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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

REPLY IN FURTHER SUPPORT OF THE DEFENDANTS' JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' UNLAWFUL DELEGATION CLAIM

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Pls.' Unlawful Delegation Resp.	The plaintiffs' opposition to defendants' joint motion for partial summary judgment on plaintiffs' unlawful delegation claim, filed May 31, 2001.
The Regulatory Act	A.R.S. §§ 36-449 through -449.03 and Title 9, Chapter 10, Article 15 of the Arizona Administrative Code, the statutes and regulations governing the licensing of abortion clinics in Arizona.
The State	The State of Arizona and its Legislature.
Unlawful Delegation DSOF	The defendants' joint Rule 1.10(*l*)(1) statement of undisputed facts in support of their motion for partial summary judgment on plaintiffs' unlawful delegation claim.

Preliminary Statement

Plaintiffs argue that the requirement that "[a] physician with admitting privileges at an accredited hospital . . . [be] in the physical facilities until each patient is stable and ready to leave the recovery room," A.A.C. R9-10-1506(B)(2), is an unlawful delegation of the State's power because hospitals have "unfettered discretion" to grant such privileges, thus depriving plaintiffs of due process. Not only is plaintiffs' challenge to that portion of the Regulatory Act premature, it ultimately lacks merit. Arizona law is clear that decisions regarding admitting privileges for physicians must "comport with due process." *Holmes v. Hoemako Hosp.*, 117 Ariz. 403, 404, 573 P.2d 477, 478 (1977). Therefore, the admitting privileges requirement is well within constitutional bounds.

Argument

I. PLAINTIFFS' FACIAL CHALLENGE IS PREMATURE AND LACKS MERIT.

As plaintiffs implicitly concede, their unlawful delegation challenge is premature, as no plaintiffs have been denied admitting privileges. [Pls.' Unlawful Delegation Resp. at 5] Nonetheless, they argue that "[t]he constitutional infirmity of an unlawful delegation lies in the state's *grant* of authority, regardless of how that authority is *exercised*." [*Id.*] Plaintiffs also speculate that because federal and state law permits hospitals to prohibit the performance of abortions in their facilities, "an Arizona hospital *can* prevent physicians who provide abortions from obtaining admitting privileges simply by adopting policies disfavoring the performance of abortions in their facility and denying admitting privileges in accordance with this policy." [*Id.* at 3 (emphasis added)] However, a facial challenge to a grant of authority–in the absence of any actual deprivation of rights–has merit only if the scheme *explicitly allows* the violation of constitutional rights. *See, e.g., Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 163 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1188 (2001) (in mounting a facial challenge to the Regulatory Act, plaintiffs bear a "heavy burden" of

demonstrating that the regulations *on their face*, are intrinsically unconstitutional).[1] The Regulatory Act does not do so.

Causeway Medical Suite v. Ieyoub, 109 F.3d 1096 (5th Cir. 1997) (cited by plaintiffs at 5-6), is instructive. In *Causeway*, the court struck down a parental consent requirement that invested judges with discretion to deny an abortion to a minor in direct conflict with Supreme Court precedent. In other words, judges were given power by statute to do something that was prohibited by law. Indeed, in clarifying its ruling, the court distinguished *Barnes v. Mississippi*, 992 F.2d 1335 (5th Cir.1993), in which the court had upheld the discretion given judges to deny an abortion to a minor. The court noted that in *Barnes*, unlike *Causeway*, the statute that conferred the discretion did *not* give judges discretion to act in a manner contrary to Supreme Court precedent. *Causeway Med. Suite*, 109 F.3d at 1109-10. Similarly, the Regulatory Act does not confer any power on Arizona hospitals to act unlawfully. Because the Regulatory Act does not explicitly allow Arizona hospitals to exercise any unlawful power and the Act does not deny due process on its face, it is constitutional.

II. THE REGULATORY ACT'S ADMITTING PRIVILEGES REQUIREMENT IS CONSTITUTIONAL.

A. Requiring Abortion Clinics to Employ the Services of a Physician with Hospital Admitting Privileges Does Not Strike at the Core of the Abortion Right.

The admitting privileges requirement of the Regulatory Act is subject to the same standard of review as are all the Act's other requirements. "If a regulation serves a valid purpose–'one not designed to strike at the right itself'–the fact that it also has 'the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'" *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (joint

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[1] The plaintiffs' burden is a heavy one regardless of the standard used by this Court. *Compare Planned Parenthood v. Lawall*, 180 F.3d 1022, 1025-27 (9th Cir. 1999) (applying *Planned Parenthood v. Casey's* "substantial obstacle" standard to facial challenge of abortion regulations) *with United States v. Salerno*, 481 U.S. 739, 745 (1987) (in facial challenge, "challenger must establish that no set of circumstances exists under which the Act would be valid").

opinion of O'Connor, Kennedy, and Souter, JJ.); *see also Eubanks v. Schmidt*, 126 F. Supp. 2d 451, 455 (W.D. Ken. 2000) (pursuant to *Casey*, facial challenge to abortion regulation requires plaintiffs to demonstrate that the regulation will have "the direct and practical effect of preventing a 'large fraction' of women . . . from obtaining the abortion they seek"). Because the admitting privileges requirement furthers the State's legitimate interest in maternal health–by requiring that abortions are performed under circumstances that will insure patient safety–it serves a valid purpose. *See, e.g., Roe v. Wade*, 410 U.S. 113, 163 (1973) (state may permissibly regulate "the qualifications of the person who is to perform the abortion" and "the licensure of that person"). Thus, although the admitting privileges requirement in some instances may "amount[] to interference and intrusion," it does not "reach the core of the protected liberty," and it is therefore constitutional. *Greenville Women's Clinic*, 222 F.3d at 167.

All of the cases relied on by plaintiffs in support of their unlawful delegation claim (except for *Pro-Choice Mississippi v. Thompson*, bench op. (S.D. Miss. 1996), an unpublished opinion), pre-date the Supreme Court's decision in *Casey* and are therefore not persuasive. As the majority in *Casey* explained, judicial decisions following *Roe v. Wade* too severely restricted the states' power to regulate abortion. *Casey*, 505 U.S. at 871-78, 882 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). Thus, as with other post-*Roe* decisions, *Hallmark Clinic v. North Carolina Department of Human Resources*, 380 F. Supp 1153, 1158 (E.D.N.C. 1974), and *Birth Control Centers, Inc. v. Reizen*, 508 F. Supp. 1366 (E.D. Mich. 1981), "went too far." *Casey*, 505 U.S. at 875 (joint opinion of O'Connor, Kennedy, and Souter JJ.). The admitting privileges requirement is an appropriate exercise of the State's authority under the framework established in *Casey*.[2]

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[2] For the same reason, and in spite of the fact that it supports the defendants' position, *Women's Health Center v. Webster*, 871 F.2d 1377 (8th Cir. 1989), is not entirely persuasive. In that case, the court struggled to distinguish the holdings in *Hallmark Clinic* and *Reizen* and thereby uphold the regulation at issue, which required physicians who performed abortions to have hospital privileges.
(continued...)

B. It Is Not Unlawful to Delegate Authority to an Entity that Must Exercise Such Authority Reasonably and in Accordance with Due Process.

Plaintiffs concede that "the state is permitted to delegate licensing power to independent medical boards, which are subject to substantive limitations on their decision making powers." [Pls.' Unlawful Delegation Resp. at 5] However, they assert that the State "may not grant such power to hospitals, which possess unfettered discretion to adopt viewpoint based policies, such as policies disfavoring abortion." [*Id.*]

Plaintiffs can point to no justification for allowing the State to delegate authority to independent medical (or other) licensing boards, but not to hospitals when the hospitals are bound by the same rules of due process. Indeed, *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232 (1957), cited by plaintiffs, actually support defendants' position on this point. In *Schware*, the Supreme Court held that because professional licensing boards are prohibited from adopting policies that are unrelated to individuals' qualifications to practice their profession, they are lawful repositories of state power. Plaintiffs observe that "[a] state can require high standards of qualification ... before it admits an applicant to the bar [or any other profession], but any qualification must have a rational connection with the applicant's fitness or capacity to practice." [Pls.' Unlawful Delegations Resp. at 5 (quoting *Schware*, 353 U.S. at 238-39); *cf. Hallmark Clinic*, 380 F. Supp at 1158 (cited by plaintiffs) ("due process cannot tolerate a licensing system that makes the privilege of doing business dependent on official whim")] Legally, there is no difference between granting power to a licensing boards and granting it to a hospital, as long as the entity provides due process. When the entity to whom authority is being delegated provides due process protection, and thus cannot exercise unfettered discretion or adopt improper policies, the grant of authority is permissible and appropriate.

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[2](...continued)
It found those cases not controlling because the regulation "involve[d] state regulation of the qualifications of persons who perform abortion rather than standards for licensure of abortion clinics." *Id.* at 1382. That distinction is almost a distinction without a difference. However, in light of *Casey*, this Court need not fashion such a distinction to uphold the Regulatory Act.

C. Arizona Hospitals Provide Substantive Due Process in Decisions Regarding Hospital Privileges.

Plaintiffs also argue that Arizona's hospitals are not bound by due process. That is simply not true. Relying on *Hallmark Clinic*, 380 F. Supp at 1158-59, plaintiffs claim that "[t]he existing limits on hospitals' authority to deny or revoke admitting privileges... are merely procedural." [Pls.' Unlawful Delegation Resp. at 1] While plaintiffs' assertion may be true under North Carolina law, it misstates the law in Arizona. "There is no doubt that as far as public hospitals [in Arizona] are concerned the Fourteenth Amendment of the United States Constitution applies and *constitutional rights will be enforced.*" *Peterson v. Tucson Gen. Hosp., Inc.*, 114 Ariz. 66, 69, 559 P.2d 186, 189 (1976) (emphasis added).

Review of the actions of Arizona's hospitals "extends to both the procedural and *substantive* aspects of a matter . . . ." *Holmes*, 117 Ariz. at 405, 573 P.2d at 479 (emphasis added). For example, in *Holmes*, after the hospital's "procedural review ha[d] been examined, . . . [the court] next look[ed] to the *substantive* matter of the rule [to] determine whether it [was] unlawful, arbitrary or capricious as a matter of law. . . ."[3] *Id.* (emphasis added). In other words, Arizona's limits are *not* "merely procedural."

Moreover, Arizona's hospitals, like professional licensing boards, are required to adopt policies that bear a reasonable connection to the purpose of those policies. *See, e.g.*, *Reiswig v. St. Joseph's Hosp. & Med. Ctr.*, 130 Ariz. 164, 634 P.2d 976 (Ct. App. 1976) (court imposed a reasonableness standard in determining whether a hospital qualification requirement for doctors who applied to enter a program for developing expertise in cardiovascular surgery was appropriate); *Peterson,* 114 Ariz. at 71, 559 P.2d at 191 (in reviewing refusal of staff privileges, court "appl[ied] . . . a reasonable standard, i.e. one that comports with the legitimate goals of the hospital and the rights of the individual and the

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[3] In *Holmes*, the plaintiff challenged the provision of the hospital's bylaws that required "[a]ll staff members [to] have and maintain insurance of a kind and amount required by the staff and approved by the governing body" as a condition of maintaining medical staff privileges. 117 Ariz. at 404, 573 P.2d at 478.

public").

In view of the fact that Arizona's courts require that hospital policies and regulations comport with due process and are reasonable, the admitting privileges requirement in no way violates the constitution.

Conclusion

This court should grant the defendants' joint motion for partial summary judgment and dismiss plaintiffs' unlawful delegation claim (Count VI) with prejudice.

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