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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 FOR SUMMARY JUDGMENT

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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.
Defs.' [ ] Mem. Supp. Summ. J.	The defendants' joint memorandum in support of their motion for partial summary judgment on the claim indicated. The defendants' filed motions for summary judgment as to all of plaintiffs' claims on April 30, 2001.
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.

Argument

I. THE REGULATORY ACT DOES NOT VIOLATE EQUAL PROTECTION.

A. The Regulatory Act Does Not Unconstitutionally Discriminate Against Abortion Providers or Women Seeking Abortion.

Plaintiffs' claims that the Regulatory Act violates the Equal Protection Clause by discriminating against abortion providers have been soundly rejected by the two circuit courts that recently considered them. *See, e.g., Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 172-75 (4th Cir. 2000), *cert. denied*, 121 S.Ct. 1188 (2001) (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" and upholding the five or more abortion "line" drawn by regulations); *Women's Medical Center of N.W. Houston v. Bell*, No. 00-20037, 2001 WL 370053 at *7 (5th Cir. Apr. 13, 2001) (upholding regulations governing abortion clinics performing more than 300 abortions per year against equal protection challenge).

Primarily citing cases that pre-date the Supreme Court's analysis of abortion regulations in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), plaintiffs incorrectly assert that the proper standard to judge their equal protection claim is strict scrutiny. [Pls.' Mem. Supp. Summ. J. at 9-13] In *Casey*, the Supreme Court did *not* apply a traditional strict scrutiny standard of review, but instead examined whether the regulations at issue were unduly burdensome on the right of abortion. *Casey*, 505 U.S. at 874 (joint opinion of O'Connor, Kennedy and Souter, JJ.).[1]

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[1] Plaintiffs' citation to *Casey* is also misleading. At the pages cited by plaintiffs, the Court stated that "the essential holding of *Roe v. Wade* should be retained and once again affirmed." The Court went on to clarify that holding: that a woman has the right to choose an abortion without "undue interference from the State;" that the State generally has the power to "restrict abortions after fetal viability;" and that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 846; *see also id.* at 852-53. Plaintiffs simply ignore the Court's statements regarding the applicable *standard of review* that are included in the Defs.' Equal Protection Mem. Supp. Summ.

(continued...)

Nonetheless, even if abortion is still considered a fundamental right after *Casey*, plaintiffs must demonstrate that the right is *infringed or burdened* in some way by the Regulatory Act in order to trigger strict scrutiny. The fact that a law simply *addresses or implicates* a fundamental right is not enough to trigger a strict scrutiny standard of review. *See, e.g., Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (definition of "household" affecting eligibility for food stamps did not directly and substantially interfere with the right of association and therefore did not trigger strict scrutiny); *Harris v. McRae*, 448 U.S. 297, 322 (1980) ("where a statutory classification does not itself impinge on a right of liberty protected by the constitution," the validity of the classification must be viewed according to a rational basis test). Therefore, even assuming that the abortion decision is a fundamental right, strict scrutiny does not apply here because the Regulatory Act imposes no substantial burden on women choosing to have an abortion or on doctors performing abortions. Thus, a woman's right to choose an abortion is not *impinged* by the Regulatory Act. *Cf. Casey*, 505 U.S. at 869 (joint opinion of O'Connor, Kennedy and Souter, JJ.) (certain restrictions on abortion are allowed); *Greenville Women's Clinic*, 222 F.3d at 173 (there is no authority for the proposition that "abortion clinics and abortion providers have a fundamental liberty interest in performing abortions free from governmental regulation").

As set forth more fully in the Defs.' Equal Protection Mem. Supp. Summ. J. (at 3-9), plaintiffs' assertions regarding the constitutionality of the Regulatory Act as applied to abortion providers lack merit because they are rationally related to the State's interest in maternal health.[2]

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[1](...continued)
J., all of which establish that the Court rejected strict scrutiny. *See Casey*, 505 U.S. at 874, 871.

[2] The Supreme Court tacitly rejected plaintiffs' assertion (at 11 n.4) that an "intermediate scrutiny" should be applied to the Regulatory Act if strict scrutiny does not apply when it denied review of the Fourth Circuit's opinion in *Greenville Women's Clinic*, 222 F.3d 157, 172-75 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1188 (2001).

B. The Regulatory Act Does Not Discriminate Against Women.

In their motion for summary judgment, plaintiffs raise a new argument in support of their equal protection claims: that the Regulatory Act discriminates against women purely on the basis of sex. Plaintiffs claim that a mere *impact* on abortion is automatically a form of sex discrimination because only women can bear children, and therefore only women can undergo abortions. This rationale has been squarely rejected by the Supreme Court. "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[3] *Gedulig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). Under plaintiffs' rationale, every law affecting abortion would require review according to the standard applicable to sex discrimination. The Supreme Court has never adopted such a standard. *See id.* (discrimination tied to pregnancy is not the same as sex discrimination); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134-35 (1976) (same). Nor do any of the cases cited by plaintiffs suggest that such an expanded view of the Equal Protection Clause is appropriate.

In asserting that the Regulatory Act discriminates against women, plaintiffs rely on language regarding gender discrimination taken from cases raising unrelated claims: claims regarding the validity of peremptory jury strikes against women, *J.E.B. v. Alabama*, 511 U.S. 127 (1994); claims made solely pursuant to Title VII, *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); and claims regarding a separate, men's-only educational institution, *United States v. Virginia*, 518 U.S. 515 (1996).[4] Clearly, those cases are all inapposite to the issue presented by this case: whether the Equal Protection Clause prohibits the State from

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[3] In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), relied upon by the plaintiffs, the Court cited *Gedulig* and made clear that a sex-based discrimination claim arises *only* if "'distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.'" *Id.* at 145. That is not the case here.

[4] In the only other case relied upon by plaintiffs, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), the Court held that a veteran preference statute *did not* violate equal protection because it did not provide a preference for men over women and there was no evidence that the law reflected a purpose to discriminate on the basis of sex. *Id.* at 280-81.

enacting laws that protect the health of women, but not of men.

As the entire course of abortion jurisprudence makes clear, the Supreme Court has never based the abortion right on equal protection grounds, which would be the natural approach if restrictions on abortion constituted gender discrimination. Instead, the joint opinion of the Court in *Casey* grounded the abortion right on substantive due process–not on equal protection. 505 U.S. at 846-53; *accord A Woman's Choice–East Side Women's Clinic v. Newman*, 132 F. Supp. 2d 1150, 1181 (S.D. Ind. 2001) (noting that although "[i]t is difficult to imagine legislation regulating abortions or access to them that does not affect women more than men," there was no basis for an equal protection analysis given courts' historical emphasis on a due process analysis; "the Equal Protection theory adds nothing to plaintiffs' case"). It would be curious indeed, if, so soon after a comprehensive review of the issue, in which the Court relied in large part on the value of stare decisis, the abortion right were held, as the plaintiffs argue, to be grounded in equal protection, so that any regulations governing abortion would constitute discrimination against women.[5]

The State's regulation of abortion cannot be regarded as an effort to deny equal treatment to any group. The State does not deny women what it permits of others; in no sense does it discriminate against women in its regulation of abortion. As the Supreme Court recently stated in connection with an equal protection challenge to actions intended to deny women access to abortion clinics, "our cases do not support the proposition" that "since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270-71 (1993); *see also Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (constitutional test applicable to government abortion-funding restrictions is not the heightened scrutiny standard used in sex-based discrimination cases); *Harris*, 448 U.S. at

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[5] The Court's failure to use an equal protection analysis in its review of the abortion right has not been due to oversight. Justice Blackmun viewed the issue in equal protection terms in *Casey*. *See* 505 U.S. at 926-30 (opinion of Blackmun, J.).

322-23 (same). The plaintiffs' "approach of equating [regulation] of any activity (abortion) that can be engaged in only by a certain class (women) with opposition to [or discrimination against] that class" not only has no support in the law, but would "lead[] to absurd conclusions." *Bray*, 506 U.S. at 272 n.4.

II. THE ADMINISTRATIVE INSPECTIONS AUTHORIZED BY THE REGULATORY ACT DO NOT VIOLATE THE FOURTH AMENDMENT.

The essential purpose of a warrant requirement is to assure private citizens that "the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope." *Skinner v. Ry. Labor Executives' Assoc.*, 489 U.S. 602, 621-22 (1989) (citing *New York v. Burger*, 482 U.S. 691, 703 (1987), and *Camara v. Municipal Court*, 387 U.S. 523, 532 (1976) (cited by plaintiffs)). Here, because plaintiffs' privacy interests are diminished and because the Regulatory Act provides reasonable safeguards, those traditional Fourth Amendment concerns and objectives are satisfied and the Act is constitutional.

A. Abortion Clinic Operators Have Diminished Privacy Interests.

Contrary to the plaintiffs' assertions, the reasonable expectation of privacy of abortion clinic operators is not comparable to residential home owners, for "[a]n expectation of privacy in commercial premises [] is different from, and indeed less than, a similar expectation in an individual's home." *Burger*, 482 U.S. at 700 (citing *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981)). Consequently, "the warrant and probable-cause requirements [of traditional Fourth Amendment analysis] have lessened application in this context." *Burger*, 482 U.S. at 702. In fact, "an administrative inspection of a closely regulated business is a 'well-established exception to the warrant requirement'" for a search. *Crosby v. Paulk*, 187 F.3d 1339, 1346 (11th Cir. 1999) (quoting *Burger*, 482 U.S. at 712). In this case, plaintiffs are not only commercial enterprises, but are closely-regulated.

The plaintiffs contend that the abortion industry is not closely-regulated because it does not have a long history of government oversight. [Pls.' Mem. Supp. Summ. J. at 18-19] However, the Ninth Circuit has applied the closely-regulated business exception to businesses with far less regulatory oversight than the abortion industry. *See, e.g., United*

States v. Argent Chem. Labs., Inc., 93 F.3d 572 (9th Cir. 1996) (cited by plaintiffs) (finding veterinary drug industry to be closely regulated).[6] As amply demonstrated in Defs.' Fourth Amendment Mem. Supp. Summ. J. (at 2-3), abortion providers–no less than veterinary drug manufacturers–are closely regulated.[7]

B. The Regulatory Act Provides Constitutionally Adequate Standards.

Tacitly recognizing their diminished privacy expectations, plaintiffs concede that a warrantless administrative search may be based on a showing that "'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied.'" [Pls.' Mem. Supp. Summ. J. at 18 n.7 (quoting *Marshall v. Barlow's*, 436 U.S. 307, 320 (1978))] Those standards are satisfied here.

The Regulatory Act itself, along with inspection protocol adopted by DHS, provide appropriate and reasonable standards and boundaries for any administrative inspections. There are only two instances in which DHS may conduct an inspection of an abortion clinic:

- after receiving an application for a license or relicensure, A.R.S. §§ 36-424(B), 36-425(A); and
- after receiving a complaint, A.R.S. § 36-424(D); A.A.C. R9-10-1503(B)(4).[8]

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[6] *United States v. Device Labeled "Theramatic,"* 641 F.2d 1289 (9th Cir. 1981), relied on by the plaintiffs, is not to the contrary. In *Theramatic*, the Ninth Circuit held that where an administrative agency performs a warrantless search of a particular physician's office for a particular device, the Fourth Amendment is violated. 641 F.2d at 1294. The court rejected the "closely regulated business" argument because, unlike here, the search was not a part of any statutory program to inspect physicians' offices. *Id.* at 1295; *see also Argent Chem.*, 93 F.3d at 577-78 (explaining limitations of *Theramatic* and applying "closely regulated business" test).

[7] The plaintiffs argue that because they have not historically been heavily regulated, the "closely regulated business" exception cannot be applied here. Plaintiffs are mistaken. The duration of a regulatory scheme is of minimal relevance; "it is the pervasiveness and regularity of the [ ] regulation that ultimately determines whether a warrant is necessary." *Donovan*, 452 U.S. at 600. Here, it is precisely the pervasiveness and regularity to which the plaintiffs object.

[8] For DHS to investigate a medical facility based on a complaint, the complaint must allege a violation of an applicable statute or administrative rule and must be sufficiently specific. [Blair (continued...)

Applicants for a license from DHS are made aware that they will be subject to an initial licensing inspection and to inspections in connection with any relicensure application, and that they may be subject to complaint investigations. Moreover, DHS inspectors normally inspect all licensed medical facilities during business hours, and initial inspections are scheduled by DHS in advance with facilities. Relicensure inspections and complaint investigations, however, are generally unannounced to allow DHS to determine how the facility routinely operates.[9] [Blair dep. at 31-33, 38] DHS's inspectors are also statutorily required to notify a facility that they are present and provide the source of their inspection authority. [Phillips dep. at 62] Simply put, plaintiffs are incorrect in their (unsupported) assertion that the Regulatory Act grants DHS unfettered access to abortion clinics. *See Burger*, 482 U.S. at 710-12 (noting the appropriateness of similar administrative inspection practices).

Plaintiffs' reliance on *Camara* is misguided. In that case, the administrative search examined by the Court allowed municipal inspectors to enter *any private apartment house* without a warrant and without any probable cause to determine whether building code violations were present. *Camara*, 387 U.S at 525-27. In holding that such a warrantless inspection was improper, the Court noted that the inspections were of private homes, a privacy interest that is not implicated by the Regulatory Act. 387 U.S. at 530-31 ("even the

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[8](...continued)
dep. at 36-37, 47] In some instances, DHS's complaint investigation will involve only a telephone conversation between the DHS inspector and the facility, instead of a visit to the facility. [*Id.* at 34]

[9] The Supreme Court has noted the appropriateness of unannounced administrative inspections. In *United States v. Biswell*, 406 U.S. 311, 316 (1972), it stated:

> [I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority"). Moreover, given that context, the individual subject to such searches had "no way of knowing the lawful limits" of the inspector's powers, and "no way of knowing whether the inspector himself [was] acting under proper authorization." *Id.* at 532. Thus, the Court's holding was limited to administrative searches "of the kind at issue [in *Camara*]," which "lack the traditional safeguards which the Fourth Amendment guarantees to the individual."[10] *Id.* at 534. The Regulatory Act does not raise any such concerns. Instead, here there is no invasion of any private home; moreover, abortion clinic operators know of the possibility of, the source of authority for, and the limits of any inspections when they apply for a license, and they tacitly consent to the authorized inspections.

As with the majority of regulatory frameworks that have been examined for compliance with constitutional protections, the Regulatory Act is constitutional because it includes adequate protections of the plaintiffs' legitimate expectations of privacy. *See, e.g., Donovan,* 452 U.S. at 598-99; *Illinois v. Krull*, 480 U.S. 340, 351 (1987) ("legislatures generally have confined their efforts to authorizing administrative searches of specific categories of businesses that require regulation, and the resulting statutes usually have been held to be constitutional") (citing representative cases concerning regulated industries).

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[10] The Supreme Court has noted that in circumstances where, as here, there is no law enforcement purpose to inspections, the Fourth Amendment interests are different from those raised in criminal searches. *See, e.g., Camara,* 387 U.S. at 530, 535 (distinguishing criminal investigation from inspection programs); *Burger*, 482 U.S. at 716-17 n.27 (upholding a valid administrative inspection conducted without a warrant because it was not a pretext for gathering evidence of violations of the penal law). Thus, in *Camara*, the Court held that given the government's interest in public safety, "probable cause" in the criminal sense of the term was not necessary for the issuance of a warrant. 387 U.S. at 534. Instead, the Court focused on the reasonableness of legislative or administrative standards for inspections. *Id.* at 538-39. As set forth above, the reasonableness standard established by the Court is satisfied by the Regulatory Act.

Because plaintiffs' privacy expectations are diminished and because the Regulatory Act's standards are reasonable and adequate, the warrantless inspections allowed by the Act are permissible.

III. THE REGULATORY ACT DOES NOT VIOLATE THE PLAINTIFFS' RIGHT TO INFORMATIONAL PRIVACY.

Notwithstanding their concession that the Court must perform a balancing test to determine whether the Regulatory Act violates the plaintiffs' informational privacy rights, plaintiffs wholly ignore the factors to be considered in that test. *See In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (listing five factors in balancing test). As set forth in the Defs.' Informational Privacy Mem. Supp. Summ. J. (at 5-10), the balancing test analysis clearly weighs in favor of the State. The strong societal interest in protecting maternal health outweighs the individual privacy interests affected by the Regulatory Act. Moreover, the limited access to information and the strong confidentiality safeguards under Arizona law give patients constitutionally adequate protection against public dissemination of private medical information and demonstrate that the Act is narrowly tailored to meet that legitimate State interest.

A. The State Does Not Have "Unfettered Access" to Patient Information.

Contrary to plaintiffs' assertions (Pls.' Mem. Supp. Summ. J. at 23-24), the State does not have unfettered access to the medical records. The Regulatory Act allows DHS access to patient records *only* for the purpose of ensuring compliance with the licensure standards established by the Regulatory Act. Thus, DHS is authorized to review and copy patient records only in one of two situations: 1) as part of a complaint investigation, or 2) as part of a sampling of records during a licensing survey. A.R.S. §§ 36-424(B), 36-424(D), 36-425(A); A.A.C. R9-10-1503(B)(4). Moreover, the information that abortion clinics must collect and keep is very limited in nature: generally, the results of a physical exam, the patient's medical history, any required lab tests or ultrasound results, and a patient's medication information. A.A.C. R9-10-1511.

Similarly, plaintiffs incorrectly assert that the Legislature did not narrowly tailor the

Regulatory Act to the State's interest in maternal health. [Pls.' Mem. Supp. Summ. J. at 24] The drafting and implementation of the narrowest possible regulations is not required to uphold the constitutionality of information access legislation. *See Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) ("[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative"). Instead, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* at 798.

Here, the State narrowly tailored the Regulatory Act by limiting the State's access to patient records to two specific situations. Without this access, the State could not effectively ensure compliance with the health and safety requirements. As Virginia Blair noted, requiring consent or a warrant could detrimentally impede an investigation. [Blair dep. at 39] Thus, further narrowing would render the Regulatory Act less effective.

Moreover, the Regulatory Act and other DHS statutes governing the licensing of medical facilities include significant safeguards to protect the privacy interests of patients. Confidentiality safeguards have long been recognized by courts as key to protecting and respecting a patient's privacy. *See, e.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Whalen v. Roe*, 429 U.S. 589 (1977); *Greenville Women's Clinic*, 222 F.3d 157. As discussed in detail in Defs.' Informational Privacy Mem. Supp. Summ. J. (at 7-8), sufficient procedural safeguards exist in the Regulatory Act to protect a patient's privacy interests. In addition, the Florida physicians who have contracted with the State to provide ultrasound reviews must maintain confidentiality regarding patient information pursuant to the contract and Florida licensing laws. F.S.A. §§ 458.33(1)(mm), 381.026(4)(a)(2).

B. There Is No Evidence That the State's Access to Confidential Information Dissuades Women from Obtaining Abortions.

Plaintiffs do not contest that the State has a legitimate interest in reviewing patients' medical records in order to further maternal health. Instead, plaintiffs argue that the potential for release of confidential information will dissuade women from obtaining abortions or reporting all necessary information. [Pls.' Mem. Supp. Summ. J. at 22] Plaintiffs have presented absolutely no evidence to support that contention.

Plaintiffs' failure to present any evidence cannot be blamed on the lack of opportunity to develop such evidence. DHS has licensed Planned Parenthood clinics–clinics that perform abortions in addition to other medical procedures–throughout Arizona for many years. As a condition of licensure, these clinics must allow DHS to inspect and copy patient medical records without a search warrant or patient consent. *See, e.g.*, A.R.S. § 36-406(1)(c) (access to health care institutions' "books, records, accounts," and any other necessary information); A.R.S. § 36-406(2)(a) (inspections of health care institutions). Notwithstanding that plaintiffs Dr. Richardson and Dr. Yrun both worked in licensed Planned Parenthood clinics in southern Arizona, neither have identified a single instance in which State access to medical information dissuaded women from seeking abortions at Planned Parenthood. There is simply no evidence that the licensure of these abortion clinics has ever dissuaded any woman from seeking an abortion.

C. Plaintiffs' Cases Are Inapposite.

Plaintiffs cite only two cases where the courts have struck down reporting or inspection requirements for abortion clinics: *Pro-Choice Mississippi v. Thompson*, No. 3:96CV596BN (S.D. Miss. 1996), an unpublished bench opinion, and *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978). [Pls.' Mem. Supp. Summ. J. at 24] Neither of those cases supports plaintiffs' claims here.

Unlike the regulations examined in *Pro-Choice Mississippi*, the Regulatory Act requires DHS to redact all information that identifies the patient and all medical information in any document that will be placed in the public record. *Compare* A.R.S. § 36-404(A) *with*

Pro-Choice Mississippi, No. 3:96CV596BN, at 26. Moreover, the Regulatory Act does not allow DHS to make medical records available to the public, another factor in the *Pro-Choice Mississippi* court's decision. Instead, DHS destroys patient information when the documents are no longer needed. [Informational Privacy DSOF ¶¶ 2, 3]

The second case plaintiffs rely upon is equally unpersuasive. In *Wynn*, the district court distinguished *Danforth* by pointing out that, unlike *Danforth*, there was the possibility of patients' names being disclosed pursuant to an exception for fetal death reporting to the vital records office. *Wynn*, 449 F. Supp. at 1327. Unlike the Illinois regulations that required abortion providers to report every abortion, the Regulatory Act does not have a mandatory reporting requirement. In addition, unlike the Illinois regulations, the Regulatory Act does not have an exception to its confidentiality requirements that requires DHS to report the names of patients to the vital records office. Thus, even under the *Wynn* analysis, the Regulatory Act is constitutional.

IV. ARIZONA LAW REQUIRES THAT HOSPITALS' DECISIONS REGARDING ADMITTING PRIVILEGES COMPORT WITH DUE PROCESS.

As the basis for their claim that the State's regulatory power has been unlawfully delegated to hospitals, the plaintiffs incorrectly argue that "accredited hospitals in Arizona have the power to prevent a physician from obtaining a license for his or her [abortion clinic] by refusing for any reason (or no reason at all), to grant that physician admitting privileges at the hospital." [Pls.' Mem. Supp. Summ. J. at 25] This assertion is directly contrary to Arizona law. In Arizona, public and private hospitals are legally bound to provide due process to physicians seeking admitting privileges and may not, as the plaintiffs incorrectly allege, parcel out privileges according to their "whim or goodwill."

Assuming there has been some delegation of authority, that delegation is not unlawful because "[t]here is no doubt that as far as [Arizona] public hospitals are concerned the Fourteenth Amendment of the United States Constitution applies and *constitutional rights*

will be enforced."[11] *Peterson v. Tucson Gen'l Hosp., Inc.*, 114 Ariz. 66, 69, 559 P.2d 186, 189 (1976) (emphasis added) (citing *Findlay v. Bd. of Supervisors*, 72 Ariz. 58, 230 P.2d 526 (1951)); *Foster v. Mobile County Hosp. Bd.*, 398 F.2d 227 (5th Cir. 1968). Similarly, decisions regarding admitting privileges for physicians in private hospitals must "comport with due process." *Holmes v. Hoemako Hosp.*, 117 Ariz. 403, 404, 573 P.2d 477, 478 (1977) (citing *Findlay*). Thus, plaintiffs' argument (at 25) is spurious because it is well settled that neither public nor private hospitals in Arizona have "unfettered discretion," but, instead, are required to provide due process to physicians seeking admitting privileges.

Plaintiffs support their contention by citing cases from other jurisdictions where, unlike in Arizona, hospitals may have unfettered discretion. *See, e.g., Birth Control Ctrs., Inc. v. Reizen*, 508 F. Supp. 1366, 1374 (E.D. Mich. 1981) (defect in the regulations "lies in the delegation of unguided power to a private entity, whose self-interest could color its decision to assist licensure of a competitor"), *aff'd in part, rev'd in part on other grounds*, 743 F.2d 352 (6th Cir. 1984); *Hallmark Clinic v. N.C. Dep't. of Human Res.*, 380 F. Supp 1153, 1159 (E.D.N.C. 1974) (amended regulation was invalid because "[s]taff privileges, like transfer agreements, depend on the whim or goodwill of a hospital"), *aff'd in part on other grounds*, 519 F.2d 1315 (4th Cir. 1975).[12] Because Arizona law provides all necessary due process, A.A.C. R9-10-1506(B)(2) is constitutional.

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[11] By its terms, the Regulatory Act does not delegate any new authority or responsibility to public and private hospitals in Arizona. Rather, under the Regulatory Act, public and private hospitals in Arizona simply maintain their authority, subject to due process, to decide who has the necessary qualifications to be granted admitting privileges in their facilities. *See generally* Defs.' Unlawful Delegation Mem. Supp. Summ. J.

[12] *See generally* Defs.' Unlawful Delegation Mem. Supp. Summ. J. (providing a more complete discussion and analysis of cases relied upon by the plaintiffs, as well as Arizona court decisions requiring public and private hospitals to provide due process in decisions concerning physicians' admitting privileges).

V. THE REGULATORY ACT IS NOT UNCONSTITUTIONALLY VAGUE.

A. The Regulatory Act Gives Fair Notice of Prohibited Conduct.

In addition to the laws cited in the complaint, plaintiffs claim for the first time in their motion for summary judgment that another laundry list of regulations are unconstitutionally vague.[13] However, in order to make that claim, plaintiffs would have to show that the law is so unclear that "ordinary people can[not] understand what conduct is prohibited." *CISPES v. FBI*, 770 F.2d 468, 475 (5th Cir. 1985) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Plaintiffs cannot do so. The new claims–like those made in the complaint–are unsustainable.

Some of plaintiffs' new claims border on the ridiculous. For example, A.A.C. R9-10-1514(B) requires clinics to provide "areas or rooms" for various purposes, such as patient interviews, a toilet, and performing abortion procedures. Plaintiffs complain that they don't know "whether the facility's rooms may be used for multiple purposes." [Pls.' Mem. Supp. Summ. J. at 30] However, the regulation clearly states "areas *or* rooms." Moreover, common sense dictates when not to mix functions–for example, one shouldn't perform abortions in the bathroom. Similarly, common sense answers plaintiffs' complaint that A.A.C. R9-10-1513(5)–requiring clinics to maintain drugs and equipment to support cardiopulmonary function–is vague because many drugs and equipment can perform that function. Clearly, therefore, there are several methods of compliance with this regulation.

Other of plaintiffs' complaints are based on regulations that simply require physicians to exercise medical judgment–which, as explained more fully in the Defendants' Joint Motion for Partial Summary Judgment on Plaintiffs' Vagueness Claim, does not render a law vague. For example, plaintiffs complain about such "vague" terms as: "serious risk of substantial impairment" (A.A.C. R9-10-1501(40)); "potentially life-threatening occurrence

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[13] The alleged vagueness of the statutes and regulations pointed to in plaintiffs' Fourth Amended Complaint–relating to health and safety guidelines, "interpreting" an ultrasound print, and gestational age–are dealt with in the Defs.' Vagueness Mem. Supp. Summ. J.

that requires an immediate response or medical treatment" (A.A.C. R9-10-1501(13)); and "vital signs" (A.A.C. R9-10-1508(G)(1)). By labeling such provisions "vague," plaintiffs are arguing that a physician should *not* be expected to know when a situation is "life-threatening," when a patient requires medical treatment, or what "vital signs" are. Not only are such expectations common and well-understood, but they are part of medical practitioners' every-day vernacular and are vital for proper medical care.[14]

Similarly, plaintiffs assert that A.A.C. R9-10-1507(1), which requires physicians to treat patients with "consideration, respect, and full recognition of the patient's dignity and individuality," is unconstitutionally vague. Physicians are always expected to treat patients with dignity and respect, and this regulation asks no more. Plaintiffs' citation to *Women's Medical Center of N.W. Houston v. Bell*, No. 00-20037, 2001 WL 370053 (5th Cir. Apr. 13, 2001), is inapposite. In that case, the law required doctors to ensure that patients' dignity, respect and sense of self-worth were enhanced, explicitly defining the standard as the "degree to which care meets or exceeds the expectations *set by the patient*." *Id.* at *8 (emphasis added). The Regulatory Act, on the other hand, has no such subjective standard of care, but rather relies on objective reasonableness. Because the physician here must simply follow objectively reasonable standards, the Act does provide fair warning of the prohibited conduct.

Because the Regulatory Act uses commonly understood terms and standards, plaintiffs cannot show that the Act is so unclear that ordinary people could not follow it.[15]

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[14] Plaintiffs also complain that the Regulatory Act does not define "counseling" or what "qualifications" are necessary for counseling (A.A.C. R9-10-1503(C)(2)). First, such terms are not beyond ordinary comprehension. Moreover, the Act does *not* require any particular qualifications, but simply that clinic directors themselves define "the amount and type of training" required to provide counseling. A.A.C. R9-10-1503(C)(2). It is hard to see what plaintiffs could not understand in this requirement.

[15] Plaintiffs also complain about A.A.C. R9-10-1511(4)(a), which requires clinics to maintain patient records in the clinic for six months after discharge. Plaintiffs' complaint is that this (continued...)

B. The Regulatory Act Does Not Invite Arbitrary Enforcement.

Plaintiffs also complain that the Act invites "arbitrary and discriminatory" enforcement. That argument fails as well.

Plaintiffs' complaint is a *facial* challenge only–there has been no evidence of any improper enforcement. Where "[t]he language of the ordinance is sufficiently clear[,] . . . the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness." *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 503 (1982). As explained above, the Regulatory Act is sufficiently clear both for plaintiffs to follow and for DHS to enforce. Therefore, the "speculative" danger of improper enforcement is not enough to sustain plaintiffs' vagueness challenge. Moreover, as discussed in Defs.' Vagueness Mem. Supp. Summ. J., DHS has stated that it will reasonably interpret and enforce the regulations, and will work with abortion providers to provide information and guidance.

Because there is no evidence of any danger of improper enforcement, plaintiffs' claim of arbitrary enforcement is unfounded and untimely.

C. The Regulatory Act Does Not Encroach on Any Constitutional Right.

Plaintiffs's contention that the Regulatory Act will cause people to "steer far wide[]" of unlawful conduct, thus potentially encroaching on constitutional rights, also lacks merit. First, as explained above, the Regulatory Act is not vague, so plaintiffs cannot show any danger that people will have to "steer far wide[]" to avoid prohibited conduct. But more importantly, the only constitutionally protected right in this case is a woman's right to choose an abortion–and *nothing* in the Regulatory Act limits when, how or why a woman may seek an abortion. All the Act requires is that abortion clinics provide clean and safe facilities and proper medical treatment. There is no constitutional right to provide substandard medical care or unsafe facilities. Therefore, even if the Regulatory Act did

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[15](...continued)
could require keeping a clinic open for document storage even it had closed down. Thus, plaintiffs' complaint is not that they do not understand this requirement, but that they would find it burdensome. That is not a vagueness challenge.

cause people to "steer wide" of the conduct prohibited by the Act, there would be no encroachment on any constitutionally protected right.

VI. THE REGULATORY ACT IS CONSTITUTIONAL AND MUST BE UPHELD IN ITS ENTIRETY.

For the reasons previously stated in each of the Defendants' Joint Motions for Partial Summary Judgment and in this response brief, the Regulatory Act is constitutional in all respects. Plaintiffs' claims to the contrary are factually and legally insupportable. Therefore, the Regulatory Act must be upheld in its entirety.

However, should this Court determine that a particular provision of the Regulatory Act is unconstitutional, that provision can be severed and the balance of the Regulatory Act should be upheld. The Regulatory Act contains a severability clause, *see* 1999 Ariz. Session Laws Ch. 311, § 10, that this Court can use to sever a particular provision of the Act while giving full force and effect to the remainder. Plaintiffs' assertion that an individual provision–or, indeed, multiple provisions–of the Act cannot or should not be severed is clearly incorrect.

"[A]n entire statute need not be declared unconstitutional if constitutional portions can be separated." *Republic Inv. Fund v. Surprise*, 166 Ariz. 143, 151, 800 P.2d 1251, 1259 (1990). Instead, under Arizona law, "if the unconstitutional part of a statute can be eliminated and the remaining constitutional part is independent and still workable, then only the part which is objectionable will be eliminated and the balance left intact." *State v. Coursey*, 71 Ariz. 227, 236, 225 P.2d 713, 719 (1950).

First, the Court must determine whether the unconstitutional portion of the statute can be eliminated. To accomplish this, the Court must "ascertain whether the legislature intended the act to be severable." *See, e.g., State Comp. Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993). "The only way a court can be sure that the legislature intended severability is by the existence of a severability clause in the statute itself. When that is the case, there is no question that severability is intended." *State v. Watson*, 120 Ariz. 441, 452, 586 P.2d 1253, 1265 (1978); *see also Citizens Clean Elections Comm'n v. Myers*,

196 Ariz. 516, 523, 1 P.3d 706, 713 (2000) ("the express severability clause informs [us] that all doubts are to be resolved in favor of severability."). Arizona courts give full effect to severability clauses whenever possible. *See, e.g., Selective Life Ins. Co. v. The Equitable Life Assurance Soc'y of the United States*, 101 Ariz. 594, 599, 422 P.2d 710, 715 (1967).[16]

Having determined that any unconstitutional provision can be eliminated, the Court must next determine whether the remaining provisions are "independent and still workable." Here, once again, the Court must examine legislative intent. The Court "must turn to the *overall* purposes and aims of the legislature in enacting the statute in order to glean legislative intent . . . . In that regard, [the court] should consider the overall policy of the legislature as expressed in the statute." *Cohen v. State*, 121 Ariz. 6, 9, 588 P.2d 299, 302 (1978) (emphasis added).

Obviously, the overall aim of the Legislature in enacting the Regulatory Act was to protect maternal health by providing access to safe abortions. The effectuation of this aim does not hinge on the inclusion of any single, specific provision of the Regulatory Act. None of the provisions the plaintiffs believe are "unconstitutional" were the inducement for the passage of the Regulatory Act. The inducement was, instead, the death of Lou Anne Herron at a Phoenix abortion clinic in 1998–along with other highly publicized abortion-related injuries and incidents.

Moreover, none of the provisions identified by the plaintiffs are so "intimately connected" with the rest of the Regulatory Act that it raises the presumption that the Legislature would not have enacted the Regulatory Act without the existence of any individual provision. *See State v. Prentiss*, 163 Ariz. 81, 86, 786 P.2d 932, 937 (1990)

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[16] Plaintiffs' argument against severability relies on the assertion that any unconstitutional provision of the Regulatory Act is not severable unless the valid provisions are wholly independent of the invalid provisions and unless "the law enforced after separation is reasonable in light of the act as originally drafted." [Pls.' Mem. Supp. Summ. J. at 33 (purporting to cite the severability test enunciated in *Millet v. Frohmiller*, 66 Ariz. 339, 343, 188 P.2d 457, 460 (1948))] However, plaintiffs fail to note that *Millet* goes on to state that "[t]he test is whether or not the legislature would have passed the statute had it been presented with the invalid features removed." *Id.*

("where valid parts of a statute are effective and enforceable standing alone and independent of those portions declared to be unconstitutional," courts will not strike other portions unless they are "intimately connected" with the invalid provisions). Each individual section of the Regulatory Act is both independent and is "workable" in its own right. For example, the provisions dealing with clinic administration are separate, distinct and "workable" apart from the provisions dealing with minimum equipment and supply standards, or those dealing with requirements for the physical facilities. Thus, even if the Court were to find one of the portions of the Regulatory Act unconstitutional, the other provisions should "not be disturbed." *Id.*

Conclusion

For the reasons set forth in the defendants' joint response, their joint response to the plaintiffs' statement of facts, and in their joint motions for partial summary judgment, this Court should deny plaintiffs' motion for summary judgment on Counts I, II, IV, V and VI of the Fourth Amended Complaint, and enter judgment for the defendants on all counts, dismissing the complaint with prejudice.

Dated: May 31, 2001

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