

THE DISTRICT COURT OF GUAM

SHANDHINI RAIDOO, *et al.*,

Plaintiffs,

vs.

LEEVIN TAITANO CAMACHO, *et al.*,

Defendants.

CIVIL CASE NO. 21-00009

**DECISION AND ORDER
RE PLAINTIFFS' OBJECTIONS TO THE
REPORT AND RECOMMENDATION ON
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Before the court is Plaintiffs' Objections to the U.S. Magistrate Judge's Report and Recommendation on Plaintiffs' Motion for Preliminary Injunction. For the reasons stated herein, the court **SUSTAINS** Plaintiffs' Objections, **MODIFIES** the U.S. Magistrate Judge's Report and Recommendation, and **GRANTS** the Plaintiffs' Motion for Preliminary Injunction.

I. Procedural Background

On February 5, 2021, Plaintiffs filed a motion for preliminary injunction, and the court referred the matter to the U.S. Magistrate Judge. *See* ECF Nos. 12 and 17. The U.S. Magistrate Judge issued her Report and Recommendation on April 23, 2021. ECF No. 32.

1 Plaintiffs filed four objections to the Report and Recommendation, ECF No. 33, and a
2 briefing schedule was issued, ECF No. 34. The court heard the matter on September 1, 2021, and
3 took the Objections under advisement.

4 **II. Factual Background**

5 The parties did not object to the “Factual and Procedural Background” of the Report and
6 Recommendation. As such, the following facts are taken from the Report and Recommendation.

7 Abortion has been a contentious issue for several decades in Guam and continues to be so
8 today. The practice was criminalized up until 1978—when it was decriminalized pursuant to 9
9 G.C.A. § 31.20 in the wake of *Roe v. Wade*—only to be banned again by the Guam Legislature
10 in 1990. Compl. ¶¶ 37, 39-40, 44, ECF No. 1; *see Roe v. Wade*, 410 U.S. 113 (1973). After the
11 ban was challenged in court, the Ninth Circuit deemed the law unconstitutional. Compl. ¶¶ 45-
12 55, ECF No. 1; *Guam Soc’y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir.
13 1992), *as amended* (June 8, 1992), *cert. denied*, 506 U.S. 1011 (1992). Abortion has been legal
14 on Guam ever since, and from 2008 to 2017, approximately 200-300 yearly abortions were
15 performed. *See* Compl. ¶¶ 55-56, ECF No. 1.

16 In 2018, the last abortion physician on Guam retired, and no local doctor has stepped in
17 to fill the vacancy. Thus, no known abortion has occurred on Guam since 2018. *Id.* ¶¶ 61-62, 71.
18 While Plaintiffs claim there are physicians on Guam willing to provide pre- and post-abortion
19 care, none are willing to provide abortion services directly, as “[a]nti-abortion stigma
20 discourages even supportive local doctors from incorporating abortion services into their
21 practice.” *Id.* ¶¶ 65-67.

22 Enter the two Plaintiffs in this case, Plaintiffs are Guam-licensed, board-certified OB-
23 GYNs experienced in providing abortion services. *Id.* ¶¶ 10-15. However, Plaintiffs do not reside
24 on Guam. They reside in Hawaii. *Id.* They have brought this lawsuit seeking to remotely supply

1 “medication abortions” to patients on Guam through telemedicine. As described by Plaintiffs, a
2 medication abortion is different from other abortion procedures performed in clinics by a doctor
3 because it is entirely self-administered by the patient herself. *Id.* ¶ 134. To obtain the medication
4 abortion, the patient orally ingests a regimen of mifepristone, and then misoprostol,
5 approximately 24-48 hours apart. *Id.* ¶ 130. The medication causes the fetal tissue to detach from
6 the uterine wall, which is then expelled through the uterus, mimicking an early miscarriage. *Id.* ¶
7 131.

8 Normally, a woman would need to receive abortion medication in-person. However, an
9 ongoing FDA-approved clinical study has allowed certain doctors to send abortion medication
10 directly to patients. *Id.* ¶¶ 133, 164-69. Consequently, Plaintiffs have generally administered
11 medication abortions entirely by telemedicine. *Id.* ¶¶ 12, 15, 164-66. Under this model, Plaintiffs
12 conduct initial and follow up-consultations via teleconference and deliver the medication by
13 mail, but never meet with the patient in-person. *Id.* ¶¶ 151, 169. If any in-person procedures are
14 necessary, such as ultrasounds or lab tests, the patient undergoes the procedure at nearby medical
15 facilities. *Id.*

16 The record demonstrates that medication abortion is safe. The chance of a major adverse
17 health event is “exceedingly rare, generally far below 0.1%.” *Id.* ¶ 136. Still, in about 1-5% of
18 cases, the process results in an “incomplete abortion,” and in about 0.8-2.9% of cases, the
19 process results in an “ongoing pregnancy.” *Id.* ¶¶ 137-38. In the case of an incomplete abortion
20 or ongoing pregnancy, an in-person procedure may be required to complete the abortion,
21 although sometimes this can be performed remotely. *Id.* Follow-up visits are encouraged after
22 the medication abortion to ensure the medication abortion was successful, either via telemedicine
23 or in-person. *Id.* ¶¶ 185-87.

1 Medication abortion is usually only available for up to 10 to 11 weeks of the pregnancy.
2 *Id.* ¶ 135. A woman’s eligibility for a medication abortion must sometimes be determined by
3 way of ultrasounds and lab results to confirm the existence and duration of the pregnancy and/or
4 rule out ectopic pregnancies. *Kaneshiro Decl.* at ¶¶ 50-56, ECF No. 13-4; *Raidoo Decl.* at ¶¶ 49-
5 56, ECF No. 13-5. This pre-abortion testing is not medically necessary for all women, and some
6 women already have this information by the time they begin seeking an abortion. *Id.*

7 Plaintiffs seek to provide medication abortion on Guam from Hawaii via telemedicine.
8 But they allege that they are prevented from doing so by 10 G.C.A. § 3218.1. While not
9 explicitly banning medication abortion, § 3218.1 requires “the physician who is to perform the
10 abortion or a qualified person” to provide a woman seeking an abortion information that “a
11 reasonable person would consider material to the decision of whether or not to undergo the
12 abortion” at least twenty-four hours before the abortion is set to occur. § 3218.1(b)(1)(B). This
13 information includes “a description of the abortion method,” the risks it poses, the “probable
14 gestational age of the unborn child,” the “probable anatomical and physiological characteristics
15 of the child,” public assistance available to support the child, available adoption services, and the
16 legal responsibilities of the father. § 3218.1(b)(1)-(2).

17 The law imposes misdemeanor criminal penalties and creates private causes of action
18 against physicians who violate these requirements. § 3218.1(f)-(g). The Guam Board of Medical
19 Examiners may initiate disciplinary action, including the revocation or suspension of the
20 physician’s medical license, for violations of Section § 3218.1. § 12209(d).

21 Plaintiffs do not challenge the nature of the information to be given. Nor do they
22 challenge the twenty-four-hour waiting period. What Plaintiffs do take issue with is the two-
23 word requirement injected at the end of the opening lines of Section § 3218.1(b)(1) and (b)(2):
24 that the information be given “in-person” to the woman seeking the abortion. 10 G.C.A. § §

1 3218.1(b)(1)-(2). Finding the “in-person” mandate prevents them from delivering the required
2 information via teleconference, Plaintiffs filed suit challenging the in-person requirements of
3 Section § 3218.1 as violating a woman’s right to an abortion. They now seek a preliminary
4 injunction to enjoin the Attorney General of Guam and the members of the Guam Board of
5 Medical Examiners (“Defendants”) from enforcing the in-person requirements of 10 G.C.A. § §
6 3218.1. Pl.’s Mot. and Mem. in Support of Mot., ECF Nos. 12 and 13.

7 **III. Magistrate Judge’s Report and Recommendation**

8 The U.S. Magistrate Judge used the “undue burden” balancing test as articulated in
9 *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014).¹

10 “In order to show an undue burden, plaintiffs must show that, ‘in a
11 large fraction of the cases in which [the law] is relevant, it will
12 operate as a substantial obstacle to a woman’s choice to undergo an
13 abortion.’” *Humble*, 753 F.3d at 914 (citing *Tucson Woman’s Clinic*
v. Eden, 379 F.3d 531, 539 (9th Cir. 2004) (quoting *Casey*, 505 U.S.
at 895) (alteration in *Eden*)).

14 To determine whether a regulation presents a substantial obstacle,
15 the court is to “compare the extent of the burden a law imposes on a
16 woman’s right to abortion with the strength of the state’s
17 justification for the law.” *Humble*, 753 F.3d at 912. “The more
18 substantial the burden, the stronger the state’s justification for the
law must be to satisfy the undue burden test; conversely, the stronger
the state’s justification, the greater the burden may be before it
becomes ‘undue’”. *Id.*

19 R. & R. at 5-6, ECF No. 32.

20 In examining the burdens of the statute in question, the Report and Recommendation
21 focused on the burden the statute has on a woman seeking abortion *in Guam*. “From that
22 perspective,” the Report and Recommendation reasoned that “compliance with Section 3218.1

23 ¹ As noted in the Report and Recommendation, the parties disputed the application of *June Medical Services L.L.C.*
24 *v. Russo*, 140 S. Ct. 2103 (2020), and the proper formulation of the undue burden test. *See* R. & R. at 6 n.2, ECF No.
32. However, neither parties filed an objection to the Magistrate Judge’s use of the benefit-burden analysis.

1 requires a single trip to a qualified person’s office in Guam—and in some cases, the trip is not
2 even an additional trip[,]” since some women could get the required in-person information at the
3 time they get their ultrasound or other tests before the abortion. *Id.* at 8.

4 In examining the benefits of the statute, the Report and Recommendation stated that
5 “abortion regulations further the state’s interest in promoting fetal life simply by reducing the
6 number of abortions that may occur[,]” relying on *Eden. Id.* at 8-9. By requiring that information
7 be given in person, that creates an additional step that may result in less abortion, “thereby
8 reflecting Guam’s interest in promoting fetal life.” *Id.* at 9.

9 Further, “common sense” dictates that in-person communication is “one of the best
10 communication methods.” *Id.* at 10. “Guam could reasonably conclude that this personal method
11 of communication creates a more pensive tone that promotes informed deliberation” prior to
12 abortion. *Id.* As such, the Report and Recommendation found that the in-person requirement may
13 have benefit to Guam’s stated interest. *Id.*

14 Citing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992);
15 *Cincinnati Women's Servs., Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006); *Karlin v. Foust*, 188 F.3d
16 446 (7th Cir. 1999); and *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994), the
17 Report and Recommendation did not find that the in-person requirement created an undue
18 burden. *Id.* at 10-11. The Report and Recommendation reasoned that (1) it is unclear whether the
19 pre- and post-abortion providers in Guam could fulfill the in-person requirement; (2) the burden
20 of a woman having to travel outside of Guam for abortion is not itself due to the in-person
21 requirement but rather, it is the result of lack of abortion providers on island; (3) there is no
22 evidence that childcare costs, time off from work, and travel within Guam cause undue burden;

1 and (4) the information can be provided by a “qualified person”² and not necessarily by the
2 abortion provider. *Id.* at 12-13.

3 As to the question of irreparable harm, balance of equities and public interest, because the
4 Report and Recommendation found that there is likely no constitutional violation, *i.e.*, the statute
5 does not create an undue burden, it similarly concluded that these three remaining factors weigh
6 in favor of the Defendants. *Id.* at 15.

7 **IV. Standard of Review**

8 When a party files a timely objection to a magistrate judge’s report and recommendation,
9 “[a] judge of the court shall make a *de novo* determination of those portions of the report or
10 specified proposed findings or recommendations to which objection is made.” 28 U.S.C. §
11 636(b)(1)(C). “A judge of the court may accept, reject, or modify, in whole or in part, the
12 findings or recommendations made by the magistrate judge.” *Id.*

13 **V. Legal Standard on Preliminary Injunction**

14 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed
15 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that
16 the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
17 *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). “When the government is a party, these last
18 two factors merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

19 **VI. Discussion³**

20 **a. Objection No. 1**

21 As noted above, in weighing the benefits of the statute, the Report and Recommendation
22 relied on *Eden* and stated that “abortion regulations further the state’s interest in promoting fetal

23 ² “Qualified Person” is defined as “an agent of the physician who is a psychologist, licensed social worker, licensed
24 professional counselor, registered nurse, or physician.” 10 G.C.A. § 3218.1(a)(13).

³ The page citation is based on the CM/ECF’s page numbering.

1 life simply by reducing the number of abortions that may occur. Within the context of
2 telemedicine, the in-person requirement creates an extra step in the medication abortion process
3 on Guam which may result in fewer abortions, thereby reflecting Guam's interest in promoting
4 fetal life." R. & R. at 8-9, ECF No. 32. Plaintiffs object to this analysis, the misapplication of
5 *Eden*, and "[t]o the extent the Magistrate Judge relied on this as a benefit when weighing the
6 benefits against the burdens, the balancing was done erroneously." Pls.' Obj. at 5, ECF No. 33.
7 The court SUSTAINS Plaintiffs' Objection No. 1.

8 In *Tucson Woman's Clinic v. Eden*, the state of Arizona singled out abortion clinics
9 requiring them to the same licensing requirements imposed on health care institutions to protect
10 maternal health. 379 F.3d 531, 536-37 (9th Cir. 2004). The plaintiffs challenged the regulation,
11 arguing, among other things, that it poses an undue burden on the right to abortion. *Id.* The Ninth
12 Circuit analyzed whether the "undue burden" standard applies in the context of promoting
13 maternal health and not just in the context of promoting fetal life. *Id.* at 539. It found that it does.
14 *Id.*

15 The Ninth Circuit observed that laws purporting to promote fetal life would "logically
16 serve the interest the law purports to promote—fetal life—because they will prevent some
17 women from obtaining abortions" and laws purporting to promote maternal health "can both
18 place obstacles in the way of women seeking abortions *and* fail to serve the purported interest[.]"
19 *Id.* at 40 (emphasis in original). This observation was purely *dicta* as the appellate court analyzed
20 whether laws purporting to promote maternal health *triggers* the "undue burden" standard. *Eden*
21 did not analyze whether the regulation in question was an undue burden.

22 The Report and Recommendation's reliance on *Eden* as it weighed the benefits of Section
23 3218.1 was improper. The Supreme Court has held that "the means chosen by the State to further
24 the interest in potential life must be calculated to inform the woman's free choice, not hinder it."

1 *Casey*, 505 U.S. at 877. Put in another way, “a state may advance its legitimate interest in
2 potential life by enacting measures designed to ensure that a woman's choice is informed and
3 mature as long as the purpose of such measures is to persuade the woman to choose childbirth
4 over abortion rather than to prevent the woman from exercising her right to choose.” *Karlin*, 188
5 F.3d at 493 (citing *Casey*, 505 U.S. at 877-78). To say that Section 3218.1 furthers the state’s
6 interest in promoting fetal life—because it reduces abortion rates by creating an additional step
7 of in-person requirement—would be in complete contradiction to the Supreme Court’s holding.

8 Defendants fail to directly address Plaintiffs’ Objection No. 1. Instead of discussing the
9 benefits versus the burdens, Defendants appear to confuse the applicable balancing test for
10 “undue burden” with rational basis review. This is apparent when Defendants’ argument
11 consistently goes back to the burden not being “substantial” without anything more (no
12 discussion of the strength of the state’s justification) and that the statute is “not irrational and
13 does not impose a substantial obstacle to a woman’s right to choose.” Defs.’ Opp’n. at 6, ECF
14 No. 35 (emphasis in original omitted). As noted above, in reviewing whether the statute presents
15 a substantial obstacle, the court must “compare the extent of the burden a law imposes on a
16 woman’s right to abortion with the strength of the state’s justification for the law.” *Humble*, 753
17 F.3d at 912. The two—burden and state justification—cannot be divorced from each other.

18 Here, Defendants fail to rebut Plaintiffs’ argument that the in-person requirement serves
19 no benefit to a legitimate state interest. Defendants argue that Plaintiffs can still accomplish the
20 statutory requirement by affiliating themselves with a qualified person to conduct the in-person
21 visit, while noting that nothing is preventing Plaintiffs from also participating by
22 videoconference when the in-person visit is conducted. Defs.’ Opp’n. at 2 n.1, ECF No. 35. This
23 argument is precisely why Plaintiffs are correct in their argument that “*forcing* the in-person
24 visit, when a live, face-to-face video conference is available,” serves no benefit or advances any

legitimate state interests.⁴ Pls.’ Reply at 5, ECF No. 36 (emphasis in original). It is also precisely why the burdens the statute imposes are unjustified.

Further, Defendants argue that there is no substantial burden for women seeking abortion in Guam.⁵ Defs.’ Opp’n. at 4-5. Defendants’ argument is completely detached from the reality that there is no abortion provider in Guam since the last one retired in 2018. *See* Compl. at ¶¶ 61-62, 71, ECF No. 1. A woman seeking abortion in Guam would have no choice but to travel outside of Guam. Raidoo Decl. at ¶¶ 69-70, 72-73, ECF No. 13-5. This is assuming that woman has the financial resources to do so, in addition to the logistical headaches of having to take time off from work, arranging for childcare, abiding by the COVID-19 quarantine and travel restrictions, among other things. *Id.* at ¶¶ 72-76. Traveling off island also makes it difficult for the woman to keep her abortion decisions confidential and risk exposure from her partner, especially those experiencing intimate partner violence (“IPV”). Washington Decl. at ¶¶ 47, ECF No. 13-3; Rawlings Decl. at ¶¶ 16-17, 23-24, ECF No. 13-6; Nichols Decl. at ¶ 65, ECF No. 13-2. For those who do not have the resources to go off-island, they are left without a choice but to carry the pregnancy to full term.

“The more substantial the burden, the stronger the state’s justification for the law must be to satisfy the undue burden test; conversely, the stronger the state’s justification, the greater the burden may be before it becomes ‘undue’”. *Humble*, 753 F.3d at 912. In other words, the “feebler” the state’s justifications, “the likelier the burden, even if slight, to be ‘undue’”. *Id.* at 914 (citing *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013)).

⁴ The issue of whether in-person is superior to video conference will be discussed *infra*.

⁵ Defendants cite to the Report and Recommendation, describing Guam as “a relatively small island at approximately 30 miles long and 8.5 miles wide at the widest part, with a total area of 21 square miles[.]” Defs.’ Opp’n. at 9, ECF No. 35.

1 Here, there are undisputed evidence of the burdens the law imposes on a woman seeking
2 abortion in Guam. It is unclear what the state's justification is for the in-person requirement since
3 Defendants did not clearly address this in their response brief, *see* Defs.' Opp'n. to Pls.' Obj. to
4 R. & R., ECF No. 35, nor did they clearly address it at the hearing. It appears Defendants'
5 justification is to promote fetal life, *see* Defs.' Opp'n. to Mot. for Prelim. Inj. at 17, ECF No. 29,
6 when it cited to *Eden*. As discussed above, the reliance on *Eden* is misplaced. The other possible
7 state justification is that in-person visit is superior to video conference. Even if this is the case,
8 this justification is feeble and is easily outweighed by the burdens imposed on the woman
9 seeking abortion.

10 **b. Objection No. 2**

11 The Report and Recommendation acknowledged the evidence provided by Plaintiffs
12 which demonstrates that in-person communication provides no more benefit than
13 videoconferencing. R. & R. at 9, ECF No. 32. Despite the undisputed evidence on this issue,
14 however, the Report and Recommendation concluded that common sense⁶ "suggest a face-to-
15 face interaction is one of the best communication methods in a variety of situations and for a
16 variety of reasons." *Id.* at 10. Based on this conclusion, the Report and Recommendation further
17 noted that "Guam could reasonably conclude that this personal method of communication creates
18 a more pensive tone that promotes informed deliberation over the 24-hour period before he
19 important final decision to abort fetal life." *Id.* Plaintiffs object to the Report and
20 Recommendation's reliance on Defendants' counsel's *ipse dixit* on the superiority of in-person

21 ⁶ Aside from commonsense, the Report and Recommendation also relied on an Arizona state appellate court stating
22 that in-person communication is superior to videoconferencing. R. & R. at 10, ECF No. 32 (citing *Parenthood*
23 *Arizona, Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 194 (Ariz. Ct. App. 2011)).
24 First, there is uncontroverted evidence before this court that says otherwise. Second, as Plaintiffs correctly point out,
the question before the Arizona state appellate court is whether "the legislature could reasonably conclude that
telephonic consultation was inferior to in-person consultation during which the interviewer could perceive the
condition and comportment of the patient[.]" *Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d at 194.
See Pls.' Obj. to R. & R. at 10 n.7, ECF No. 33. That is not the case here. !

1 communication and so-called “common sense.” Pls.’ Obj. at 5, ECF No. 33. The court
2 SUSTAINS Plaintiffs’ Objection No. 2.

3 The evidence from Plaintiffs includes expert testimony from Dr. Jeffrey Huntsinger,
4 PhD., and Dr. Mark Nichols, M.D. Huntsinger is an associate professor in Social Psychology at
5 Loyola University Chicago, with a Ph.D. in Psychology from the University of Virginia.
6 Huntsinger Rebuttal Decl. at ¶¶ 1-2, ECF No. 30-1. Huntsinger states that “the evidence shows
7 that engagement in interpersonal communication, including for purposes of providing
8 information or counseling, via live face-to-face video conference is comparable to, and may even
9 have some benefits over, in-person communication in terms of impact, outcomes, and
10 experience.” *Id.* at ¶ 24. In fact, “communication via synchronous audio-video technology has
11 the capacity to enhance the power, impact, and effectiveness of the communicative experience
12 by ensuring that parties to the communication are in a setting where they feel comfortable, safe,
13 and secure to engage in the communication, and by providing a visual window into that setting
14 that could bolster the development of mutual understanding and shared connection.” *Id.* His
15 testimony is based on his education, training, teaching experience as a psychologist, familiarity
16 with the relevant scientific research and literature (research and literature on interpersonal
17 communication, telemedicine, and teletherapy), attendance at professional conferences, as well
18 as conversations with other social psychologists, therapists and clinical psychologists. *Id.* at ¶ 7.

19 Nichols is a board-certified obstetrician-gynecologist licensed to practice in the states of
20 Oregon and Montana, with a medical degree from the University of California, Davis. Nichols
21 Decl. at ¶¶ 1-2, ECF No. 13-2. He has over three decades of experience in his medical field,
22 including having served various academic and leadership positions at the Oregon Health
23 Sciences University (OHSU) and in the medical community. *Id.* at ¶ 3-9. In his expert opinion,
24 “there is no evidence that in-person communications are inherently superior to live, face-to-face

1 telemedicine in ensuring that patients are well-informed.” Nichols Rebuttal Decl. at ¶ 3, ECF No.
2 30-2. “Research confirms that telemedicine is just as effective as in-person communications for
3 informed consent conversations, with no differences in patient comprehension or understanding.”
4 *Id.* at ¶ 8. Nichols cites to a randomized controlled trial⁷ of in-person and live, face-to-face
5 videoconferencing telemedicine on informed consent conversations. “The study showed that
6 patient comprehension of the information provided was virtually identical between patients who
7 received the information through an in-person conversation and patients who received the
8 information using live telemedicine.” *Id.* at 9.

9 Defendants failed to offer any evidence that supports their position that in-person
10 communication is superior to live, face-to-face video conference. Not one, single expert was
11 offered by Defendants. Defendants also failed to offer any evidence to rebut Plaintiffs’ evidence
12 or question the credibility or qualifications of Plaintiffs’ experts. Instead, Defendants made
13 unsupported assertions of their position regarding their alleged superiority of in-person
14 communication. *See* Defs.’ Am. Opp’n. to Mot. for Prelim. Inj. at 26, ECF No. 29 (“[T]here is a
15 distinct difference between counseling patients face-to-face rather than over a video feed. . . . No
16 other method shares the same capability for impact upon the psyche as does hearing information
17 from, and communicating with, another human being who is physically present with you.”).

18 “[T]he Court, when determining the constitutionality of laws regulating abortion
19 procedures, has placed considerable weight upon evidence and argument presented in judicial
20 proceedings.” *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016), as
21 revised (June 27, 2016). The Supreme Court found that it was not wrong of the district court in
22 *Hellerstedt* to “give significant weight to evidence in the judicial record” and it is in fact
23

24 ⁷ “Randomized controlled trial” is the gold standard of study design, because “the design most effectively minimizes the risk of confounding factors influencing the results.” Nichols Rebuttal Decl. at ¶ 10, ECF No. 30-2.

1 “consistent with [the Supreme Court’s] case law.” *Id.* The district court in *Hellerstedt* considered
2 the evidence in the record, “including expert evidence, presented stipulations, depositions, and
3 testimony. It then weighed the asserted benefits against the burdens.” *Id.* “Courts are free to base
4 their findings on commonsense inferences *drawn from the evidence.*” *Id.* at 2317 (emphasis
5 added).

6 Here, the Report and Recommendation acknowledged that Defendants did not provide
7 any evidence in support of their arguments about the superiority of in-person communication. R.
8 & R. at 10, ECF No. 32. Nonetheless, the Report and Recommendation found that in-person
9 communication may be superior to other methods of communication based on “common sense.”
10 *Id.* However, the undisputed evidence before the court all points to the fact that a live, face-to-
11 face video conferencing is “comparable to, and may even have some benefits over, in-person
12 communication[.]” Huntsinger Rebuttal Decl. at ¶ 24, ECF No. 30-1. There is no evidence on the
13 record in which the court can draw inferences from as to the commonsense conclusion that in-
14 person communication is better than videoconferencing. Accordingly, the Report and
15 Recommendation erred in its finding.

16 c. Objection No. 3

17 Plaintiffs’ third objection is on the Report and Recommendation’s holding that Plaintiffs
18 are unlikely to succeed on the merits of their claim. Pls.’ Obj. at 10-15, ECF No. 33. The holding
19 was based on the erroneous reasonings discussed above. Accordingly, the court SUSTAINS
20 Plaintiffs’ Objection No. 3.

21 The Report and Recommendation cited to four cases⁸ wherein “logistical issues inherent
22 to in-person requirements did not constitute undue burden.” R. & R. at 11, ECF No. 32. Plaintiffs
23 distinguished these cases as two not even imposing any in-person requirement at all and

24 ⁸ *Casey*, 505 U.S. 833; *Taft*, 468 F.3d 361; *Karlin*, 188 F.3d 446; and *Schafer*, 18 F.3d 526 (8th Cir. 1994).

1 permitting the required information to be provided over the telephone (*Casey* and *Schafer*); the
2 other as the burden coming from having to require the physician to provide information and not
3 the in-person requirement (*Taft*); and the last one was a facial challenge to the entire abortion
4 informed consent statute and did not distinguish the state's interest in imposing an in-person
5 requirement from its interest in imposing the 24-hour delay (*Karlin*). Pls.' Obj. to R. and R. at
6 13-14, ECF No. 33.

7 Nonetheless, even if these cases are not distinguishable, the controlling law provides that
8 "the undue burden test is context-specific, and that both the severity of a burden and the strength
9 of the state's justification can vary depending on the circumstances." *Humble*, 753 F.3d at 914.
10 "While a twenty-four-hour waiting period that requires two trips to an abortion provider has been
11 found not to impose an undue burden on Pennsylvania women based on the circumstances of that
12 state at the time the Court decided *Casey*, a similar provision in another state's abortion statute
13 could well be found to impose an undue burden on women in that state depending on the
14 interplay of [record-specific] factors[.]" *Karlin*, 188 F.3d at 485. The Ninth Circuit emphasized
15 that courts must "weigh the extent of the burden against the strength of the state's justification *in*
16 *the context of each individual statute or regulation*." *Humble*, 753 F.3d at 914 (emphasis added).

17 As discussed above, the state justification here is lacking. The information required to be
18 given to a woman seeking abortion at least 24-hours prior to the procedure can be provided via
19 live, face-to-face video conferencing, and Defendants have not shown any real justification or
20 benefits of the in-person requirement. Meanwhile, the burdens imposed by the in-person
21 requirement are substantial.

22 **d. Objection No. 4**

23 Plaintiffs' fourth and final objection is on the Report and Recommendation's holding that
24 Plaintiffs are unlikely to satisfy the remaining preliminary injunction factors. Pls.' Obj. to R. &

R. at 15, ECF No. 33. The holding was based on the erroneous reasonings discussed above. Accordingly, the court SUSTAINS Plaintiffs' Objection No. 4.

The remaining factors are whether there is irreparable harm in the absence of preliminary relief and whether the balance of equities tips in Plaintiffs' favor and is in the public's interest. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Further, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 1002 (citation and internal quotation marks omitted). As the court finds Plaintiffs are likely to succeed on the merits, it similarly finds Plaintiffs have met the remaining *Winter* factors.

VII. Section 3218.1's "individually and in a private room" requirement

In their Motion for Preliminary Injunction, Plaintiffs also take issue with Section 3218.1's requirement that the information be provided "individually and in a private room." *See* Mem. in Support of Pls.' Mot. for Prelim. Inj. at 37, ECF No. 13. Section 3218.1(b)(4) provides that the information be "provided to the woman individually and in a private room to protect her privacy and maintain the confidentiality of her decision and ensure that the information focuses on her individual circumstances and that she has an adequate opportunity to ask questions." 10 G.C.A. § 3218.1(b)(4). The Report and Recommendation did not address this issue. It found that the issue is "intertwined" with the in-person requirement and since the Report and Recommendation denied the in-person requirement, the "individually and in a private room" requirement is moot. R. & R. at 14 n.4, ECF No. 32.

Plaintiffs argue that the "individually and in a private room" requirement "simply do not apply in the context of telemedicine." Mem. in Support of Pls.' Mot. for Prelim. Inj. at 37, ECF No. 13. Further, Defendants note that this section does not preclude the woman from "bringing

1 whomever she wants (presumably a trusted friend or relative) into the room with her, because
2 she holds the power to expand the zone of her informational privacy right to include, and allow
3 disclosure to, whomever she chooses.” Defs.’ Opp’n. to Pls.’ Mot. for Prelim. Inj. at 27, ECF No.
4 29.

5 This court agrees with the Report and Recommendation that the in-person requirement
6 and the “individually and in a private room” requirement are “intertwined.” Accordingly,
7 because the court is granting Plaintiffs’ injunctive relief to enjoin the in-person requirement, it is
8 likewise granting injunctive relief to enjoin the “individually and in a private room” requirement.

9 **VIII. Conclusion**

10 For the reasons stated above, the court SUSTAINS all four objections, MODIFIES the
11 Report and Recommendation, and GRANTS the motion for preliminary injunction. The court
12 will issue a separate order on the motion for preliminary injunction.

13 **SO ORDERED.**



14 /s/ Frances M. Tydingco-Gatewood
15 Chief Judge
16 Dated: Sep 03, 2021