Janet Napolitano
Attorney General
Firm State Bar No. 14000

Kevin D. Ray (007485)
Lynne C. Adams (011367)
Timothy C. Miller (016664)
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1610

Attorneys for defendants Catherine Eden and Janet Napolitano

Nikolas T. Nikas (011025)
Denise M. Burke (admitted pro hac vice)
Stephen M. Crampton (admitted pro hac vice)
Brian Fahling (admitted pro hac vice)
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

Attorneys for defendant Richard M. Romley

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Tucson Woman's Clinic, et. al.,

Plaintiffs,

v.

Catherine Eden, in her capacity as Director of the Arizona Department of Health Services, et. al.,

Defendants.

No. CIV 00-141 TUC RCC

THE DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' EQUAL PROTECTION CLAIM

(Oral Argument Requested)

Pursuant to Fed. R. Civ. P. 56, the defendants move this court for partial summary judgment, dismissing with prejudice Count I of the plaintiffs' Fourth Amended Complaint, which is based on a violation of equal protection. This motion is supported by the accompanying memorandum in support and separate statement of facts relied upon pursuant to D. Ariz. R. 1.10(*l*)(1).

April 30, 2001.

Janet Napolitano
Attorney General

By Lynne C. Adams
Kevin D. Ray
Lynne C. Adams
Timothy C. Miller
Assistant Attorneys General
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-1610

Richard M. Romley
Maricopa County Attorney

By Denise M Burke
Nikolas T. Nikas
Denise M. Burke
Stephen M. Crampton
Brian Fahling
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

Copy mailed on April 30, 2001 to:

Ms. Bonnie Scott Jones
Ms. Julie Rikelman
THE CENTER FOR REPRODUCTIVE LAW & POLICY
120 Wall Street, 14th Floor
New York City, New York 10005
Attorneys for Plaintiffs

Edna Martin

Janet Napolitano
Attorney General
Firm State Bar No. 14000

Kevin D. Ray (007485)
Lynne C. Adams (011367)
Timothy C. Miller (016664)
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1610

Attorneys for defendants Catherine Eden and Janet Napolitano

Nikolas T. Nikas (011025)
Denise M. Burke (admitted pro hac vice)
Stephen M. Crampton (admitted pro hac vice)
Brian Fahling (admitted pro hac vice)
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

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MEMORANDUM IN SUPPORT OF THE DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' EQUAL PROTECTION CLAIM

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A.A.C.	The Arizona Administrative Code.
DHS	The Arizona Department of Health Services, the state agency that is responsible for overseeing the regulation and licensing of abortion clinics pursuant to the Regulatory Act.
Equal Protection DSOF	The defendants' joint Rule 1.10(*l*)(1) statement of undisputed facts in support of their partial motion for summary judgment on plaintiffs' equal protection claim.
The Regulatory Act	A.R.S. §§ 36-449 through -449.03, A.R.S. § 36-2301.02 and Title 9, Chapter 10, Article 15 of the Arizona Administrative Code, the statutes and regulations governing the licensing of abortion clinics in Arizona and ultrasound review requirements applicable to such clinics.
The State	The State of Arizona and its Legislature.

Preliminary Statement

The plaintiffs make two equal protection claims, both of which are without merit and have been summarily rejected by the Fourth and Fifth Circuit Courts of Appeals in challenges to South Carolina and Texas's abortion clinic regulations. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 1188 (2001); *Women's Medical Center of N.W. Houston v. Bell*, No. 00-20037, 2001 WL 370053 (5th Cir. Apr. 13, 2001). In addressing, and rejecting, the plaintiffs' first equal protection argument–that the Regulatory Act impermissibly distinguishes between abortion providers and individuals who perform other medical procedures–the Fourth Circuit correctly determined that abortion procedures are "rationally distinct from other routine medical services." *Greenville Women's Clinic*, 222 F.3d at 172-75. Thus, regulating physician practices that perform abortions is within the State's discretion and "serves the complex public interests on the subject." *Id.*

Both the Fourth and Fifth Circuit Courts also considered and rejected the plaintiffs' second equal protection argument–that the Regulatory Act impermissibly distinguishes between abortion providers who perform a certain number of abortions each month and those who do not.[1] As the circuit courts found, line-drawing of this type is a legislative function "and is presumed valid." *Greenville Women's Clinic*, 222 F.3d at 174; *Women's Medical Center*, 2001 WL 370053 at *7.

The plaintiffs' claims in this case are identical to those brought in South Carolina and Texas, and the result–upholding the Regulatory Act–should be identical as well.

---

[1] The Fourth Circuit upheld an identical "line" as that adopted by the Regulatory Act–five or more first trimester abortions in any month and any post-first trimester abortions in any month. Although the Texas regulations drew the line in a different place–at 300 abortions per year–the Fifth Circuit nonetheless approved of legislative line-drawing generally.

Argument

I. THE PROPRIETY OF THE REGULATORY ACT MUST BE VIEWED ACCORDING TO THE RATIONAL BASIS TEST.

The more stringent "strict scrutiny" standard of judicial equal protection review is triggered only when a regulation targets a suspect class or impinges upon a fundamental right protected by the Constitution. *Greenville Women's Cinic*, 222 F.3d at 172. In this case, neither of those prerequisites are present. *See id.* at 173 (abortion providers do not form a suspect class); *Women's Medical Center*, 2001 WL 370053 at *6 (because regulations did not limit abortion access, rational basis review was appropriate).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court called into doubt its previous holding in *Roe v. Wade*, 410 U.S. 113 (1973), that abortion was a fundamental right. In *Casey*, the court did not apply a traditional strict scrutiny standard of review, but instead determined whether the regulations were unduly burdensome on that right. *Casey*, 505 U.S. at 874 (joint opinion of O'Connor, Kennedy and Souter, JJ.) (holding that the constitutionality of a regulatory scheme pertaining to abortion need not serve a compelling state interest); *see also id.* at 954 (dissenting opinion of Rehnquist, J.) (noting that majority opinion rejected strict scrutiny review and need for "compelling state interests"). In fact, in *Casey*, the Supreme Court explicitly overruled cases decided following the Court's decision in *Roe v. Wade* that "decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." 505 U.S. at 871 (joint opinion of O'Connor, Kennedy and Souter, JJ.); *Planned Parenthood v. Dempsey*, 167 F.3d 458, 464 (8th Cir. 1999) (*Casey* held "that strict scrutiny does not apply to regulations affecting the right to abortion").[2]

---

[1] This Court must separately determine whether the Regulatory Act imposes an undue burden on (continued...)

Thus, the Regulatory Act must be upheld if "'there is any reasonably conceivable state of facts that could provide a rational basis for the classification'" created by the Regulatory Act. *Greenville Women's Cinic*, 222 F.3d at 172 (citation omitted).

II. THE REGULATORY ACT DOES NOT VIOLATE EQUAL PROTECTION BECAUSE IT IS RATIONALLY RELATED TO THE STATE'S INTEREST IN MATERNAL HEALTH.

Legislative classifications subject to a rational basis standard of review are presumed to be constitutional, a presumption "that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981); *see also McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."). The constitutional presumption is appropriate because it limits the ability of courts to substitute their judgments for those of the legislature in attempting to remedy social and economic problems. *See Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (the legislature, not the courts, is "the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems"); *Hodel*, 452 U.S. at 331 (court should not "substitute its policy judgment for that of" the legislature in equal protection analysis).

A. The State Has a Legitimate Interest in Protecting Maternal Health and Welfare.

There is no dispute that the State has a legitimate interest in protecting the health and welfare of women choosing abortion. In *Casey*, the Supreme Court noted that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman."

(...continued)
the right to choose an abortion, and review the remaining equal protection issues by applying the rational basis standard. *See, e.g., Greenville Women's Clinic*, 222 F.3d at 173. Thus, the defendants have also moved for partial summary judgment on the plaintiffs' "undue burden" claim separately from this motion. As indicated in that motion, the Regulatory Act does not unduly burden a woman's right to choose to have an abortion.

505 U.S. at 847; *accord Williamson v. Lee Optical*, 348 U.S. 483, 486 (1955) (state has legitimate concern for public's health and safety).

B. Abortion Is Inherently Different from Other Medical Procedures.

Plaintiffs contend that the Regulatory Act violates their equal protection rights because it singles out physicians and clinics that perform abortion procedures from providers of other "similar" medical procedures and subjects the abortion providers to more rigorous regulation. That argument fails, however, because the nature of abortion procedures is distinctly different from all other medical procedures that the plaintiffs point to as "similar."

The plaintiffs' equal protection argument ignores the fundamental principle of equal protection law–that only persons *similarly situated* must be treated alike. As the Supreme Court explained:

> The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." . . . But so too, "[t]he constitution does not require things which are different in fact or opinion to be treat in law as though they were the same." . . . The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.

Plyler v. Doe, 457 U.S. 202, 216 (1982) (internal citations omitted). Thus, states have "the power to treat different classes of persons in different ways." *Reed v. Reed*, 404 U.S. 71, 77 (1971).

Since the Supreme Court's decision in *Roe v. Wade*, courts have recognized that for the purposes of regulation, abortion services are rationally distinct from other routine medical services, because of the "particular gravitas of the moral, psychological, and familial aspects of abortion decision." *Greenville Women's Clinic*, 222 F.3d at 173. As the Supreme Court noted in *Casey*,

> [T]he abortion decision . . . is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the spouse, family,

> and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

Casey, 505 U.S. at 852; *see also Greenville Women's Clinic*, 222 F.3d at 173-74 (citing other Supreme Court decisions finding that abortion services "significantly differ" from other medical or surgical procedures).

In addition to the moral and psychological differences inherent in an abortion procedure, there are also more pragmatic differences. Unlike other medical procedures, abortions are rarely performed by a woman's regular doctor or a doctor previously known to her; women generally do not have a long-standing relationship with their abortion provider. [Equal Protection DSOF ¶ 1 (testimony from plaintiffs' expert)] In addition, because of confidentiality issues, many women select their abortion provider based on advertisements in the Yellow Pages or on the Internet, rather than receiving referrals from acquaintances or their family doctor. [*Id.*]

Moreover, because of the stigma that is still attached by many people to abortion, the State must take a more active role in policing standards for abortion providers. Although the adequacy and appropriateness of other "similar" medical procedures is "regulated" by private malpractice actions in addition to state and other regulation, with abortion, the stigma and confidentiality issues often prevent women from filing lawsuits to protect their own rights. *Cf. Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (woman seeking an abortion "may be chilled" from filing suit "by a desire to protect the very privacy of her decision from the publicity of a court suit"). Thus, the State has a heightened responsibility to adopt regulation to protect women who might be unwilling or unable to protect their own rights to safe abortions.

As the Fourth Circuit Court of Appeals noted in the *Greenville* case,

> In adopting an array of regulations that treat the often relatively simple medical procedures of abortion more seriously than other medical procedures,

> South Carolina recognizes the importance of the abortion practice while yet permitting it to continue, as protected by the Supreme Court's cases on the subject.

222 F.3d at 175. Therefore, because abortion procedures differ significantly from other medical procedures, an equal protection claim cannot arise from differential treatment of abortion procedures. As the Supreme Court recognized in *Plyler*, "[t]he initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States," 457 U.S. at 216, and the distinction here is reasonably drawn. *See Greenville Women's Clinic*, 222 F.3d at 174 (finding that South Carolina's abortion clinic regulations did not violate equal protection because "South Carolina has a rational basis for regulating abortion clinics while not regulating other healthcare facilities").

C. The State Reacted to Abortion-Related Deaths and Injuries in Distinguishing Between Abortion Providers and Other Physicians.

In distinguishing abortion providers from physicians performing other medical procedures in their private offices, the State relied on information that demonstrated that some providers of unregulated abortion services were severely impacting the health of women seeking abortions.

In connection with its consideration of the legislation regarding the regulation of abortion clinics, the Legislature heard testimony regarding the April 17, 1998 death of Lou Anne Herron from complications associated with an abortion. [Equal Protection DSOF at ¶ 2] During her abortion, Ms. Herron's abortion provider, Dr. John Biskind, lacerated Ms. Herron's uterus. [*Id.*] Following the abortion and before Ms. Herron's condition was stabilized, Dr. Biskind left Ms. Herron in the care of medical assistants who were not properly trained. [*Id.*] As even the plaintiffs' own expert, Dr. David Grimes, recognized, Ms. Herron's death was "absolutely preventable," and was the result of substandard care. [*Id.*] This incident, as well as another abortion-related death in 1995 and the birth of a near term baby during an attempted abortion, provided the impetus for the State to examine the

regulation of abortion clinics and to enact new rules governing such clinics and abortion procedures. [*Id.* at ¶ 3]

Based on the inherent difference between abortion procedures and other medical procedures and in light of the deaths and other complications arising from abortions performed in Arizona (but not from other medical procedures), the State had a rational basis for regulating abortion clinics but not all other healthcare facilities. That classification "approximate[s] the nature of the problem," while still accounting for the "limitations on the practical ability of the State to remedy every ill." *Plyler*, 457 U.S. at 216; *accord United States v. Cent. Adjustment Bureau, Inc.*, 823 F.2d 880, 881 (5th Cir. 1987) (no equal protection violation based on Congress's determination to regulate only independent debt collectors under the Fair Debt Collection Practices Act because "even if independent debt collectors are in fact less abusive than other debt collectors, it is sufficient that Congress reasonably believed independent debt collectors were more abusive"). The classification here is the province of the State to make and in no way runs afoul of equal protection. *See Greenville Women's Clinic*, 222 F.3d at 174.

D. The State Regulates Other Medical Facilities Performing Similarly Invasive Procedures and Many Facilities That Perform Only Noninvasive Procedures.

Although the plaintiffs complain that the State does not regulate "similar medical procedures," they are incorrect. Arizona currently regulates several types of medical facilities where surgical procedures are performed, including hospitals, rural general hospitals, special hospitals, infirmaries, and outpatient surgical centers. *See* Ex. A (attached) (chart identifying all health care facilities currently regulated by DHS and the applicable statutory and regulatory authority). And, that list will no doubt grow. The Legislature's Joint Health Committee of Reference is required to "review the types of facilities that remain exempt from regulation by [DHS]"and make recommendations to the Legislature by December 31, 2001 regarding "which classes of exempt facilities should be regulated by

[DHS] to ensure the public health." [Equal Protection DSOF at ¶ 4]

In addition, the State also licenses other medical facilities based on the *type* of medical procedures they provide, even if they are performed in a private physician's office or clinic. Freestanding urgent care centers, physicians' offices that use general anesthesia, and physicians' offices that keep patients overnight are all currently regulated by DHS. A.R.S. § 36-402(3)(a). Each of these types of medical facilities is subject to DHS rules and regulations that address "the construction, equipment, sanitation, staffing for medical, nursing and personal care services, and record keeping," A.R.S. § 36-405(A)–the areas that the Regulatory Act addresses for abortion clinics.

Although the plaintiffs have pointed to several medical procedures that are not currently regulated by DHS, many of which they claim are no more invasive than abortion, they ignore the many medical services that involve *noninvasive* medical procedures, and yet are subject to DHS regulation. For example, DHS regulates agencies that provide a variety of skilled nursing services–the majority of which are less invasive than an abortion–in patients' homes. A.R.S. § 36-425.01; *see also* A.R.S. § 36-151(5) ("home health agency" is "primarily engaged in providing skilled nursing services and other therapeutic services"). It also licenses and regulates nursing care institutions (which provide inpatient nursing services to persons who need them but do not require direct physician care), adult day health care services (which provide supervision and activities, personal care, training and therapeutic or restorative health services during a portion of a day), and assisted living services (which provide supervisory care and personal care services to adults). A.R.S. § 36-425.02 (licensing of nursing care institutions); A.R.S. § 36-401(A)(22) (including home health agencies in definition of "health care institution"); A.R.S. § 36-446.01(B) (establishing oversight for assisted living facilities); *see also* Ex. A (chart identifying all health care facilities currently regulated by DHS). As with the Regulatory Act, DHS's regulation and oversight of these types of medical facilities are based on the State's

determination that licensure in such cases is necessary to protect the public health, safety and welfare.

That some services are *not* regulated does not invalidate the regulations here–the State is not required to regulate *all* medical services and providers that may pose a threat to public health, safety and welfare. *See Williamson*, 348 U.S. at 489 (legislatures may create reform that "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (legislature need not "'strike at all evils at the same time or in the same way'"). Instead, the State may address potential health risks as they are identified, as it has done here. Although the State has not chosen to regulate every medical procedure that may result in injury, it has chosen to regulate a broad selection of procedures and providers, all of which–including abortion–have the potential to destroy public health, safety or welfare. Thus, the Regulatory Act does not violate the plaintiffs' equal protection rights.

III. THE STATE ACTED APPROPRIATELY IN DISTINGUISHING BETWEEN PHYSICIANS AND CLINICS THAT PERFORM MORE THAN FIVE FIRST-TERM ABORTIONS PER MONTH AND THOSE THAT DO NOT.

In an attempt to balance the additional requirements that licensing would impose with the desire to protect the health and welfare of women seeking abortions, the State determined to regulate only those abortion clinics and providers that performed more than five first-trimester abortions per month or any that performed later-term abortions. *See* A.R.S. § 36-449.01(2) (defining "abortion clinic" as any facility, other than an accredited hospital, in which five or more fist trimester abortions in any month or any second or third trimesters abortions are performed"). Although plaintiffs complain that this line-drawing violates equal protection, the State's determination to create this classification reasonably furthers its interest in protecting maternal health, and thus the plaintiffs' claim fails.

Similarly, the State's determination to regulate only clinics performing a certain number of abortions each month or any risky late-term abortions is rational and withstands judicial scrutiny. As with the South Carolina and Texas regulations, the Regulatory Act attempts to regulate only those medical practitioners that perform abortions as more than an incidental part of their practice. The Regulatory Act excludes family practitioners or gynecologists who performs only a few first-term abortions during the course of a year as an accommodation to those practitioners. Although the plaintiffs may argue that the line was drawn incorrectly here, the State was well within its prerogative in placing it where it did. *See Women's Medical Center*, 2001 WL 370053 at *6 (upholding regulatory classification based on number of abortions performed because Texas constitutionally "could have required ***all*** abortion providers to be licensed") (emphasis added); *see also Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (upholding mandatory retirement for judges at age 70 and noting that "'a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect'"); *Massachusetts Bd. of Ret. v. Murgia,* 427 U.S. 307, 314 (1976) (upholding mandatory retirement of police officers at age 50 and noting that "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one"); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (classification is not unconstitutional because it is "imperfect" or because it is "not made with mathematical nicety;" "rough accommodations" are allowed). Thus, the State's policy determination to draw the line at a level where it believed that the risks to health and welfare in connection with abortion increased is rationally related to its interest in protecting public health, and this Court should not substitute its judgment for that of the State's in drawing that line. *See Women's Medical* Center, 2001 WL 370053 at *6 ("Whether the court agrees with the accuracy of the line of demarcation drawn by the Legislature to distinguish the classification is of no great moment."); *Stenberg v. Carhart*, 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting) ("'Irrespective of the difficulty of the task, legislatures, with their superior

factfinding capabilities, are certainly better able to make the necessary judgments [regarding abortion standards and practices] than are courts.'").

The *Greenville* court approved of an identical provision in South Carolina law, noting that "this type of line-drawing is typically a legislative function and is presumed valid. . . . Indeed, line-drawing of this type is not only typical of legislation, it is necessary." *Greenville Women's Clinic*, 222 F.3d at 174 (providing examples of other legislation–including the Americans with Disabilities Act and the Family and Medical Leave Act–that apply only to businesses with a certain number of employees, leaving others unregulated); *accord Schweiker*, 450 U.S at 238-39 (no equal protection violation even though law involved "line-drawing" that necessarily excluded some individuals). Thus, the court determined that including only clinics or offices in which more than five first-trimester abortions were performed each month was appropriate in light of South Carolina's "legitimate interest in promoting and protecting the health of women visiting abortion clinics." *Greenville Women's Clinic*, 222 F.3d at 175. "[T]he actual placement of the line is not a decision that the courts may second-guess." *Id.*; *accord Women's Medical Center*, 2001 WL 370053 at *7 ("[d]eciding the optimal number of abortions to trigger the licensing requirement is a legislative function").

Conclusion

This court should grant the defendants' motion for summary judgment on equal protection grounds and dismiss plaintiffs' equal protection claim (Count I) with prejudice.

April 30, 2001.

Janet Napolitano
Attorney General

By Lynne C. Adams
Kevin D. Ray
Lynne C. Adams
Timothy C. Miller
Assistant Attorneys General
1275 W. Washington Street
Phoenix, Arizona 85007
(602) 542-1610

Richard M. Romley
Maricopa County Attorney

By Denise M Burke
Nikolas T. Nikas
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Stephen M. Crampton
Brian Fahling
Special Deputy Maricopa County Attorneys
c/o 16465 Henderson Pass, #1132
San Antonio, Texas 78232
(210) 494-7781

Copy mailed on April 30, 2001 to:

Ms. Bonnie Scott Jones
Ms. Julie Rikelman
THE CENTER FOR REPRODUCTIVE LAW & POLICY
120 Wall Street, 14th Floor
New York City, New York 10005
Attorneys for Plaintiffs

Elva Martin

EXHIBIT A
DHS LICENSURE OF HEALTH CARE INSTITUTIONS
Under the authority of A.R.S. § 36-401 *et. seq.*

- *Unclassified Health Care Institutions* (Includes facilities such as urgent care centers and outpatient treatment clinics); A.A.C. R9-10-115.
- *General Hospitals*; A.A.C. R9-10-211 to R9-10-233.
- *Rural General Hospitals*; A.A.C. R9-10-311 to R9-10-333.
- *Special Hospitals*; A.A.C. R9-10-411 to R9-10-438.
- *Adult Day Health Care Facilities*; A.A.C. R9-10-501 to R9-10-514.
- *Assisted Living Facilities*; A.A.C. R9-10-701 to R9-10-724.
- *Hospices*; A.A.C. R9-10-801 to R9-10-812.
- *Nursing Care Institutions*; A.A.C. R9-10-901 to R9-10-917.
- *Home Health Agencies*; A.A.C. R9-10-1101 to R9-10-1109.
- *Infirmaries*; A.A.C. R9-10-1211 to R9-10-1230.
- *Recovery Care Centers*; A.A.C. R9-10-1401 to R9-10-1412.
- *Abortion Clinics*; A.A.C. R9-10-1501 to R9-10-1514.
- *Outpatient Surgical Centers*; A.A.C. R9-10-1701 to R9-10-1713.

Janet Napolitano
Attorney General
Firm State Bar No. 14000

Kevin D. Ray (007485)
Lynne C. Adams (011367)
Timothy C. Miller (016664)
Assistant Attorneys General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1610

Attorneys for defendants Catherine Eden and Janet Napolitano

Nikolas T. Nikas (011025)
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THE DEFENDANTS' RULE 1.10(*l*)(1) STATEMENT OF FACTS IN SUPPORT OF THEIR JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' EQUAL PROTECTION CLAIM

Pursuant to Rule 1.10(*l*)(1), Local Rules of the District of Arizona, the defendants rely on the following facts in support of their joint motion for partial summary judgment on plaintiffs' equal protection claim (Count I):

1. Most women do not have longstanding relationships with their abortion providers. [Grimes dep. at 124] To attract patients, many abortion providers advertise in the Yellow Pages and on the Internet. [Bettigole dep. at 99-102]

2. Lou Anne Herron died on April 17, 1998 in the A-Z Women's Center, a Phoenix abortion clinic, as the result of a lacerated uterus, an injury that occurred during an abortion. [EJA00000177-293 (Phoenix Police Department Report, dated July 15, 1998)] Although Ms. Herron's injury might not have resulted in death under different circumstances, the A-Z Women's Center was understaffed, and the staff that was on the premises during the abortion were improperly trained. [Grimes dep. at 91-97; EJA00005670-5879 (testimony of Dr. John I. Biskind in *State v. Biskind*, No. CR 99-00198 (Ariz. Superior Ct.), dated February 13, 2001)] Ms. Herron's care at the A-Z Women's Center was well beneath the standard of care for abortions and was "absolutely preventable." [Grimes dep. at 94, 96, 99]

3. This death and two other abortion-related incidents–the 1995 abortion death of a twenty-six year old woman who bled to death when her uterus was lacerated during an abortion and the 1998 birth of "Baby Phoenix" following an attempted abortion at 37 weeks gestation–were the impetus for the Arizona Legislature's decision to study and eventually regulate abortion clinics. [Bettigole dep. at 87; Davis dep. at 35, 62; EJA00000152-176 (1/18/96 interview transcript of Dr. John I. Biskind before the Arizona Board of Medical Examiners); EJA00000100 (*Near-Abortion Spurs Investigation of Valley Physician*, ARIZ. TRIB., July 11, 1998); Arizona State Senate Final Revised Fact Sheet, H.B. 2706, 44th Leg., 1st Reg. Sess. at 1 (Ariz. 1999) ("Events in 1998 at a Phoenix abortion clinic raised several questions about the responsibility of state agencies to ensure the public health and safety regarding abortion and other outpatient medical procedures."); Arizona House of

Representatives Bill Summary, H.B. 2706, 44th Leg., 1st Reg. Sess. at 1 (Ariz. 1999) ("Events at a Phoenix abortion center raised questions as to how state agencies protect the public pertaining to abortion and various types of outpatient medical procedures.")]

4. At the same time that the Legislature was considering legislation to regulate abortion clinics, it also passed legislation that required DHS to regulate urgent care centers. [S.B. 1098, 44th Leg., 1st Reg. Sess. (Ariz. 1999); Davis dep. at 36; Phillips dep. at 19-21] DHS began regulating urgent care centers in July 2000. [Blair dep. at 28-29] In addition, pursuant to House Bill 2647, the Legislature's Joint Health Committee of Reference "shall review the types of facilities that remain exempt from regulation by [DHS]"and shall make recommendations by December 31, 2001 regarding "which classes of exempt facilities should be regulated by [DHS] to ensure the public health." [H.B. 2647, 44th Leg., 2nd Reg. Sess. at § 9 (Ariz. 1999)]

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Janet Napolitano
Attorney General

By Lynne C. Adams
Kevin D. Ray
Lynne C. Adams
Timothy C. Miller
Assistant Attorneys General
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(210) 494-7781

Copy mailed on April 30, 2001 to:

Ms. Bonnie Scott Jones
Ms. Julie Rikelman
THE CENTER FOR REPRODUCTIVE LAW & POLICY
120 Wall Street, 14th Floor
New York City, New York 10005
Attorneys for Plaintiffs

EQUAL PROTECTION

DEPOSITION EXCERPTS

Excerpts from Deposition of Joel Bettigole, M.D.
October 13, 2000

[87:01 - 87:25] Bettigole, Joel

Q. Doctor, can you tell me what you know about the case involving Louann Herron or Dr. Biskind?

A. Well, you know, obviously, I read the papers like everybody else did, and I knew the facility very well because I worked there years ago. And I knew Dr. Biskind – you know, casually I met him a couple of times.

And I knew the owner of the clinic very well. And I knew how the clinic was run. And I knew them, and I knew that they had one death previous to that, couple years before. And I was very saddened and very shocked at the death of Louann Herron, as well as the 37-week fetus, which they attempted to deliver, but I was not suprised.

Q. Why weren't you surprised?

A. Because I know the doctor involved was and impaired physician, and I know the guy who owned the clinic didn't use high-quality personnel, and like -- you know, it happened to be an abortion clinic, but it could have been a plastic surgeon doing liposuction and doing the same thing could happen. It's just that -- as an aside, I mean, these whole regs, that cause these regs, that caused the legislature to do something.

Q. Doctor, my name is Chuck Pyle. I represent Janet Napolitano, one of the defendants in this case. I just have a few questions.

One, you referred -- I haven't got this statement, but you referred to in an advertising you had a web site, and I attempted to download that. Maybe we can have that marked. I guess we are up to Exhibit 3?

MS. BURKE: Three

THE WITNESS: Let me see if you have got it all.

That's it.

(Deposition Exhibit No. 3 was marked for identification.)

Q. BY MR. PYLE: Exhibit 3 is information that is available to people trying to find out information about your office on the Internet, right?

A. That's correct.

Q. And you have done that for purposes of advertising and attracting clients or patients?

A. Works very well.

Q. And then Exhibit 4, this is your Yellow Page ad?

A. Yes.

Q. I guess the top half?

A. That's an old one. You have got an old book. These people don't exist.

Q. the Family Planning Institute, the

bottom half of the ad?

A. You have got an old book here.

Q. We are in Tucson. So we don't get the new stuff.

A. Well, it is even an old book for Tucson. This is '98. You are two years behind, but I use the same ad. Let's see. Yes, it is essentially the same ad.

MR. PYLE: Okay. Can I have that marked as Exhibit 4?

(Deposition Exhibit No. 4 was marked for identification.)

THE WITNESS: I just want -- on this Exhibit 4, that it's only the top half of the ad that

applies to me, and that the ad is from a 1998 book and we have -- and -- although the ad is very similar.

[101:23 - 102:24] Bettigole, Joel

Q. In the page on your web site that is entitled "Surgical Abortion Services," it says, "The physicians performing abortions are board certified

OB/GYNs with over 50 combined years of special expertise in abortion medicine."

A. Talking about the guy who covers me and myself.

Q. Okay. Has this -- is this your new associate or is this --

A. Yes, but th e guy who worked with me

also was the same ilk.

Q. So they would have about 20 years of experience in performing --

A. 20 to 30. I have 30. So that leaves him at least 20.

Q. Okay. Then on your web site there's clear information as to where the clinics are located. You have got a picture of your Phoenix clinic, right?

A. That's right.

Q. And also on the web site is a map to where the clinic would be located, how to get to it?

A. Yes.

Q. And it also shows the relationship of the clinic to Good Samaritan Hospital. Looks like it, unless this a delicatessen here. I don't know.

A. Yes, Good Sam.

Excerpts from Deposition of Virginia Marie Blair
October 17, 2000

[28:01 - 29:08] Blair, Virginia

Q. Sorry if I asked you this before, but what is the purpose of the Division of Assurance overall?

A. It is to regulate health-care institutions and child day-care institutions.

Q. And what is the purpose of your division, the Office of Medical Facilities?

A. Specifically, we regulate acute care health care institutions. Hospitals. Outpatient surgery centers. Recovery care centers. Outpatient treatment clinics which encompass a wide variety including outpatient dialysis facilities, outpatient physical therapy, comprehensive outpatient rehab, primary care, urgent care centers.

Q. What is an urgent care center?

A. Urgent care center is a type of facility that is defined in statute. And I don't have the statutory definition in front of me. But they provide unscheduled care to people in an outpatient setting.

Q. So DHS regulates urgent care centers; is that correct?

A. We do. We regulate free standing urgent care centers that are not part of a hospital.

Q. And how long has DHS been regulating urgent care facilities?

A. They were required to be licensed as of July 1st of this year.

Q. And they weren't regulated in any way by DHS before July 1st of this year?

A. Urgent care centers that were not private practice were always regulated by DHS for as long as they have had licensure standards. However any, including private practice urgent care centers, are required to be licensed now.

[91:09 - 97:05] Grimes, David

Q. And this police report details the discussions that detectives had with different staff of the A-Z Women's Clinic who were there on April 17th, 1998, when Lou Anne Herron had an abortion?

A. Correct.

Q. Okay. And based on what you have read, Doctor, is it accurate to say that Lou Anne Herron was at the clinic for about three hours before she died?

A. I would have to check to see what time she arrived at the clinic.

Q. If the police report says three hours, you wouldn't disagree with that?

A. Wouldn't quarrel with it, but I have not seen the medical records.

Q. Okay. And based on what you read, there was no registered nurse on site in the afternoon when Lou Anne Herron had her abortion, was there?

A. That is my understanding.

Q. The only staff that were there besides Dr. Biskind were medical assistants?

A. I don't know the training of all of them.

Q. That is what the police report would say, correct?

A. I have no other evidence.

Q. Now, Doctor, some of the discussions in this police report suggest that Dr. Biskind asked some of the

staff who were performing ultrasounds to manipulate the ultrasound to come up with a gestational age below 24 weeks. Do you recall that in the report?

A. Yes, I do.

Q. Okay. Is it a fair statement to say that gestational age is one of the primary determinants of safety ---

A. (Interposing) That is true.

Q. --- in an abortion? And that an ultrasound is probably the most accurate way to get gestational age -- determine gestational age?

A. Oftentimes.

Q. Okay. And, therefore, if you are going to do an ultrasound to determine gestational age, is it important that the ultrasound be performed by someone who is trained?

A. Yes.

Q. Okay. And is it important that the person not manipulate the ultrasound to reach a desired result?

A. Certainly.

Q. Based on your review of the police report, is it your understanding that some of the medical assistants had never stepped into the recovery room at the time of Lou Anne Herron's death?

A. I understand that some were new.

Q. In fact, one had been out of school a week and the other had not even graduated. Isn't that what the report says?

A. I don't recall specifically.

Q. The report also details, during Lou Anne

Herron's time in the recovery room, that one of the medical assistants went to tell Dr. Biskind that there might be a problem with Lou Anne Herron, and he was eating his lunch. Do you remember that discussion?

A. Yes.

Q. Okay. And do you remember that, according to this report, he responded angrily that he was eating his lunch and did not want to be bothered. Do you remember that?

A. I recall that.

Q. Would you say that that meets the standard of

care that a physician should provide in that situation?

A. No.

Q. Do you recall from this police report that the clinic administrator was not trained as a nurse or a medical assistant?

A. That is my understanding.

Q. And that after Dr. Biskind became upset, he told the medical assistant to go find the administrator and send the administrator in to check on Lou Anne Herron?

A. I recall he argued with the administrator.

Q. He argued with her. That is correct. But do you recall one of the medical assistants testifying to the police or giving evidence to the police that the administrator was told by Dr. Biskind to take care of Lou Anne Herron?

A. I don't recall.

Q. Okay. If that was the case, and the administrator had no medical training at all, would that

meet the standard of care?

A. I think it would be reasonable for an administrator to take a look at a patient in jeopardy, yes.

Q. Okay. Not while the physician was eating his sandwich?

A. Separately, together. I think it is -- would not be unreasonable, especially if a transfer is being contemplated. The administrative staff will oftentimes handle that.

Q. Okay. But there is nothing at this point in the police report that would suggest that anything was -- anyone was discussing transfer. In fact, she stayed there for approximately three hours, correct?

A. That is my understanding.

Q. Is it important that medical assistants and other staff be properly trained?

A. Certainly.

Q. Do you recall in this police report that the medical assistants became more and more agitated because there was more and more blood under Lou Anne Herron's legs? Do you recall that?

A. Yes, I do.

Q. Do you recall, in fact, that one of the medical assistants described it as a puddle of blood?

A. Yes.

Q. And do you recall that -- as you just testified, you recall reading that Lou Anne Herron and -- excuse me, that the administrator and Dr. Biskind were arguing about whether there should have been an RN

available in the afternoon. Do you recall that?

A. That was the claim, right.

Q. Do you recall that at some point during the three hours, Dr. Biskind -- while Lou Anne Herron was still bleeding, he just simply left the facility?

A. He left at one point. I know he did see, reportedly, the patient and worked on her IV. So he did see her at least once in the recovery room by report.

Q. I don't want to go into the details with you. I am not sure that is correct, but that is what you recall?

A. Teresa Jensen's testimony or report was that he tended to her in the recovery room.

Q. He walked in, correct?

A. And worked on her IV. So he was clearly aware of her situation.

Q. And then he left, correct?

A. That is my understanding.

Q. Okay. Would leaving in a situation where a patient was bleeding heavily be the standard of care?

A. No. It is inexcusable.

Q. Do you recall this same Teresa that you were just talking about say that she was never given any policy or procedure manuals to study nor given any training before she worked in the recovery room?

A. I recall that.

Q. And would that meet the standard of care, not receiving training like that?

A. Well, training is one thing. Policy and

procedure manuals are something separate. Training is important. I am not sure manuals are.

[99:4 - 99:9] Grimes, David

Q. Dr. Graham also stated that Lou Anne Herron should not have died and would have survived with a minimal amount of care and treatment from Dr. Biskind. Do you agree with that?

A. I am not sure "minimal" is the term I would use. But absolutely, this death was preventable.

[124:01-124:04] Grimes, David

Q. And many of the women who come in don't have a long-term relationship with the abortion provider, correct?

A. Correct.

[35:07 - 35:24] Davis, Victoria

Q. Now you had mentioned that the Joint Study Committee, their purpose was to look into the current practice of regulating abortion clinics and other outpatient treatment centers?

A. Um hum, yes.

Q. And when you say their purpose was to look into it, were they -- besides just looking at it, were they trying to come to some conclusions?

A. I think that they wanted to know how outpatient treatment centers, which abortion clinics fall under that category, are regulated. Who has authority over it. And how they could prevent another tragedy from occurring like the Lou Ann Heron death.

Q. What conclusions did the committee come to on how to prevent another tragedy?

A. I would say that the conclusions were the draft legislation in 2647, giving us the authority to regulate abortion clinics.

[35:25 - 36:25] Davis, Victoria

Q. Did anyone on the committee think that that

regulation was not a way to prevent another tragedy from happening?

A. I know that there was testimony provided that no amount of regulation could prevent bad judgment of an individual doctor. But the general consensus was that

some sort of regulation was necessary for abortion clinics, and the committee wanted to look into other outpatient treatment centers to determine if they should also be regulated to insure certain levels of minimum standards of safety.

Q. Did the committee look into that, other procedures?

A. At the same time that the abortion clinic regulation bill was going through the legislative process, there was also a bill that went through on urgent care centers that was sponsored by Ann Day. And urgent care centers were also outpatient treatment centers, and they were brought under regulation, as well.

Q. Do you know the bill number?

A. I believe it was Senate bill 1098.

Q. And do you know what happened to that bill?

A. It passed.

Q. It passed?

A. It passed.

[62:16 - 62:25] Davis, Victoria

Q. Do you know what point he was making there?

A. Let's see. This would have been when the bill was introduced, and he would have been giving a preamble.

Q. Do you know the point he was trying to make in that statement there?

A. He didn't want to have a recurrence of the Lou Ann Heron incident. They wanted to empower DHS and BOMEX to be able to regulate so there wouldn't be a

25 recurrence.

Excerpts from Deposition of Kathleen Phillips
October 19, 2000

[19:12 -21:25] Phillips, Kathleen

Q. Do you have any knowledge of whether the Joint Study Committee is considering regulating other surgical procedures than abortion?
A. I don't know.
Q. Okay. Are you familiar with a bill that I believe is called Senate Bill 1098 that relates to urgent care centers?
A. Yes. When you say familiar, could you tell me what that means?
Q. Have you ever heard of it?
A. Yes.
Q. Did it pass?
A. Yes.
Q. To the best of your knowledge?
A. Yes.

Do I know the contents? No.
Q. No. Okay. Do you know whether the bill authorizes the Department of Health Services to regulate urgent care centers?
A. The Department already has that authority to regulate urgent care centers.
Q. Why does it have that sentence.
A. Through Title 36.
Q. And how does that -- what does Title 36 say that gives the department that authority?
A. Title 36 gives the department the authority to regulate healthcare institutions of which urgent care centers is

one of those institutions.

Q. Okay. Are you aware of whether Senate Bill 1098 gives the Department of Health Services any greater authority to regulate urgent care centers than it had before?

A. I don't know.

Q. You haven't -- have you worked with this law at all?

A. No. I am not familiar with its contents.

Q. Okay. Are you aware of whether the Department of Health Services has drafted any rules to apply to urgent care centers or is in the process of doing so?

A. We will begin drafting rules for urgent care centers in the next couple of months.

Q. Do you know, is there a time at which those rules are due?

A. No. There is no due date on those rules. We believe that we will complete them in approximately a year. Again, that's approximation.

Q. Are there urgent care centers that are currently regulated by the Department of Health Services?

A. Yes.

Q. And is it accurate to say that they are subject to rules that are not specific to urgent care centers?

A. Correct.

Q. What rules are they subject to now?

A. They're called our -- oh, I can't remember what you call them.

Q. Are they OTC, outpatient treatment centers?

A. They might be outpatient treatment centers. Yeah. I'm not positive, though.

Q. Okay.

A. Virginia Blair knows. She's the program person and she knows more about this than anyone, so...

Q. But it is correct that you don't plan to continue applying just those generic rules to urgent care centers, that, instead, you plan to make more specific rules for urgent care centers?

A. That is the plan.