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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF GILA

THE ESTATE OF BABY VILLEGAS, DECEASED, by and through MARIO VILLEGAS; MARIO VILLEGAS on his own behalf and on behalf of all survivors of BABY VILLEGAS, Deceased Plaintiff, vs. JACKRABBIT FAMILY MEDICINE, INC., an Arizona corporation dba CAMELBACK FAMILY PLANNING, GABRIELLE J. GOODRICK, M.D. and "JANE DOE GOODRICK" a married couple, and KRISTIN J. LIVINGSTON, M.D. and "JOHN DOE LIVINGSTON," a married couple, et. al. Defendants.	**Case No. CV202200007** **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** **(Assigned to Hon. Bryan B. Chambers)**

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INTRODUCTION

This case is a last-ditch effort by an abusive husband to continue exercising control over his former wife after she divorced him.[1] By seeking damages for an abortion that she chose to have after he misled her about having a vasectomy,[2] he has been able to publicize private details about her personal reproductive choices and make her a necessary participant in these proceedings, which have dragged on for years. Although his theory of the case has changed several times since he initially filed it in 2020, the lawsuit remains meritless. The statute on which he now relies is unconstitutional, and the proximate cause of his alleged injuries is his ex-wife's *decision* to have an abortion—a decision in which she was firm and unwavering[3]—and not Defendants' alleged violations of the statute. Moreover, the survivorship claims he asserts on behalf of the aborted embryo are not cognizable under Arizona law.

Accordingly, for the reasons set forth below and in Defendants' opening brief, the Court should grant Defendants' motion for summary judgment and deny Plaintiffs' cross-motion for summary judgment.

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[1] Defs.' Resp. to Pls.' Separate Statement of Facts (Nov. 30, 2023) ("Defs.' Second SOF") p. 31, ¶ 22–27; *see also* Expert Report of Dr. Rae Taylor ("Taylor Report") (appended to Aff. of Tom Slutes (Second) as Ex. F).

[2] Defs.' Second SOF p. 31, ¶¶ 22–23; *see also* Taylor Report; Tr. of Dep. of M.S. ("Patient Tr.") (appended to Pls.' Separate Statement of Facts (July 11, 2022) as Ex. 3) at 29–33.

[3] Defs.' Statement of Facts in Supp. of Mot. for Summ. J. (Aug. 29, 2023) ("Defs.' SOF") ¶ 21.

ARGUMENT

I. On Counts 1 and 3 of the Second Amended Complaint, the Court Should Grant Defendants' Motion for Summary Judgment and Deny Plaintiffs' Cross-Motion for Summary Judgment

A. The Act Violates Constitutional Protections for Free Speech

As explained in Defendants' opening brief, the U.S. Supreme Court has characterized statutes regulating the informed consent process for abortion care as regulations of conduct that incidentally burden speech, *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2373 (2018), which generally makes them subject to intermediate scrutiny under the First Amendment, *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 292 ¶ 98, 448 P.3d 890, 913 (2019). *See* Defs.' Mot. for Summ. J. & Mem. of Law (Defs.' Mem.") at 3. Defendants maintain that the Act should be subject to strict scrutiny under Arizona Constitution article 2, § 6, because that provision provides broader protection for free speech than the First Amendment, *Brush & Nib Studio*, 247 Ariz. at 281 ¶ 45, and the Act discriminates on the basis of content and viewpoint, *id.* at 292 ¶ 99. Defs.' Mem. at 3. Under either standard, the Act is presumptively unconstitutional, and the parties seeking to enforce it—here, Plaintiffs—have the burden of proving that it satisfies heightened scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *United States v. Stevens*, 559 U.S. 460, 468 (2010); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664–65 (1994). But Plaintiffs make no effort whatsoever to establish that the Act satisfies either strict or intermediate scrutiny. For that reason alone, they are not entitled to summary judgment on Defendants' free speech defense. Moreover, the arguments Plaintiffs do make concerning the Act's constitutionality miss the mark.

First, Plaintiffs argue that a finding of unconstitutionality would defeat the legislature's purpose in enacting the statute. Pls.' Revised Mem. at 9–10. But the legislature

lacks the power to enact a law that violates the federal or state constitution, and such a law is necessarily invalid. *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 520 ¶ 14, 1 P.3d 706, 710 (2000) ("[A]ny exercise of legislative power is subject to the limitations imposed by the constitution.").

Second, Plaintiffs argue that the Act is a permissible regulation of abortion clinics, Pls.' Revised Mem. at 11–12, but they fail to demonstrate that it satisfies either strict or intermediate scrutiny. Moreover, their argument relies on disputed facts and the testimony of an unqualified expert—Dr. Hazelrigg—about the professional standard of care for obtaining informed consent from abortion patients. *See id.*; *infra* at 13–14; 19–22. Dr. Hazelrigg's testimony must be excluded because he is not qualified. *See infra* at 13–14.

Third, Plaintiffs argue that the Act satisfies the federal undue burden standard. Pls.' Revised Mem. at 12. Even if that were true, it would be irrelevant. The undue burden standard was a test for determining whether a law violated abortion patients' rights under the Due Process Clause, not abortion providers' rights under the First Amendment. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846, 876–77 (1992). And in any event, it has been overruled. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

Fourth, *Casey* does not control the outcome here. The First Amendment claim in that case was an afterthought given that, under precedent that was controlling at the time *Casey* was briefed and argued to the U.S. Supreme Court, the Due Process Clause rendered statutes unconstitutional per se if they substituted a legislature's political judgment for a physician's professional judgment about what information should be provided as part of the informed consent process for abortion care. *See Casey*, 505 U.S. at 882 (overruling *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. Am. Coll. of*

Obstetricians & Gynecologists, 476 U.S. 747 (1986)). A plurality of the Court disposed of the First Amendment claim in a single, cryptic paragraph. *Id.* at 884. Later decisions issued by a majority of the Court make clear that statutes containing "content- and speaker-based rules" are constitutionally suspect, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011) (invalidating a state statute that restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors); such rules are particularly dangerous "in the fields of medicine and public health, where information can save lives," *NIFLA*, 138 S. Ct. at 2374 (quoting *Sorrell*, 564 U.S. at 566) (invalidating a state statute that imposed disclosure requirements on crisis pregnancy centers); and laws compelling speech are even more harmful than laws restricting speech, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (invalidating a state statute that authorized public sector unions to impose fees on non-member public employees).

In any event, the plurality's decision to uphold the Pennsylvania statute at issue in *Casey* hinged on a statutory exception excusing an abortion provider from the required disclosures if "he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." *Casey*, 505 U.S. at 883–84 (quoting 18 Pa. Cons. Stat. § 3205 (1990)). The Act at issue here contains no comparable exception for the exercise of good-faith clinical judgment. A.R.S. § 36-2153. It is therefore distinguishable.

Because the Act's content- and speaker-based speech mandates are constitutionally suspect under current federal precedents, and the Act is distinguishable from the Pennsylvania statute upheld in *Casey*, this Court must conduct an independent assessment of the Act's constitutionality by applying either intermediate scrutiny, the applicable standard

under the First Amendment, or strict scrutiny, which is warranted by the enhanced protection that the Arizona Constitution affords free speech. *See* Defs.' Mem. at 3. Plaintiffs have failed to demonstrate that the Act satisfies either standard.

Fifth, Plaintiffs' reliance on *State v. Jean*, 243 Ariz. 331, 407 P.3d 524 (2018), is misplaced. *See* Pls.' Revised Mem. at 13–14. There, the Arizona Supreme Court provided two reasons for rejecting the defendant's argument that Arizona Constitution article 2, § 8, afforded him greater protection from governmental search and seizure than the Fourth Amendment. *Jean*, 243 Ariz. at 342 ¶ 39. First, the Court held that the defendant "waived this argument before the court of appeals by raising it for the first time in his reply brief." *Id.* Here, in contrast, Defendants raised their constitutional defense in their opening brief. *See* Defs.' Mem. at 1–4. Second, the Court held that the defendant had failed to address "why or how" the Arizona Constitution afforded him greater protection from governmental search and seizure than the Fourth Amendment. *Jean*, 243 Ariz. at 342 ¶ 39. Here, in contrast, the Arizona Supreme Court has already conclusively determined that "the Arizona Constitution provides broader protections for free speech than the First Amendment" based on its text. *Brush & Nib Studio,* 247 Ariz. at 281 ¶ 45. Further, that Court has "often relied on federal case law in addressing free speech claims under the Arizona Constitution," *id.* at 282 ¶ 46, given that "a violation of First Amendment principles 'necessarily implies' a violation of the broader protections of article 2, section 6 of the Arizona Constitution," *id.* at 282 ¶ 47 (citation omitted).

Moreover, Plaintiffs are wrong about who bears the burden of proof. *See* Pls.' Revised Mem. at 14–15. As explained above, under strict or intermediate scrutiny, once Defendants establish that the Act infringes on their free speech rights by compelling them to

engage in government-mandated speech—which is clear from the text of the Act, A.R.S. § 36-2153—the burden shifts to Plaintiffs to demonstrate that the Act satisfies the applicable level of scrutiny. *See supra* at 2. Thus, it is Plaintiffs, and not Defendants, who must "create a factual record" to justify the Act's burdens on speech. *See* Pls.' Revised Mem. at 14. Plaintiffs have failed to do so.[4]

Finally, contrary to Plaintiffs' contention, Defendants' argument is not misleading in any respect. *See* Pls.' Revised Mem. at 14. Defendants accurately describe the requirements of the Act and the content of the Arizona Department of Health Services' website. *See* Defs.' Mem. at 2 (citing A.R.S. § 36-2153(A)(2)(f) and Ariz. Dep't of Health Servs., A Woman's Right to Know: Statewide Resources Arizona – 2014 (Aug. 2016), https://www.azdhs.gov/documents/prevention/womens-childrens-health/informed-consent/right-to-know-resources.pdf). Further, the Court may take judicial notice that, nationwide, crisis pregnancy centers are organizations with a pro-life viewpoint that aim to discourage people from having abortions, given that this fact is not subject to reasonable dispute. *See* Ariz. R. Evid. 201.[5]

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[4] Plaintiffs' citation to *Nelson v. Planned Parenthood Center of Tucson, Inc.,* 19 Ariz. App. 142, 144–45, 505 P.2d 580, 582–83 (1973), is inapposite for two reasons. First, *Nelson* did not concern the application of strict or intermediate scrutiny. *Id.* Second, the decision cited by Plaintiffs was vacated in its entirety on rehearing. *Id.* at 152.

[5] *See generally* Moira Gaul, *Fact Sheet: Pregnancy Centers—Serving Women and Saving Lives (2020 Study)*, Charlotte Lozier Institute (July 2021), https://lozierinstitute.org/fact-sheet-pregnancy-centers-serving-women-and-saving-lives-2020/; Hannah Getahun, Isabella Zavarise & Katie Nixdorf, *A woman who mistakenly visited an anti-abortion crisis pregnancy center said she was met with pushback for seeking an abortion*, Business Insider (Dec. 5, 2022, 7:11 PM EST), https://www.businessinsider.com/crisis-pregnancy-centers-target-women-seeking-abortions-with-misinformation-pushback-2022-11.

B. The Act Does Not Authorize Claims by the Estate

Plaintiffs fail to establish that the Act has an implied right of action for aborted embryos. They erroneously rely on *Napier v. Bertram*, 191 Ariz. 238, 954 P.2d 1389 (1998), where the statute at issue was "silen[t] on whether a cause of action is conferred by the statute or should be recognized as a result of the statute." *Id.* at 240 ¶ 9. Here, in contrast, the Act creates a private right of action for specific sets of individuals. *See* A.R.S. § 36-2153(K). Aborted embryos are simply not among them. *See id.* This exclusion of a particular group from a carefully crafted list of who is authorized to bring suit does not equate to silence regarding whether a cause of action is conferred. Further, in *Napier*, the statute at issue contained criminal penalties but no civil enforcement provision, which frustrated its legislative purpose to protect the public. *Id.* at 241 ¶ 12. Here, in contrast, the statute expressly provides a civil remedy for violations by creating a private right of action for specified individuals. *See* A.R.S. § 36-2153(K).

Because the legislature was not silent about the existence of a civil cause of action, but instead clearly and explicitly delineated who may seek damages for a violation of the Act, no further inquiry is permitted. *See Burns v. City of Tucson*, 245 Ariz. 594, 596 ¶ 6, 432 P.3d 953, 955 (App. 2018) ("[W]hen the statute is plain and unambiguous, [courts] will not engage in any other method of statutory interpretation." (citation omitted)). The Court should therefore reject Plaintiffs' invitation to question the wisdom of the legislature's policy choices and rewrite the statute to better serve Plaintiffs' litigation goals. Notably, Plaintiffs have provided no legal authority for the assertion that an aborted embryo is a "member . . . of the [Act's] protected class." Pls.' Revised Mem. at 16. Indeed, this assertion requires the assumption that the Act's omission of aborted embryos from subsection K was a legislative

oversight. To the contrary, the legislature expressed a clear intention to create a private right of action for a specific group of individuals, and it declined to add aborted embryos to that group each of the four times it amended the Act following its initial enactment in 2009. *See* Defs.' Mem. at 5–6. Further, as explained in Defendants' opening brief, the interpretive canon *expression unius est exclusion alterius* counsels courts to construe the legislature's exclusion of remedies as intentional. *See id.* at 6.

The legislature also expressly excluded lawsuits by the "father of the unborn child if the father was married to the mother at the time she received the abortion" when the "pregnancy resulted from the plaintiff's criminal conduct." A.R.S. § 36-2153(K). Mario Villegas is both the embryo's father and the executor of its estate. Allowing him to bring suit under the Act on behalf of the estate would allow him to evade the criminal conduct exception, rendering the exception toothless. *Cf. Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11, 432 P.3d 925, 927 (2019) ("A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous."); *State v. Green*, 248 Ariz. 133, 135 ¶ 8, 459 P.3d 45, 47 (2020) (quoting *Hoffman v. Chandler ex rel. Cnty. of Pima*, 231 Ariz. 362, 363 ¶ 7, 295 P.3d 939, 940 (2013) ("We must 'strive to construe a statute and its subsections as a consistent and harmonious whole.'")).

Finally, Defendants agree with Plaintiffs that, under A.R.S. § 36-2153, Plaintiff Villegas may not recover for the speculative economic loss alleged to have resulted from the death of the embryo. Pls.' Revised Mem. at 14. If Plaintiff Villegas believes that this is a poor outcome from a public policy perspective, he may lobby the legislature to amend the relevant statutes. But this Court may not ignore the plain, unambiguous text of the Act or expand its remedies beyond the legislature's clear delineation. *See Burns*, 245 Ariz. at 596 ¶ 6.

C. The Act Limits Damages for Psychological, Emotional, and Physical Injuries to Those Proximately Caused by the Statutory Violation

Defendants undertook a statutory analysis of the text surrounding a subset of damages—those available under the statute for psychological, emotional, and physical injuries—in their summary judgment motion. Defs.' Mem. at 7. This subsection of the statute was neither discussed in the Court's 2022 summary judgment order nor discussed by the parties in briefing the prior summary judgment motion. Plaintiffs point to nowhere in the briefing or the order that specifically analyzed this narrow issue. Yet, the only argument Plaintiffs make for why the Court should ignore the plain text of the statute is the earlier order denying summary judgment. Pls.' Revised Mem. at 21.

Even if this Court were to conclude that its earlier order denying Defendants' motion for summary judgment touched on this issue, "[a] court does not lack the power to change a ruling simply because it ruled on the question at an earlier stage,' especially where a substantial change has occurred in the evidence." *Sholes v. Fernando*, 228 Ariz. 455, 458-459 ¶ 8, 268 P.3d 1112, 1115–16 (App. 2011) (citing *Hall v. Smith*, 214 Ariz. 309, 317 ¶ 28, 152 P.3d 1192, 1200 (App. 2007). Arizona courts have found that the "law of the case" doctrine "is not absolute [and] does not have the same binding effect as the doctrine of res judicata." *Sholes*, 228 Ariz. at 459 ¶ 8 (citation omitted). "[R]eliance upon law of the case *does not justify* a court's refusal to reconsider a ruling when an error in the first decision renders it manifestly erroneous or unjust or when a substantial change occurs in essential facts or issues, in evidence, or in the applicable law." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 279, 860 P.2d 1328, 1332 (App. 1993) (citing *Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 483, 720 P.2d 81, 84 (1986)).

For the reasons discussed in Defendants' opening brief, which are completely unaddressed by Plaintiffs, Defendants have shown that a claimant seeking relief under A.R.S. § 36-2153(L)(1) must establish that damages for psychological, emotional, and physical injuries are *caused* by a statutory violation. Since Plaintiffs have not and cannot do so, Defendants seek a partial summary judgment order that Plaintiffs cannot recover damages for psychological, emotional, and physical injuries under the Act because they have presented no evidence that their alleged injuries were *caused* by the alleged statutory violation. Critically, the Patient maintains that there is no circumstance in which she would not have had an abortion, which means that each of the injuries alleged by Plaintiffs would have occurred regardless of any alleged violation of the Act. *See* Defs.' SOF ¶ 21.

Similarly, insofar as Plaintiffs seek a finding that the statute does not require proof of proximate cause, Pls.' Revised Mem. at 5, their request should be denied as overbroad because the Act plainly requires proof of causation for alleged psychological, emotional, and physical injuries. Plaintiffs have failed to support their assertion that, for this subset of injuries—those that the statute explicitly defines as "*resulting* from the violation of this section," A.R.S. § 36-2153(L)(1) (emphasis added)—there is no causation requirement.

II. On Counts 2 and 4 of the Second Amended Complaint, the Court Should Grant Defendants' Motion for Summary Judgment and Deny Plaintiffs' Cross-Motion for Summary Judgment

A. Arizona's Wrongful Death Statute Does Not Permit Recovery for the Death of an Embryo

As explained in Defendants' opening brief, Arizona's wrongful death statute, A.R.S. § 12-611, does not authorize recovery for the death of a pre-viable embryo. Defs.' Mem. at 8–10. Plaintiffs concede that, under controlling precedent, the statute cannot be interpreted to authorize such recovery "absent a clear and definitive demonstration of legislative intent."

Pls.' Revised Mem. at 18 (quoting *Summerfield v. Superior Ct. In & For Maricopa Cnty.*, 144 Ariz. 467, 479, 698 P.2d 712, 724 (1985)). They contend that the Act, A.R.S. § 36-2153, demonstrates the required legislative intent by creating a cause of action for failing to obtain informed consent prior to an abortion. *See* Pls.' Revised Mem. at 18. But the Act makes no reference to the wrongful death statute, and the relief it authorizes is discrete and limited to a narrow class of beneficiaries. *See* A.R.S. § 36-2153(K). It provides no indication whatsoever that the legislature intended to dramatically expand the scope of the wrongful death statute and overrule decades of settled precedent concerning its interpretation.

Notably, the Act states that the cause of action it creates is "[i]n addition to other remedies available under the common or statutory law of this state." *Id.* This language demonstrates that the Act's remedy is independent of other available remedies, such as those provided by the wrongful death statute, and does not alter their scope.[6]

B. The Estate Has Not Alleged an Injury That is Compensable Under Arizona's Survival Statute

Plaintiffs' response fails to allege an injury compensable under Arizona's survival statute. Plaintiffs merely assert that A.R.S. § 14-3110 "preserves 'every cause of action' the decedent could have pursued if she had survived." Pls.' Revised Mem. at 19 (citing A.R.S. § 14-3110). This does not change the fact that prospective economic damages may only be recovered in an action for wrongful death, and not an action under the survival statute. *Gandy v. United States*, 437 F. Supp. 2d 1085, 1089 (D. Ariz. 2006) (applying Arizona law). Nor does it change the fact that Arizona's survival statute does not permit the deceased

[6] Defendants agree with Plaintiffs that the term "person" in Arizona's survival statute, A.R.S. § 14-3110, must be interpreted in lockstep with the term "person" in the wrongful death statute, A.R.S. § 12-611. *See* Pls.' Revised Mem. at 18. For the reasons stated above, neither statute grants personhood status to pre-viable embryos.

party's representative or estate to recover damages for lost future earnings, nor that the statute, on its face, prohibits recovery for pain and suffering. A.R.S. § 14-3110 ("[U]pon the death of the person injured, damages for pain and suffering of such injured person shall not be allowed."). The language highlighted by Plaintiffs simply means that if a plaintiff already has a valid cause of action and then dies, that cause of action can continue. For example, in *Quintero v. Rodgers*, 221 Ariz. 536, 540 ¶12, 212 P.3d 874, 878 (Ct. App. 2009), the court allowed an action under the survival statute to continue after the plaintiff died in an unrelated workplace accident. Here, the Plaintiffs do not allege that the embryo incurred any damages or economic losses prior to the abortion.

Plaintiffs fare no better as to punitive damages. They cite *Medasys Acquisition Corp. v. SDMS, P.C.*, 203 Ariz. 420, 55 P.3d 763 (2002), for the proposition that monetary damages are not required before punitive damages may be awarded. Pls.' Revised Mem. at 19–20. But the question in *Medasys* was whether the court should distinguish between compensatory damages and equitable relief as a basis for allowing punitive damages, and the court concluded that it should not. *Medasys*, 203 Ariz. at 424. Here, Plaintiffs have not brought a claim for equitable relief. In this context, Plaintiffs' failure to allege an injury compensable under Arizona's survival statute is fatal to their claim for punitive damages.

Finally, Plaintiffs' erroneous construction of "personhood" is irrelevant here. Even granting Plaintiffs' assumption that embryos "are 'persons' under the Arizona Constitution," Pls.' Revised Mem. at 20, Plaintiffs have failed to allege an injury compensable under the survival statute because they do not allege—nor could they—that the embryo suffered an injury prior to its death. This Court should therefore reject Plaintiffs' claim for compensatory and punitive damages under the survival statute.

C. Plaintiffs' Medical Expert Must Be Disqualified Because He Does Not Specialize in Abortion Care

Plaintiffs misconstrue Defendants' arguments about Dr. Hazelrigg's lack of qualification. Dr. Hazelrigg must be disqualified not because "he did not limit his obstetrics practice to abortion care" or obtain certification in complex family planning, Pls.' Revised Mem. at 22, but because Dr. Hazelrigg does not provide abortion care at all and therefore does not satisfy the requirements of A.R.S. § 12-2604(A). Given that Dr. Hazelrigg has no experience obtaining informed consent for abortion, he is not qualified to evaluate the adequacy of Defendants' informed consent practices. His testimony concerning the professional standard of care for providing abortions and obtaining a patient's informed consent to abortion must therefore be excluded.

Further, Plaintiffs are incorrect that "proof of the *standard of care* is not required is because [sic] the Statute mandates both the content of the information and the manner of delivering it." Pls.' Revised Mem. at 22. Many provisions of the Act set forth *categories* of information that an abortion provider must deliver, such as "[t]he nature of the proposed procedure or treatment," A.R.S. § 36-2153(A)(1)(b); "[t]he immediate and long-term medical risks associated with the procedure that a reasonable patient would consider material to the decision of whether or not to undergo the abortion," A.R.S. § 36-2153(A)(1)(c); and "[a]lternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion," A.R.S. § 36-2153(A)(1)(d). Abortion providers must determine what specific information to provide with respect to each statutory category based on the professional standard of care. Plaintiffs rely on Dr. Hazelrigg's testimony to argue that the information provided by Defendants was

inadequate, *see, e.g.*, Pls. Revised Mem. at 11, but Dr. Hazelrigg is not qualified to offer an opinion on this topic.

D. Plaintiffs Failed to Proffer Required Expert Testimony on Causation

The Medical Malpractice Act ("MMA") generally applies to any cause of action for injury or death against a licensed health care provider, including claims based on negligence, misconduct, errors or omissions, or breach of contract in the rendering of health care. A.R.S. §§ 12-561–12-573. The only exception to this rule is for battery claims. *See, e.g., Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 309 ¶9, 70 P.3d 435, 439 (2003); A.R.S. § 12-562.[7]

Plaintiffs do not dispute that a party alleging lack of informed consent in a medical malpractice action for wrongful death or survivorship must show causation. Nor could they dispute this, as the case law is overwhelming on this point. *Barrett v. Harris*, 207 Ariz. 374, 378 ¶ 10, 86 P.3d 954, 958 (Ct. App. 2004); *see also Shetter v. Rochelle,* 2 Ariz. App. 358, 367, 409 P.2d 74, 83 (1965) (finding that "[t]he fact that the plaintiff proceeded to have this operation upon her other eye by another surgeon, presumably after she was fully informed of the inherent risks to this operation, is some evidence that disclosure by the defendant of inherent risks would not have deterred her from having the earlier operation."). Moreover, the MMA is clear on this point. A.R.S. § 12-563 ("Both of the following shall be necessary elements of proof that injury resulted from the failure of a health care provider to follow the accepted standard of care: 1. The health care provider failed to exercise that degree of

[7] In *Duncan*, the court found that the MMA, on its face, prohibited patients from suing licensed health care providers for assault and battery. 205 Ariz. at 313, ¶27. The plaintiff argued that the MMA violated article 18, § 6, of the Arizona Constitution, which states the "right of action to recover damages for injuries shall never be abrogated..." *Id.* The court concluded that claims for true battery, where a doctor treats a patient without any consent whatsoever, were extinguished by the MMA improperly and thus held that part of the act unconstitutional. *Id.* at 314, ¶33. However, it distinguished claims based on lack of *informed* consent, holding that the MMA permissibly subsumed them. *Id.*

care, skill and learning expected of a reasonable, prudent health care provider in the profession or class to which he belongs within the state acting in the same or similar circumstances. 2. Such failure was a proximate cause of the injury."). Even negligence per se cases require causation. *See* Defs.' Mem. at p. 14–15 (citing *Motors Ins. Corp. v. Rhoton*, 72 Ariz. 416, 421, 236 P.2d 739, 742 (1951) (finding failure to conform to the statute is not in and of itself an act of actionable negligence, "but could only be an act of actionable negligence if in fact it proximately caused or contributed to the accident and resulting injuries for which damages are sought.")).

Recognizing the deficiencies in their proof, Plaintiffs now argue that they are *not bringing a negligence-based medical malpractice claim*, but rather, a medical battery claim outside of the MMA. As a result, they argue that they need not prove causation. Pls. Revised Mem. at 21–22. It is now more apparent than ever that Plaintiffs' claims must be dismissed.

Plaintiffs cannot bring a medical battery action for the facts alleged in this case because medical battery is not an available claim when the issue is whether a patient had *informed consent*, as opposed to any consent at all. *Duncan*, 205 Ariz. at 310 ¶13. In *Duncan*, the Arizona Supreme Court was clear that medical battery is only available when a plaintiff can prove that a physician performed a procedure absent any consent whatsoever or in willful disregard of the patient's limited or conditional consent. *Id.* at 311 ¶18. "[C]laims involving lack of consent, i.e., the doctor's failure to operate within the limits of the patient's consent, may be brought as battery actions. In contrast, true 'informed consent' claims, i.e., those involving the doctor's obligation to provide information, must be brought as negligence actions." *Id.* at 310 ¶13; *c.f. Carter v. Pain Ctr. of Ariz., P.C.*, 239 Ariz. 164, 165 ¶ 1, 367 P.3d 68, 69 (App. 2016), *as corrected* May 10, 2016. Here, the Act is an "informed

consent" statute. *See* A.R.S. § 36-2153(A) ("An abortion shall not be performed or induced without the voluntary and *informed consent* of the woman on whom the abortion is to be performed . . . consent to an abortion is voluntary and *informed* only if all of the following are true. . .") (emphasis added). Beyond the plain language of the Act, it is clear this case is about whether Defendants met their obligations "to provide information" and therefore the issue in this case must treated as a question of whether Defendants engaged in medical negligence and not medical battery. *Duncan*, 205 Ariz. at 310 ¶ 13; *see* A.R.S. § 12-561.

Plaintiffs argue that, despite undisputed evidence that the Patient consented to the abortion—including the Patient's own testimony and signed consent forms, Defs.' SOF ¶ 21; *see* Pls.' Separate Statement of Facts (July 11, 2022), Ex. 2 (GV 001 and 002)—Defendants engaged in battery. They contend that any violation of the Act completely nullifies the Patient's consent. Pls.' Revised Mem. at 21. But the plain language of the Act refutes this argument. It states that "consent to an abortion is voluntary and informed only if" the Act's requirements are satisfied, and not that consent to an abortion occurs only if the Act's requirements are satisfied. A.R.S. § 36-2153. Beyond distinguishing between informed consent and consent per se in the opening section, the Act focuses on *informed* consent throughout its text. *See* A.R.S. § 36-2153(A); *See* A.R.S. § 36-2153(K)(1); (L); (D)(4).[8]

Even if this were not clearly a case about "informed" consent, "[t]o be liable for medical battery, a defendant health care provider must have done two things: first, the health care provider must have intentionally made physical contact with the patient and, second,

[8] Strangely, Plaintiffs even want a finding of fact that A.R.S. § 36-2153 defines "informed consent" rather than consent per se—a finding Defendants do not dispute. *See* Pls.' Revised Mem. at 4.

that physical contact must have been deliberately against the patient's will or substantially at variance with the consent given." Medical battery, 8 American Law of Torts § 26:17; *see also Duncan*, 205 Ariz. at 313 ¶ 28 (citing *Mills v. Rogers*, 457 U.S. 291, 295 n. 4, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982) ("Under the common law of torts, the right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician.")). Here, the Patient had a medication abortion, in which she self-administered the necessary medications. Defendants had no physical contact with the Patient that was against her will. Plaintiffs now disavow any negligence theory they previously asserted to support their wrongful death and survivorship claims. Pls.' Revised Mem. at 21, ln. 20–21 ("But, Plaintiffs' common law claim is for medical battery not negligence"). The only conclusion this Court can make is that Plaintiffs have explicitly waived any claims under the wrongful death and survivorship statutes based on a negligence theory. Accordingly, the Court must grant Defendants summary judgment on the wrongful death and survivorship claims because there is no viable theory left in the case to support them.

Even if the Court were to ignore these statements made more than three years into this litigation—something Defendants urge the Court not to do—Plaintiffs' claims would still fail because courts have required plaintiffs who wrongly called their claim a "battery" claim to provide expert testimony on proximate cause. *Gorney v. Meaney*, 214 Ariz. 226, 228 ¶ 2, 231 ¶ 16, 150 P.3d 799, 801, 804 (Ct. App. 2007) (finding plaintiff needed expert causation testimony and ignoring the fact that plaintiff incorrectly labeled the claim as a battery when it was really about informed consent and therefore treated the claim as negligence on appeal.) Therefore, proximate cause is a necessary element, which Plaintiffs have failed to satisfy.

III. Plaintiffs Are Not Entitled to Partial Summary Judgment on Their Ten Proposed Findings of Fact and Conclusions of Law

A. Many of the Proposed Findings and Conclusions Are Vague and Overbroad

Plaintiffs' proposed findings of fact and conclusions of law are random statements taken out of context from the Court's summary judgment decision on an earlier version of Plaintiffs' complaint. Many of these statements are at such a high level of generality that they would contribute little or nothing to the ultimate resolution of the case. For example, Plaintiffs ask the Court to find that "[t]he Statute is plain and unambiguous." Pls.' Revised Mem. at 4. But they do not specify "plain and unambiguous" as to what point. As stated, the proposed finding is vague and overbroad. Defendants maintain that the Act is plain and unambiguous insofar as it creates a private right of action only for the three categories of people specified in A.R.S. § 36-2153(K), and Plaintiffs take a contrary position. *Compare* Defs.' MSJ at 5-6, *with* Pls.' Revised Mem. at 15–17. Similarly, Defendants maintain that the Act plainly and unambiguously requires that a claimant prove proximate cause to recover damages for psychological, emotional, and physical injuries, and Plaintiffs take a contrary position. *See supra* at 9–10. Likewise, Defendants maintain that the Act plainly and unambiguously sets forth the requirements for informed consent rather than consent per se, and Plaintiffs take a contrary position. *See supra* at 16 at 10–21. The proposed finding would not resolve these disputes.

Further, Plaintiffs ask the Court to find that "[t]he Statute must be applied as written," Pls.' Revised Mem. at 4, but such a finding would do little to resolve the parties' disputes concerning the meaning of the Act's text. Likewise, Plaintiffs ask the Court to find that "[a]ny abortion performed without valid consent is a violation of the Statute," and that

"M.S.V.'s consent was invalid." Pls.' Revised Mem. at 4–5. But they do not define what "valid" means in this context, making the proposed findings vague and unhelpful.

In addition, Plaintiffs ask the Court to find that A.R.S. § 36-2153(K)(2) "entitles a father to sue for statutory damages." Pls.' Revised Mem. at 5. This proposed finding is overbroad. The Act creates a private right of action for a putative father only if he was married to the abortion patient at the time of the abortion and the pregnancy did not result from his criminal conduct. *See* A.R.S. § 36-2153(K)(2).

B. Some of the Proposed Findings and Conclusions Turn on Disputed Issues of Fact

Plaintiffs ask the Court to find that "[t]he abortion violated the Statute," Pls.' Revised Mem. at 5, based on the Court's previous summary judgment order, in which the Court was required to view all evidence in a light most favorable to Plaintiffs—who were non-moving parties—and draw all reasonable inferences in Plaintiffs' favor. Order Denying Mot. for Summ. J. (Nov. 10, 2022) ("MSJ 1 Order") at 2. There, the Court noted two factual issues that precluded summary judgment for Defendants. First, it appeared that no physician had referred the Patient to Dr. Goodrick, who prescribed the abortion medications to the Patient, so the requirements of A.R.S. § 36-2153(A)(1) could not have been satisfied. MSJ 1 Order at 7. But subsequent, undisputed testimony establishes that it is common practice in Arizona for physicians working at the same clinic to refer patients to one another. *See* Tr. of Dep. of Paul Isaacson, M.D. ("Isaacson Tr.") (appended to Aff. of Tom Slutes (Second) as Ex. E) at 14:8-13; 15:11-16:1. Thus, based on prevailing professional norms, Arizona abortion providers would understand Dr. Holmes to be the "referring physician" for purposes of the Patient's abortion. *Id.* at 14:14-17; 14:24-15:3.

Second, the Court noted that no evidence conclusively established that Dr. Holmes informed the Patient of the existence of a website maintained by the Arizona Department of Health Services or offered to give the Patient a printed copy of the website's information, as required by A.R.S. § 36-2153(A)(2)(f)-(g). *See* MSJ 1 Order at 7 (citing "noncompliance facts #10 and #11" in Pls.' Resp. to Defs.' Mot. for Summ. J. at 6 nn. 13-14). It concluded that "a reasonable jury could find that [the Patient] was not provided informed consent." *Id.* But a reasonable jury could also make a contrary finding based on Dr. Holmes' testimony that she answers all of a patient's questions and frequently "elaborate[s]" on each point in the state-mandated script, Tr. of Dep. of Jessica Holmes, M.D. (May 17, 2022) ("Holmes Tr.") at 66:14–20; 72:17–73:14 (appended to Pls.' Separate Statement of Facts (July 11, 2022) as Ex. 7). Notably, the Patient testified that she couldn't remember all of the specifics of her informed consent visit with Dr. Holmes, Patient Tr. at 55, and she couldn't remember if Dr. Holmes told her about the website, *id.* at 59, but "[she] didn't feel like [she] left there with any questions at all," *id.* at 56. Plaintiffs cite no conclusive evidence that Dr. Holmes failed to inform the Patient about the website; they can only cite an absence of documentation.

Further, this Court may not enter proposed finding #10. First, as described above, Plaintiffs have no viable tort claims in this case. *See supra* at 14–17. They are prohibited from advancing a battery claim and argue they are not bringing negligence claims. Therefore, a finding that this statute sets the standard in tort as well as for statutory claims is not necessary for a resolution of Plaintiffs' claims in this case. Second, even if Plaintiffs were asserting negligence, there is an issue of fact preventing the Court from ruling in Plaintiffs' favor.

If Plaintiffs were asserting negligence, they would be arguing negligence per se—that violating a statute, without further inquiry into the circumstances or reasonableness, is sufficient to create liability. *Ibarra v. Gastelum*, 249 Ariz. 493, 495 ¶ 7, 471 P.3d 1028, 1030 (Ct. App. 2020) (citing *Deering v. Carter*, 92 Ariz. 329, 333, 376 P.2d 857 (1962)). But before negligence per se can be used, a court must decide if a plaintiff is a member of the category of people the statute seeks to protect. *Id.* The Act explicitly does not protect "the father of the unborn child if the father was married to the mother at the time she received the abortion" and "the pregnancy resulted from the plaintiff's criminal conduct." A.R.S. § 36-2153(K)(2).[9]

In dispute is whether the pregnancy is the result of criminal conduct. Defendants have offered the opinion of associate professor and chair of the Department of Criminology and Justice at Loyola University New Orleans and the founder and director of the Gendered Violence Research Project at Loyola University to aid the finder of fact as to whether the pregnancy resulted from Mr. Villegas' criminal conduct. Defs.' Second SOF 22–23. While obviously, Dr. Rae Taylor will not be testifying as to the ultimate fact of whether Mario Villegas' criminal conduct precludes his recovery in this case, she will be offering opinions on how the evidence in this case supports the finding that coercive control and reproductive coercion led to the pregnancy at issue; that lying about one's ability to reproduce is a form of reproductive coercion; that a victim of coercive control is more likely to be susceptible to reproductive coercion; and that this lawsuit is consistent with continued coercive control asserted to this day by Mario Villegas over the patient. *Id.* 24–27. Each of these opinions

[9] A.R.S. § 13-1401(A)(7)(c) provides that a sexual act is without consent when the "victim is intentionally deceived as to the nature of the act."

will help the finder of fact resolve the ultimate question. Her report also compiles a great deal of the testimony from the Patient relating to this criminality with deposition citations clearly establishing an issue of fact here.

IV. Plaintiffs Are Not Entitled to a Finding That the Arizona Constitution's Due Process Clause Treats Pre-Viable Embryos as Persons

Whether the Arizona Constitution's Due Process Clause, Ariz. Const. art. 2, § 4, treats pre-viable embryos as persons is not relevant to the issues presented in this case. This lawsuit concerns whether Plaintiffs are entitled to an award of civil damages based on certain statutory causes of action. When enacting those statutes, the Arizona Legislature was free to define the class of affected "persons" more broadly or narrowly than the persons protected by the Due Process Clause. Notably, when determining whether viable fetuses and pre-viable embryos constitute persons for purposes of the wrongful death statute, neither the Arizona Supreme Court not the Arizona Court of Appeals considered whether they constitute persons for purposes of the Due Process Clause. *See Summerfield*, 144 Ariz. at 479; *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 391 ¶ 21, 121 P.3d 1256, 1261 (Ct. App. 2005). Thus, the constitutional question is not dispositive of the statutory interpretation questions, and it is beyond the scope of this case.

CONCLUSION

For the reasons set forth above and in Defendants' opening brief, the Court should grant Defendants' motion for summary judgment and deny Plaintiffs' cross-motion for summary judgment.

DATED this 30th day of November, 2023.

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