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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LAURA OWENS,

Plaintiff,

Vs.

GREGORY GILLESPIE,

Defendant.

Case No.: CV2021-052893

MOTION TO DISMISS/MOTION FOR JUDGMENT ON PLEADINGS OF PLAINTIFF'S ABORTION COERCION CLAIM

(Assigned to the Hon. Alison Bachus)

Defendant, GREGORY GILLESPIE, by and through undersigned counsel, hereby respectfully moves to dismiss the allegation of "abortion coercion" contained in Plaintiff's Complaint pursuant to 12(b)(6) and 12(b)(7), and as a Motion for Judgment on the Pleadings pursuant to 12(c), *Arizona Rules of Civil Procedure* (A.R.C.P.). This Court denied a prior Motion to Dismiss on December 14, 2021, for a failure by Defendant to consult with Plaintiff pursuant to Rule 12(j) and to allege Plaintiff's Complaint did not contain facts warranting relief under any interpretation. This current Motion differs significantly from the previous, as it is confined to a particular statute cited to by Plaintiff in her Complaint and contains allegations that the court must adjudicate pursuant to A.R.C.P. 12(b)(6), and (7). Attached to this Motion

is a Good Faith Consultation Certificate as required by Rules 7.1(h) and 12(j). As and for his Motion, Mr. Gillespie states and alleges as follows:

ARGUMENT

Plaintiff alleges three (3) counts for relief in her Complaint: (1) A.R.S. § 13-3601 (which she voluntarily dismissed upon learning that Title 13 does not create civil causes of action); (2) A.R.S. § 36-2153 (abortion conducted without informed consent); and (3) the tort of intentional infliction of emotional distress.

Plaintiff's claim for relief under A.R.S. § 36-2153 fails because the statute does not create a cause of action for any of Defendant's conduct alleged in the Complaint. Moreover, to the extent the statute creates a cause of action, such action may only be brought against a person who conducts an abortion without informed consent (which the statute defines precisely and at great length in a manner unrelated to any of Defendant's alleged conduct). No such person is joined in this action, nor does Plaintiff allege that any person other than herself performed or induced an abortion as defined in the statute.

I. Plaintiff's Complaint fails to state a claim for which relief can be granted.

"Abortion coercion" claim

Statutory language

Plaintiff alleges that Defendant has violated A.R.S. § 36-2153(G). This subsection states, in its first sentence, "A person shall not intimidate or coerce in any way any person to obtain an abortion." This provision does not contain any further explanation of what "intimidate or coerce in any way" means in this context, *nor* does it state that a person who does those things is liable for damages. It does not on its face create a cause of action for

damages against Defendant. The remainder of subsection G goes on to state that a parent cannot coerce a minor to obtain an abortion, then prescribes certain remedies for a minor whose parents deny her financial support due to the minor's refusal to have an abortion performed. Again, nothing in subsection G or the statute defines intimidation or coercion, nor does any part of the statute expressly state a cause of action for intimidation or coercion.

In matters of statutory interpretation, the court must read the entire statute and interpret each term within the context of its accompanying provisions.[1] When a statute expressly lists things of a class, unlisted members or objects of the same class must be excluded absent language to the contrary (e.g., "including but not limited to").[2]

In § 36-2153, there are several such lists. The statute lists information that a physician who is to perform an abortion must provide to the woman receiving the abortion, orally and in person at least 24 hours before the procedure. § 36-2153(A)(1)(a)-(g). The statute lists additional information that must be given, orally and in person at least 24 hours before the procedure, by the physician or a qualified professional to whom the responsibility has been delegated. *Id*. at § (A)(2)(a)-(h). The statute then lists other requirements for receiving and documenting the patient's informed consent, including information about the drug mifepristone and the medical indications supporting an emergency procedure (if applicable). *Id*. at § (B)-(C). Then, the statute instructs the department of health services to establish and maintain a website with an enumerated list of information to be kept and made available. *Id*. at § (D)(1)-(8). Later, the statute identifies people who may file a civil action under the statute and the

[1] *State v. Gaynor-Fonte*, 211 Ariz. 516, 518 (Ariz. 2005).
[2] *Southwestern Iron and Steel Indus., Inc v. State*, 123 Ariz. 78, 79 (1979) (adopting the statutory principle of Expressio unius est exclusio alterius).

available relief for damages resulting from a violation of the statute, again expressly stating that the claim is based on failure to obtain informed consent before performing an abortion. *Id*. at (K)(1)-(3) and (L)(1)-(3).

The statute does not create a cause of action against a person who did not perform an abortion without informed consent. A.R.S. § 36-2153 does create a cause of action under subsection K, specifically for a woman, the father of the unborn child, or a maternal grandparent to recover against a physician who performed an abortion without informed consent, as defined by subsection A (detailed above). Subsection K provides:

> "K. In addition to other remedies available under the common or statutory law of this state, any of the following may file a civil action to obtain appropriate relief for a violation of this section: 1. A woman on whom an abortion has been performed without her informed consent as required by this section."

Two other statutes in Title 36, Chapter 20 impose other requirements relating to informed consent, all of which are acts and conditions required of the provider. *See* A.R.S. §§ 36-2156 and 36-2158. In fact, every statute in the chapter describes requirements for medical providers—not private citizens.

Statutory interpretation

The plain language of the statute limits the cause of action to the conduct the statute requires of medical providers conducting abortion procedures. The only express claims it creates are for the woman, the father, or a maternal grandparent to sue the provider who performed an abortion without informed consent. Every cognizable claim under the operative sections of the statute require that an abortion was conducted without informed consent, and the duty to obtain and keep record of informed consent rests squarely on the physician. The

statute cannot be reasonably read in any way except that relief must be sought from the physician who performed the abortion. Because the cause of action arises from an abortion conducted without informed consent, and the statute's definition of informed consent refers entirely to acts the provider must undertake, there is simply no cause against a private citizen unless they performed an abortion procedure (an act that is prohibited by A.R.S. § 36-2155).

The remedy, if there is one, cannot come from Defendant because he did not perform or induce an abortion without informed consent. He cannot do so, nor does the Complaint allege that he did. Moreover, he has no duty to engage in any of the acts required by the statute (or any other statute in Title 36, Chapter 20). The Complaint asserts that Plaintiff obtained "abortion pills" (Complaint at 28, ¶ 16), administered the first pill not in Defendant's presence (¶ 18), administered the second pill a day later outside of Defendant's presence (¶ 21), administered the second pill again two days after that outside of Defendant's presence (Complaint at 29, ¶ 24), administered the first pill again four days after that outside of Defendant's presence (Complaint at 30, ¶ 36), and finally administered the second pill for a third time (the only relevant act in Defendant's presence) another day after that (¶ 40). Plaintiff alleges in the Complaint that she undertook at least five affirmative acts inducing an abortion outside of Defendant's presence and another affirmative act in his presence but does not allege that Defendant performed or induced an abortion. None of the conduct alleged against Defendant constitutes performing or inducing an abortion, nor does the Complaint allege Defendant had a duty or failed to comply with the statue's informed consent requirements.

Therefore, even accepting all material facts pled by Plaintiff as true for purposes of adjudicating the pleadings, she "would not be entitled to relief under any interpretation of the

facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 (1998). This is because the statute simply does not contemplate the relief she is requesting.

Intimidation or coercion

Assuming, *arguendo*, that the statute creates an independent cause of action in the absence of a defendant performing an abortion without informed consent, the only remotely cognizable claim is that a person's intimidation or coercion forced someone to perform or induce an abortion. As discussed in the previous section, Plaintiff undertook all of the affirmative acts that she alleges resulted in the termination of her pregnancy and did so almost entirely outside of Defendant's presence. Her Complaint does not state that Defendant coerced her, but rather that she terminated the pregnancy "for the sake of a relationship with Defendant" (Complaint at 30, ¶¶ 42 and 46). Therefore, taking the facts alleged in the Complaint as true, Plaintiff herself asserts that she chose to terminate the pregnancy based on the belief that she could continue to have a relationship with Defendant. In the light most favorable to her, it could be surmised that Plaintiff means to claim that she relied on promises from Defendant; accordingly, the question is whether promises qualify as intimidation or coercion in this context.

Title 36 does not define intimidation or coercion, but the terms are used in other statutes with specific meanings. A.R.S. § 13-1202, a criminal statute, defines intimidation as intimidating, by words or conduct, to injure someone or cause serious damage to their property, to cause serious public inconvenience such as evacuation of a building, or to injure or damage the property of another person to assist in a criminal street gang, syndicate, or racketeering enterprise. A.R.S. § 13-1307, the criminal sex trafficking statute, defines coercion

as threatening to abuse the law, making a passport or other government identification inaccessible to its owner, extortion, causing or threatening financial harm, or facilitating or controlling a person's access to a controlled substance. The Complaint does not allege that Defendant did any of these things.

Defendant cannot find any legal support for Plaintiff's position that offering to remain in a relationship with someone if they terminate their pregnancy is intimidating or coercive. The acts she alleges—that Defendant promised he would work toward a marriage and eventually have a child with her (Complaint at 28, ¶ 13), attend an event with her (*Id*. at 29, ¶ 29), wanted to start a family with her (*Id*.), wanted to meet her father (*Id*.), "support her after this" and "begin their relationship" (¶ 32)—are not even remotely of the kind of words or conduct that Arizona law elsewhere defines as intimidation or coercion. The only acts in the Complaint that might come close are the alleged threats to "go public with Plaintiff's abortion" to damage her reputation (¶ 44), but that is alleged to have occurred after Plaintiff's actions to abort the pregnancy and is therefore temporally excluded. Again, assuming all the facts alleged in the Complaint are true, there is no conceivable claim for which relief can be granted.

II. Plaintiff failed to join a necessary party to recover for an abortion without informed consent.

Because Plaintiff's A.R.S. § 36-2153 claim can only be remedied through a cause of action against the physician who performed the abortion without her "informed consent"—or is at least predicated on the requirement that an abortion without informed consent actually happened—Plaintiff has failed to join a necessary party. A.R.S. § 36-2153 imposes an affirmative duty on the physician performing the abortion to obtain the qualifying individual's informed consent. Under Rule 19(a)(1)(A), the physician who performed the abortion on

Plaintiff must be joined because the court cannot accord complete relief—or any relief for that matter—among the existing parties.

Even if Defendant's actions did create an actionable claim for an abortion without informed consent, the Complaint must necessarily be against both the Defendant and whoever "performed or induced" the abortion. The provider who conducted the procedure or, as here, authorized Plaintiff's use of abortion-inducing medication has the duty to receive and document informed consent. If Plaintiff acquired the medications—which she administered six times—without consulting a medical provider, then there is no intervening party who could have received informed consent. Paradoxically, the only person who could have ensured informed consent would then have been Plaintiff herself. Because that would clearly not be a cognizable claim, the Complaint would have to be dismissed outright. In the alternative, if Plaintiff did receive authorization from a physician and now alleges the abortion was performed or induced without her informed consent, then relief can only be afforded if that physician is joined as a party. After all, their intervening breach of duty proximately caused the alleged harm. The physician, if there is one, must be at least partially liable under the statute and share in the attribution of fault or indemnify Defendant. Plaintiff has failed to join the physician as a necessary party to the litigation, making it impossible for this court to adjudicate the A.R.S. § 36-2153 claim.

III. A.R.S. § 36-2153(G) is unconstitutional.

The statute here cited in support of Plaintiff's Complaint is unconstitutional as applied to Defendant. If the statute creates the cause of action Plaintiff alleges, then it acts as an impermissible content-based prior restraint on speech in violation of the First Amendment to

the United States Constitution. Furthermore, the statute violates the due process clause of the Fourteenth Amendment because it is impossible to determine what acts a person must not do to avoid liability.

A. A.R.S. § 36-2153(G) violates the First Amendment.

a. A.R.S. § 36-2153(G) acts as a prior restraint on free speech.

The First Amendment guarantees citizen's the right to freedom of speech and, through the Fourteenth Amendment, this right is protected against state action.[3] A statute acts as a prior restraint on freedom of speech when it suppresses "the precise freedom which the First Amendment sought to protect against abridgment."[4] The Supreme Court of the United States has held there is a "heavy presumption" against the constitutionality of prior restraints on expression.[5] Reasonable restrictions on "time, place, or manner" of protected speech are not prior restraints.[6]

Here, A.R.S. § 36-2153(G) seeks to prevent individuals from expressing their opinion or belief about abortion with no regard to time, place, or manner. The relevant sentence of the statute, which prohibits a person from certain speech at any time and in front of any person, acts as a prior restraint on speech that the Constitution would otherwise protect. Discussing abortion law in front of a pregnant woman could be construed to be prohibited under the statute. Discussing abortion procedures or the risks of full-term pregnancy at a medical symposium could be prohibited. Expressing one's personal opinion about the morality of abortion in a private conversation—e.g., "I believe that bearing an unwanted child who the

[3] *Saia v. People of State of New York*, 344 U.S. 558, 559-60 (1948).
[4] *Carroll v. President and Comm'rs of Princess Anne,* 393 U.S. 175, 181, (1968).
[5] *Organization for a* Better *Austin v. Keefe,* 402 U.S. 415, 419 (1971) (quoting *Carroll v. President and Comm'rs of Princess Anne,* 393 U.S. 175, 181, (1968)).
[6] 16B C.J.S. *Constitutional Law* § 937 (2022).

parents cannot support is unethical"—could be construed to violate the statute. All that would be required is that the speech "intimidates" or "coerces" a person "in any way" to receive an abortion. Because those terms are so impenetrably broad—discussed further below—the only guaranteed way to avoid potential liability is to remain silent. That is the textbook definition of prior restraint and plainly violates the Constitution.

A person's right to express their views without fear of liability is *precisely* the freedom the First Amendment is designed to protect.[7] The Supreme Court held this right can only be restricted in a few, limited circumstances, such as when the words themselves are "inherently likely to provoke a violent reaction."[8] Two individual parties privately discussing how to proceed with a pregnancy cannot be prohibited in the manner the statute purports.

b. A.R.S. § 36-2153(G) is void for vagueness.[9]

A statute is void for vagueness under the First and Fifth Amendments when "the person of ordinary intelligence" is not given "a reasonable opportunity to know what is prohibited" and where application of the law will lead to "arbitrary and discriminatory enforcement."[10] Here, the statute states "*A person shall not* ***intimidate or coerce*** *in* ***any way any person*** *to*

[7] *U.S. v. Stevens*, 559 U.S. 460, 461 (2010) ("the First Amendment's free speech guarantee does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits"); *see also Virginia v. Black*, 538 U.S. 343, 348 (2003) "(the hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." (Quoting *Abrams v. United States,* 250 U.S. 616, 630, (1919) (Holmes, J., dissenting)).

[8] *Cohen v. California,* 403 U.S. 15, 20 (1971).

[9] While the doctrine of vagueness is more commonly applied to criminal or penal statutes, it is also applicable when the statute affects the First Amendment. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("[W]here a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms'").

[10] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *see also Connally v. General Construction Co.*, 269 U.S. 385 (1926) (holding a criminal statute is vague when "men of common intelligence must guess as its meaning").

obtain an abortion."[11] (Emphasis added). The statute does not specify what it means to "intimidate or coerce" or what conduct constitutes "any way" of so doing. Although the statute's ostensible purpose is noble—no one should ever be intimidated or coerced into any significant act against their wishes—its mandate is impossible to elucidate.

Defendant's counsel does not routinely ask rhetorical questions in motions, but they seem warranted here. Does expressing a viewpoint about abortion without knowledge of being overheard count as "any way" of intimidating or coercing "any person"? Does it matter whether the person speaking has reason to know "any person" might find their opinion or actions intimidating or coercive? Would handling out pamphlets with information about the possible harm of teen pregnancy constitute intimidation? Does "any person" include someone who is not yet pregnant, or who the speaker does not know is pregnant, or someone who cannot become pregnant at all? Does an actual completed abortion procedure need to take place, or is the mere intimidating or coercive influence sufficiently actionable?

What if the "intimidation" or "coercion" pertains to a medically necessary procedure, such as a husband pleading with his wife to terminate a pregnancy that will likely kill her if carried to full term? An emotional plea between individuals in their private sphere surely cannot be what the statute hopes to enjoin. Can "a person" intimidate or coerce themselves to obtain an abortion? The statute certainly suggests it is possible with its amazingly broad sweep: it doesn't say "A person shall not intimidate … any *other* person …".

These questions do not have answers, and that is exactly why the statute must fail. If there is no way for a person to discern what speech or conduct is permitted, then the statute is

[11] A.R.S. § 36-2153(G).

unconstitutionally vague. A statute like this that has interpretations with no discernible standard of conduct is void for vagueness under the First Amendment.[12]

The legislative history is similarly ambiguous. Under a section entitled "Miscellaneous," the statute's sponsor states the statute, "Stipulates that a person, including a parent or guardian of a minor, shall not coerce in any way a person to obtain an abortion."[13] The legislative sessions following the statute's proposal are devoid of any discussion over the meaning of the provision, and the wording of subsection G remains the same in every iteration of the Bill. The term "abortion coercion" has never been used by Arizona courts to Defendant's knowledge, nor in the Ninth Circuit, or the Supreme Court of the United States.

Absent an ability to discern the meaning of the statute, individuals are not given a reasonable opportunity to conform their conduct to abide by the statute, and its enforcement is likely to be arbitrary and discriminatory.[14] A.R.S. § 36-2153(G) contravenes the rights of individuals to exercise their right to free speech without restrictions or any semblance of clarity as to what conduct the statute is seeking to deter. A.R.S. § 36-2153(G) is void for vagueness and unconstitutional.

c. A.R.S. § 36-2153(G) is overbroad under the First Amendment.

A statute is overbroad when "'a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'"[15]

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[12] *Connally v. General Construction Co.*, 269 U.S. 385 (1926).
[13] Arizona House Bill Summary, 2009 Reg. Sess. H.B. 2564.
[14] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).
[15] *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n. 6 (2008); *see also State v. Baldwin*, 184 Ariz. 267, 269 (1995) (quoting *State v. Jones*, 177 Ariz. 94, 99 (App.1993)) ("An overbroad statute is one designed to burden or punish activities which are not constitutionally protected, but ... includes within its scope activities which are protected by the First Amendment.")

A.R.S. § 36-2153(G) does not provide any clarity as to what conduct would constitute a violation nor does the statute define what constitutes as "intimidate or coerce." Therefore, it must be presumed that the statute applies to any speech related to abortion if the receiver subjectively believes it to be intimidating or coercive. Under this reading, any time a person references, speaks about, acknowledges, etc., abortion, the statute may be triggered. It may be assumed for the sake of the analysis that the "plainly legitimate sweep" of the statute would be physical or violent coercion to obtain an abortion—"terminate your pregnancy or else"—but the broad language surely encapsulates speech or behavior that is not criminal.

As such, there are a wide range of conversations that would be considered violative of the statute that are protected by the First Amendment. In particular, the statute could prohibit communication that occurs within the "zone of privacy" protected by the Fourteenth Amendment.[16] The Supreme Court held that there is a protected zone that encompasses the conduct of married and unmarried persons, particularly with decisions regarding family planning, as the "decision whether to bear or beget a child" is a fundamental right.[17] As such, the State action seeking to intervene in the right is subjected to strict scrutiny.[18] Given the overbreadth of the statute at issue, it can be presumed that it would fail to survive strict scrutiny.

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[16] *Griswold v. Connecticut*, 318 U.S. 479, 483 (1965) ("[t]he First Amendment has a penumbra where privacy is protected from governmental intrusion.")

[17] *Id.* at 485 (holding married couples have a right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

[18] *Griswold v. Connecticut*, 318 U.S. 479, 504 (White, J concurring). A statute survives strict scrutiny only when it is narrowly tailored to further a compelling governmental interest.

More generally, suppose an individual electronically posts a statement indicating they are pro-choice on social media, and someone who greatly respects their opinion reads the statement and feels pressure to abort their pregnancy unbeknownst to the speaker. Under the statute, any person who comes across the statement and finds it to be intimidating or coercive could assert that they are a victim of "abortion coercion." Without the ability to discern the meaning of the statute and exclude legitimate permissible conduct from its prohibition, the statute is void for overbreadth and unconstitutional.

WHEREFORE, Defendant hereby respectfully requests the following:

A. That this Court dismiss Plaintiff's Complaint with regards to the abortion coercion claim with prejudice pursuant to 12(b)(6) or 12(b)(7); in the alternative, that this Court dismiss Plaintiff's Complaint on the grounds that A.R.S. § 36-2153(G) is unconstitutional;

B. That this Court award Defendant his attorneys' fees and costs pursuant to A.R.S. §§ 12-341, 12-349; and

C. That this Court grant such other and further relief as deemed appropriate.

RESPECTFULLY SUBMITTED this 15th day of February 2022.

WOODNICK LAW, PLLC

Gregg R. Woodnick
Kaci Y. Bowman
Attorneys for Defendant

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ORIGINAL of the foregoing e-filed
This 15th day of February 2022, with
the Clerk of the Superior Court.

COPY of the foregoing document
e-mailed the same day to:

Honorable Alison Bachus
Maricopa County Superior Court

Laura Owens
[redacted]
Scottsdale, AZ [redacted]
[redacted]
Plaintiff Pro Per

By*:* */s/Sara Seeburg*

GOOD FAITH CONSULTATION CERTIFICATE

In conformance with Rules 7.1(h) and 12(j), *Arizona Rules of Civil Procedure*, counsel undersigned hereby certifies that he conferred in good faith with Plaintiff, Laura Owens, on February 3, 2022 regarding the Defendant's Motion to Dismiss dated 02/15/22.

WOODNICK LAW, PLLC

Gregg R. Woodnick
Kaci Y. Bowman
Attorneys for Defendant

VERIFICATION

GREGORY GILLESPIE, being first duly sworn upon his oath, deposes and says:

That he is the Respondent in the foregoing cause of action; that as such, he is authorized to make this Verification; that he has read the foregoing *Motion to Dismiss/Motion for Judgment on Pleadings of Plaintiff's Abortion Coercion Claim,* and knows the contents thereof to be true of his own knowledge, except as to those matters stated on information and belief, and as to such, he believes the same to be true.

DocuSigned by:
Greg Gillespie
F68541EEEBEC422...

GREGORY GILLESPIE

2/15/2022

Date