Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-052893 10/12/2022

HONORABLE ALISON BACHUS

CLERK OF THE COURT
C. Lett
Deputy

LAURA OWENS KYLE O'DWYER

v.

GREGORY GILLESPIE KACI YOUNG BOWMAN

GREGG R WOODNICK
MARKUS W RISINGER
COURT ADMIN-CIVIL-ARB DESK
JUDGE BACHUS

UNDER ADVISEMENT RULING

Pending before the Court is Defendant's Motion to Dismiss/Motion for Judgment on the Pleadings of Plaintiff's Abortion Coercion Claim, filed February 15, 2022. Following an extension of time for a response, the motion was fully briefed and oral argument occurred. Having considered the parties' filings, presentations at oral argument, and applicable law and rules, the Court enters the following order:

Plaintiff alleged in her Complaint that Defendant "employed false promises, and verbal and emotional abuse to coerce Plaintiff into getting an abortion."[1] Compl. at 2. In the instant Motion, Defendant moved to dismiss Plaintiff's claim regarding coercion of abortion under Rule 12(b)(6) and 12(b)(7) of the Arizona Rules of Civil Procedure. Defendant further moved for judgment on the pleadings as to the same claim under Rule 12(c). In so doing, Defendant challenged the constitutionality of the statute on which Plaintiff based her abortion coercion claim, the first sentence of A.R.S. § 36-2153(G) (hereinafter, "the statute"). Defendant served upon the

[1] At the time the pregnancy was terminated, *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) had not been decided.

Arizona Attorney General, the Speaker of the Arizona House of Representatives, and the President of the Arizona Senate, a Notice Pursuant to A.R.S. § 12-1841. Affidavits of service as to all three individuals were docketed. No representative from the Attorney General's Office, Arizona House of Representatives, or Arizona Senate sought to intervene, file briefs, or participate in these proceedings; indeed, A.R.S. § 12-1841 does not compel any of their participation. A.R.S. § 12-1841(D).

A motion to dismiss is not a procedure for resolving disputes about the facts or merits of a case. *Coleman v. City of Mesa,* 230 Ariz. 352, 363 (2012). A motion to dismiss requires a court to accept all material facts alleged by the nonmoving party as true [*Acker v. CSO Chevira,* 188 Ariz. 252, 255 (App. 1997) (citing *Lakin Cattle Co. v. Engelthaler,* 101 Ariz. 282, 284 (1966))], view those facts "in the light most favorable to the nonmoving party" [*Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 69, (App. 2014)], and "indulge [the nonmoving party] all reasonable inferences" that the pleaded facts permit [*Cullen v. Auto-Owners Ins. Co*., 218 Ariz. 417, 419 (2008)]. Therefore, in ruling on a motion to dismiss, the Court will "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen,* 218 Ariz. at 419. The Court may grant the motion only if the plaintiff is not entitled to relief "under any facts susceptible of proof in the statement of the claim." *ELM Ret. Ctr., LP v. Callaway,* 226 Ariz. 287, 289 (App. 2010) (quoting *Mohave Disposal, Inc. v. City of Kingman,* 186 Ariz. 343, 346 (1996)).

A motion for judgment on the pleadings, which is brought under Rule 12(c) of the Arizona Rules of Civil Procedure, tests the sufficiency of the complaint and should be granted if the complaint fails to state a claim for relief. *Emmett McLoughlin Realty, Inc. v. Pima Cty.*, 203 Ariz. 557, 558 (App. 2002); *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359 (App. 1999). "On a motion for judgment on the pleadings, all of the allegations of the opposing party's pleadings must be accepted as true and the moving party is entitled to judgment only if the position of the opposing party, as stated in its pleadings, clearly entitles the moving party to judgment." *Wenrich v. Household Fin. Corp.*, 5 Ariz. App. 335, 338 (1967). A motion for judgment on the pleadings is appropriately granted if the complaint fails to set forth a claim for which relief can be granted. *Save Our Valley Ass'n v. Ariz. Corp. Comm'n*, 216 Ariz. 216, 218 (App. 2007) (quoting *Giles*, 195 Ariz. at 359) (internal quotation marks omitted). In assessing the sufficiency of a claim, the Court applies Rule 8 of the Arizona Rules of Civil Procedure, which requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008). "Because Arizona courts evaluate a complaint's well-pled facts, mere conclusory statements are insufficient to state a claim upon which relief can be granted. The inclusion of conclusory statements does not invalidate a complaint, but a complaint that states only legal conclusions, without any supporting factual allegations, does not satisfy Arizona's notice pleading standard under Rule 8." *Id.* (citing *Long v. Ariz. Portland Cement*

Co., 89 Ariz. 366, 369 (1961)). The purpose of the notice pleading standard is to "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Mackey v. Spangler*, 81 Ariz. 113, 115 (1956).

In his Motion, Defendant contended that Plaintiff has failed to state a claim on the abortion coercion claim, which Plaintiff brought under A.R.S. § 36-2153. A.R.S. § 36-2153(G) states:

> A person shall not intimidate or coerce in any way any person to obtain an abortion. A parent, a guardian or any other person shall not coerce a minor to obtain an abortion. If a minor is denied financial support by the minor's parents, guardians or custodian due to the minor's refusal to have an abortion performed, the minor is deemed emancipated for the purposes of eligibility for public assistance benefits, except that the emancipated minor may not use these benefits to obtain an abortion.

Because Plaintiff was not a minor when she terminated her pregnancy, the operative sentence is the first one quoted above. That sentence makes it unlawful for anyone to "intimidate or coerce in any way any person to obtain an abortion." The statute does not define "intimidate" or "coerce"; the only definitions pertaining to A.R.S. § 36-2153 that are present in the statutory scheme are found in A.R.S. § 36-2151.

When a statute does not include definitions of terms, courts "look primarily to the language of the statute itself and give effect to the statutory terms in accordance with their commonly accepted meanings." *State v. Reynolds*, 170 Ariz. 233, 234 (1992). "In doing so, we apply a practical and commonsense construction." *State v. Jernigan*, 221 Ariz. 17, 19 (App. 2009) (citing *Douglass v. Gendron*, 199 Ariz. 593, 596 (App. 2001). "When a word is not defined in any statute, we generally 'refer to a widely used dictionary to determine its meaning.'" *Id.* (citing *Files v. Bernal*, 200 Ariz. 64, 66 (App. 2001)). The Merriam-Webster Dictionary defines "coerce" as: (1) "to compel an act or choice"; (2) "to achieve by force or threat"; and (3) "to restrain or dominate by force." *Coerce*, Merriam-Webster Dictionary (online ed.), http://www.merriam-webster.com/coerce (last visited Oct. 10, 2022). In turn, "compel" is defined as (1) "to drive or urge forcefully or irresistibly" and (2) "to cause to do or occur by overwhelming pressure." *Compel*, Merriam-Webster Dictionary (online ed.), http://www.merriam-webster.com/coerce (last visited Oct. 10, 2022); *but see* Black's Law Dictionary, 7th ed. (defining "coerce" as "[t]o compel by force or threat"). Assuming the truth of Plaintiff's well-pled allegations and indulging all reasonable inferences therefrom, the Court concludes that the Complaint could possibly state a claim upon which relief may be granted, as the alleged acts by Defendant could meet some definition of "coerce."

However, the Court's inquiry does not end there. In his Motion, Defendant further challenged the constitutionality of A.R.S. § 36-2153(G). Specifically, Defendant argued that the statute is (a) a prior restraint on free speech, (b) overbroad, and (c) void for vagueness.

Before addressing those arguments, the Court first recognizes "there is a strong presumption in favor of the constitutionality of a legislative enactment, and the party challenging its constitutionality bears the burden of proving that the statute infringes upon a constitutional guarantee or that it violates a constitutional principle." *State v. Book-Cellar, Inc.*, 139 Ariz. 525, 528 (App. 1984) (citing *State v. Yabe*, 114 Ariz. 89 (App. 1977)). "An act of the legislature is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional." *State v. Ramos*, 133 Ariz. 4, 6 (1982). Courts do not declare a statute unconstitutional unless they are "satisfied beyond a reasonable doubt that the act is in conflict with the federal or state constitutions." *Book-Cellar*, 139 Ariz. at 528 (citing *Chevron Chemical Co. v. Superior Court*, 131 Ariz. 431 (1982); *Litchfield Elementary Sch. Dist. v. Babbitt*, 125 Ariz. 215 (App. 1980)). "In interpreting a statute the courts should, if possible, give the statute a constitutional construction." *Id.* (citing *Mardian Constr. Co. v. Superior Court*, 113 Ariz. 489 (1976)). Indeed, it is the duty of the courts "to uphold statutes, if their language will permit, even though the statute may not be 'artfully drawn.'" *Id.* (quoting *State v. Grijalva*, 111 Ariz. 476, (1975), cert. denied, 423 U.S. 873. With these principles in mind, the Court turns to Defendant's arguments.

First, Defendant contends A.R.S. § 36-2153(G) constitutes a prior restraint on free speech. A state has the authority to enact laws to promote the health, safety, and general welfare of its people, but "the state's power is limited in the area of speech." *State v. Bauer*, 159 Ariz. 443, 449 (App. 1988). "[A] prior restraint stops one from speaking at all." *Id.* When analyzing a prior restraint, "the court has regard to substance and not to mere matters of form," and "in accordance with familiar principles, the statute must be tested by its operation and effect." *Id.* (quoting *Near v. Minnesota*, 283 U.S. 697, 708 (1931)). "Prior restraints on speech are the most serious and least tolerable infringement on First Amendment rights." *Nash v. Nash*, 232 Ariz. 473, 481 (App. 2013) (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)). "Although not all prior restraints are invalid, they come with a heavy presumption against constitutional validity." *Id.* at 481-82 (citing *Near*, 283 U.S. at 716; *State v. Book-Cellar, Inc.*, 139 Ariz. 525, 530 (App. 1984)). "[W]hen a state seeks to restrict speech based on its content, the usual presumption of constitutionality afforded legislative enactments is reversed." *State v. Evenson*, 201 Ariz. 209, 217 (App. 2001) (citing *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000)). The "presumption of invalidity can be overcome if the restriction ... serves a compelling governmental interest, is necessary to serve the asserted [compelling] interest, is precisely tailored to serve that interest, and is the least restrictive means readily available for that purpose." *Nash*, 232 Ariz. at 481-82 (quoting *Hobbs v.*

County of Westchester, 397 F.3d 133, 149 (2d Cir. 2005) (quotation omitted); *see Sable Commc'ns of Cal. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989) (protection of children's psychological well-being is compelling interest; regulation restraining indecent sexual expression may be upheld if narrowly tailored to serve that interest)).

In its research, the Court could locate no Arizona authority addressing the constitutionality of A.R.S. § 36-2153(G), or any authority outside of Arizona addressing a similar statute. The closest Arizona cases the Court could find dealt with the constitutionality of prohibitions on "harassment" in the context of criminal statutes. For example, in *State v. Brown*, the Court of Appeals upheld the constitutionality of A.R.S. § 13-2921. 207 Ariz. 231, 234 (App. 2004). The *Brown* court quoted federal case law that "harassment is not protected speech." *Id.* (quoting *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988)). The *Brown* court further underscored that A.R.S. § 13-2921 prohibited certain types of communication and contained a specific intent requirement. *See id.* No such restrictions or limitations are found in A.R.S. § 36-2153(G). While this Court certainly recognizes that "[r]esorts to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution," *Cantwell et al. v. Connecticut*, 310 U.S. 296, 310 (1940) (quoted by *State v. Starsky*, 106 Ariz. 329, 333 (1970)), A.R.S. § 36-2153(G) constitutes an impermissible prior restraint. The Court assumes *arguendo* that the statute serves a compelling interest in protecting the emotional and physical well-being of pregnant persons, and the statute is necessary to serve that interest. However, the wording of the statute is not precisely tailored to serve the interest of keeping pregnant persons free from coercion or intimidation. As noted *supra*, the statute contains no specific intent requirement. Although the plain meaning of "coerce" (according to one common dictionary) is to forcefully drive someone or to place overwhelming pressure on them, it is possible for someone to violate the statute by giving an impassioned, public speech on why someone ought to have an abortion, and a pregnant person then feels compelled to act. This is because "coerce" can mean "to compel an act or choice" and "compel" can mean "to drive or urge forcefully or irresistibly," and the statute bars a speaker from coercing "*any person in any way*." (Emphasis added.) Therefore, even if it were the speaker's intent to speak only in generalities, and not direct his/her speech at a particular pregnant person, the speaker would be in violation of the statute. Conversely, if one assumes the person giving that impassioned speech did have the intent to compel every pregnant person who was listening to have an abortion, that speaker would be in violation of the statute if they were successful in compelling a pregnant person to have an abortion. Such a result is impermissible, however, because to punish a person for making a public speech on the issue of abortion (either for or against) violates the First Amendment right to free speech.[2] Finally, the Court cannot

[2] The Court recognizes that Plaintiff has not alleged Defendant's speech was a speech in the proverbial town square. The Court further acknowledges that a jury could conclude Defendant used crude language,

conclude that the statute constitutes the least restrictive means for serving the compelling governmental interest. The Court is unable to devise a narrowing construction without effectively rewriting the statute, and the Court is aware of its limited role to interpret, not make, law. The Court is unwilling to insert words of limitation or clarification of the Court's own invention, because that would exceed the Court's authority. After applying *Nash* and other case law, the Court concludes that the first sentence of A.R.S. § 36-2153(G) is an impermissible prior restraint on speech.

In addition, Defendant argued A.R.S. § 36-2153(G) is overbroad and vague.[3] When considering vagueness and overbreadth challenges to a statute, courts are guided by "a strong presumption" that a statute is constitutional. *Brown*, 207 Ariz. at 236 (citing *State v. Kaiser*, 204 Ariz. 514 (App. 2003); *State v. Lefevre*, 193 Ariz. 385 (App. 1998); *State v. Ochoa*, 189 Ariz. 454 (App. 1997)). That presumption "requires the challenging party to establish beyond a reasonable doubt that the statute violates some provision of the constitution." *Id.* (quoting *Bird v. State*, 184 Ariz. 198, 203 (App. 1995)). "Although '[o]verbreadth and vagueness challenges often appear in tandem,' they are distinct concepts." *Id.* (quoting *State v. Kessler*, 199 Ariz. 83 (App. 2000)).

"'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.'" *State v. Jones*, 177 Ariz. 94, 99 (App. 1993), quoting John E. Nowak, et al., Constitutional Law, ch. 18, § III at 868 (2d ed. 1983); *see also Virginia v. Hicks*, 539 U.S. 113, 118-119 (2003). "A statute is unconstitutionally over broad when it prohibits *or deters* conduct protected by the First Amendment." *State v. Carrasco*, 201 Ariz. 220, 224 (App. 2001) (emphasis

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bullied Plaintiff, and misled Plaintiff about his intentions. But that does not change the statute's overbroad language, which encompasses protected speech.

[3] Defendant's standing to bring these constitutional challenges was not challenged by Plaintiff. The Court notes that Defendant has standing. Regarding overbreadth, Arizona courts "have previously held that even though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth of it is so drawn to sweep within its ambit protective speech or expression of other persons not before the Court." *Doran v. Salem Inn*, 422 U.S. 922, 932 (1975) (quoted by *State v. Jones*, 177 Ariz. 94, 99 (App. 1997)). Regarding vagueness, "*two* conditions must be met for a defendant *not* to have standing to assert a statute's vagueness with respect to its application to others—1) the statute must be readily subject to a narrowing construction, and 2) the statute must not deter legitimate expression." *State v. Jones*, 177 Ariz. 94, 98 (App. 1993) (italicization in original). The Court does not find the first sentence of A.R.S. § 36-2153(G) is readily subject to a narrowing construction, and the Court will not overstep its constitutional bounds. Finally, the Court recognizes that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974) (quoted by *State v. Ochoa*, 189 Ariz. 454, 460 (App. 1997)). Although Defendant arguably lacks standing because his conduct, as alleged in the Complaint, constitutes coercion, the Court cannot conclude that the statute "clearly applies" to Defendant. Defendant therefore has standing.

added); *State v. Brock*, 248 Ariz. 583, 588 (App. 2020). "'[C]ourts will invalidate a statute that reaches a substantial amount of constitutionally protected conduct,' even if it also has lawful applications." *Brock*, 248 Ariz. at 588 (quoting *State v. Boehler*, 228 Ariz. 335, 35 (App. 2011) (internal quotation omitted)). "Nonetheless, a statute is unconstitutionally overbroad only if 'its deterrent effect on legitimate expression [is] not only real, but substantial as well.'" *Id.* (quoting *Ochoa*, 189 Ariz. at 459 (internal quotation omitted)). The Court concludes that the first sentence of A.R.S. § 36-2153(G) is overbroad, as it reaches or deters a substantial amount of constitutionally protected speech. As discussed *supra*, the statute reaches speech that may not be intended to compel a particular person, as well as impassioned or forceful public discourse. Although the statute constitutionally prohibits certain unprotected speech, such as threats that coerce or intimidate a person to have an abortion, the statute impermissibly reaches protected speech. Thus, the first sentence of A.R.S. § 36-2153(G) is overbroad.

Defendant's other constitutional challenge is that the statute is vague. Per case law,

> [a] statute is unconstitutionally vague if it fails to give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" or if it allows for arbitrary and discriminatory enforcement by failing to provide an objective standard for those who are charged with enforcing or applying the law.

In re Maricopa County Juvenile Action No. JS-5209 & No. JS-4963, 143 Ariz. 178, 183 (App. 1984) (quoting *Grayned v. Rockford*, 408 U.S. 104, 108 (1972)). "A statute whose terms are vague and conclusory does not satisfy due process requirements." *Id.* "The purpose of the vagueness doctrine is to: 1) ensure fair notice of prohibited activity; 2) prevent arbitrary enforcement; and 3) avoid inhibiting free expression when such rights are implicated." *Jones*, 177 Ariz. at 97 (citing *State v. Western*, 168 Ariz. 169, 171, 812 P.2d 987, 989 (1991)). "Although due process requires fair notice, it 'requires neither perfect notice, absolute precision nor impossible standards. It requires only that the language of a statute convey a definite warning of the proscribed conduct.'" *State v. Coulter*, 236 Ariz. 270, 274 (App. 2014) (quoting *Bird v. State*, 184 Ariz. 198, 203 (App.1995)). "The fact that a legislative body could have crafted a more precise and clear statute does not mean the statute enacted is unconstitutionally vague." *Id.* (citing *U.S. v. Powell*, 423 U.S. 87, 94 (1975)). "A statute is not vague simply because it is broad or that there may be difficulty in deciding whether certain marginal conduct falls within the scope of the statute." *Id.* at 274-75 (citing *Parker v. Levy*, 417 U.S. 733, 757 (1974)). Here, the terms "coerce" and "intimidate" are not defined. While the Court has concerns there is subjectivity involved in determining whether the statute has been violated, the Court cannot conclude that the statute is facially vague, in light

of the above case law. The Court does not find that Defendant has met his burden to overcome the presumption of constitutionality with respect to vagueness.

Although the Court has found the first sentence of A.R.S. § 36-2153(G) constitutes an impermissible prior restraint and is overbroad, the Court finds the remainder of the statute is severable. An "entire statute should not be declared unconstitutional if the constitutional portions can be separated." *Book-Cellar*, 139 Ariz. at 533 (citing *Cohen v. State*, 121 Ariz. 6 (1978)). "The test for severability is whether the elimination of a part of the statute will result in the remaining sections making little sense in expressing the intent of the legislature." *Id.* (citing *Barrows v. Garvey*, 67 Ariz. 202 (1948)). The Court finds the first sentence of A.R.S. § 36-2153(G) may be excised, for purposes of disposing of the motion before it, without impact on any remaining section of the statute. No party has contended the sentence is unable to be excised. Thus, this ruling has no impact on the remainder of A.R.S. § 36-2153, and indeed, no party has requested injunctive relief as to the first sentence of A.R.S. § 36-2153(G). This ruling is therefore limited to granting dismissal of one count of Plaintiff's Complaint and goes no further.

Finally, Defendant moved to dismiss on the basis that A.R.S. § 36-2153(G) did not create a private right of action, and for failure to join an indispensable party under Rule 12(c)(7). Mindful that it must consider statutes "as a whole and giv[e] harmonious effect to all sections," the Court disagrees with both arguments. *State v. Jernigan*, 221 Ariz. at 20 (citing *Douglass*, 199 Ariz. at 596). First, with respect to the private right of action argument, A.R.S. § 36-2153(K) provides that a civil action may be filed "to obtain appropriate relief for a violation of this section." "Section" does not refer only to subsection K; rather, it refers to the entire "section" of Title 36, which is section 2153. Second, Defendant contended Plaintiff failed join an indispensable party (i.e., the provider who performed her abortion). The Court does not find such a requirement in the language of A.R.S. § 36-2153(K), however, and as Defendant recognizes, Plaintiff administered medication to herself to terminate the pregnancy. The Court acknowledges that the language of the statute does not seem to fit neatly with the facts of this case, but the Court cannot conclude that dismissal on 12(c)(7) grounds is required.

Based on the foregoing,

IT IS THEREFORE ORDERED granting Defendant's Motion to Dismiss/Motion for Judgment on the Pleadings of Plaintiff's Abortion Coercion Claim, filed February 15, 2022. Plaintiff's claim under A.R.S. § 36-2153(G) is dismissed for the reasons described above.

The Court having reviewed the parties' certificates regarding compulsory arbitration,

IT IS ORDERED that this matter is subject to compulsory arbitration and transferring this matter to the Civil Court Administration Arbitration Desk for appointment of an arbitrator.