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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

DEFENDANTS' JOINT RESPONSE TO PLAINTIFFS' MOTION TO STRIKE

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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.
DSOF	The defendants' joint Rule 1.10(*l*)(1) statements of undisputed facts in support of their motions for partial summary judgment.
NAF	The National Abortion Federation, a professional association of abortion providers that has adopted clinical policy guidelines related to abortion procedures.
PPCNA	Planned Parenthood of Central and Northern Arizona, one of the largest abortion providers in Arizona, and the author of abortion "protocols."
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

Plaintiffs' motion to strike is nothing more than a tactical maneuver to divert attention from the fact that recent decisions have gutted most of plaintiffs' claims. With recent appellate decisions upholding more restrictive regulatory schemes in South Carolina (*Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1188 (2001)), and Texas (*Women's Medical Center v. Bell*, 248 F.3d 411 (5th Cir. 2001)), the law is clearly on the defendants' side. Therefore, plaintiffs are trying to create a bogus "factual dispute" to avoid summary judgment. That attempt fails.

Plaintiffs attempt to avoid the imposition of summary judgment on their claims by arguing that documents and facts cited by defendants are irrelevant or inadmissible. This is both untrue and irrelevant. As the party with the ultimate burden of proof at trial, it is *plaintiffs'* burden to come forward with evidence that affirmatively supports each essential element of their claims. Defendants do not need to present *any* evidence to support summary judgment in their favor–they need only show that plaintiffs cannot establish their claims.

Moreover, plaintiffs' claims of irrelevance and inadmissibility lack any merit.[1] Thus, plaintiffs have not *disputed* any of the facts that support the defendants' motions for summary judgment; they simply argue about the weight that this Court–or any other fact finder–should give those facts. That is an inappropriate inquiry in a motion for summary judgment, and therefore both plaintiffs' motion to strike and their oppositions to defendants' motions for summary judgment must fail.

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[1] Although the defendants do not believe that plaintiffs' authenticity objections have merit, defendants are nonetheless obtaining affidavits or other information that may be necessary to authenticate those documents. Pursuant to Fed. R. Civ. P. 56(f), the defendants request that this Court allow them the necessary additional time in which to obtain the necessary affidavits or information. The defendants avow that they will submit such affidavits before the hearing on this motion and both parties' motions for summary judgment, which is scheduled for October 1, 2001.

Argument

I. PLAINTIFFS' OBJECTIONS, EVEN IF SUSTAINED, DO NOT DEFEAT DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

Plaintiffs imply that defendants must prove with admissible evidence that the Regulatory Act is constitutional. But as the Supreme Court noted in *Celotex v. Catrett*, 477 U.S. 317 (1986), the standard for a motion for summary judgment depends on whether the moving party bears the ultimate responsibility at trial. Here, because they bear the ultimate burden at trial, it is the *plaintiffs* who have the burden of negating with specific evidence–not with mere speculation–the validity of the bases that might support the Regulatory Act. *Id.* at 323. This is particularly true here, where the plaintiffs must overcome the presumption that the Regulatory Act is constitutional.

To obtain summary judgment, the defendants are not required to "disprove" plaintiffs' allegations–the defendants need only point out the plaintiffs' *lack of evidence* as to any one essential element of their claims. *Id.* "The moving party need not produce admissible evidence showing the absence of a genuine issue of material fact when the nonmoving party has the burden of proof, but may discharge its burden simply by pointing out that there is an absence of evidence to support the nonmoving party's case." *El Shirbiny v. Hewlett Packard Co.*, 2001 WL 590034, at *2 (N.D. Cal. May 24, 2001) (explaining burden for summary judgment under Supreme Court's "trilogy" of *Celotex*, *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

Defendants have met their burden under *Celotex*. In each of their motions for partial summary judgment, and in the accompanying statements of fact, defendants demonstrated that plaintiffs *have not* provided any evidence establishing each essential element of their claims. Defendants have also demonstrated with affirmative evidence that plaintiffs *cannot* establish the essential elements of their claims.[2] Defendants, however, are not required to

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[2] For example, in order to show that plaintiffs cannot demonstrate that the Regulatory Act is (continued...)

support their motions with affirmative evidence that negates plaintiffs' claims. *See, e.g.*, *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876 (9th Cir. 1987) (applying the *Celotex* analysis where non-movant plaintiff bore the ultimate burden of proof).

Plaintiffs cannot defeat defendants' motions for summary judgment merely by objecting to the admissibility of evidence, as they have attempted to here. Even if the evidence presented by defendants in connection with their motions is inadmissible (and as set forth below, it is not), plaintiffs still bear the burden of establishing each essential element of all of their claims both legally and factually. They have not and cannot do so.

II. THE DOCUMENTS AND FACTS CITED BY DEFENDANTS IN SUPPORT OF THEIR SUMMARY JUDGMENT MOTIONS ARE ADMISSIBLE.

The bulk of plaintiffs' evidentiary arguments are simply a rehashing of the central disputes of the case dressed up as attacks on the quality of the evidence. As explained below, all of their attacks fail.

A. Defendants' Statement of Facts Does Not Violate Rule 1.10(*l*)(1).

Plaintiffs assert that the defendants have failed to comply with D. Ariz. R. 1.10(*l*)(1) because some of the numbered paragraphs in the DSOF are comprised of more than one sentence. To the contrary, the DSOF clearly conforms with the applicable rule. The facts are set forth in a serial fashion and not in narrative form. The use of multiple sentences that relate to one statement of fact and are each supported by individual citations to the record

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[2](...continued)
unrelated to DHS's legitimate interest in maternal health, the defendants relied on a copy of PPCNA's protocols. Plaintiffs object to the introduction of this evidence on foundation grounds. However, even if sustained, this objection does not change the fact that plaintiffs cannot and have not established that the challenged regulations were drafted with some nefarious purpose in mind.

is not prohibited. Indeed, that method facilitates a more organized presentation of facts for the Court. This contention therefore lacks merit.[3]

B. The Documents Referenced in the DSOF Are Admissible and Support Defendants' Motions for Summary Judgment.

Plaintiffs object to the defendants' citation to various documents, requesting that this Court strike them from the record because they are allegedly unauthenticated. Among the documents plaintiffs challenge are:

- trial and administrative hearing records/transcripts;
- a police report;
- a newspaper article;
- legislative bills, legislative fact sheets and summaries;[4]
- PPCNA abortion protocols and a PPCNA abortion fact sheet; and
- the NAF Clinical Policy Guidelines.

Plaintiffs' contentions regarding the authenticity of each of these documents ignore the applicable rules of evidence and fly in the face of common sense and practice. Indeed, plaintiffs have not provided any explanation for why they believe these documents are not authentic. Nonetheless, defendants are currently obtaining any affidavits or other information necessary to authenticate the documents should this court rule that they are otherwise inadmissible.

1. The authenticity of all of the documents is satisfied by testimony or other evidence indicating that the documents are what the defendants purport them to be.

Federal Rule of Evidence 901(a) provides that the authenticity requirement is satisfied if there is "evidence sufficient to support a finding that the matter in question is what its

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[3] It is interesting that the plaintiffs complain about this practice, given that they used the same method in their Amended Supplemental Statement of Facts in Further Support of Plaintiffs' Motion for Summary Judgment, dated June 11, 2001.

[4] Although plaintiffs appear to concede that the legislative fact sheets and summaries are admissible, *see* Pls.' Mot. to Strike at 6, they curiously do not concede that the legislative bills *themselves* are admissible, even though plaintiffs attached them to each of their complaints.

proponent claims." The standard for a showing of authenticity under Rule 901 is the presence of sufficient evidence for a reasonable person to determine "that the evidence is what it purports to be." *United States v. Paulino*, 13 F.3d 20, 23 (1st Cir.1994); *accord* 5 JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE § 901.02[2] (1999) (Rule 901 satisfied if proponent makes sufficient showing to allow "reasonable person to believe the evidence is what it purports to be"). Among the types of evidence allowed by Rule 901 is testimony that supports the authenticity of a document and evidence that a document is from a public source, including a public office "where items of this nature are kept." Fed. R. Evid. 901(b)(1) & (7). In determining whether there is sufficient proof that the document is what the proponent claims it to be, the trial judge may base his findings on circumstantial evidence. *E.g.*, *United States v. Bagaric*, 706 F.2d 42, 67 (2nd Cir. 1983) ("finding may be based entirely on circumstantial evidence"), *overruled on other grounds by NOW v. Scheidler*, 510 U.S. 249 (1994). In addition, the contents of the document may provide sufficient indicia of authenticity. *Paulino*, 13 F.3d at 24. All of the documents that plaintiffs claim have not been properly authenticated are, in fact, supported by evidence that indicates their authenticity.

For example, both the PPCNA protocols and the PPCNA abortion fact sheet were exhibits to the deposition of Bryan Howard, PPCNA's president and CEO. Mr. Howard testified that the PPCNA protocols were prepared by PPCNA and given to the Arizona legislature in connection with its consideration of the Regulatory Act, and that they were an accurate statement of PPCNA's internal protocols. [Howard Dep. at 19-21] Regarding the fact sheet, Mr. Howard stated that it was "a fact sheet that [PPCNA] would use in counseling a patient or prospective patient about first trimester abortions." [*Id.* at 22-23 (although document currently used by PPCNA may have been revised, it would still be "largely similar" and address "these kinds of topics, risks")] This undisputed testimony provides sufficient evidence of the authenticity of the documents.

Similarly, the trial transcript and police report are supported by intrinsic evidence of

their reliability. The trial transcript is signed by the court reporter who transcribed the testimony and created the transcript. The police report includes circumstantial evidence to support the conclusion that the document is an official record.

The plaintiffs have not provided *any* basis for their assertions that the documents are not authentic, and they have not even indicated that they believe that the documents are not what they purport to be. In light of the evidence that supports the authenticity of each of the documents challenged by plaintiffs, plaintiffs' contentions fail.

2. Plaintiffs' expert and other witnesses relied on the NAF Guidelines, and the Guidelines and PPCNA documents are part of the public record.

Plaintiffs' objection to the NAF Guidelines on authenticity grounds is curious, given that they not only were produced by entities politically aligned with plaintiffs, but that Dr. Grimes, one of *plaintiffs' own experts*, specifically relied on this document in reaching his conclusions concerning this case. [Expert Report of David Grimes, M.D. at ¶ 28 (citing to NAF Guidelines)] Indeed, plaintiffs produced to the defendants an identical copy of the document relied upon by defendants in response to document requests and in connection with Dr. Grimes' expert report. [*Id.* at 9 (listing NAF Guidelines as an "Exhibit To Be Used as a Summary of or Support for Opinions")] Plaintiffs' argument regarding the NAF Guidelines therefore implicitly requires them to argue that the document relied upon by their expert is not "a true and accurate copy" of the NAF Guidelines. Plaintiffs have not even attempted to "explain why [their] expert witnesses may properly rely upon [the NAF Guidelines], but the [defendants] may not do so." *Baulch v. Johns*, 70 F.3d 813, 817 (5th Cir. 1995) (holding that authenticity challenge to document relied upon by defendants' own expert witness and produced to plaintiffs by defendants was frivolous, and awarding sanctions to plaintiffs based on such arguments).

Moreover, several of the plaintiffs themselves specifically referred to and relied upon the NAF Guidelines when they provided comments to DHS regarding the proposed rules. [*See* Undue Burden DSOF ¶ 4 (Dr. Raphael)] Dr. Raphael also testified that he was familiar

with the NAF Guidelines and considers them to be authoritative in the abortion field. [*See id.* at ¶ 9] Plaintiffs' objection now to the Guidelines is clearly only a tactical move; they certainly cannot claim that the document that their expert attached to his expert report and about which their own witnesses testified is not authentic. *See Baulch*, 70 F.3d at 817 (evidentiary objection was frivolous in part because "the attorney had no reason to doubt the document's accuracy").

The State also relied on the NAF Guidelines and the PPCNA Protocols in drafting the Regulatory Act. [*See* Undue Burden DSOF ¶¶ 3-7] Therefore, both are now considered a part of the official public record and have indicia of reliability regarding their authenticity.

3. Federal Rule of Evidence 902 allows for self-authentication of many of the documents.

With the exception of the PPCNA documents and the NAF Guidelines, the other documents are capable of self-authentication pursuant to Fed. R. Evid. 902. Rule 902 embodies case law and statutory developments which, over the years, sufficiently established the reliability and admissibility of these type of documents without the need for extrinsic evidence. *See* Fed. R. Evid. 902 advisory committee's note. Rule 902 recognizes that due to the nature of these type of documents, they are very likely authentic. *Id.* (noting that "[t]he likelihood of forgery of newspapers or periodicals is slight indeed.").

C. Plaintiffs Are Incorrect that Portions of the DSOF Are Not Based on Personal Knowledge or Otherwise Supported by the Record in this Case.

Plaintiffs also object to portions of the DSOF, claiming either that they are not based on personal knowledge or are not supported by the record. However, a review of the plaintiffs' numerous claims in this regard demonstrates that their objections are baseless. Instead of appropriate evidentiary objections, plaintiffs' arguments in this regard are nothing more than supplemental argument regarding the merit of the motions for summary judgment and challenging the weight and quality of the evidence, not its admissibility. Despite plaintiffs' invitation to do so, the Court should not weigh the evidence in reviewing defendants' motions for summary judgment, but simply determine if there is a dispute

regarding a material issue. *Liberty Lobby*, 477 U.S. at 252.

For example, plaintiffs allege that defendants' claim that "DHS has never had a problem safeguarding patient confidentiality" is not based on personal knowledge. [Pls.' Mot. to Strike at 12] However, in support of that fact, defendants cite the deposition testimony of Kathleen Phillips, a DHS employee, who testified as follows in response to a question concerning patient confidentiality: "We have never had a problem with confidentiality in the department." [Informational Privacy DSOF ¶ 4] Plaintiffs may not like that testimony and they may try to distinguish it somehow through argument, but their objection that it is "not based on personal knowledge" is obviously incorrect.

Plaintiffs' claims that certain factual statements contained in the DSOF are not supported by the evidence are similarly baseless. For example, plaintiffs allege that defendants' claim that when DHS removes records of a medical facility for further review, the records "are only available to those employees of the Office of Medical Facilities Licensure who need access" is not supported by the record. [*See* Pls.' Mot. to Strike at 12] In support of that fact, defendants cite the deposition testimony of Virginia Blair, a DHS employee, who testified that the following individuals may have access to abortion clinic files: "Support staff that are working on them and the surveyor or team leader or program manager who needs to have access." [Blair Dep. at 54] Ms. Blair also testified that "[t]he only people that are in our program that are in that area are employees of the Office of Medical Facilities. And we would question anybody else. Visitors are required to wear badges even if they come from other divisions of DHS." [*Id.*] Like the other statements plaintiffs object to on these grounds, their assertions that the statements are not supported by the record are demonstrably inaccurate.

III. PLAINTIFFS' RELEVANCE OBJECTIONS LACK MERIT.

Plaintiffs also urge this Court to strike individual sentences and entire paragraphs from the Equal Protection DSOF, the Informational Privacy DSOF, and the Fourth Amendment DSOF on the grounds of relevancy. Given the broad view of relevancy adopted

by the Federal Rule of Evidence 401, plaintiffs are simply incorrect. Relevant evidence is "evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphasis added). Each of the facts about which plaintiffs complain are, in fact, relevant to the inquiry in this case.

A. Equal Protection DSOF

Plaintiffs object to paragraph 1 of the Equal Protection DSOF, which indicates that many abortion providers advertise in the Yellow Pages or on the Internet. This fact, along with others to which plaintiffs do not object, supports defendants' position that abortion is inherently different from other medical procedures, a position directly contrary to plaintiffs' equal protection claim. Its relevance is plain.

Plaintiffs also object to paragraph 4, which discusses DHS's regulation of urgent care centers. This evidence is relevant to the State's regulation of other medical facilities, and it directly contradicts plaintiffs' claim that the Regulatory Act violates equal protection because the State does not regulate similar medical procedures.

B. Informational Privacy DSOF

Plaintiffs ask this Court to strike the deposition testimony of Drs. Richardson and Raphael; plaintiffs' expert Dr. Taffett; and plaintiffs' witnesses Howard, Yrun, and Drs. Bettigole and Tamis, all of which is cited in paragraph 4 of the Informational Privacy DSOF. Each of these witnesses testified that they were not aware of any instance in which DHS ever breached patient information or patient confidentiality. This information is obviously relevant to defendants' claim that plaintiffs have failed to meet their burden of demonstrating that DHS's privacy safeguards are constitutionally inadequate, a claim central to plaintiffs' informational privacy claim.

C. Fourth Amendment DSOF

Finally, plaintiffs move to strike paragraphs 1, 2 and 3 of the Fourth Amendment DSOF. Each paragraph demonstrates that plaintiffs are currently subject to other state and

federal regulations, many of which allow both announced and unannounced audits and inspections of their facilities. These facts directly relate to the abortion clinics' status as "closely-regulated businesses," a fact legally important to the resolution of plaintiffs' Fourth Amendment claim.

Conclusion

This Court should deny plaintiffs' Motion to Strike in its entirety.

Dated: June 29, 2001

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