. Both doctors wish to provide abortion services in Guam, primarily through the use of telemedicine services. ER-11–12. On January 28, 2021, plaintiffs Raidoo and Kaneshiro filed a complaint in the District Court of Guam on behalf of themselves and their patients against the Attorney General of Guam, members of the Guam Board of Medical Examiners, and others, seeking a declaratory judgment, and preliminary and permanent injunctive relief, alleging that part of Guam's in-person informed consent requirement in 10 GCA § 3218.1 violated their patient's right to an abortion under *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), and their progeny and that the law violated the equal protection clause of the Fourteenth Amendment. ER-66.

Raidoo and Kaneshiro seek to remotely supply "medication abortions" to Guam patients through telemedicine. ER-11–12. Plaintiffs do not challenge the content of the State-mandated information, nor do they challenge the statute's 24-hour waiting period. ER-13. Instead, Plaintiffs challenge the in-person consultation requirement of 10 GCA § 3218.1, alleging it prevents them from providing medication abortions to Guam patients because they cannot conduct the consultations over teleconference. ER-13.

Relying on the "undue burden" standard from *Casey*, Plaintiffs allege that, even if they delegated the responsibility of conveying the State-mandated

information to other "qualified persons," as permitted by 10 GCA §§ 3218.1(a)(13) & (b)(1), requiring a patient to make a separate trip to a separate healthcare provider imposes an unnecessary obstacle. ER-107. (Compl. ¶ 208). This separate trip, they say, violates abortion patients' rights to due process and equal protection guaranteed by the Fourteenth Amendment by singling out and treating telemedicine medication abortion patients differently than any other telemedicine patients. ER-110. (Compl. ¶ 228).

Initially, Plaintiffs also challenged the constitutionality of 9 GCA § 31.20(b)(2), which states that an abortion may only be performed in a physician's medical clinic or in a hospital. ER-104–107; ER-108–109. (Compl. ¶¶ 193–207, 217–221). Prior to any hearing on the preliminary injunction, the Defendants stipulated that 9 GCA § 31.20 does not prohibit medication abortions administered through telemedicine. (ECF No. 26; ECF No. 27). The parties also stipulated to dismiss certain defendants, specifically, the ten individual members of the Commission on the Healing Arts of Guam. (ECF No. 19).

Plaintiffs moved for a preliminary injunction on February 5, 2021. ER-64. Defendants filed their written opposition on March 5, 2021 (ECF No. 29), and the District Court referred the matter to a magistrate judge (ECF No. 17). The magistrate issued a Report and Recommendation on April 23, 2021, recommending that a preliminary injunction be denied. ER-27. Plaintiffs objected to the magistrate's

findings and, on September 3, 2021, the District Judge sustained the objections. ER-10. The District Court issued its order modifying the magistrate's report and granting a preliminary injunction days later on September 7, 2021. ER-7. Defendants filed their Notice of Appeal of this decision and order to the Ninth Circuit Court of Appeals on September 22, 2021. ER-6.

The Defendants filed an unopposed motion to stay the appellate proceedings pending the United States Supreme Court's consideration of *Dobbs v. Jackson Women's Health Org.*, No. 19-1392. *See* 9th Cir. ECF 13 (Sept. 29, 2021), which this court granted, *see* 9th Cir. ECF 14 (Oct. 1, 2021). Following the Supreme Court's opinion in *Dobbs*, Defendants submitted a third status report and motion for summary reversal, *see* 9th Cir. ECF 18 (June 28, 2022). Plaintiffs opposed the motion for summary reversal. 9th Cir. ECF 19 (July 8, 2022). This Court denied the motion without prejudice and set a briefing schedule. 9th Cir. ECF 21 (Aug. 18, 2022). This brief follows.

SUMMARY OF THE ARGUMENT

The United States Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization* fundamentally changed the legal standard governing constitutional challenges to abortion regulations. The Supreme Court rejected the "undue burden" standard that had previously applied to abortion regulation challenges and held that a law regulating abortion is "governed by the same standard

of review as other health and safety measures." 142 S.Ct. at 2246. Abortion regulations must now merely pass the lenient rational basis test and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id*. at 2284. The challenged law does.

In *Dobbs*, the Supreme Court identified legitimate state interests that abortion regulations could serve:

> These legitimate interests include respect for and preservation of prenatal life at all stages of development [ ]; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

142 S.Ct. at 2284 (citing *Gonzales v. Carhart*, 550 U.S. 124, 156-157 (2007); *Roe*, 410 U.S. at 150; *Washington v. Glucksberg*, 521 U.S. 702, 728-731 (1997) (internal citation omitted).

Guam's abortion regulation found in 10 GCA § 3218.1(b) requires an in-person informed consent consultation prior to a physician providing an abortion. The consultation may be provided either by the attending physician or a number of other "qualified persons." The people of Guam, through their duly-elected representatives, decided that requiring a physician or other qualified person to provide a patient seeking an abortion with an informed consent consultation about the risks and consequences of the procedure, including available alternatives, is an effective and persuasive means of advancing a legitimate governmental end that favors childbirth.

The Guam Legislature could have thought that this consultation requirement promotes, among other things, Guam's recognized, legitimate interests in respect for the preservation of prenatal life at all stages of development, the protection of maternal health and safety, *and* the preservation of the integrity of the medical profession. *See Dobbs*, 142 S.Ct. at 2284.

The Guam Legislature has also found that the best means of effectuating this policy choice is for the consultation to occur in person and in an individual and private setting at least 24 hours before the abortion. In this setting, the patient may receive the information about risks and alternatives, free from distraction and outside influences. It also provides a closed and pensive setting in which the patient and doctor may observe each other in their entirety and discuss the information, including the risks and alternatives. In-person encounters are qualitatively different from virtual or distance-based conferences, and the legislature acted rationally in requiring an in-person consultation. The in-person consultation requirement applies equally to all individuals seeking an abortion.

Because Guam's law survives rational basis review, the Plaintiffs failed to establish entitlement to a preliminary injunction. The Defendants are likely to prevail on the merits and the balance of the hardship and equities weighs in their favor as well. The only question remaining in this case is not whether the Guam legislature made the best choice as to how to effectively communicate its legitimate

interests and persuade patients, but whether its choice was rational. Post-*Dobbs*, the analysis is straightforward and the Defendants are entitled to an appellate judgment in their favor.

The preliminary injunction should be vacated and the case remanded for further proceedings, including the likely dismissal in favor of Defendants.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right . . . In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

A district court's order granting a preliminary injunction will be reversed if the district court "relied on an erroneous legal premise" or "abused its discretion." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). "A district court's order is reversible for legal error if the court does not employ the appropriate legal standards which govern the issuance of a preliminary injunction or if, in applying the appropriate standards, the court misapprehends the law with respect to the underlying issues in litigation." *Id.* (citations omitted).

To be entitled to a preliminary injunction, plaintiffs must satisfy four factors: (1) that they are likely to succeed on the merits, (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities

tips in their favor, and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20; Doe *#1 v. Trump*, 984 F.3d 848, 861-62 (9th Cir. 2020). "When the government is a party, these last two factors merge." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Where a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute [] the moving party must make a more rigorous showing that it is likely to prevail on the merits. This is necessary to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957–58 (8th Cir. 2017). The burden is on the party seeking an injunction of proving entitlement to the drastic remedy. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) ("A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'") (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

For constitutional challenges to abortion regulations, rational-basis review is the appropriate standard of review. *Dobbs*, 142 S.Ct. 2228, 2283 (2022). "A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'" *Id.* at 2284 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). "It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id.* Under rational-

basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

ARGUMENT

I. Title 10 GCA § 3218.1 and its in-person informed consent requirement passes rational basis review.

This appeal arises from an order granting a preliminary injunction. The Plaintiffs have not met their burden in establishing the four preliminary injunction factors. *Winter*, 555 U.S. at 20; *Doe #1*, 984 F.3d at 861-62. First, particularly post-*Dobbs*, the Defendants are almost certainly the ones likely to prevail on the merits. The District Court erred in applying the "undue burden" standard instead of rational basis. And to the extent it did perform rational basis review, it inappropriately shifted the burden of proof away from the challengers and engaged in inappropriate courtroom fact-finding. As to the remaining injunction elements, the outcome further weighs in favor of the Guam defendants. With this in mind, the Defendants respectfully submit that there is no sustainable basis for the preliminary injunction entered against portions of 10 GCA § 3218.1.

A. The Supreme Court, in *Dobbs*, fundamentally altered the standard of review applicable to abortion regulations, which means the District Court's order now relies on an erroneous legal premise.

In 1973, the United States Supreme Court determined that at least certain abortion regulations may violate the Due Process Clause of the Fourteenth

Amendment. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). The Supreme Court later refined the constitutional test for abortion regulations, and explained that laws imposing an "undue burden" on a patient's access to abortion would violate the constitution. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992); *see also June Medical Services L.L.C. v. Russo*, 140 S.Ct. 2103, 2120 (2020) (applying the "undue burden" standard). In light of this precedent, this Court adopted and applied a balancing test that required a district judge to weigh the benefits of a law regulating abortion against its burdens to determine whether there was an "undue burden." *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 916 (9th Cir. 2014).

In enjoining the Guam officials, the district judge, and the magistrate judge on report and recommendations before that, applied the *Humble* framework. The District Court also cited both *Roe* and *Casey*. ER-11; ER-17–18. (Decision & Order, at 2, 8–9). And, in seeking both ultimate relief and a preliminary injunction, the Plaintiffs in this case rely on *Roe, Casey,* and their progeny. ER-72; ER-75. *See Raidoo*, Civ. Case No. 21-00009, Compl., ECF No. 1 ¶¶ 19 n.4 & 37 (relying on *Casey* and *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th

Cir. 1992), *as amended* (June 8, 1992);[2] *Raidoo*, Civ. Case No. 21-00009, Memo. in Support of Pltf's Mot. for a Prelim. Inj., ECF No. 13 at 21 (D. Guam, Feb. 5, 2021).

In *Dobbs*, the United States Supreme Court expressly overruled *Roe* and *Casey*. *Dobbs,* 142 S.Ct. at 2284 ("We now overrule those decisions . . . ."). In doing so, the Supreme Court also abrogated the previous decisions of, and framework developed by, the courts of appeal. *See, e.g.*, *SisterSong Women of Color Reproductive Justice Collective v. Governor of Georgia*, 40 F.4th 1320, 1325-26 (11th Cir. 2022) ("As a result, we acknowledge that *Dobbs* abrogates many previous decisions of this Court."). The Court abandoned the undue burden test, finding it "unworkable." *Dobbs,* 142 S.Ct. at 2275. The Court observed that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision. . . ." *Id.* at 2304. Rational-basis review replaced the undue burden standard. *Id.* at 2283-84.

Because the District Court relied on a now-displaced standard, the entry of a preliminary injunction is based on an erroneous legal premise. Given that the error in this case turns on a question of law, this Court can pass on the question *de novo*, *Guam Fresh, Inc. v. Ada*, 849 F.2d 436, 437 (9th Cir. 1988) ("Questions of law underlying a preliminary injunction motion are reviewed de novo."), and provide

[2] *Ada* principally relies on *Roe*, *see Ada* 962 F.2d at 1368-1373, but also briefly analyzes the "undue burden" test from *Casey*, *id.* at 1373 n.8.

guidance to the lower courts on pending and straightforward questions, *cf. Young v. Hawaii*, -- F.4th --, No. 12-17808, 2022 WL 3570610 at *1 (9th Cir., Aug. 19, 2022) (O'Scannlain, J., dissenting); *see also EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, No. 19-5516, 2022 WL 2866607 at *1-2 (6th Cir., July 21, 2022) (Bush, J., concurring in part and dissenting in part).

B. Under rational basis review, 10 GCA § 3218.1 is on firm constitutional ground.

1. The District Court applied the wrong standard of review and inappropriately shifted the burden to Guam.

As an initial matter, the Supreme Court has found that there is no Constitutional right to an abortion, under either the due process clause, *Dobbs*, 142 S.Ct. at 2242, or the equal protection clause, *id.* at 2245-46, of the Fourteenth Amendment. "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision. . . ." *Id.* at 2242. They are governed by the "rational basis" standard just like "other health and safety measures." *Id.* at 2246. Rational basis review is a "lenient standard," *see* I*nd. Petroleum Marketers & Convenience Store Ass'n v. Cook*, 808 F.3d 318, 320 (7th Cir. 2015); *see also Cabrera v. Att'y Gen. United States*, 921 F.3d 401, 404 (3d Cir. 2019) ("The threshold for upholding distinctions in a statute under rational-basis review is extremely low"), and does not require the state to produce evidence to support its laws. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315. Indeed,

rational-basis review does not demand "that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992). The Court's review simply requires "that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker." *Id.* (cleaned up). It is the "rare case" that a statute does not pass rational-basis review. *Id.*

The in-person consultation requirement found in 10 GCA § 3218.1 satisfies rational basis review in the face of the Fourteenth Amendment due process and equal protection challenges claimed by Plaintiffs. ER-110. *See Raidoo*, Civ. Case No. 21-00009, Compl., ECF No. 1, at 45, ¶¶ 227–229. While the District Court did not address this claim in granting preliminary injunction, it remains a cause of action which Plaintiffs have already advanced before this Court. *See* Pl.-Appellees' Opp. To Defs-Appellants' Mtn. for Summ. Reversal, 9th Cir. ECF 19 at 6–9 (July 8, 2022). Plaintiffs' claim to this end is unavailing.

The Supreme Court in *Dobbs* cautioned that, in reviewing challenges to state abortion regulations, "courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" 142 S.Ct. at 2284 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 729-730 (1963); *Dandrige v. Williams*, 397 U.S. 471, 484-486 (1970); *United States v. Carolene Products*, 304 U.S. 144, 152 (1938)). In that regard, the Court in *Ferguson* reiterated that it is not concerned with the wisdom, need, or

appropriateness of the legislation and held that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." 372 U.S. at 729, 730. Extending this principle, the *Dobbs* Court stated: "A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.' " 142 S.Ct. at 2284 (citing *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

The District Court failed to apply this strong presumption of validity in two ways. First, it failed to apply the correct legal standard. The lower court enjoined the Guam law in accordance with *Planned Parenthood v. Humble*, 753 F.3d 905 (9th Cir. 2014), which was rooted in *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992). ER-18. (Decision & Order at 9). Consistent with *Humble* and *Casey*, the lower court applied the "undue burden" standard which required a balancing between the benefits and the burdens of a law regulating abortion. Yet, *Dobbs* overruled *Casey* and, by extension, the circuit cases relying on them, *see SisterSong*, 40 F.4th at 1325-26.

Second, to the extent the lower court conducted a rational-basis review as a component of its *Humble* application, it improperly shifted the burden to the government and inappropriately engaged in courtroom fact-finding. The District Court did not afford 10 GCA § 3218.1(b) the presumption of validity it is constitutionally due. *Dobbs*, 142 S.Ct. at 2284. It instead stated that "Defendants fail to rebut Plaintiff's argument that the in-person requirement *serves no benefit* to a

legitimate state interest" and that "Plaintiffs are correct in their argument that 'forcing the in-person visit, when a live, face-to-face video conference is available,' *serves no benefit or advances any legitimate state interests*." ER-18–19. (Decision & Order at 9–10) (emphasis added).

The *Dobbs* Court held that a law regulating abortion "must be sustained if there is a rational basis on which the legislature *could have thought* that it would serve legitimate state interests." 142 S.Ct. at 2284. (emphasis added) (citing *Heller*, at 320, *FCC v. Beach Commc'ns, Inc*., 508 U.S. 307, 313 (1993), *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam), and *Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 491 (1955)). The burden is *not* on the state to prove the rational basis, but on the challenger to rebut the statute's presumptive validity. *Beach Commc'ns*, 508 U.S. at 315 ("[T]hose attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." (cleaned up)); *Cabrera*, 921 F.3d at 404 ("And rational-basis review confers a presumption of validity on legislation that must be rebutted by the challenger." (cleaned up)); *Lewis v. Ascension Parish Sch. Bd.*, 806 F.3d 344, 363 (5th Cir. 2015) ("On rational basis review, the burden is on the challenger to rebut the "strong presumption of validity" accorded the action and prove that the action is not rationally related to a legitimate government purpose.").

Instead of applying the proper rational basis standard, the lower court explicitly placed the burden on the Defendants to prove rationality. The District Court erred in failing to require the Plaintiffs to disprove that the law bore a relationship to *any* legitimate state interest. It inverted the test and found the government failed to rebut plaintiffs' arguments. Plaintiffs had merely alleged certain *limited* reasons why better alternatives to the in-person requirement may exist.

The District Court further assessed the rational basis for the law from a results-oriented standpoint and surmised the law could produce no palpable "benefit." ER-18–20. (Decision & Order, at 9–11).[3] However, the U.S. Supreme Court has repeatedly held to the contrary in multiple respects.

The Supreme Court prohibits lower courts from engaging in the type of outcome-based analysis the District Court undertook here. "A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320; *see Beach Commc'ns*, 508 U.S. at 315 ("legislative choice is not subject to courtroom fact-finding and may be . . . unsupported by evidence or empirical data."). "In short, the judiciary may not sit as a superlegislature to judge

[3] In referring to the "benefits" and "burdens" while conducting rational basis review, the lower court effectively confused rational basis with the *Humble* test. This mixing of tests further demonstrates how the District Court applied the wrong standard of review and improperly shifted the burdens.

the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Dukes*, 427 U.S. at 303. "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge*, 397 U.S. at 486.

Further, the U.S. Supreme Court overtly does not require laws akin to 10 GCA § 3218.1 to manifest a readily apparent chain of cause and effect in order to be deemed as having a rational basis.

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide* a rational basis for the classification.

Beach Commc'ns, 508 U.S. at 313 (citations omitted) (emphasis added). " 'A statutory discrimination will not be set aside if any state of facts, reasonably may be conceived to justify it.' " *Dandridge*, 397 U.S. at 485 (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)). "In other words, a legislative choice . . . may be based on rational speculation . . . ." *Beach Commc'ns*, 508 U.S. at 315.

Finally, the U.S. Supreme Court does not condemn laws of this nature as violating equal protection simply because they may be imprecise in their effect. "In the area of economics and social welfare, a State does not violate the Equal

Protection Clause merely because the classifications made by its laws are imperfect. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge*, 397 U.S. at 485 (citation omitted); *see Heller*, 509 U.S. at 321 ("courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."). "'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.'" *Id*. (quoting *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913)).

2. Guam's statute is related to a legitimate state interest.

As relevant to 10 GCA § 3218.1(b), the *Dobbs* Court outlined a variety of legitimate state interests, which the regulation promotes. According to the Supreme Court in *Dobbs*,

> "These legitimate interests include respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."

142 S.Ct. at 2284 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157-158 (2007); *Roe*, 410 U.S. at 150; *Washington v. Glucksberg*, 521 U.S. 702, 728-31 (1997)). In *Gonzales*, the Court acknowledged the "government may use its voice and its

regulatory authority to show its profound respect for the life within a woman" and that "the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of a fetus that may become a child." 550 U.S. at 157-158. Similarly, while the test has changed, the government of Guam's interests expressed in 10 GCA § 3218.1 have remained constant, including: to preserve potential life, maternal health, and to promote the integrity of the medical profession.

One can easily ascertain from Guam's in-person consultation requirement a reasonably conceivable state of facts which ostensibly inform its rational basis. *See Beach Commc'ns*, 508 U.S. at 313. A private, in-person setting is the appropriate and solemn setting for a patient to fully appreciate the information being provided about the abortion, including the morphological state of the fetus and alternatives to the abortion. While it can be partially mimicked, the same level of formality is not present when the information is being provided over video conferencing or other audio-visual medium. The in-person requirement reasonably creates a setting free from distractions and promotes attention to and exchange of the information.

As Defendants argued in opposition to preliminary injunction, this personal method of communication is intended to make the most impactful impression possible, and to create a pensive tone that promotes an informed deliberation before the final important decision whether to abort a potential life. ER-34; ER-36. The

decision whether to have an abortion can understandably be a difficult one, involving the consideration of weighty ethical, moral, financial, and other considerations, and "[t]he State has an interest in ensuring so grave a choice is well informed." *Gonzales*, 550 U.S. at 159.

With its in-person consultation requirement, the Guam Legislature has prescribed that only a direct, face-to-face meeting with the person providing information "material to the decision of whether or not to undergo an abortion" such as "the probable anatomical and physiological characteristics" of the fetus can best assure the woman will firmly understand the significance of the act of abortion and take that information to heart. See 10 GCA § 3218.1(b)(1)(B). In the Guam Legislature's estimation, for any woman to appreciate the gravity and apprehend the full consequences of a decision that has profound and lasting meaning, there is no adequate substitute for an in-person meeting for the provisioning of information crucial to her decision.

Accordingly, state and local legislatures are not estopped from hypothesizing that requiring abortion-related information to be delivered in person, and answering questions in person, provides the best means for the government to reach the patient in crucial, even if subtle, ways unique to in-person, human interaction and interpersonal communication. No other method shares the same capability for impact upon the psyche as does hearing information from, and communicating with,

another human being who is physically present with you. There are qualitative differences in personal communication between meeting someone up close and in the flesh, where physical touch may be had and the subtleties of human emotion can be felt, versus speaking to their reduced-size image on a video screen. Several types of media are capable of imparting information, but they cannot convey the information with the same degree of profoundness as an in-person interaction does.

This is not an arbitrary concept. Courts have observed the same phenomenon, with equal self-evidence and without scientific verification, by extolling the virtues of in-person witness testimony in the courtroom. The U.S. Supreme Court holds that the "primary object" of the Confrontation Clause is "'compelling [a witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and in the manner in which he gives his testimony whether he is worthy of belief.' " *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (quoting *Mattox v. U.S.*, 156 U.S. 237, 242 (1895)). The import of this notion is that imparting information in person has a distinct qualitative effect upon the observer as to how they receive, assess, and characterize the information given. The same could be said for a patient contemplating whether to undergo an abortion.

Courts also maintain that this effect of live, in-person testimony cannot be duplicated in a videoconference medium. "[T]he ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video

conferencing." *Edwards v. Logan*, 38 F.Supp.2d 463, 467 (W.D.Va. 1999); *United States v. Int'l Business Machines Corp.*, 90 F.R.D. 377, 381 (S.D.N.Y. 1981) ("There is a strong preference for live testimony, long recognized by the courts, as it provides the trier of fact the opportunity to observe the demeanor of the witness."). "Virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it." *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001). And the adoption of such rule is "a firm judgment," *id.*, and not some arbitrary or irrational choice.

The judicial branch has applied this rule against the government as well. The Sixth Circuit, in discussing the use of video depositions, stated:

> "The State suggests that video depositions are almost as good as live testimony and not much is lost by not having first hand, face-to-face presence in court. That may be true in many cases, but still the jury and the judge never actually see the witness. . . . The immediacy of a living person is lost. In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life . . . ."

Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir. 1993).

Ultimately, it is of no consequence whether, after a trial, in-person consultation is found far superior to videoconferencing in possibly persuading a patient to elect not to obtain an abortion, or whether Plaintiffs can show in court that scientific evidence lends some support to their argument. The law does not require

the legislative choice to be an "exact fit." *See United States v. Navarro*, 800 F.3d 1104, 1114 (9th Cir. 2015) ("Moreover, "[t]he rational basis standard . . . does not require that the Commission choose the best means of advancing its goals." (quoting *Vermouth v. Corrothers*, 827 F.2d 599, 603 (9th Cir.1987)). For those are questions firmly committed to the Guam Legislature, not a federal district court. *See, e.g.*, *McLean v. Crabtree*, 173 F.3d 1176, 1186 (9th Cir. 1999) ("We need not inquire whether the [agency]'s policy is the best means for addressing this risk because "rational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (quoting *Heller,* 509 U.S. at 319); *Stern v. Tarrant Cnty. Hosp. Dist.*, 778 F.2d 1052, 1056 (5th Cir. 1985) ("When a legislature has a choice of means, each rationally related to its legislative purpose, it may constitutionally choose any of them. Its choice of one does not render the others irrational."). Contrary to the District Court here, the judiciary is not to engage in courtroom fact-finding against the state when performing rational basis review.

Guam's abortion regulation requiring that certain abortion-related information be provided to patients in person has a rational basis that does not violate the due process or equal protection rights afforded by the Fourteenth Amendment.

C. Because abortion regulations no longer present constitutional questions under the Fourteenth Amendment, the preliminary injunction against the Guam officials must be vacated.

As discussed, *see supra* Part I.B, the Defendants are likely to succeed on the ultimate merits of Plaintiffs challenge to 10 GCA § 3218.1. The Defendants now turn to the lower court's discussion of the remaining three preliminary injunction factors. The District Court dedicated eight lines in its Decision & Order to address and rule upon the *Winter* factors, other than likelihood of success on the merits. 555 U.S. 7 (2008); ER-25. The lower court summarily concluded that Plaintiff would suffer irreparable harm if preliminary injunction were not granted, exclusively by citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), for the holding that "the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.' " ER-25. (Decision & Order at 16). The court determined that preliminary injunction was in the public interest, again by merely citing *Melendres*, 695 F.3d at 1002, for its holding that, "it is always in the public interest to prevent the violation of a party's constitutional rights." ER-25. Without discussing the balancing of equities, the court summarily concluded: "As the court finds Plaintiffs are likely to succeed on the merits, it similarly finds Plaintiffs have met the remaining *Winter* factors." ER-25. The District Court committed reversible error by its findings as to all three remaining *Winter* factors.

1. The irreparable harm element does not weigh in favor of a preliminary injunction.

First, the District Court's reliance upon *Melendres* was upended by *Dobbs*. Because abortion is no longer recognized as a fundamental or constitutional right, Plaintiffs do not automatically suffer irreparable injury under *Melendres*. Aside from their reliance on *Melendres*, Plaintiffs offered no proof of the alleged irreparable harm. ER-38–39. Without such proof, the court had no basis for concluding that irreparable harm to the Plaintiffs and their patients exists. *See Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc*., 736 F.3d 1239, 1250-1251 (9th Cir. 2013) (finding district court abused discretion by finding irreparable injury by relying on unsupported and conclusory statements); *see also Flexible Lifeline Sys., Inc. v. Precision Lift, Inc*., 654 F.3d 989, 997, 1000 (9th Cir. 2011) ("surely a standard which presumes irreparable harm without requiring any showing at all is also 'too lenient.' ").

There is also no evidence that the alleged "harm" is irreparable. The informed consent statute, 10 GCA § 3218.1(a)(13), permits the informed consent information be given in person by a physician, nurse, psychologist, counselor, or social worker. It does not require the physician actually performing or administering the abortion to personally do the consultation, although they may. Nothing prevents Plaintiffs from affiliating or enlisting as their agents Guam health care providers who could provide Plaintiffs' patients the information in person. In fact, Plaintiffs declare they "already

have professional relationships with OB/GYNS in Guam" and "are aware of multiple supportive physicians in Guam who are willing to provide pre- and post-abortion testing and care to abortion patients." ER-58; ER-62. (Compl, Ex. 4, at ¶¶ 80, 81; Compl., Ex. 5, at ¶¶ 77, 78). Any perceived "harm" may be overcome by having a Guam-based professional conduct the in-person consultation. "The law need not give abortion doctors unfettered choice in the course of their medical practice." *Gonzales*, 550 U.S. at 163.

Because Plaintiffs' claim of irreparable harm is wholly within their own control, based on their desire to not associate with local providers, extraordinary and preliminary relief is unwarranted. *See Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.") "Speculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also Doe #1*, 957 F.3d at 1059-1060 (Plaintiffs "cannot meet this burden by submitting conclusory factual assertions and speculative arguments that are unsupported in the record."); *Herb Reed Enters., LLC*, 736 F.3d at 1250.

The lower court's analysis also ignored the harms to legitimate state interests. By enjoining the law, the District Court prevented enforcement of a statute that

advances interests recognized by the Supreme Court, including the promotion of fetal life and the advancement of patient health. *See Dobbs*, 142 S.Ct. at 2307 (Kavanaugh, J., concurring) ("Roe overreached . . . and caused significant harm to what *Roe* itself recognized as the State's "important and legitimate interest" in protecting fetal life.").

2. The equities and public interest weigh in favor of Defendants.

The respective harm Guam endures by preliminary injunction is unavoidable, as "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Veh. Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

"The passage of time gives rise to a strong presumption of constitutionality." *Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2085 (2019). "[T]his Court … presumes that [a state] statute will be construed in such a way as to avoid the constitutional question presented." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). As submitted to the District Court, Guam's in-person abortion information consultation 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. ER-38.

Generally, "the purpose of a preliminary injunction is to preserve the status quo between the parties pending a resolution of a case on the merits." *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012). Plaintiffs do not seek to preserve the status quo pending determination of the merits; they attempt to *change* the status quo. This is especially relevant here because Plaintiffs do not seek prohibitory injunction to maintain the status quo ante. They instead seek mandatory injunction to alter the landscape and to require Guam to abandon a law faithfully observed without objection since 2012—a law that merely and reasonably regulates, not bans, abortion. The change Plaintiffs seek must be found in the Legislature, not in the federal courts. *See Dobbs*, 142 S.Ct. at 2259 ("[W]e thus return the power to weigh those arguments to the people and their elected representatives.").

D. In the event this Court seeks to weigh factors not disposed of in *Dobbs*, then the appropriate remedy is remand to the District Court for reconsideration.

Prior to this Court issuing a briefing schedule, the Defendants filed a motion for summary reversal asserting that the proper remedy was to vacate the preliminary injunction and remand to the District Court for reconsideration in light of *Dobbs*. 9th Cir. ECF 18 (June 28, 2022). This Court denied the motion without prejudice. 9th Cir. ECF 21 (Aug. 18, 2022). Given the fundamentally changed legal landscape post-*Dobbs*, this Court may wish to vacate the preliminary injunction and remand for reconsideration. Where the decision upon which the lower court's opinion was

based has been reversed by the Supreme Court, an appropriate remedy is to vacate the judgment of the District Court and remand for reconsideration in light of the new standard. *See*, *e.g.*, *Harrison v. Dyson*, 492 F.2d 1162, 1163 (5th Cir. 1974); *Vazquez-Valentin v. Santiago-Diaz*, 459 F.3d 144, 148 (1st Cir. 2006) (reversal and remand for reconsideration is appropriate where the lower court "misapprehended the law" and needs to reconsider that matter "in light of the Supreme Court's opinion."). While the Defendants are confident in the merits of their defense, *see supra* Parts I.A-C, they also renew, in the alternative, their motion for summary reversal. The preliminary injunction may be summarily vacated and the matter returned to the District Court for reconsideration in light of *Dobbs*.

CONCLUSION

In the end, this case involves many complex moral and ethical questions for doctors, patients, and legislatures to grapple with in the future. However, the Supreme Court's opinion in *Dobbs* makes the *legal* question straightforward. This Court should **VACATE** the preliminary injunction and **REMAND** this case for further and final proceedings.

Respectfully submitted September 14, 2022

LEEVIN TAITANO CAMACHO
Attorney General of Guam

/s/ *Jordan Lawrence Pauluhn*
JORDAN LAWRENCE PAULUHN
Assistant Attorney General

STATEMENT OF RELATED CASES

On behalf of the defendants-appellants, the undersigned is aware of no related cases now pending before this Court.

LEEVIN TAITANO CAMACHO
Attorney General of Guam

/s/ *Jordan Lawrence Pauluhn*
JORDAN LAWRENCE PAULUHN
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed and served the foregoing document with the Clerk of Court for the Ninth Circuit Court of Appeals using the CM/ECF system.

This 14th day of September 2022.

/s/ *Jordan Lawrence Pauluhn*
JORDAN LAWRENCE PAULUHN
Assistant Attorney General

ADDENDUM

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15, 2016); subsection (e) amended by P.L. 33-218:5 (Dec. 15, 2016); and subsection (k) amended by P.L. 33-218:6 (Dec. 15, 2016); and subsection (m) amended by P.L. 33-218:7 (Dec. 15, 2016);.

2017 NOTE: References to "territory" and "territorial" removed and/or altered to "Guam" pursuant to 1 GCA § 420.

NOTE: This provision was to become effective sixty (60) days after the "printed materials" described in § 3218.1 (c) and the "checklist certification" described in § 3218.1(c)(5) were approved by the Department of Public Health and Social Services (DPHSS) pursuant to the rule-making process set forth in Title 5, Chapter 9, Article 3 of the Guam Code Annotated. P.L. 31-235:4 (Nov. 1, 2012). P.L. 32-089:2 (Nov. 27, 2013) amended the approving authority from DPHSS to "a majority vote of a team consisting of the Director of DPHSS, who shall serve as the Chairperson, the Medical Director of the DPHSS; and OB/GYN doctor from the Guam Medical Association; a Social Worker from the National Association of Social Workers; and a Psychiatrist from the Guam Behavioral Health and Wellness Center." The "printed materials" described in § 3218.1 (c) and the "checklist certification" described in § 3218.1(c)(5) were to be approved no later than 120 days after enactment, pursuant to P.L. 32-089:2.

§ 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:

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

(B) the following medically accurate information that a reasonable person would consider material to the decision of whether or not to undergo the abortion:

(i) a description of the proposed abortion method and

(ii) 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;

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

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

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

(F) 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:

(A) 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;

(B) 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;

(C) 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;

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

(E) 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

(F) 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)(l), (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.

SOURCE: Added by P.L. 31-235:2 (Nov. 1, 2012).

2013 NOTE: This provision was to become effective sixty (60) days after the "printed materials" described in § 3218.1 (c) and the "checklist certification" described in § 3218.1(c)(5) were approved by the Department of Public Health and Social Services (DPHSS) pursuant to the rule-making process set forth in Title 5, Chapter 9, Article 3 of the Guam Code Annotated. P.L. 31-235:4 (Nov. 1, 2012). P.L. 32-089:2 (Nov. 27, 2013) amended the approving authority from DPHSS to "a majority vote of a team consisting of the Director of DPHSS, who shall serve as the Chairperson, the Medical Director of the DPHSS; and OB/GYN doctor from the Guam Medical Association; a Social Worker from the National Association of Social Workers; and a Psychiatrist from the Guam Behavioral Health and Wellness Center." The "printed materials" described in § 3218.1 (c) and the "checklist certification" described in § 3218.1(c)(5) were to be approved no later than 120 days after enactment, pursuant to P.L. 32-089:2.

2012 NOTE: Subsection designations in subsection (b) were altered to adhere to the Compiler's alpha-numeric scheme in accordance with the authority granted by 1 GCA § 1606.

§ 3219. Extension of Time.

The Office of Vital Statistics may, by regulation, and upon such conditions as it may prescribe to assure compliance with the purposes of this article, provide for the extension of the periods prescribed in §§ 3216 and 3217 of this article for the filing of death certificates, fetal death reports and medical certifications of cause of death in cases in which compliance with the applicable prescribed period would result in undue hardship.

§ 3220. Marriage Registration.

(a) A record of each marriage performed on Guam shall be filed with the Guam Registrar of Vital Statistics as provided in this section.

(b) The officer who issues the marriage license shall prepare the license and certificate on the form prescribed and furnished by the Office of Vital Statistics upon the basis of information

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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