Nos. 02-17275, 02-17381, and 02-17382

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TUCSON WOMAN'S CLINIC; DAMON RAPHAEL, M.D.; OLD PUEBLO FAMILY PLANNING; ROBERT H. TAMIS, M.D. P.C.; SIMAT CORP., dba Abortion Services of Phoenix; and ROBERT H. TAMIS, M.D., on behalf of themselves and their patients seeking abortions,

Plaintiffs-Appellants/Cross-Appellees,

v.

CATHERINE EDEN, in her official capacity as Director of Arizona Department of Health Services; JANET NAPOLITANO, in her official capacity as Attorney General of the State of Arizona; RICHARD M. ROMLEY, in his official capacity as Maricopa County Attorney and as representative of all other prosecuting attorneys similarly situated throughout the State of Arizona,

Defendants-Appellees/Cross-Appellants.

DEFENDANTS-APPELLEES/CROSS-APPELLANTS' COMBINED RESPONSE AND OPENING BRIEF

On Appeal from the United States District Court
for the District of Arizona, No. CV00-00141-TUC-RCC

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because this case involves constitutional challenges brought under the Fourteenth Amendment to the United States Constitution. The right to sue state officials for alleged constitutional violations is conferred by 42 U.S.C. § 1983.

This Court has jurisdiction under 28 U.S.C. § 1291 because both Plaintiffs-Appellants/Cross-Appellees ("Plaintiffs") and Defendants-Appellees/Cross-Appellants ("Defendants") appeal from the district court's final judgment that disposed all claims with respect to all parties. Final judgment was entered on October 1, 2002. Both Plaintiffs and Defendants timely filed their notices of appeal on October 31, 2002. *See* FED. R. APP. P. 4(a)(1).

ISSUES PRESENTED FOR REVIEW

1. Arizona enacted comprehensive statutes and promulgated regulations to govern the health standards for abortion clinics. *See* Arizona Revised Statutes Annotated ("A.R.S.") §§ 36-402, 36-449 through 36-449.03, and 36-2301.02, and Title 9, Chapter 10, Article 15 of the Arizona Administrative Code (the "Regulatory Act" or "Act"). Did the district court err in holding that the Fourth Amendment's warrant requirement applies to compliance inspections of abortion clinics, even though warrantless searches of closely regulated

industries are constitutionally permissible and the Regulatory Act comprehensively regulates abortion clinics?

2. Did the district court err in holding that Arizona Administrative Code ("A.A.C.") R9-10-1511(A)(4)(b), A.A.C. R9-10-1511(A)(4)(c), and A.R.S. § 36-2301.02(C) unconstitutionally violate a woman's right to informational privacy, given (i) the overwhelming evidence that patient information will be kept strictly confidential, (ii) the State's necessity for such information to conduct compliance inspections, and (iii) the State's interest in protecting maternal health?

3. Did the district court err in holding that the portion of the Regulatory Act that requires abortion providers to treat women "with consideration, respect and full recognition of the patient's dignity and individuality" is unconstitutionally vague, given that it requires abortion providers to adhere to an objective standard?

4. Did the district court correctly determine that the Regulatory Act does not impose an "undue burden" on Arizona women seeking abortions, given that (i) the express terms of the Regulatory Act do not directly implicate a woman's right to decide to have an abortion, and (ii) Plaintiffs failed to establish that the Act would deprive women of the choice to have an abortion.

5. Did the district court correctly determine that the Regulatory Act does not

violate equal protection guaranties, given that (i) it is rationally related to the State's interest in maternal health and (ii) abortion implicates unique personal, emotional, and social consequences, in addition to medical ones?

6. Did the district court correctly determine that the Regulatory Act does not violate equal protection guaranties by distinguishing between those facilities that perform more than five first-term abortions per month and those that do not, given that it is a fundamental power of the Arizona Legislature to draw lines and to use its police power to protect the health of women?

7. Did the district court correctly determine that the Regulatory Act does not violate equal protection guaranties by discriminating against women solely on the basis of sex, given that the United States Supreme Court has never held that laws affecting abortion require review according to the heightened standard applicable to sex discrimination and has held that discrimination on the basis of pregnancy is not the same thing as discrimination on the basis of sex?

8. Did the district court correctly hold that the Regulatory Act does not illegally delegate "third party veto power" regarding abortions to Arizona public and private hospitals, given that the Plaintiffs presented no evidence that hospitals would deny admission privileges to abortion providers or that Arizona courts would allow such decisions to stand?

9. Did the district court correctly hold that any unconstitutional provisions of the Regulatory Act could be "cleanly" severed without implicating the remainder of the Act?

STATEMENT OF THE CASE

This case addresses the constitutionality of the Regulatory Act and Arizona's (the "State's") right to establish minimum health standards to protect women seeking abortions. In 1998, in response to the death of Lou Anne Herron from an abortion and other incidents of substandard abortion practice, Arizona enacted the Regulatory Act. Plaintiffs filed constitutional challenges to the Regulatory Act on March 1, 2000. The district court has enjoined its enforcement pursuant to agreement of the parties since that time. On October 1, 2002, on the parties' motions for summary judgment, the district court upheld over 100 discrete portions of the Regulatory Act, declaring only four regulatory provisions and one portion of the enabling legislation unconstitutional. EOR 227.[1] The district court rejected Plaintiffs' undue burden, equal protection, and unlawful delegation claims, and upheld all but one of the provisions of the Act on a vagueness challenge. *Id.* Conversely, the district court granted summary judgment to the Plaintiffs on their Fourth Amendment and informational privacy claims. *Id.*

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[1] Citations to "EOR__" are to items included in the Plaintiffs' Excerpts of Record. Citations to "Supp. EOR __" are to items included in the Defendants' Supplemental Excerpts of Record.

DEFENDANTS' STATEMENT OF FACTS

I. The Legislative History, Purpose, and Description of the Regulatory Act.

On April 17, 1998, Lou Anne Herron died in the A-Z Women's Center, a Phoenix abortion clinic, as the result of a lacerated uterus, an injury sustained during an abortion performed by Dr. John Biskind. Supp. EOR 146 ¶ 1. Although Ms. Herron's injury might not have resulted in death under different circumstances, Dr. Biskind left the Center before Ms. Herron was stabilized, delayed getting emergency care for her, and allowed his understaffed and ill-trained employees to inadequately care for her until she died. *Id.* Ms. Herron's care at the A-Z Women's Center was well beneath the standard of care for abortions, and her death was "absolutely preventable." *Id.*

As the district court found, the State promulgated the Regulatory Act in response "to specific incidents, including the death of Lou Anne Herron from complications associated with an abortion, where maternal health was impacted by sub-standard medical care." EOR 227 at 6. The two other abortion-related incidents that motivated the Legislature to study and then regulate abortion clinics were the 1995 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. Supp. EOR 146 ¶ 2. As the Arizona Legislature made clear, "[e]vents 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." *Id.*

Prior to enacting the statutory portion of the Act, the Arizona Legislature convened a Joint Study Committee to study the possibility of and options for regulating state abortion clinics. *Id.* at ¶ 3. The Committee received input from many Arizona abortion providers, including Planned Parenthood of Central and Northern Arizona ("PPCNA"), whose President and Chief Executive Officer met with legislators, legislative staff members, and DHS personnel to make certain that any regulation was "legitimate regulation oriented toward patient safety."[2] *Id.* Thus, the Regulatory Act was intended to protect maternal health, not to "drive [abortion] providers out of providing abortion services." *Id.* at ¶ 5.

Reflecting that intent, the Regulatory Act is a codification of national standards for abortion practice. The Arizona Legislature and the Arizona Department of Health Services ("DHS") relied on standards promulgated and recommended by the National Abortion Federation ("NAF") and on a "Condensed Abortion Protocol" provided by PPCNA (the "Protocol"), which is, in turn, based on the national standards and guidelines of the Planned Parenthood Federation of America. *Id.* at ¶ 8. The NAF guidelines for abortion care are considered an authoritative source of good medical

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[2] Notably, PPCNA was never a party to this lawsuit. Moreover, Planned Parenthood of Southern Arizona was originally a plaintiff, but withdrew from the case on May 8, 2000, two months after the lawsuit was filed. Supp. EOR 31.

practice for the provision of abortions. Moreover, the Planned Parenthood standards, including the Protocol, are "generally NAF consistent" and a "source of helping [everyone] continuously look at quality improvement" in the provision of abortion. *Id.* at ¶ 9.

After the statutory portion of the Act was in place, DHS held public hearings and solicited and received input and comment from abortion providers, including PPCNA and Plaintiffs Raphael and Richardson, regarding the proposed administrative rules needed to implement the Act. *Id.* at ¶ 4. In addition, DHS visited several Arizona abortion clinics to learn more about their practices and procedures. *Id.*

II. There Was No Evidence That the Regulatory Act Will Negatively Affect Abortion Clinics or the Ability of Women to Obtain Abortions.

The Plaintiffs failed to provide admissible, credible evidence in support of their claim that the Regulatory Act will cause pregnant women to delay or forego abortions. They failed to prove, with any degree of certainty or precision, what additional costs and time, if any, compliance with the Regulatory Act might impose on their individual practices, whether or not they would have to pass those costs onto their patients, and in what manner and amount those costs might be charged to patients. *Id.* at ¶ 10. Indeed, soon after filing this lawsuit in March 2000, each Plaintiff *decreased* the price he charged for first trimester abortions. *Id.* These price

decreases were made in response to market conditions and occurred in spite of the fact that the Plaintiffs were already complying with all or many of the provisions of the Regulatory Act. *Id.* Moreover, the Plaintiffs presented no evidence demonstrating that even if compliance with the Regulatory Act caused them to cease performing abortions, no other Arizona abortion providers could provide the service to women. Finally, Plaintiffs' experts did not attempt to ascertain what, if any, actual impact the Regulatory Act would have on the provision of abortions in Arizona or upon the decisions of Arizona women.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

The vast majority of Plaintiffs' "facts" are misstatements of the record, and, in any event, are legally irrelevant. Plaintiffs state as "fact" that "[a]lthough the regulatory scheme purports to require DHS officials and their agents to maintain the confidentiality of patient information, confidential medical information is frequently 'leaked' or discussed by people who have a legal obligation not to disclose it." Pls.' Op. Br. at 20. There was no evidence to support Plaintiffs' suggestion that DHS has "leaked" patient information or has a history of problems maintaining patient confidentiality. In fact, the evidence established that DHS has never had a problem maintaining patient confidentiality and that the incidents to which the Plaintiffs' excerpts of record refer involved parties *not* affiliated with DHS. *See* EOR 136 at 82:15-21; EOR 137 at 140 ¶ 26, 66:2-6, 125:18-126:25.

Similarly, Plaintiffs allege as "fact" that the Regulatory Act is "inconsistent" with national standards for abortion care. Pls.' Op. Br. at 24. However, a simple line-by-line and section-by-section comparison of the Regulatory Act with NAF's clinical policy guidelines and with the Protocol establishes that the Regulatory Act has both the character of the NAF guidelines and the exacting detail of the PPCNA protocol. *See* Supp. EOR 146 at Ex. A (NAF Guidelines), Ex. B (PPCNA Protocol). Indeed, the Regulatory Act and the PPCNA Protocol contain nearly identical provisions and requirements. *See* Supp. EOR 146 at Ex. B.

Numerous other factual statements are simply immaterial. Plaintiffs' exhaustive recitation of different abortion procedures and other surgical procedures, such as hysteroscopy, vasectomy, and the draining of intraoral abscesses (Pls.' Op. Br. at 6-15), has no bearing on any relevant legal or factual issue to be resolved in this case. As the federal courts have long recognized, "abortion is a unique act." *See infra* Argument, Part VI.C.1.

SUMMARY OF ARGUMENT

The district court determined that one provision of the Regulatory Act violates the Fourth Amendment's prohibition against unreasonable searches and seizures. EOR 227 at 7-8. Specifically, the court held that "[d]ue to the sensitive nature of abortion and the physician-patient relationship, licensed abortion clinics are sufficiently different from other places of business that courts have found to be

closely regulated." *Id.* However, the court failed to recognize that the Regulatory Act itself "closely regulates" abortion clinics and, consequently, DHS is not required to obtain either a judicial or an administrative warrant prior to conducting a compliance inspection of a licensed abortion clinic.

The district court also held that three provisions of the Regulatory Act were unconstitutional because they violated a woman's right to informational privacy. Although the court acknowledged that DHS is governed by statutes and regulations designed to safeguard confidential information and prevent disclosures, it nonetheless found that these safeguards were outweighed by a woman's right to keep her personal information private. In reaching that conclusion, however, the district court ignored well-established case law recognizing the legitimate need of public health officials for access to personal health information.

The district court determined that the portion of the Regulatory Act that requires abortion providers to treat women "with consideration, respect and full recognition of the patient's dignity and individuality" is unconstitutionally vague. *Id.* at 17-18. The court erred in finding the provision vague because reasonably prudent persons would be able to interpret the regulation and determine what conduct is required and what conduct is prohibited.

The district court correctly held that the Regulatory Act does not impose an undue burden on Arizona women seeking abortions. *Id.* at 18-19. In reaching that

conclusion, the district court joined several other federal courts in affirming that state abortion clinic regulations, such as the Regulatory Act, do not directly implicate the abortion "liberty," as recognized by the United States Supreme Court.

The Plaintiffs raise three equal protection challenges to the Regulatory Act. Two of those claims focus on the effect of the Regulatory Act on physicians who perform abortions, and the remaining claim focuses on the regulation of women on the basis of their sex. The district court correctly determined that none of the classifications created by the Regulatory Act violates equal protection, and that all satisfied the rational basis test. The court correctly used that standard of review, because the Regulatory Act does not burden a fundamental right nor target a suspect class. Moreover, the United States Supreme Court has clearly held that classifications concerning pregnancy are not necessarily sex-based classifications, which also mandates review according to the rational basis test.

The Plaintiffs claim that the Regulatory Act violates their due process rights under the Fourteenth Amendment because it "delegates veto power over abortion facility licensing to area hospitals without imposing any standards or limitations on those hospitals' decisions to grant admitting privileges." Pls.' Op. Br. at 48. As the district court correctly concluded, that claim is both factually and legally without

merit because it is based on pure speculation and ignores applicable federal and state precedent.

Finally, the district court upheld the vast majority of the discrete subsections of the Regulatory Act, striking down only four subsections of the regulations and one provision of the enabling statute. The court then properly applied the express terms of the Act's severability provision, "cleanly" severing the parts held invalid, while holding constitutional and viable the remainder. EOR 227 at 19. The decision of the district court to sever the portions of the Act that it found unconstitutional was consistent with the express term of the severability clause and relevant case law.

ARGUMENT

I. Standard of Review.

Appeals from the grant or denial of summary judgment are reviewed by this Court *de novo*. *Biodiversity Legal Found. v. Bagley*, 309 F.3d 1166, 1175 (9th Cir. 2002). In reviewing the grant of summary judgment, this Court "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." *Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). Moreover, constitutional issues, like those raised by this matter, are subject to *de novo* review. *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1196 (9th Cir. 2002). However, this Court "must interpret a state statute in a way that renders

it constitutional, with any uncertainties being resolved in favor of constitutionality." *Alliance of Auto. Mfrs. v. Hull*, 137 F. Supp. 2d 1165, 1169 (D. Ariz. 2001).

APPEAL OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS

II. THE REGULATORY ACT DOES NOT VIOLATE THE FOURTH AMENDMENT.

The Regulatory Act provides that a licensed abortion clinic "shall ensure that the Department's director or the director's designee is allowed immediate access to the abortion clinic during hours of operation." A.A.C. R9-10-1503(B)(4). The district court erred in determining that this provision violates the Fourth Amendment.

This Court has recognized the "*Colonnade-Biswell*" exception to the warrant requirement for administrative searches of commercial premises employed in a "closely regulated" industry. *See, e.g., United States v. V-1 Oil Co.*, 63 F.3d 909, 911 (9th Cir. 1995). Under this exception, warrantless searches of and seizures on commercial property used in "closely regulated" industries are constitutionally permissible. *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. Biswell*, 406 U.S. 311 (1972). The Regulatory Act applies to a "closely regulated" industry and meets all of the necessary requirements for warrantless searches.

A. The Provision of Abortions in Arizona Is a Closely Regulated Industry.

The essential purpose of the Fourth Amendment's 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 *United States v. Burger*, 482 U.S. 691, 703 (1987)). Further, it is the pervasiveness and regularity of regulation that "ultimately determines whether a warrant is necessary." *Donovan v. Dewey*, 452 U.S. 594, 606 (1981); *see also United States v. Argent Chem. Labs., Inc.*, 93 F.3d 572, 576 (9th Cir. 1996). Pursuant to this "pervasiveness and regularity test"–a test that has been adopted by this Court–the provision of abortions in Arizona is a closely regulated industry.

1. The Regulatory Act alone creates a closely regulated industry.

The scope and breadth of the Regulatory Act alone are enough to classify the provision of abortions in Arizona as a closely regulated business for the purposes of the Fourth Amendment. This Court has recognized that "the pervasiveness and regularity" of one set of specific regulations "is sufficient" to make an industry "closely regulated." *See Argent Chem. Labs.*, 93 F.3d at 576 (citing *Burger*, 482 U.S. 691). In *Argent Chemical*, this Court found that a business that manufactured veterinary drugs was closely regulated by the Food and Drug Administration by virtue

of the existence and application of a *single* regulatory act, the Food, Drug and Cosmetics Act. *See Argent Chem. Labs.*, 93 F.3d at 574-77 (citing 21 U.S.C. § 301, *et. seq.*). In reaching that conclusion, this Court recognized that "[v]irtually every phase of the drug industry is heavily regulated" under the terms of the Food, Drug and Cosmetics Act. *Id.* at 575. In support of this assertion, this Court gave several examples of the areas regulated, including personnel qualifications and responsibilities, buildings and facilities specifications, equipment specifications, laboratory controls, and requirements for recording and reporting. *Id.* at 576 n.2.

This analysis is directly applicable to the Regulatory Act and mandates the conclusion that the passage of the enabling statute and promulgation of the regulations comprising the Regulatory Act make abortion in Arizona a closely regulated business. Under the Act's terms, virtually every phase of care that a woman receives at an abortion clinic is regulated to ensure her safety: patient intake, A.A.C. R9-10-1508(A), (E); the abortion procedure itself, A.A.C. R9-10-1508(F), (G); post-operative care, A.A.C. R9-10-1508(H), R9-10-1509; and maintenance of patient records, A.A.C. R9-10-1510(8), R9-10-1511. In addition, the Regulatory Act prescribes minimum standards for personnel qualifications, A.A.C. R9-10-1505; physical plant, A.A.C. R9-10-1512, R9-10-1514, and equipment, A.A.C. R9-10-1513. Thus, under the *Argent Chemical* analysis, the Act's "pervasiveness and regularity" make the provision of abortions in Arizona "closely regulated." *Id.* at 576.

2. Additional state and federal regulations support the conclusion that abortion in Arizona is a closely regulated industry.

Several additional state and federal statutes also govern the provision of abortions in Arizona. Supp. EOR 138 ¶ 1. The existence and application of these statutes lend additional support to the conclusion that the provision of abortions in Arizona is a closely regulated industry.

Arizona statutes regulate numerous aspects of abortion. Those statutes require parental consent before a minor obtains an abortion, A.R.S. § 36-2152; provide that state hospitals are not required to perform abortions, A.R.S. § 36-2151; limit public hospitals to performing abortions only when necessary to save the life of the woman, A.R.S. § 15-1630; prohibit the abortion of a viable fetus except to preserve the life or health of the woman, A.R.S. § 36-2301.01; require physicians to use available medical means to promote, preserve, and maintain the life of a fetus that survives an abortion, A.R.S. § 36-2301; and allow physicians and other medical staff members to refuse to participate in abortions, A.R.S. § 36-2151.

In addition to these state regulations, numerous federal regulations also apply to the provision of abortions in Arizona. The administration and dispensation of drugs and narcotics are regulated by the Drug Enforcement Administration, pursuant to Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801, *et. seq.* Because abortion providers perform a variety of laboratory

tests, they are also subject to the Clinical Laboratory Improvement Amendments of 1988 ("CLIA"), 42 U.S.C. § 263a. CLIA, like the Regulatory Act, allows for unannounced inspections of facilities and permits review of patient records, laboratory forms, the facility's physical plant, employee records, instruments, and policy manuals. *See id.*; Supp. EOR 138 ¶ 3. CLIA also requires that facilities have written policies and procedures detailing personnel duties, training, testing being performed, and the "duty and behavior" of personnel towards patients. Finally, abortion facilities are regulated to safeguard employee and patient safety under the Occupational Safety and Health Act ("OSHA"). Public Law 91-596, 91st Cong., S.2193, December 29, 1970; 29 U.S.C. § 651, *et. seq.* This state and federal oversight confirms that abortion in Arizona is a closely regulated industry.

B. Compliance Inspections Authorized by the Regulatory Act Satisfy the *Burger* Test.

Regulatory compliance inspections of closely regulated businesses may be conducted without a warrant if the inspections serve a substantial government interest and are necessary to further the purpose of the regulations, and if the inspection program, in terms of certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. *Burger*, 482 U.S. at 702-03. The Regulatory Act satisfies each of these requirements and, therefore, the compliance inspections authorized by the Regulatory Act do not require a warrant.

1. The Regulatory Act serves a substantial government interest.

The interest of the State in protecting the health and safety of women seeking abortions clearly qualifies as a substantial governmental interest. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("the State has a legitimate interest ... in protecting the health of the woman"); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 168 (4th Cir. 2000) (upholding comprehensive abortion clinic regulations and finding State's interest in health and safety valid), *cert. denied*, 531 U.S. 1191 (2001) ("*Greenville Women's Clinic I*").

2. Compliance inspections further the purposes of the Regulatory Act.

Warrantless compliance inspections are imperative to adequately and properly enforce the provisions of the Regulatory Act and to ensure that women in Arizona receive safe and competent medical care. As this Court has observed, "[u]nannounced inspections have a deterrent effect; forcing inspectors to obtain a warrant before an inspection might frustrate the purposes of the Act by alerting owners to inspections." *Argent Chem. Labs.*, 93 F.3d at 576 (citing *Burger*, 482 U.S. at 702-03; *Biswell*, 406 U.S. at 316). Similarly, as the Supreme Court recognized,

> [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.

Biswell, 406 U.S. at 316. The same principles apply to the Regulatory Act. Unannounced inspections further the primary health and safety purposes of the Act and help deter substandard abortion practitioners.

3. The Regulatory Act provides a constitutionally adequate substitute for a warrant.

The basic functions of a warrant are to "advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope" and to "limit the discretion of inspecting officers." *Burger*, 482 U.S. at 703. These requirements are satisfied "if the owner of commercial property knows that his property will be subject to periodic inspections undertaken for specific purposes, and if the inspection is limited in time, place, and scope." *V-1 Oil*, 63 F.3d at 912 (citing *Burger*, 482 U.S. at 703). The Regulatory Act clearly satisfies these criteria.

Moreover, as the U.S. Supreme Court has recognized, an expectation of privacy in commercial premises is different from, and indeed less than, a similar expectation in an individual home, and the warrant and probable cause requirements of traditional Fourth Amendment analysis have lessened application in this context. *Burger*, 482 U.S. at 699-700. In commercial property employed as a closely regulated business, the expectation of privacy is "particularly attenuated." *Id.* at 700.

Notice of Inspections Pursuant to the Act. Licensed abortion clinics are on notice that their premises may be inspected "during hours of operation" and that DHS will conduct licensure inspections, relicensure inspections, and complaint investigations. A.A.C. R9-10-1503(B)(4).

Limitations on Inspections Pursuant to the Act. The Regulatory Act and DHS policies and procedures contain numerous standards sufficient to satisfy the Plaintiffs' diminished expectation of privacy in their commercial premises. DHS may conduct abortion clinic inspections in three specified circumstances: (1) initial licensure inspections, scheduled in advance with the facility; (2) unannounced relicensure inspections; and (3) unannounced complaint investigations. Supp. EOR 138 ¶ 6. DHS surveyors will inspect abortion facilities only during business hours, regardless of the type of inspection or investigation they are performing. *Id.* When a DHS surveyor performs a licensure or relicensure inspection, he or she will tour the facility, review written policies and procedures, review medical and personnel records, and interview staff and patients, if necessary and possible. *Id.* at ¶ 7.

In connection with complaint investigations, DHS will follow different–but equally specific–standards. The Regulatory Act enables DHS to conduct a complaint investigation only when the director determines "that there is reasonable cause to believe that a health care institution is not adhering to licensing requirements." A.R.S. § 36-424(D). DHS interprets "reasonable cause" narrowly to mean "only a

complaint that alleges a violation" of the Regulatory Act. Supp. EOR 138 ¶ 5. Thus, a complaint must be specific enough to be susceptible to investigation before any investigation will commence. *Id.* at ¶ 8. Once DHS determines that a complaint may be bona fide, the complaint is prioritized and assigned to a surveyor, who will determine whether an on-site visit is necessary or if the information may simply be obtained from the facility by telephone. *Id.*

During any inspection or investigation, if a surveyor finds a discrepancy between the requirements of the Regulatory Act and the facility's practices and procedures, the surveyor will prepare a written report and provide it to the facility. *Id.* at ¶ 9. The facility will then be given an opportunity to respond to DHS's initial findings. *Id.* If, after reviewing the information provided by the facility, the surveyor still believes that there is a discrepancy, a team leader, program manager, other supervisor, or an assistant director of DHS will review and resolve the matter. *Id.*

Thus, DHS has in place reasonable administrative standards for conducting inspections–standards that satisfy the Plaintiffs' diminished expectations of privacy. Neither the Fourth nor the Fourteenth Amendments require more. *See, e.g., Burger*, 482 U.S. at 702-12.

III. THE REGULATORY ACT DOES NOT VIOLATE A WOMAN'S RIGHT TO INFORMATIONAL PRIVACY.

The district court determined that three provisions of the Regulatory Act–A.A.C. R9-10-1511(A)(4)(b) and R9-10-1511(A)(4)(c), and A.R.S. § 36-2301.02(C)–violated a woman's informational right to privacy.[3] EOR 227 at 9-10. The district court erred in reaching this conclusion because it failed to give appropriate weight to the privacy safeguards inherent in the Act and the State's legitimate interest in protecting maternal health.

This Court has previously recognized that individuals have a constitutionally protected privacy right "in avoiding disclosure of personal matters," including medical information. *Planned Parenthood v. Lawall,* 307 F.3d 783 (9th Cir. 2002). However, the right to informational privacy is not absolute; rather, it is a conditional right that may be infringed upon a showing of proper governmental interest. *Id.* at 790 (citing *In re Crawford,* 194 F.3d 954, 959 (9th Cir. 1999)).

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[3] A.A.C. R9-10-1511(A)(4)(b) requires a licensed abortion clinic to "ensure that a medical record maintained at the abortion clinic is provided to [DHS] for review no later than 2 hours from the time [DHS] requests the medical record."

A.A.C. R9-10-1511(A)(4)(c) requires a licensed abortion clinic to "ensure that a medical record maintained off-site is provided to [DHS] for review no later than 24 hours from the time [DHS] requests the medical record."

A.R.S. § 36-2301.02(C) requires licensed abortion providers to provide ultrasound prints, which must be taken in any abortion after twelve weeks' gestation, to DHS's contractor for review of the estimated gestational age of the aborted fetus.

In determining whether the inherent governmental power to ensure health and safety outweighs the individual's right to privacy, courts balance five factors–the type of information requested, the potential for harm in any subsequent non-consensual disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access. *Lawall*, 307 F.3d at 790. Although the medical information that the Regulatory Act requires is personal and, if disclosed to the public, could cause harm, the final three factors favor access to the limited information required by the Regulatory Act.

A. The Regulatory Act and Other Statutes Governing DHS Adequately Safeguard a Patient's Informational Privacy.

The Regulatory Act's provisions regarding personal information are appropriately limited. The information that must be documented in a patient's file is comparable to the information that must be in *any* medical file, whether created in connection with an abortion or with any other medical procedure, and generally includes the results of a physical exam, the patient's medical history, any required lab tests or ultrasound results, and the patient's medication information. A.A.C. R9-10-1511.

The Regulatory Act allows DHS access to patient records only for the purpose of ensuring that clinics are complying with the licensure standards established by the

Act. DHS reviews (and potentially copies) patient records *only* in one of two situations:

- as part of sampling records during a licensing survey, or
- as part of a complaint investigation.

A.R.S. §§ 36-424(B), 36-424(D), 36-425(A); A.A.C. R9-10-1503(B)(4); *see also* A.R.S. § 36-406 (DHS may access books and records reasonably necessary to insure compliance with the Act). Thus, the type of information that DHS may obtain under the Regulatory Act is precisely detailed and the circumstances in which it can review that information are sharply limited and closely connected to furthering the State's interest in safeguarding maternal health.

In addition to the restrictions explained above that limit access to patient information, the Regulatory Act and other statutes governing DHS's licensing of medical facilities severely restrict the manner and circumstances in which patient information may be disclosed by DHS or its contractor. A.R.S. § 36-449.03(I) prohibits DHS from "releas[ing] personally identifiable patient or physician information" related to abortion clinics or their patients. *See also* A.A.C. R9-10-1511(C) (same). Similarly, A.R.S. § 36-404(A)(2) limits the disclosure of information and records received and kept by DHS, making "[p]atient records, including clinical records, medical reports, laboratory statements and reports, any file, film, record or report or oral statement relating to diagnostic findings and treatment

of patients, or any information from which a patient or a patient's family might be identified" unavailable to the public. Further, DHS may only release specific, identifiable patient information pursuant to a court order or when necessary and pertinent to an investigation. A.R.S. § 36-404(B). In those situations, "[t]he recipient shall maintain patient and source name confidentiality." *Id.*

In regard to ultrasound prints obtained in connection with an abortion, A.R.S. § 36-2301.02(G) prohibits DHS and its contractor from releasing patient identifying information obtained from a copy of any print sent to the contractor for review.[4] To the extent that DHS uses any patient information it obtains from the required ultrasound prints and reports for statistical or research purposes, it may release that information only in aggregate form, without any identifiable patient information. A.R.S. § 36-2301.02(G).

Moreover, DHS specifically trains its staff on the necessity of patient confidentiality and how to maintain that confidentiality. Supp. EOR 142 ¶ 1. When DHS employees remove records from a medical facility for review in their offices, those records are not kept in public files, are not available for public inspection, and are only available to certain DHS employees who need access to perform their official

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[4] In addition, DHS intends to implement an anonymous coding system that eliminates patient and abortion provider names and other identifying information from ultrasound prints or reports provided to the DHS contractor employed to review the ultrasound prints. Supp. EOR 142 ¶ 8.

duties. *Id.* at ¶ 2. At the conclusion of an investigation, DHS destroys the records to protect confidentiality. *Id.* at ¶ 3. DHS has never had a problem safeguarding patient confidentiality. Indeed, in spite of the fact that many of the Plaintiffs, the Plaintiffs' experts, and other witnesses were subject to DHS licensing and regulation prior to the adoption of the Regulatory Act, none were aware of any instance in which DHS had breached patient confidentiality or released patient information. *Id.* at ¶ 4. This type of confidentiality training further bolsters the adequacy of the State's confidentiality safeguards. *See Greenville Women's Clinic v. Comm'r, South Carolina Dep't of Health & Envtl. Control*, 306 F.3d 141 (4th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3568 (U.S. Feb. 12, 2003) (No. 02-1235) ("*Greenville Women's Clinic II*").

Finally, Arizona's health facility licensing statutes provide for criminal proceedings for violations of patient privacy rights. A.R.S. § 36-431 makes it a Class 3 misdemeanor to knowingly release information in violation of the disclosure prohibitions, and A.R.S. § 36-431.01 allows DHS to assess civil penalties for disclosing confidential medical information in violation of the statutory prohibitions.

In light of these protections and the fact that this is a facial challenge to the constitutionality of the Act, the trial court erred in its determination that the possibility of disclosure by DHS outweighed its need to obtain confidential medical information. As this Court recently noted in *Lawall*, "the Supreme Court has explicitly held that the possibility of disclosure of information by state employees

may not serve as the basis for a decision regarding the facial validity of a statute." 307 F.3d at 788-89; *see also Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 513 (1990) ("[W]e refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure [of patient information] by state employees."). Thus, the mere possibility that private medical information may be disclosed to the public, in spite of the numerous protections against such disclosure, is not enough to overcome the presumption that the Regulatory Act is constitutional.

B. The State Must Have Access to Medical Information to Adequately Protect Maternal Health.

The State must have access to medical records in order to monitor abortion clinics' compliance with the law. Access to patient records enables the State to collect information pertinent to the preservation of maternal health and to control threats to public health. The courts have consistently recognized these interests as valid for purposes of limited disclosure of medical information. *E.g., Casey,* 505 U.S. 833; *Whalen v. Roe,* 429 U.S. 589 (1977); *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976); *Greenville Women's Clinic I,* 222 F.3d 157; *Greenville Women's Clinic II,* 306 F.3d 141. As the Third Circuit Court of Appeals stated, "[g]enerally, the reporting requirements which have been upheld have been those in which the government had advanced a need to acquire the information to

develop treatment programs or control threats to public health." *United States v. Westinghouse*, 638 F.2d 570, 578 (3rd Cir. 1980).

The district court's determination ignores the State's substantial need for that information in order to adequately protect maternal health and ensure that clinics are complying with the law. If abortion clinics were to redact patient identifiable information, as the district court suggested, DHS would not be able to ensure that abortion clinics are properly documenting patient information including the patient's name, address, date of birth, and emergency contact information, as required by A.A.C. R9-10-1511(A). Moreover, the inspection and investigation processes, both of which are key components in ensuring compliance with healthcare standards, would be significantly hindered. Such information is essential because DHS needs identifying information to track records and to review quality assurance and peer review activities. Supp. EOR 142 ¶ 5. If DHS were required to obtain patient consent prior to looking at specific charts, that consent would, at a minimum, significantly delay and impede an investigation into unsafe practices. *Id.* Additionally, requesting consent to review files could allow the provider to discover which patient had filed a complaint, information that DHS must keep confidential. A.R.S. § 36-404(A)(3). The district court thus failed to adequately account for DHS's inability to insure the accuracy of reported information and to properly investigate potential health threats if the patient's identifying information is redacted.

C. The State Has a Legitimate Public Policy Interest in Limited Disclosure of Sensitive Personal Information.

As numerous courts have held, including this Court in *Lawall*, the State's legitimate interest in maternal health weighs in favor of disclosure of the information required by the Regulatory Act. That is particularly true here, where the Act was enacted in response to multiple incidents of substandard abortion care, including the death of Lou Anne Herron. EOR 227 at 6. Creating regulations that set minimum health standards for abortion clinics is central to the State's interest in safeguarding maternal health. Allowing the State to monitor abortion procedures and access patient records furthers the Act's core health and safety purposes. The Regulatory Act appropriately reflects the State's essential and valid concerns.

Recently, the Fourth Circuit upheld South Carolina's abortion clinic regulations against a similar challenge. *Greenville Women's Clinic II*, 306 F.3d 141. In that case, the court conceded that the information implicated by South Carolina's regulations was private information that could cause significant harm if disclosed. However, the court concluded that allowing government officials who inspected abortion clinics to review and copy necessary documents, including *unredacted* patient medical records, helped ensure compliance with the valid and legitimate state interest in establishing valid, minimum healthcare standards. *Id.* at 154. The court also determined that South Carolina's inspection and copying requirements did not

have a legally significant impact on the abortion decision or the physician-patient relationship, especially in view of the confidentiality requirements built into the regulatory scheme to protect a patient's privacy. *Id.* at 153-54.

In reaching these conclusions, the Fourth Circuit relied on *Danforth*, in which the Supreme Court upheld a statutory requirement that medical facilities and physicians performing abortions maintain records containing health data and make that information available to local, state, or national public health officers. Notwithstanding the informational privacy concerns inherent in such a requirement, the Supreme Court upheld the regulations because they were justified by the State's interest in protecting maternal health. 428 U.S. at 80; *accord Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) (upholding an abortion pathology reporting requirement because it was reasonably related to accepted medical standards and constituted common medical practice); *Lawall*, 307 F.3d at 790 (rejecting informational privacy challenge to Arizona parental consent abortion statute; finding a legitimate government need for the information and that public policy militated towards government access).

Similarly, in *Casey*, the Supreme Court determined that the record-keeping and reporting requirements of Pennsylvania's abortion statute were based on the State's legitimate interest in the health of women seeking abortion. 505 U.S. at 900-01. Those provisions included reporting the physician's name, the abortion facility, the

woman's age, the number of prior pregnancies the patient had, the number of abortions the patient had, the gestational age of the fetus, the type of abortion procedure, the date of the abortion, any preexisting medical condition, any medical complications, the basis for determining that the abortion was medically necessary, the weight of the aborted fetus, and whether the woman was married. *Id.* at 900. In finding the government's need for the information to be legitimate, the Court stated that "record keeping and reporting provisions that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." *Id.* (citing *Danforth,* 428 U.S. at 80).

As with the regulations examined in those cases, the State's need for access to the information so that it can adequately protect maternal health outweighs the possibility of harm that may result from the limited release of medical information permitted by the Regulatory Act. This conclusion is not changed despite the fact that, because the Act has been stayed during these judicial proceedings, there is no evidence demonstrating that the confidentiality provisions in place are adequate to protect a woman's privacy. In rejecting the same argument, the Fourth Circuit noted that the challenge was a facial challenge: "Even though the abortion clinics can conceive of circumstances where patients' privacy rights could be violated, either deliberately or through negligence, we cannot assume that the confidentiality measures adopted by South Carolina to prevent such violations will be administered

improperly." *Greenville Women's Clinic II*, 303 F.3d at 156; *accord Lawall*, 307 F.3d at 789 (mere possibility of disclosure of information by state employees may not serve as the basis for a decision regarding the facial validity of an abortion statute; "Planned Parenthood's repeated reference to the fact that an employee, or someone under court supervision, may have disclosed confidential information regarding a pregnant minor, while disturbing, does not render the provision facially unconstitutional.").

The Regulatory Act strikes a proper balance between the State's need to know certain information to facilitate its establishment of minimum health and safety standards and a woman's right to privacy. Consequently, the district court erred in finding that portions of the Act violated a woman's right to informational privacy.

IV. THE PROVISION OF THE REGULATORY ACT REQUIRING THAT PATIENTS BE TREATED WITH RESPECT AND DIGNITY IS NOT UNCONSTITUTIONALLY VAGUE.

The district court determined that A.A.C. R9-10-1507(1) (the "Treatment Regulation"), which requires abortion providers to treat women "with consideration, respect and full recognition of the patient's dignity and individuality," is constitutionally infirm. EOR 227 at 17-18. It concluded that the Treatment Regulation required abortion providers to adhere to a standard that was "'based not on their own behavior, but on the subjective viewpoint of others.'" *Id.* at 17-18 (quoting *Women's Med. Ctr. v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001)). That

conclusion was incorrect. Unlike the regulations examined by the Fifth Circuit in *Bell*, compliance with the Treatment Regulation is not measured by the *patient's* subjective expectations, but on commonly understood standards of professional behavior.

The Treatment Regulation is unconstitutionally vague only if "ordinary people can[not] understand what conduct is prohibited," and thus people of common intelligence would be forced to "guess at the meaning of [the] words." *CISPES v. FBI*, 770 F.2d 468, 475, 476 (5th Cir. 1985) (holding that statute making it criminal to "coerce, threaten, intimidate, harass or obstruct" foreign officials was not unconstitutionally vague) (internal quotation omitted). Recognizing that courts "can never expect mathematical certainty from our language," a regulation is not void for vagueness unless it is so unclear regarding what is prohibited that it "may trap the innocent by not providing fair warning," or it is so lacking in objective standards that it encourages "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108-10 (1972).

The Texas regulations that the Fifth Circuit held were unconstitutionally vague required abortion providers to ensure 1) that all patients were "cared for in a manner and in an environment that enhances each patient's dignity and respect," 2) that each patient received "care in a manner that maintains and enhances her self-esteem and self-worth," and 3) that each patient was provided with care that "meets or exceeds

the expectations set by the patient." *See Bell*, 248 F.3d at 421-22. Those provisions were held to be vague because they "measure[d] compliance by the subjective expectations or requirements of an individual patient as to the enhancement of her dignity or self-esteem." *Id.* at 422. Thus, the regulations gave abortion providers no "fair warning" of their compliance. *Id.*

The Treatment Regulation, unlike the Texas regulations, does not subject abortion providers to sanctions based on the subjective expectations of others. Instead, the standards established by the Regulation are based on the abortion providers' own objective behavior–the manner in which they treat their patients consistent with customary local medical standards of care for physician-patient interaction. They must treat women "with consideration, respect and full recognition of the patient's dignity and individuality." A.A.C. R9-10-1507(1). Certainly, reasonably prudent doctors (and other professionals who deal with the public) should have no difficulty in understanding how to treat patients with "consideration, respect" and "dignity." Thus, the Treatment Regulation is not unconstitutionally vague, although it may fall short of mathematical precision. *See Greenville Women's Clinic II*, 306 F.3d at 151 (upholding South Carolina abortion clinic regulations against vagueness challenge because "we are satisfied that a reasonable person, reading the

regulation in its entirety and in the context of South Carolina statutes, would be able to interpret that regulation and determine what is required and what conduct is prohibited").

DEFENDANTS' RESPONSE TO PLAINTIFFS' OPENING BRIEF

V. THE REGULATORY ACT DOES NOT IMPOSE AN "UNDUE BURDEN" ON ARIZONA WOMEN.

A. The Regulatory Act Does Not Implicate the Right of Women to Seek Abortions.

In recent years, numerous courts have repeatedly rejected arguments that state abortion clinic regulations implicate the abortion "liberty" and create an undue burden on women seeking abortions–the precise argument that the Plaintiffs assert here. Indeed, abortion clinic regulations from Mississippi, South Carolina, Tennessee, and Texas have survived similar undue burden challenges. *See Pro-Choice Mississippi v. Thompson*, No. 3:96CV596BN, bench op. (S.D. Miss., Sept. 27, 1996); *Greenville Women's Clinic I*, 222 F.3d 157; *Adams & Boyle, P.C. v. Tennessee Dep't of Health,* 2000 U.S. Dist. LEXIS 20198 (M.D. Tenn. April 17, 2000) (invalidated on vagueness grounds); *Women's Med. Ctr. v. Archer,* 159 F. Supp. 2d 414 (S.D. Tex. 1999).

The abortion "liberty," which the United States Supreme Court has held is protected by the Fourteenth Amendment, has been defined as "the right of the woman herself–not her husband, her parent, her doctor, or others–to make the decision to

have an abortion." *Greenville Women's Clinic I*, 222 F.3d at 166. Moreover, only when the State unduly burdens the ability of the woman *to make the abortion decision* "does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Casey*, 505 U.S. at 874 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). Accordingly, to the extent that state regulations interfere with a woman's status as the ultimate decision-maker, courts have invalidated them. *Id.* at 887-98 (majority opinion).

Regulations that are "designed to foster the health of women seeking an abortion" are valid as long as they do not constitute an "undue burden." *Id.* at 878. "Undue burden" is shorthand for "the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* In order to prevail on their undue burden claim, the Plaintiffs must demonstrate that the Regulatory Act would present a "substantial obstacle" to a "large fraction" of women in Arizona who might seek an abortion. *Id.* at 895 (majority opinion); *see also Greenville Women's Clinic I*, 222 F.3d at 165.

Thus, the appropriate focus of the analysis is on a woman seeking an abortion, *not* on the impact the Regulatory Act will have on the Plaintiffs.[5] As the district court

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[5] Notably, virtually all of the evidence relied on by the Plaintiffs in the district court and on appeal reflects the purported impact of the Regulatory Act on the Plaintiffs or other abortion providers, *not* on Arizona women. *See* Supp. EOR 135 ¶¶ 136-150; Pls.' Op. Br. at 17-18.

recognized, the Regulatory Act does not "directly effect (sic) a woman's right to decide to have an abortion." EOR 227 at 18. It does not delegate decision-making authority to anyone else, nor does it restrict the ability of doctors to decide whether to perform an abortion, when to do so, or what method to use. Instead, the Act simply fosters women's health without placing *any* obstacle–substantial or otherwise–in the path of women seeking abortions.

B. The Regulatory Act Will Not Prohibitively Curtail a Woman's Right to Choose Abortion in Arizona.

Because the Regulatory Act does not interfere with a woman's right to choose whether to have an abortion, it is valid unless it creates a prohibitive financial burden on abortion providers or would so severely diminish the number of abortion providers as to prohibitively curtail a woman's right to choose an abortion. *Greenville Women's Clinic I*, 222 F.3d at 167 (regulations are valid unless they impose burdens that "essentially depriv[e] women of the choice to have an abortion"). Plaintiffs have demonstrated neither condition here.

Plaintiffs have not presented *any* specific or credible evidence regarding whether they will be forced to actually increase the prices they charge patients and what those increases would be. Moreover, after initiating this lawsuit, each of the Plaintiffs *decreased* the price he charges for an abortion. Supp. EOR 145 ¶ 10. When weighed against the Regulatory Act's maternal health benefits, speculative fee

increases that are not supported by specific credible estimates do not constitute an undue burden on women seeking abortions. *See, e.g., Archer*, 159 F. Supp. 2d at 450-54.

Nor is there any evidence that the Regulatory Act will affect women's access to abortion providers. Plaintiffs have failed to demonstrate that they would actually cease providing abortions if the Regulatory Act is enforced. Similarly, they have failed to prove that no other Arizona abortion providers would be able to stay in business and absorb a potentially increased patient load. These evidentiary failures defeat Plaintiffs' undue burden claims. *See, e.g., Adams & Boyle,* 2000 U.S. Dist. LEXIS at *16 ("[C]losure of [doctor's office] would not constitute an undue burden, in this case, even if the closure decreases the availability of abortions .... Furthermore, plaintiffs have failed to provide any evidence that the existent, licensed facilities [in other parts of the state] could not absorb [additional patients].").

The cases cited by Plaintiffs (Pls.' Op. Br. at 46-47) are inapposite. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), *partially overruled on other grounds*, *Casey*, 505 U.S. 882-87, addresses a requirement that second trimester abortions be performed in hospitals. The Regulatory Act does not contain a similar requirement. Further, the *Akron* court stated that "examples of permissible regulation ... [include] licensing of the [abortion] facility." *Id.* at 431 n.14. Moreover, *Planned Parenthood v. Doyle*, 162 F.3d 463 (7th Cir. 1998), and

Planned Parenthood v. Atchison, 126 F.3d 1042 (8th Cir. 1997), are irrelevant in that they concern, respectively, a ban on a specific abortion procedure and a requirement that the construction of new abortion clinics comply with a state law requiring a certificate of need. Again, the Regulatory Act does not contain either of these requirements.

It is undisputed that Arizona has a "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *See, e.g., Roe v. Wade*, 410 U.S.113, 150 (1973). The Regulatory Act clearly implements that interest. It was enacted in direct response to "specific incidents, including the death of Lou Anne Herron from complications associated with an abortion, where maternal health was impacted by substandard medical care," EOR 227 at 6, and it simply codifies "national medical- and abortion-association recommendations designed to ensure the health and appropriate care of women seeking abortions." *Greenville Women's Clinic I*, 222 F.3d at 159, 167-69. The Plaintiffs did not–and cannot–demonstrate that the Regulatory Act will create a substantial obstacle to a large fraction of Arizona women seeking abortion, and thus the Court must uphold the district court's ruling in favor of the Defendants on the undue burden claim.

VI. THE REGULATORY ACT DOES NOT UNCONSTITUTIONALLY SINGLE OUT ABORTION PROVIDERS FOR REGULATION.

Although the Plaintiffs correctly identify the three levels of equal protection scrutiny applied by courts to legislative classifications (Pls.' Op. Br. at 27-28), they incorrectly conclude that the Regulatory Act is subject to strict scrutiny review. As the district court determined, because the Regulatory Act neither targets a suspect class nor impinges upon a fundamental right protected by the Constitution, it is subject to a rational basis test. EOR 227 at 6.

A. Abortion Providers Do Not Have a Fundamental Right to Perform Abortions.

Because the Regulatory Act governs the level and type of medical care that doctors performing abortion must provide to their patients, it is targeted at *abortion providers*, not at women choosing to have abortions. It is beyond question that abortion providers "are not considered members of a suspect class for purposes of equal protection analysis." *Id.* at 5; *Greenville Women's Clinic I*, 222 F.3d at 173 (abortion providers do not form a suspect class). Thus, the Regulatory Act does not target a suspect class.

By focusing on the nature of the medical procedures that they are performing instead of on the party at whom the legislation is targeted, the Plaintiffs are attempting to bootstrap the fundamental right of women to choose abortion to themselves. However, as the district court correctly found, there is no fundamental

right for doctors to perform abortions. EOR 227 at 6 ("[E]ven if abortion remains a fundamental right after *Casey*, the fundamental right is that of a woman to choose an abortion, not of a doctor to perform one."); *accord Greenville Women's Clinic I*, 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"). Indeed, there is no fundamental right for any particular doctor to perform any particular medical procedure or to make any particular profit. Thus, the rational basis test is the appropriate standard of review for these individuals' equal protection claims.

B. The Regulatory Act Is Not Subject to Strict Scrutiny Review.

Although the Plaintiffs focus on whether abortion is a fundamental right under the Constitution (Pls.' Op. Br. at 30-32), since its decision in *Casey*, the Supreme Court has abandoned that inquiry and focused instead on whether the right to choose abortion–whether a fundamental right or not–is *impinged* by the regulations in question.[6] Thus, in *Casey*, the Court did not apply a traditional strict scrutiny standard of review, but instead first determined whether the regulations were unduly burdensome on the right to choose abortion. *Casey*, 505 U.S. at 874 (joint opinion

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[6] On the issue of whether abortion is a fundamental right, *compare Roe v. Wade*, 410 U.S. 113 (statutes or regulations impinging on abortion right are subject to strict scrutiny review) *with Casey*, 505 U.S. at 871, 874 (1992) (joint opinion of O'Connor, Kennedy and Souter, JJ.) (rejecting strict scrutiny test; constitutionality of statutes or regulations pertaining to abortion need not serve a compelling state interest).

of O'Connor, Kennedy, and Souter, JJ.) (any regulation that does not "'strike at the [abortion] right itself' is assessed by asking not whether it serves a compelling state interest, but whether it 'serves a *valid* purpose'"); *see also id.* at 954 (dissenting opinion of Rehnquist, J.) (noting that majority opinion rejected strict scrutiny review and need for "compelling state interests"). As the Fifth Circuit noted in connection with its examination of Texas's abortion clinic regulations, because the Regulatory Act does not *limit* or otherwise *infringe* upon a woman's right to choose or access to an abortion, rational basis review is the appropriate level of judicial scrutiny, *even if* abortion is still a fundamental right after the *Casey* decision. *Bell*, 248 F.3d at 419 (holding that because regulations did not limit abortion access, rational basis review was appropriate).

The Plaintiffs' support for the proposition that the Regulatory Act is subject to strict scrutiny review is comprised almost entirely of abortion cases decided *before Casey* and cases that do not address the unique jurisprudence that has developed regarding abortion regulations. Pls.' Op. Br. at 29-35. In *Casey*, the Supreme Court explicitly overruled cases that were decided after the Court's decision in *Roe v. Wade* that held 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"). Thus, those earlier cases no longer have any precedential value to the extent that they conflict with the holding in *Casey*.[7]

Citing the Fourth Circuit's interrelated discussions of equal protection and undue burden principles, the Plaintiffs seek to draw a distinction between the standard of review adopted in *Casey* and *Greenville Women's Clinic I* and the level of review that is applicable here. Pls.' Op. Br. at 31 n.14, 33. That distinction is based on an overly simplistic view of equal protection and due process that is not supported by the law. To the contrary, in numerous contexts, the Supreme Court has noted that the due process rights afforded by the Fifth Amendment also encompass equal protection rights and principles. *See, e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 768-70 (1975). As *Casey* explicitly recognized, it is logical and appropriate for courts to address due process and equal protection rights together. *See Casey*, 505 U.S. at 871 (joint opinion of O'Connor, Kennedy and Souter, JJ.); *A Woman's*

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[7] The Plaintiffs intimate that the level of scrutiny adopted in *Casey*–the rational basis test–is applicable only to cases in which the State's interest in abortion regulations is in preserving potential life. Pls.' Op. Br. at 32-33. Thus, the Plaintiffs argue that the *Casey* undue burden standard is inapplicable here, where the State's interest is primarily in maternal health. *Id.* However, that argument contradicts the plain language of *Casey*, wherein the Court indicated that an interest in maternal health was a legitimate interest to justify abortion regulations that did not unduly burden a woman's right to abortion. 505 U.S. at 847; *accord Bell*, 248 F.3d at 419 (abortion clinic regulations had "the legitimate state purpose of protecting the health of Texas women").

Choice-East Side Clinic v. Newman, 132 F. Supp. 2d 1150, 1181 (S.D. Ind. 2001) (declining to adopt different standards of review for equal protection and due process/undue burden claims "[i]n light of all the attention devoted to litigating abortion rights under the Due Process Clause"), *rev'd on other grounds*, 305 F.3d 684 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1273 (2003).

The Plaintiffs assert–without any support–that strict scrutiny review is required by the district court's determination that portions of the Regulatory Act violate a woman's right to informational privacy.[8] Pls.' Op. Br. at 30. However, as even the cases the Plaintiffs cite acknowledge, the challenged classifications are subject to strict scrutiny review only if they impinge on or implicate a fundamental right. Therefore, the Plaintiffs must tie the privacy right to the classifications that they allege violate equal protection. The Plaintiffs have not, and cannot, demonstrate that the alleged differential treatment of Plaintiffs and those doctors who perform allegedly similar medical procedures impinges upon *abortion patients'* right to informational privacy. Thus, the appropriate standard of review is the rational basis

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[8] The two cases upon which the Plaintiffs rely–*Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942)–stand for the well-settled, and unremarkable, proposition that the constitutionality of claims that implicate fundamental rights are subject to strict scrutiny review. Not only were the cases decided well before *Casey*, they do not include any discussion regarding judicial review of abortion regulations.

test, irrespective of the constitutionality of the Regulatory Act on informational privacy grounds. *See* EOR 227 at 6; *see also Greenville Women's Clinic I*, 222 F.3d at 173.

C. The Regulatory Act Does Not Violate Equal Protection Because It Is Rationally Related to the State's Interest in Maternal Health.

As the district court correctly noted, 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." EOR 227 at 6 (citing *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981)); *see also Greenville Women's Clinic I*, 222 F.3d at 172 (the Regulatory Act must be upheld if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification" they create). The Regulatory Act does not violate equal protection guaranties "because the state of Arizona had a rational basis for creating the classification" about which the Plaintiffs complain. EOR 227 at 6.

1. The Regulatory Act rationally distinguishes between abortion and other medical procedures because abortion is unique.

Focusing only on the medical aspects of abortion, the Plaintiffs allege that the Regulatory Act cannot be rationally related to maternal health because it does not apply to all physicians who perform "comparable procedures" in Arizona. Pls.' Op.

Br. at 37. However, as the district court found, that argument fails because the nature of abortion procedures is "inherently different" from all other medical procedures that the Plaintiffs deem "comparable." EOR 227 at 6.

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 the abortion decision." *Greenville Women's Clinic I*, 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 persons who perform and assist in the procedure; 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 (emphasis added); *see also Greenville Women's Clinic I*, 222 F.3d at 173-74 (citing other Supreme Court decisions finding that abortion services "significantly differ" from other medical or surgical procedures); *Bell*, 248 F.3d at 417 (upholding abortion clinic regulations against similar challenge because "the Legislature reasonably could conclude that women receiving abortions in 'high-volume' physician offices need more protection than patients undergoing other surgical procedures in such offices").

As even the Plaintiffs concede, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (internal citations omitted). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. *Id.* at 216. Given the inherent differences between abortion and other medical procedures, the district court correctly concluded that the State had a rational basis for regulating abortion clinics while not regulating other medical facilities. *See Greenville Women's Clinic I*, 222 F.3d at 174 (holding same).

2. The State may choose to regulate some medical services and not others.

Even if abortion *were* comparable to other medical procedures (and it is clearly not), that does not undermine the constitutionality of the Regulatory Act. 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 v. Lee Optical*, 348 U.S. 483, 489 (1955) (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 abortion, a procedure that undeniably has caused death in the recent past and clearly has the potential to harm maternal health, safety, and welfare. Thus, the Regulatory Act does not violate the Plaintiffs' equal protection rights.

3. The State rationally responded to abortion-related deaths and injuries in distinguishing between abortion providers and other physicians.

The State's determination to regulate abortion providers and not other physicians performing other medical procedures in their private offices was motivated by 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. EOR 227 at 6; Supp. EOR 146 ¶ 2. This incident provided the impetus for the State to examine the regulation of abortion clinics and to enact new rules governing such clinics and abortion procedures. Supp. EOR 146 ¶ 2.

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, 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. The classification here is the province of the State to make and does not violate equal protection. *See Greenville Women's Clinic I*, 222 F.3d at 174.

VII. THE REGULATORY ACT APPROPRIATELY DISTINGUISHES 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 upon abortion providers with the desire to protect the health and welfare of women seeking abortions, the State determined to regulate only those abortion providers who perform more than five first-trimester abortions per month or any 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 first trimester abortions in any month or any second or third trimesters abortions are performed"). Although the Plaintiffs complain that this line-drawing violates equal protection by "leaving the most inexperienced abortion providers unregulated" (Pls.' Op. Br. at 45), the district court correctly upheld the Regulatory Act against this challenge, stating that "courts may not second-guess a legislature's 'line drawing' when it would be permissible for the legislature to regulate all abortion providers irrespective of how many abortions

they provide."[9] EOR 227 at 7 (citing *Bell*, 248 F.3d at 419 (upholding regulatory classification based on number of abortions performed because Texas constitutionally "could have required *all* abortion providers to be licensed") (emphasis added)).

Moreover, as the Fourth Circuit noted, "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 I*, 222 F.3d at 174 (holding that regulating 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"); *accord Bell*, 248 F.3d at 421 ("Deciding the optimal number of abortions to trigger the licensing requirement is a legislative function.").

The State's policy determination to draw the regulatory line at a level where it believed that the risks to women's health and welfare increased is rationally related to its interest in protecting maternal health, just as the State's decision to regulate all abortion providers would be rationally related to the same goal. As the district court noted, courts may not substitute their judgment for that of the State in drawing the

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[9] The Plaintiffs tacitly admit that the appropriate standard of review for this equal protection claim is the rational basis test. Pls.' Op. Br. at 45-46.

regulatory line. This Court should therefore uphold the district court's decision. *See Greenville Women's Clinic I*, 222 F.3d at 175 ("[T]he actual placement of the line is not a decision that the courts may second-guess.").[10]

VIII. THE REGULATORY ACT DOES NOT IMPERMISSIBLY DISCRIMINATE ON THE BASIS OF GENDER.

The Plaintiffs claim that the Regulatory Act discriminates against women on the basis of sex, and therefore is unconstitutional. They assert that the district court erred in holding that "classification concerning pregnancy is not necessarily sex-based classification" and that "Supreme Court jurisprudence concerning the right to have an abortion is clearly rooted in substantive due process, not equal protection." EOR 227 at 7. They also contend that the district court should have applied a heightened level of equal protection scrutiny to the Regulatory Act. Pls.' Op. Br. at 42-43. To the contrary, the district court's analysis of this claim reflects the United States Supreme Court's analysis–and rejection–of similar claims.

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[10] The Plaintiffs claim (Pls.' Op. Br. at 45 n.20) that the decisions in *Greenville Women's Clinic I* and *Bell* are inapposite here because the plaintiffs in those cases did not present any evidence that doctors who provide fewer abortions are less safe than those who provide more. As the trial court tacitly found in ruling for the Defendants on this claim, any "evidence" of such a safety link that the Plaintiffs presented (and they presented none) is irrelevant to the constitutionality of the Regulatory Act. EOR 227 at 7 (noting that even if "more experienced abortion providers perform safer abortion procedures," as the Plaintiffs claimed, courts could not "second-guess a legislature's 'line drawing'"). Moreover, the Legislature could have rationally concluded that abortion providers who perform more abortions simply have more opportunities to provide substandard practice, thereby justifying regulation of such providers.

A. A Woman's Right to Choose Abortion Is Rooted in Substantive Due Process.

The Plaintiffs' contention that the Regulatory Act discriminates against women on the basis of their sex is based on the incorrect premise that laws that touch upon a woman's right to choose abortion are properly examined in an equal protection context. However, 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. *Casey*, 505 U.S. at 846-53;[11] *accord A Woman's Choice*, 132 F. Supp. 2d at 1181 (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").

Thus, the effect of the Regulatory Act on women–as distinguished from the effect on the doctors who provide abortion services–is properly examined in the context of a due process analysis, not an equal protection analysis. The district court

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[11] 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.).

correctly held that the Regulatory Act does not impose any undue burden on a woman's right to choose abortion. *See supra* Argument, Part V. The Plaintiffs' sex discrimination claim therefore lacks merit.

B. The Regulatory Act Does Not Create Sex-Based Classification.

1. The Regulatory Act must be viewed according to the rational basis standard of review.

Even if this Court determines that the Regulatory Act's effect on a woman's right to abortion should be subject to a traditional equal protection analysis, the Plaintiffs' sex discrimination claim still fails. Under the Plaintiffs' rationale, every law affecting abortion would require review according to the heightened standard applicable to sex discrimination (Pls.' Op. Br. at 41); however, the Supreme Court has rejected that assertion on numerous occasions.

In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Court made clear that the "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.... [T]wo of our cases deal specifically with the disfavoring of abortion, and establish conclusively that it is not *ipso facto* sex discrimination." *Id.* at 271-73 (citing *Harris v. McRae*, 448 U.S. 297, 322-23 (1980) (constitutional test applicable to government abortion-funding restrictions is not the heightened scrutiny standard used in sex-based discrimination

cases); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (same)); *see also Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134-35 (1976) (discrimination tied to pregnancy is not the same as sex discrimination); *Kazimer v. Widman*, 225 F.3d 519, 527 (5th Cir. 2000) ("[D]iscrimination on the basis of *pregnancy* ... is not the same thing as ... discrimination on the basis of *sex*."); *Women's Med. Ctr. of N.W. Houston v. Bell*, Civ. No. H-99-3639, slip op. (S.D. Tex. April 1, 2002) (rejecting claim that Texas's abortion licensing regulations were invalid because they discriminated on the basis of sex and relying upon *Bray* as support); *Bell v. Low Income Women of Texas*, 95 S.W.3d 253 (Tex. 2002) (holding that Texas abortion funding restriction did not violate Texas Constitution by discriminating against women; "The biological truism that abortions can only be performed on women does not necessarily mean that governmental action restricting abortion funding discriminates on the basis of gender.").

The holding in *Bray* was presaged by the Supreme Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974). In that case, the Court noted that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.* at 496 n.20. Nonetheless, the Plaintiffs assert that *Geduldig* does not control this case because it "involved withholding benefits from pregnant women, not imposing special burdens on them." Pls.' Op. Br. at 43. That distinction is spurious–to

withhold a benefit is necessarily to impose a burden, and vice versa. Thus, this is a distinction in terminology only, and is not a valid basis for ignoring the Supreme Court's direction regarding gender classifications as distinguished from pregnancy classifications.

Moreover, even if the distinction were legitimate, it is based on an invalid premise–that the Regulatory Act imposes "special burdens" upon pregnant women. As the district court held, the Regulatory Act does not impose *any* undue or "special" burdens upon women seeking abortions. Instead, the Regulatory Act imposes minimum standards–or "burdens," in the words of the Plaintiffs–only on facilities that provide abortions to women, not on the women themselves. Thus, the Regulatory Act neither imposes burdens upon nor deprives women of any benefits offered to others, and the district court appropriately relied on *Geduldig* (and *Bray* by extension) in rejecting the Plaintiffs' sex discrimination claim.[12]

Nashville Gas Company v. Satty, 434 U.S. 136 (1977), relied upon by the Plaintiffs, does not change that conclusion. Although the case provides the Plaintiffs with some seemingly good "sound bites," when examined in context, the holding in the case is not at odds with the more recent Supreme Court opinions on the topic, particularly *Bray*. The plaintiffs in *Nashville Gas* brought their claims solely

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[12] Nor have the Plaintiffs provided an iota of evidence that the Regulatory Act "create[s] or perpetuate[s] the legal, social, and economic inferiority of women," as the Plaintiffs claim. Pls.' Op. Br. at 43.

pursuant to Title VII of the Civil Rights Act of 1964. *Id.* at 137-38. They did not raise any equal protection claims. For that reason, the Court's analysis was limited to the requirements of Title VII.[13] *Id.* at 142-43. Thus, although the *Nashville Gas* case frames the relevant inquiry for Title VII claims, it adds nothing to the jurisprudence regarding the constitutionality of the Regulatory Act.

2. The Regulatory Act is rationally related to a valid state interest.

When viewed in light of the appropriate rational basis standard, the Regulatory Act withstands any equal protection challenge. The Regulatory Act is reasonably calculated to protect maternal health by establishing minimum medical standards consistent with standard of local and national abortion providers and is therefore constitutional.

IX. THE ADMISSION PRIVILEGES REQUIREMENT COMPORTS WITH DUE PROCESS.

Plaintiffs argue that A.A.C. R9-10-1506(B)(2), which requires regulated abortion providers to have a physician with admitting privileges at an accredited hospital present in the facility until each patient is stable and ready to leave the

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[13] Relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that Title VII prohibits employers from adopting policies that deprive women of employment opportunities because of their gender unless there is a business necessity for such a policy. *Nashville Gas*, 434 U.S. at 142-43. Specifically, the Court invalidated a company policy of divesting female employees of seniority status if they took a leave of absence for pregnancy, but not if they took leave for any disease or disability. *Id.*

recovery room, unconstitutionally delegates standardless licensing authority to third parties.[14] Pls.' Op. Br. at 47. This argument relies solely on speculation and assumptions about the "worst-case" scenario, not on admissible evidence. However, in the context of a facial challenge to a regulation, it is inappropriate to rely on pure speculation. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("speculation about ... hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications'"); *Greenville Women's Clinic II,* 306 F.3d at 147 ("[t]o show the necessary respect to legislative departments, particularly in light of Article III's limitation of judicial power to cases and controversies, we require evidence–as opposed to speculation–sufficient to rebut the regulation's presumptive constitutionality").

For example, Plaintiffs argue that in light of the Arizona Legislature's decision to limit the types of abortions performed in public hospitals, "[a]ny hospital in Arizona ***can*** follow the legislature's lead by adopting a policy disfavoring the performance of abortion in the facility. Such a hospital ***could*** then prevent abortion providers from obtaining admitting privileges at the hospital simply by denying admitting privileges in accordance with that policy. Such refusal to ***would arguably***

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[14] Plaintiffs are incorrect that the Regulatory Act "mandates that [every] physician who provides abortions must have admitting privileges at an Arizona hospital." Pls.' Op. Br. at 47. To the contrary, the Act expressly requires only that an abortion clinic have at least one doctor with admitting privileges present at the clinic whenever abortions are performed. A.A.C. R9-10-1506(B)(2).

... be permissible under Arizona law." Pls.' Op. Br. at 50-51 (emphasis added). However, Plaintiffs have provided no evidence to support these assertions. Pointedly, their choice of language–italicized and bolded above–betrays their utter inability to support their assertions.

Moreover, these suppositions rely on three equally unsupported assumptions that are in direct conflict with the actual evidence in this case. First, Plaintiffs assume that the Arizona Legislature "disfavors" abortion. There is absolutely no evidence in the record to support this assumption.

Second, Plaintiffs rely on the assumption that hospitals will choose to follow this nonexistent policy of animus toward abortion and deny admission privileges to abortion providers. Again, there is no evidence to support this assertion. In fact, the evidence directly refutes this contention. All of the Plaintiffs currently have admitting privileges–two of them at more than one hospital. Supp. EOR 147 ¶ 1. Moreover, none of the Plaintiffs has ever been denied admitting privileges by an Arizona hospital. *Id.*

Finally, Plaintiffs assume, without any factual basis, that Arizona courts will endorse a system of discrimination against abortion providers in decisions concerning admitting privileges. This final assumption contradicts established Arizona law that requires that decisions concerning admitting privileges comport with both substantive and procedural due process. *Peterson v. Tucson Gen. Hosp.*, 559 P.2d 186, 189 (Ariz.

1976) ("[T]here is no doubt that as far as public hospitals are concerned the Fourteenth Amendment of the United States Constitution applies and constitutional rights will be enforced by the courts."); *Holmes v. Hoemako Hosp.*, 573 P.2d 477, 479 (Ariz. 1977) (decisions by private hospitals regarding admitting privileges for physicians must "comport with due process"). Thus, the Regulatory Act does not "give hospitals the authority to act in an unconstitutional manner," and their decisions regarding admitting privileges are subject to "judicial review and will be held up to constitutional standards." EOR 227 at 12; *see also Peterson*, 559 P.2d at 191 (private hospital's decision not to renew physician's staff privileges must be based upon application of a standard that comports with legitimate goals of hospital and the rights of the individual and the public).[15]

> As the Fourth Circuit noted recently in rejecting identical claims:
>
> There is nothing in the record or, indeed, in the general experience in South Carolina that suggests that the requirements to have admitting arrangements with local hospitals ... present[s] a substantial impediment to obtaining or retaining a[n] [abortion clinic] license. To the contrary,

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[15] Federal courts have rejected state requirements that abortion providers maintain admitting privileges *only* when applicable state law did not provide for due process. *See Birth Control Centers, Inc. v. Reizen*, 508 F. Supp. 1366 (E.D. Mich. 1981), *aff'd in part, rev'd in part on other grounds*, 743 F.2d 352 (6th Cir. 1984) (state law did not provide for due process); *Hallmark Clinic v. North Carolina Dep't of Human Res.*, 380 F. Supp. 1153 (E.D.N.C. 1974) (provision rejected because, under existing state law, there were virtually no limits on hospitals' decisions). Unlike the provisions in those cases, the Regulatory Act's admitting privileges requirement is subject to due process requirements, not to the "whim or goodwill" of a hospital. *See Hallmark Clinic*, 380 F. Supp. at 1159.

> the appellants in this case have obtained licenses .... The abortion clinics' asserted fears are further undermined by South Carolina's requirement that public hospitals not act unreasonably, arbitrarily, capriciously, or discriminatorily in granting or denying admitting privileges.

Greenville Women's Clinic II, 306 F.3d at 147. The court stated that a requirement for admitting privileges at local hospitals was "so obviously beneficial to patients ... and the possibility that the requirements will amount to a third-party veto power is so remote that, on a *facial challenge*, we cannot conclude that the statute denies the abortion clinics due process." *Id.* (emphasis added).

The Eighth Circuit Court of Appeals also rejected a similar claim in *Women's Health Center of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989). The court noted:

> The requirement that physicians performing abortions obtain surgical privileges, which involves the independent action of a public or private hospital, poses no more significant threat to plaintiffs' due process rights than the requirement that those performing abortions be licensed physicians, which involves the independent action of a medical licensing board. Both requirements represent the state's legitimate effort to ensure that abortion is "as safe for the woman as normal childbirth at term ...[and] is performed by medically competent personnel under conditions insuring maximum safety for the woman."

Id. at 1382 (citing *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (State could require persons performing abortions to be licensed physicians)).

Similarly, the Plaintiffs have utterly failed to establish that there is even a remote possibility that Arizona hospitals will not comply with the law and fail to

provide due process to applicants for admitting privileges. Their mere speculation is not enough to overcome the State's legitimate interest in maternal health. If a hospital were to deny admitting privileges, the aggrieved doctor could bring an as applied challenge to this provision of the Regulatory Act. However, the Plaintiffs' attempt to bring a facial challenge based on the nonexistent record below was properly rejected by the district court.

X. ANY UNCONSTITUTIONAL PROVISIONS OF THE REGULATORY ACT CAN BE CLEANLY SEVERED.

The Plaintiffs cite several cases to support their assertion that this Court should not sever any invalid sections of the Regulatory Act, but should instead strike the entire law. Pls.' Op. Br. at 51-52. Some of these cases are inapposite factually, while others merely state the applicable legal standard that, if applied, supports the district court's decision to give effect to the express terms of the severability clause.[16] The district court applied Arizona's well-established test regarding severability:

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[16] *See Hull v. Albrecht*, 960 P.2d 634, 639-40 (Ariz. 1998) (declining to apply severability clause of current law because the Legislature had reenacted the law, repealing the severability clause); *Huerta v. Flood*, 447 P.2d 866, 870 (Ariz. 1968) (explaining that severability clauses cannot be applied to remove invalid portions when the law affects free speech; vagueness of statute deprived defendant of equal protection); *Hudson v. Kelly*, 263 P.2d 362, 375 (Ariz. 1953) (finding that unconstitutional provision attempting to destroy the independent constitutional office of State Auditor is so connected with the Act, as a whole, as to render the whole Act invalid, despite severability clause); *State Comp. Fund v. Symington*, 848 P.2d 273 (Ariz. 1993) (striking entire law because it had no express severability clause).

> [W]here the valid parts of a statute are effective and enforceable standing alone and independent of those portions declared unconstitutional, the court will not disturb the valid law if the valid and invalid portions are not so intimately connected as to raise the presumption the legislature would not have enacted one without the other, and the invalid portion was not the inducement of the act.

State Comp. Fund v. Symington, 848 P.2d 273, 280 (Ariz. 1993).

The Plaintiffs rely on a Senate Fact Sheet as support for their assertion that a "central purpose" (or "inducement") for the Regulatory Act was to grant authority to monitor abortion providers and therefore that severing those portions of the Act, if necessary, would invalidate the entire Act. Pls.' Op. Br. at 52. However, as the Fact Sheet makes clear, although "monitoring compliance" with "standards for obstetric gynecologic services" was one of the objectives of the Regulatory Act, the inducement for the Act was the "[e]vents in 1998 at a Phoenix abortion clinic [which] raised several questions about the responsibility of state agencies to ensure the public health and safety regarding abortion and other outpatient medical procedures." Supp. EOR 145 ¶ 2. Thus, the overriding purpose of the Regulatory Act is to ensure the health and safety of women seeking abortions by establishing a minimum standard of medical care. The Regulatory Act does this by codifying local and national abortion clinic standards, such as those already used by NAF and PPCNA.

The provisions invalidated by the district court do not undermine the establishment of that standard of care embodied in the myriad of subsections upheld

by the court. Therefore, if the Court affirms any portion of the district court's order finding portions of the Regulatory Act unconstitutional, it should also affirm the district court's determination that any unconstitutional portions of the Regulatory Act could be severed without disturbing the remainder of the Act.

CONCLUSION

Defendants request that this Court 1) affirm the district court's ruling upholding the constitutionality of the Regulatory Act on due process, equal protection, and unlawful delegation grounds; 2) affirm in part and reverse in part the district court's ruling on vagueness grounds; and 3) reverse the district court's entry of summary judgment for the Plaintiffs on Fourth Amendment and informational privacy grounds.

Dated: April 9, 2003

Respectfully submitted,

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Revised FORM 8

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

Case No. 02-17275, 02-17381, 02-17382

(See next page) **Form Must Be Signed by Attorney or Unrepresented Litigant and *Attached to the Back of Each Copy of the Brief***

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Anne C. Adams

Signature of Attorney or
Pro Se Litigant

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Defendants-Appellees/Cross-Appellants' Combined Response and Opening Brief and Addendum, and one copy of the Defendants-Appellees/Cross-Appellants' Supplemental Excerpts of Record were mailed via first class mail on this 9th day of April, 2003 to:

Ms. Bonnie Scott Jones
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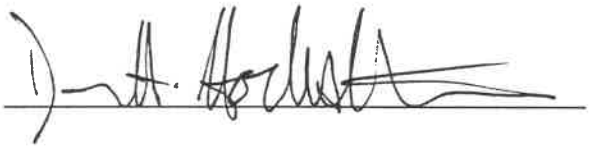

ADDENDUM

ADAMS & BOYLE, P.C., d/b/a THE WOMEN'S CENTER, on behalf of their patients seeking pregnancy terminations, et al. v. TENNESSEE DEPARTMENT OF HEALTH, et al.

No. 3:99-0465

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2000 U.S. Dist. LEXIS 20198

April 14, 2000, Decided

April 17, 2000, Entered

DISPOSITION:
[*1] Plaintiffs' second Renewed Motion for Temporary Restraining Order and Preliminary Injunction GRANTED in part and DENIED in part.

COUNSEL:
For TIFFANY NICOLE TRAVIS, BRISTOL REGIONAL WOMEN'S CENTER, P.C., JAMES OLIVER, M.D., plaintiffs: Thomas C. Jessee, Jessee & Jessee, Johnson City, TN.

For HEALTH, TENNESSEE DEPARTMENT OF, TENNESSEE HEALTH FACILITIES COMMISSION, PAUL SUMMERS, DONALD SUNDQUIST, defendants: Michael William Catalano, E. Blaine Sprouse, Office of the Attorney General, Nashville, TN.

JUDGES:
JOHN T. NIXON, UNITED STATES DISTRICT COURT.

OPINIONBY:
JOHN T. NIXON

OPINION:

MEMORANDUM

Pending before the Court is Plaintiffs' second Renewed Motion for a Temporary Restraining Order and Preliminary Injunction, (Doc. No. 27), to which Defendants have replied, (Doc. No. 47). Plaintiffs, in turn, have filed a Response to Defendants' Reply. (Doc. No. 63.) For the reasons set forth below, Plaintiffs' Motion is GRANTED in part and DENIED in part.

I. BACKGROUND

The instant lawsuit stems from litigation commenced in the state courts of Tennessee and concerns the continuing operation of several facilities providing abortions and other gynecological services to women in middle and [*2] eastern Tennessee. At issue is the constitutionality of certain provisions of Tennessee's certificate of need ("CON") and licensing laws regulating the construction and operation of health care institutions in the state. See Tenn Code Ann. § § 68-11-111, -106(a)(c), -201(3), -204(3), -213(a)(1)(b)(2), and -223 (Tenn. 1999). Plaintiffs have requested that the Court enjoin those portions of the CON and licensing laws that regulate the construction and operation of those ambulatory surgical treatment centers ("ASTCs") in which, according to the statute, a "substantial number of medical or surgical pregnancy terminations are performed." Tenn Code Ann. § 68-11-201(3). Plaintiffs move for the injunction on the grounds that the statutory provisions are (i) unconstitutionally vague and (ii) constitute an undue burden on the right of women to obtain abortions in the State of Tennessee, in violation of the Fourteenth Amendment to the U.S. Constitution. (See Doc. No. 27.)

A. The Statutory Scheme

Under Tennessee law, CONs and licenses must be obtained before any type of health care institution is initiated, constructed or modified. n1 Among those health care institutions required [*3] to obtain a CON

and a license are those ASTCs and private physicians' offices at which a "substantial number of medical or surgical pregnancy terminations are performed." n2 Tenn. Code Ann. § 68-11-201(3). By contrast, however, those facilities and private physicians' offices which do not perform a "substantial number" of abortions remain unregulated under the statutory scheme because they are excluded from the definition of an ASTC. Id. To date, at least seven facilities at which abortions are performed are licensed under this statutory scheme. (Doc. No. 49, Gammon Aff.)

> n1 A healthcare institution is defined within the statute as "any agency, institution, facility or place ... which provides health services and is one (1) of the following: nursing home; recuperation center; hospital; [or] ambulatory surgical treatment center ...." Tenn. Code Ann. 68-11-102(4).
>
> n2 Ambulatory surgical treatment centers ("ASTCs") are defined within Section 68-11-201(3) as "any institution, place or building devoted primarily to the maintenance and operation of a facility for the performance of surgical procedures or *any facility in which a medical or surgical procedure is utilized to terminate a pregnancy* ... Excluded from ... [the definition of ASTC] are the private physicians' and dentists' office practices, except those private physicians' and dentists' offices at which a *substantial number of medical or surgical pregnancy terminations are performed.*" Tenn. Code Ann. §. 68-11-201(3) (emphasis added.)

[*4]

Although the statutory scheme draws regulatory distinctions based upon the term "substantial number," the term remains undefined within the scheme and any of the regulations promulgated thereunder. Indeed, the record indicates that the Tennessee Health Facilities Commission, ("THFC"), the administrative body in charge of issuing licenses and CONs, does not have any defined, internal standards for determining whether a facility or doctor performing abortions should in fact be subject to the licensing and CON requirements. Melanie M. Hill, the Director of Tennessee's Board for Licensing Health Care Facilities from 1996 - 1998, testified that there is no "magic number" of abortions that need be performed by any one doctor or facility before the CON and licensing statues are triggered. (Doc. No. 27, Attach. Ex. C, Hill Dep. at 20.) Additionally, Ms. Hill testified that THFC does not have a "broad definition" or a "list of procedures" for determining whether a doctor or facility performing abortions must obtain a CON under the statute, but instead that THFC considers a number of factors relevant, including

> how the facility is holding itself out to the public, is it a doctor's office, [*5] is it advertising as a surgery center, what types of things they're doing there, if you're doing some minor removing a mole [surgery] or something like that ... the Health Facilities Commission statute does not go into broad definition of a list of procedures.

(Id. at 22.) The factors mentioned by Ms. Hill, however, are not published in any THFC publication or in any of the regulations governing THFC.

Tennessee's CON and licensing laws were designed to ensure that "the establishment and modification of health care institutions, facilities and services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health care of the people of Tennessee." Tenn. Code Ann. § 68-11-103. As such, the regulations governing the issuance of CONs and licenses to health care institutions are, in most cases, uniform. See id. (stating that, in order to further the policy goals of the CON and licensing provisions, "the provisions of this section [governing the issuance of CONs and licenses] shall be equitably applied to all health care entities"). Similarly, the penalties for [*6] noncompliance with the CON and licensing scheme are uniform generally. For example, regulated facilities or individuals failing to comply with the regulations may face substantial civil penalties, including but not limited to fines, as well as criminal prosecution. Tenn. Code Ann. § § 68-11-213. Additionally, the State may seek injunctive relief against any who violate these statutes. Tenn. Code Ann. § 68-11-111.

However, ASTCs performing abortions, and many of the employees and associates of such facilities, are subject both to stricter regulations and penalties than other facilities covered under the regulatory scheme. For example, ASTCs at which pregnancies are terminated must (i) maintain at least two million dollars ($ 2,000,000) of medical malpractice liability insurance in force and (ii) satisfy all applicable regulations and requirements of the board for compliance with state and local building codes, except where the board determines that a waiver is appropriate. Tenn. Code Ann. § 68-11-223(b)(1)(A), (B). Additionally, the administrators of such facilities are required to be (i) a licensed physician, licensed practical nurse, registered nurse, or have a college degree from [*7] a four-year accredited institution and experience in a health-related field; and (ii) of good moral character. Tenn. Code Ann. § 68-11-

223(b)(1)(D). Employees providing direct patient care, officers, directors, owners or shareholders owning 51% or more of the stock in such ASTCs also cannot have been convicted of or pleaded to a felony or any crime involving moral turpitude within five years preceding the application of a CON and a license. Tenn. Code Ann. § 68-11-223(b)(1)(E). Moreover, those employees providing direct patient care, officers, directors, owners or shareholders owning 51% or more of the stock in such ASTCs who have pleaded *nolo contendere* or been convicted of any violation of the CON and licensing laws are prohibited from working at such an ASTC. Tenn. Code Ann. § 68-11-223(b)(1)(F). Finally, ASTCs n3 found to be in violation of Tenn. Code Ann. § 68-11-223(b)(1) are subject to "a civil penalty not exceeding two thousand dollars ($ 2,000) for each violation of" Tenn. Code Ann. § 68-11-223. Tenn. Code Ann. § 68-11-223(b)(3).

n3 Unless otherwise noted, the term "ASTC" will be used to describe facilities at which a "substantial number" of abortions are performed, in accordance with the statutory language. See Tenn. Code Ann. § 68-11-201(3).

[*8]

Justifications for the tougher restrictions on ASTCs are set forth in Section 223 as well. According to the Tennessee State Legislature, such regulations are necessary because there have been cases documenting:

(A) The existence of unsterile and unsanitary conditions;
(B) Fire and safety violations, electrical code violations and inadequate ventilation;
(C) Improper disposal of infectious waste;
(D) Allowing patients to leave too soon after the abortion procedure;
(E) Lack of records on patients and complications;
(F) Doctors practicing without a license or without local hospital privileges; and
(G) Surgical procedures performed without a nurse in attendance.

Tenn. Code Ann. § § 68-11-223(a)(3)(A)-(G). In addition, the statute notes that ASTCs at which a substantial number of abortions are performed

are the only medical facilities in the state that regularly perform surgery on minors without the knowledge or consent of the parents, guardian or custodian; and yet the parents, guardian or custodian are not relieved of their financial liability and familial responsibilities; [that] such centers should be held to similarly applicable standards as other health [*9] care related facilities; [that] the state has a legitimate interest in protecting its citizens from exploitation, the spread of infectious diseases, and ensuring that its citizens utilizing such centers are provided with quality health care as is required in all health care facilities licensed and regulated by the state; and [finally, that] many such centers do not carry or maintain adequate medical malpractice insurance, if any, and the state has an interest in ensuring that those persons utilizing such centers have an adequate recourse to recover financially if a malpractice suit arises from the use of such facilities.

Tenn. Code Ann. § 68-11-223(a)(4)-(7).

B. Procedural Background and Party History

Defendants in this case include the Tennessee Department of Health, ("TDH"), Tennessee THFC, State Attorney General Paul Summers, and Governor Donald Sundquist. (Docs. No. 1, 2.) Plaintiffs in this case currently include Dr. James Oliver, the Bristol Regional Women's Center, ("BRWC"), and the former patients of a facility formerly known as The Women's Center, ("TWC"). (See Docs. No. 37, 38.) However, at the time this lawsuit was commenced, Plaintiffs also [*10] included TWC itself and Doctors Wesley A. Adams, Jr., M.D., and Gary C. Boyle, M.D. (Doc. No. 2.) Although former Plaintiffs TWC and Drs. Adams and Boyle have since been dismissed from this lawsuit, (see Docs. No. 37, 38), a summary of their involvement in this lawsuit and the events preceding their dismissal from it is essential to the Court's analysis.

The facility formerly known as TWC was located at 419 Welshwood Avenue in Nashville, Tennessee. (*Doc. No. 2 Attach., W. Boyle Aff. 2 P 3.)* TWC was opened as a physician's office in 1990 by Drs. Adams and Boyle after Dr. Boyle was approached by Les Brown, an employee of Tennessee's Department of Health and Environment. (Id. PP 2, 3.) Mr. Brown had asked Dr. Boyle to open a facility in order to provide quality gynecological services in Nashville, including abortions, because the State of Tennessee was considering closing at least one other such facility due to patient risk. (Id. P 3.)

Although he was not required to do so when he first opened TWC in 1990, Dr. Boyle was asked at some later point by Mr. Brown to apply for a CON. (Doc. No. 2 Attach., CON application; W. Boyle Aff. P 2.) Accordingly, Dr. Boyle [*11] applied for a CON. (Id.) Dr. Boyle eventually obtained a CON for TWC from the State in 1994, and subsequently began the process of applying for a license. (W. Boyle Aff. at P 6; see also Doc. No. 5, Attach. 1, Tenn. Dep't of Health et al. v. Gary C. Boyle, M.D., et al., Chancery Court for the State

of Tenn., Twentieth Judicial District, Davidson County, No. 99-1343-I, Compl. P 20.)

However, after soliciting TWC's services and granting it a CON, Defendants refused to grant TWC a license, and TWC's CON expired in 1996. (Doc. No. 5, Attach. 1, *Tenn. Dep't of Health et al., supra,* Compl. P 22.) According to Defendants, a license was never issued because former Plaintiffs Drs. Adams and Boyle "had failed to install a fire sprinkler system as required and had failed to meet other Codes [specified as necessary under the statutory scheme and] as determined by" TDH. (Id.) Yet according to Dr. Boyle, when he first opened TWC, "the building was renovated to meet all existing building codes ... and received approval for occupancy by the Metro Building Office." (*W. Boyle Aff. 2 P 5.)*

Although their CON expired and despite the denial of their application [*12] for a license, former Plaintiffs Adams and Boyle continued to operate TWC without interruption until 1998. (Doc. No. 5 Attach., *Tenn. Dep't of Health et al., supra,* Compl. PP 25-26.) The record indicates that THFC was aware that TWC's CON expired in 1996, and that Drs. Adams and Boyle were continuing to operate TWC without a CON or license throughout 1996-1998. (Id. PP 23-24.) Indeed, in 1998, Drs. Adams and Boyle unsuccessfully petitioned THFC for a CON. (Id. P 26.) Yet, despite its knowledge of TWC's continued operation throughout 1996-1998, THFC did not enforce the statutory scheme against Plaintiffs until Defendants filed for an injunction against TWC and Drs. Adams and Boyle on May 13, 1999, in the Tennessee State Court of Chancery. (Doc. No. 5, Attach. 1, Tenn. Dep't of Health et al. v. Gary C. Boyle, M.D., et al., Chancery Court for the State of Tenn., Twentieth Judicial District, Davidson County, No. 99-1343-I, Compl. May 13, 1999.)

C. The Chancery Court Action

In the Chancery Court action, Defendants alleged that Drs. Adams and Boyle were operating TWC in violation of certain provisions of Tennessee State law requiring private physicians [*13] who perform a "substantial number" of abortions to obtain licenses and CONs. (See generally id.) Accordingly, Defendants sought to prohibit further operation of TWC by obtaining an injunction against Drs. Adams and Boyle and TWC. (Id.; see also Tenn. Code Ann. § 68-11-213(a) (authorizing TDH to initiate proceedings seeking injunctive and other relief in the Chancery Courts).)

In response, Drs. Adams and Boyle and TWC argued to the Chancery Court that the statutory scheme under which licenses and CONs are required was vague and arbitrary, that it placed an undue burden upon women seeking an abortion, that it violated the equal protection clause of the U.S. Constitution, and that Defendants were equitably estopped from enforcing the statutes against them. (See Doc. No. 6, Attach. *Tenn. Dep't of Health et al., supra,* Mem., June 7, 1999.) Additionally, Drs. Adams and Boyle and TWC, acting on behalf of itself and its patients, filed the instant action in this Court on May 28, 1999, seeking to temporarily restrain or permanently enjoin Defendants from enforcing against them those provisions of Tennessee law which were the subject of the proceedings in Chancery [*14] Court. (See Doc. No. 2.)

On June 7, 1999, the Chancery Court issued a temporary injunction against Plaintiffs. (Doc. No. 6, Attach. *Tenn Dep't of Health et al., supra,* Mem. Op. and Ord. of Inj., June 7, 1999.) On July 1, 1999, the Chancery Court issued a Memorandum Opinion and Order permanently enjoining Plaintiffs from further ownership and operation of TWC. n4 See *Tenn. Dep't of Health et al., supra,* Mem. Op. and Ord. of Inj., July 1, 1999. In its opinion, the Chancery Court considered all of Plaintiffs' constitutional and equitable claims, and found them to be without merit. With respect to the issue of vagueness, the Chancery Court found that Drs. Adams and Boyle in fact understood the meaning of the term "substantial number" and that therefore, Drs. Adams and Boyle did not consider the term vague. *Tenn. Dep't of Health et al., supra,* Mem. Op. at 7, July 1, 1999. In support of this finding, the Chancery Court relied upon an admission made by Drs. Adams and Boyles' attorney, Scott McDearmon, that 80% to 90% of the work done at TWC per year involved pregnancy terminations, and that there was "no question" that 80% to 90% constituted [*15] a "substantial number" within the meaning of the statute. n5 Id. This admission was made during a THFC hearing held during 1998, when Drs. Adams and Boyle were attempting to get another CON and license for TWC. (Doc. No. 47 at 8-9; Doc. No. 65, Attach. Ex. 4 at 4.) In light of this statement by Mr. McDearmon, the Chancery Court declined to rule on the constitutional issue of whether the statutory scheme was in fact vague. n6 Id.

n4 After extensive research, it appears to the Court that there are no other opinions issued by any other court in Tennessee, published or unpublished, addressing the constitutionality of the statutory scheme at issue other than that opinion issued recently by the Chancery Court in Tenn. Dep't of Health et al. v. Gary C. Boyle, M.D., et al., Chancery Court for the State of Tennessee, Twentieth Judicial District, Davidson County, No. 99-1343-I, July 1, 1999.

n5 In 1998, the number of abortions performed per month at TWC was approximately 250-280. (See Doc. No. 65, Attach. Ex. 4 at 4.)

n6 The permanent injunction issued by the Chancery Court on July 1, 1999 remains in effect against Drs. Adams and Boyle and TWC. Because BRWC, Dr. Oliver and the patients of TWC were not named defendants in the Chancery Court action, the Chancery Court injunction does not apply to any of those parties. See Tenn. Dep't of Health et al. v. Gary C. Boyle, M.D., et al., Chancery Court for the State of Tennessee, Twentieth Judicial District, Davidson County, No. 99-1343-I, July 1, 1999 Opinion (applying injunction only to TWC and Drs. Adams and Boyle). However, on February 4, 2000, Defendants notified the Court that they filed a Motion to Amend the Complaint in *Tenn. Dep't of Health et al., supra,* in order to add Dr. James C. Oliver, M.D. and others to that action, thereby including them within the scope of the July 1, 1999 injunction.

With respect to BRWC, the Court notes that BRWC was not named in the Motion to Amend the Complaint. On February 18, 1999, BRWC received a letter from Linda B. Penny, Executive Director of THFC (the "Penny Letter"). (Doc. No. 35, Attach. Ex. F.) The Penny Letter stated that "it appears ... [BRWC] is not an ASTC." (Id.) However, during a hearing held on August 23, 1999, Plaintiffs' counsel informed the Court that BRWC is presently petitioning the licensing board to determine the necessity of obtaining a CON and a license. Counsel for Plaintiffs also stated that the State threatened BRWC with a lawsuit similar to that filed in the Chancery Court against Drs. Adams and Boyle and TWC should BRWC fail to appear before the Board for such determination. Since that time, however, neither party has provided the Court with any information regarding BRWC's status. Accordingly, Defendants' position with respect to BRWC is unclear to the Court at this time.

[*16]

D. The Instant Lawsuit

Plaintiffs filed the instant lawsuit on May 28, 1999. Initially, Defendants responded to Plaintiffs' action in this Court by arguing that this Court should abstain from exercising its jurisdiction over the lawsuit pursuant to the abstention doctrine set forth in *Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971).* (Doc. No. 5.) Shortly after Defendants filed their response, and during the period of time between which the Chancery Court issued its temporary injunction and its permanent injunction, Plaintiffs filed a Renewed Motion for a Temporary Restraining Order, ("TRO"), with this Court in which they challenged the constitutionality of the CON and licensing statutes. (Doc. No. 13.) On June 16, 1999, this Court granted in part and denied in part the Renewed Motion for a TRO, and denied the first Motion for a TRO as moot. n7 (Doc. No. 23.) However, the June Order did not contain a ruling on the merits of the claims presented in Plaintiffs' Renewed Motion for a TRO. (See id.)

n7 The Court's June 16, 1999 Memorandum and Order, (Docs. No. 21, 23), hereinafter will be referred to jointly as the "June Order."

[*17]

Following the Chancery Court's issuance of the permanent injunction on July 1, 1999, Plaintiffs filed a Motion to Amend the Complaint in the instant action, in which they sought to add additional Plaintiffs to the case. (Doc. No. 26.) The Proposed plaintiffs listed in the Amended Complaint were Dr. James Oliver, Tiffany Nicole Travis, and BRWC. (Doc. No. 27 at 2.) Dr. Oliver currently leases the property formerly known as TWC from Drs. Adams and Boyle, and operates it under the name "Dr. Oliver's Office." (Doc. No. 54, Hensley Dep. at 25, 62-3.) Dr. Oliver also leases the equipment previously used at TWC from Drs. Adams and Boyle. (Doc. No. 56, Oliver Dep. at 31-34.) Dr. Oliver continues to perform abortions at the facility formerly known as TWC, and the number of abortions performed per month at Dr. Oliver's Office are approximately 290. (See Doc. No. 54, Hensley Dep. at 25; Doc No. 64, Attach. Mem. in Supp. of Pl.'s Mot. to Amend Compl. at 5.) However, the record also indicates that Dr. Oliver and his staff provide women with other necessary gynecological services unrelated to abortions. n8 (See Doc. No. 56, Oliver Dep. at 51.)

n8 To the Court's knowledge, THFC has not yet determined whether Dr. Oliver's Office is an ASTC within the ambit of the CON and licensing statutes. However, THFC did send Dr. Oliver a letter informing him of the Chancery Court's Opinion enjoining Drs. Adams and Boyle from further operation of TWC, and asking him for statistical information pertaining to his practice located at 419 Welshwood Avenue. (Doc. No. 56, Oliver Dep. Ex. 8, July 21, 1999 letter from THFC to Dr. Oliver.)

[*18]

BRWC, located in Bristol, Tennessee, is another facility at which abortions and other gynecological services are performed, and is owned and operated by former Plaintiffs Drs. Adams and Boyle. (Doc. No. 54, Hensley Dep. at 35.) The record is devoid of any statistical information pertaining to the number of abortions or other gynecological services performed at BRWC. Finally, at the time the Motion to Amend the Complaint was filed, Tiffany Nicole Travis was a patient of Dr. Oliver's. (See Doc. No. 27 at 2.)

In addition to their Motion to Amend the Complaint, Plaintiffs filed a second Renewed Motion for a TRO, (Doc. No. 27), which the Court presently considers. Plaintiffs' second Renewed Motion for a TRO once again challenges the constitutionality of the statutory scheme under which the State of Tennessee issues licenses and CONs to facilities at which abortions are performed. (See generally Doc. No. 27.) As did their prior Motions, Plaintiffs' second Renewed Motion for a TRO alleges that the "entire regulatory scheme" set forth in Tenn. Code Ann. § 68-11-102 et seq. "rests on the undefined and irrelevant distinction between facilities that perform 'a substantial number' [*19] of abortions and those that do not," and fails to "further the health or safety of women seeking abortions." (Doc. No. 27 at 3, PP 3-4.) Accordingly, Plaintiffs maintain that the licensing scheme is (i) vague and arbitrary, and (ii) that it places an undue burden on a woman's right to obtain an abortion. (Id. at P 3.)

In response to Plaintiffs' Motion to Amend the Complaint, Defendants first filed a Motion to Dismiss for Failure to State a Claim, in which they argued again that this Court should abstain from exercising its jurisdiction over Plaintiffs' lawsuit under *Younger, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746,* and also under *Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943).* (Doc. No. 24.) Subsequently, Defendants filed the instant Response to Plaintiffs' second Renewed Motion for a TRO. (Doc. No. 47.)

On September 14, 1999, this Court granted Plaintiffs' Motion to Amend, and granted in part and denied in pan Defendants' Motion to Dismiss. n9 (Doc. No. 37.) According to the September Order, BRWC and Dr. Oliver were made Plaintiffs in the instant action, and Drs. Adams and Boyle and TWC were dismissed with prejudice. [*20] As such, Plaintiffs in the instant action currently include BRWC, Dr. James Oliver, M.D., and the former patients of the facility formerly known as TWC. n10 (See Docs. No. 37, 38.) However, the September Order did not resolve Plaintiffs' second Renewed Motion for a TRO, which is the subject of the instant Memorandum.

n9 The Court's September 14, 1999 Memorandum and Order, (Docs. No. 37, 38), hereinafter will be referred to jointly as the "September Order."

n10 Tiffany Nicole Travis was not added as a Plaintiff in this case. (See Docs. No. 37, 38.)

After careful consideration of the parties' arguments and the record before it, the Court concludes that Tenn. Code Ann. § 68-11-201(3) is unconstitutionally vague. However, the Court also concludes that the statutes at issue do not constitute an undue burden. The Court's reasoning is explained below.

II. LEGAL STANDARD

In determining whether to issue a preliminary injunction, a court must consider (1) whether the plaintiff has shown a strong [*21] or substantial likelihood of success on the merits; (2) whether irreparable harm will result if the injunction is not issued; (3) whether the public interest is advanced by granting the injunction; and (4) whether substantial harm will result to others if the injunction is issued. *Suster v. Marshall, 149 F.3d 523, 528 (6th Cir. 1998); Thomas by Thomas v. Davidson Academy, 846 F. Supp. 611, 616 (M.D. Tenn. 1994).* These four elements are not absolute prerequisites, but rather are to be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc., 52 F.3d 1373, 1381 (6th Cir. 1995)* (citing *In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)).* If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter, 716 F. Supp. 1064, 1066 (M.D. Tenn. 1980).* The Court will therefore focus its inquiry upon the first factor, although it will discuss the others in turn.

III. DISCUSSION

A. Likelihood of Success

In establishing a likelihood of success on the merits, "a plaintiff [*22] must show more than the mere possibility of success. However, it is ordinarily sufficient if plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics Holding Corp., II v. Cafcomp Systems, Inc., 119 F.3d 393, 402 (6th Cir. 1997)* (citation omitted).

1. Vagueness

a. Standing

As an initial matter, the Court must address an issue of standing raised by Defendants. Defendants argue that Plaintiffs are not likely to succeed on the merits of their vagueness claim because Plaintiffs in fact knew that they were performing a substantial number of abortions within the meaning of the statute and that the statutory scheme applied to them. (See Doc. No. 47 at 6-11.) Essentially, Defendants' argument attacks Plaintiffs' ability to bring a vagueness challenge to the statutory scheme at issue.

In support of their argument, Defendants rely primarily upon an admission made by Scott McDearmon, the attorney who represented Dr. Adams and Dr. Boyle in 1998 at the administrative hearing before THFC:

> unlike with some [*23] other facilities where there may be a good question as to what is substantial. [Sic] Here, admittedly 80-90%, I guess whatever 3300 to 3500 surgical procedures [per year] in the office are pregnancy terminations.

(Doc. No. 47 at 8-9; Doc. No. 65, Attach. Ex. 4 at 4.) Based upon Mr. McDearmon's admission, Defendants argue that the statutory scheme provided Plaintiffs with fair warning that the actual number of abortions performed at Dr. Oliver's Office per month (approximately 290) constitute a substantial number of abortions within the meaning of the statute. Defendants point out that the number of abortions currently performed per month at Dr. Oliver's Office (approximately 290) is comparable to the actual number of abortions which were performed per month at TWC (approximately 250-280) before it was enjoined from further operation in July, 1999. (Doc. No. 47 at 6-9.) Additionally, Defendants point out that the Chancery Court relied upon Mr. McDearmon's admission to institute the injunction against TWC and Drs. Adams and Boyle in July, 1999. Tenn. Dep't of Health et al. v. Gary C. Boyle, M.D., et al., Chancery Court for the State of Tennessee, Twentieth Judicial District, [*24] Davidson County, No. 99-1343-I, Op. at 7, July 1, 1999.

Defendants are indeed correct in suggesting that "one who has received fair warning of the criminality of his own conduct from the statute" and "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974).* However, after carefully considering the circumstances of this case, the Court finds that neither Mr. McDearmon's statement nor the Chancery Court's opinion preclude Dr. Oliver and BRWC from bringing a vagueness challenge. n11

> n11 Defendant makes this argument only with respect to BRWC and Dr. Oliver, and therefore the Court will not include the patients of TWC within its discussion.

First, with respect to Mr. McDearmon's comment, the Court notes that it was a statement made at an administrative hearing expressing Mr. McDearmon's opinion. In addition, when he made the statement, Mr. McDearmon represented TWC and Drs. Adams and [*25] Boyle, and not Dr. Oliver, BRWC, or the former patients of TWC. Defendants have failed to cite any authority supporting their argument that the opinion of an attorney, expressed while representing a party during an administrative hearing, is binding on an entirely different party in an entirely different legal proceeding. Additionally, the Court has been unable to find any such authority. As such, the Court finds that Mr. McDearmon's statement does not prohibit Plaintiffs from bringing a vagueness challenge to the statutory scheme.

Second, with respect to the Chancery Court's opinion, the Court finds that the Chancery Court's reliance upon Mr. McDearmon's statement in its July 1, 1999 Opinion cannot deprive the current Plaintiffs of standing to bring a vagueness challenge. Although the Chancery Court relied upon Mr. McDearmon's statement to support a finding that TWC and Drs. Adams and Boyle could not challenge the statute on vagueness grounds, Tenn. Dep't of Health et al., supra, at 7, the Chancery Court never found that 80% to 90% of the procedures performed per year constitutes a "substantial number," nor did it attempt to define the term "substantial number." Instead, the [*26] Chancery Court made a narrow finding that Mr. McDearmon admitted that the statutory scheme applied to his clients' conduct, and, as such, there was no question in the minds of TWC or Drs. Adams and Boyle that their conduct was in fact covered by the statutory scheme. Specifically, the Chancery Court stated:

> It is clear [from Mr. McDearmon's statement to THFC] that ... [TWC and Drs. Adams and Boyle] understood the meaning of the term "substantial number" and did not consider it as being vague. Thus, ... [TWC and Drs. Adams and Boyle] received fair notice of the provisions of the statute. Their conduct is clearly within the ambit of the statute ... In consideration of ... [Mr. McDearmon's statement], this court finds it unnecessary to rule on the

constitutionality of the statute in question as to ... [TWC and Drs. Adams and Boyle] and the claim of vagueness.

Id. Moreover, the unpublished opinion of the Chancery Court binds only TWC and Drs. Adams and Boyle, the parties against whom the action was commenced by THFC and TDH in May, 1999, and has no bearing upon the conduct of either BRWC or Dr. Oliver.

Finally, THFC sent Dr. Oliver a letter dated [*27] July 21, 1999, notifying him of the Chancery Court's injunction against TWC and Drs. Adams and Boyle. (Doc. No. 56, Oliver Dep. Ex. 8, July 21, 1999 letter from THFC to Dr. Oliver.) Although the letter informed Dr. Oliver of the Chancery Court opinion, the letter only states that the "Order enjoins ... [TWC and Drs. Adams and Boyle], their agents, officers, partners, associates, employees or anyone acting on their behalf from owning, operating, managing, and maintaining an ambulatory surgical treatment center without a ... [CON] and a license." (Doc. No. 56, Oliver Dep. Ex. 8, July 21, 1999 letter from THFC to Dr. Oliver.) Dr. Oliver is not an agent of Drs. Adams and Boyle. n12 Moreover, the letter was sent to Dr. Oliver to simply to determine whether Dr. Oliver's practice fell within the definition of ASTC as set forth in Tenn. Code Ann. § 68-11-201(3). (Id.) As such, the letter from THFC failed to notify Dr. Oliver that anything in the Chancery Court's opinion might have pertained to him. Accordingly, the Chancery Court's reliance upon Mr. McDearmon's statement to grant Defendants an injunction against TWC and Drs. Adams and Boyle failed to put Plaintiffs BRWC and Dr. [*28] Oliver on notice that their conduct was prohibited under the statute. Accordingly, the Court will consider whether Plaintiffs are likely to succeed on the merits of their claim that Tenn. Code Ann. § 68-11-201(3) is unconstitutionally vague.

> n12 To the extent that Defendants' argument implies that Dr. Oliver is an agent of Drs. Adams and Boyle and should therefore be charged with the knowledge of Drs. Adams and Boyle, this argument is misguided. (See Doc. No. 47 at 8 ("Dr. Oliver stepped into the shoes of Drs. Adams and Dr. Boyle and continued to operate the facility [formerly known as TWC, located] at 419 Welshwood Avenue as an ASTC performing a 'substantial number of abortions.'") It is well-established that
>
> an agency relationship contains three essential attributes. First, the agent must have the power to alter the legal relations between the principal and third parties. Second, the agent must be a fiduciary of the principal in matters within the scope of the agency. Third, the principal must have the right to control the agents' conduct of matters entrusted to her.
>
> *Eyerman v. Mary Kay Cosmetics, Inc., 967 F.2d 213, 219 (6th Cir. 1992).*
>
> In this case, none of the three essential attributes of agency are present. First, Dr. Oliver has no power to alter the legal relations between Drs. Adams and Boyle and any third parties. Indeed, Dr. Oliver is not an employee or representative of Drs. Adams and Boyle, but instead an independent doctor who leased from Drs. Adams and Boyle the space formerly known as TWC and the equipment used at the facility formerly known as TWC after Drs. Adams and Boyle were enjoined from operating TWC in July, 1999. (Doc. No. 56, Oliver Dep. at 31-34.) He receives no income or salary from Drs. Adams and Boyle, and only pays them rent on the property and equipment located at 419 Welshwood Avenue. Moreover, Dr. Oliver had no professional association with Drs. Adams and Boyle before he rented the facility formerly known as TWC from them in July, 1999. (See Doc. No. 56, Oliver Dep. at 20-3.) Accordingly, the first attribute of agency is not satisfied.
>
> Second, Dr. Oliver is not a fiduciary of Dr. Adams and Boyle. A fiduciary is defined as "[a] person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." BLACK'S LAW DICTIONARY 431 (6th ed. 1991). Further definition of the word "fiduciary" includes "[a] person or institution who manages money or property for another and who must exercise a standard of care in such management activity imposed by law or contract." Id. The only agreements existing between Drs. Adams and Boyle and Dr. Oliver is are contracts for the lease of property and equipment located at 419 Welshwood Avenue. With the exception of money due on the leases, Dr. Oliver pays no money to Drs. Adams and Boyle. Dr. Oliver never managed TWC for Drs. Adams and Boyle, and he does not manage the facility known as "Dr. Oliver's Office" for Drs. Adams and Boyle. Dr. Oliver's business and the profits from his business are his own; indeed, he is not working for the benefit of Drs. Adams and Boyle, but only for his own benefit. (See Doc. No. 56, Oliver Dep. at 20-3; 31-4.)

> Finally, Drs. Adams and Boyle have no right to control Dr. Oliver's conduct of matters entrusted to Dr. Oliver, for the simple reason that Drs. Adams and Boyle never entrusted any matters to Dr. Oliver via a contractual agreement or otherwise. As such, none of the three essential attributes of agency are present in this case. Accordingly, the Court finds that Dr. Oliver is not the agent of Drs. Adams and Boyle, and any knowledge Drs. Adams and Boyle may have had regarding the interpretation of the term "substantial number" cannot be imputed to Dr. Oliver.

[*29]

Plaintiffs have alleged that the statutory distinction between those private physicians and facilities performing a substantial number of abortions and those which do not perform a substantial number of abortions in Tenn. Code Ann. § 68-11-201(3) is arbitrary and vague. (Doc. No. 27 at 3 PP 2-6.) Specifically, because the phrase "substantial number" is undefined by the statute or regulations promulgated thereunder, Plaintiffs allege that "physicians performing the exact same procedure may or may not be regulated based upon how the State chooses to interpret the ... term 'substantial'" on a case-by-case basis. (Doc. No. 27 at 3, P 4.) As set forth below, the Court finds that Plaintiffs will likely be successful in proving that the term "substantial number," as used in Tenn. Code Ann. § § 68-11-201(3) is unconstitutionally vague both because it fails to provide Plaintiffs with either adequate notice of what conduct is prohibited, and it encourages arbitrary and discriminatory enforcement.

b. Standard of Review

In order to comport with the due process requirements of the Fourteenth Amendment, a statute must give fair warning as to what conduct is forbidden. See *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc., 455 U.S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982).* [*30] As explained by the Supreme Court:

> vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Id. at 498.

"'The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment.'" *Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997),* (quoting *Hoffman Estates, 455 U.S. at 498).* Defendants, citing 511 *Detroit St. v. Kelley, 807 F.2d 1293, 1295 (6th Cir. 1986)* and *Thomas v. United States, 189 F.2d 494, 497 (6th Cir. 1951),* suggest that the Court should determine whether the term "substantial number" of abortions is vague by reference to how ordinary [*31] people are likely to understand the term. (Doc. No. 47 at 19-21.) However, the Sixth Circuit and the Supreme Court have held that higher scrutiny and a stricter test are warranted when "criminal penalties are at stake." n13 *Women's Med. Prof. Corp., 130 F.3d at 197* (internal citations omitted); see also *City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 1857, 144 L. Ed. 2d 67 (1999).* Fn14 As such, "vagueness may invalidate a criminal law for either of two independent reasons." *Morales, 119 S. Ct. at 1859;* see also *Richmond Med. Ctr. For Women v. Gilmore, 55 F. Supp. 2d 441, 1999 WL 507453,* *46 (E.D. Va.). Specifically, such laws may be void for vagueness if they (i) fail "to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits," or if they (ii) "authorize and even encourage arbitrary and discriminatory enforcement." *Morales, 119 S. Ct. at 1857.*

> n13 The Court notes that an even stricter test would apply if a the law at issue "threatened to inhibit the exercise of constitutionally protected rights." *Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997)* (holding in part that "a relatively strict test is warranted" when criminal penalties are at stake, and also that the "most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights"). Arguably, the statutes at issue do impact indirectly a woman's fundamental right to obtain an abortion because they regulate the licensing of doctors performing abortions. However, the Court finds that the statutes do not in fact regulate the right of a woman to obtain an abortion but instead regulate the licensing and granting of CONs to those doctors and facilities performing abortions.

[*32]

In this case, a higher standard of scrutiny than that set forth in Thomas or 511 Detroit St. governs the Court's

analysis. Indeed, the statutory scheme in this case is not one "that simply regulates business behavior and contains a *scienter* requirement." *Morales, 119 S. Ct. at 1858.* Instead, Tenn. Code Ann. § 68-11-213(b)(2), as applied to those persons or facilities performing a "substantial number" of abortions via Tenn. Code Ann. § 68-11-201(3), both regulates business behavior and contains a criminal penalty should those businesses fail to comply with the regulations. Furthermore, the penalty fails to contain a *scienter* requirement. Indeed, the criminal statutory provision states only that a violation of the licensing requirements "is a Class B misdemeanor." Tenn. Code Ann. § 68-11-213(b)(2). As such, the Court will use the standard of review suggested by the Sixth Circuit in Women's Med. Prof. Corp. and the Supreme Court in Morales. n14

n14 The Court's conclusion that a heightened standard of scrutiny governs its analysis of Plaintiffs' facial challenge to the statute is further supported by the Sixth Circuit's reasoning in 511 Detroit St., the case upon which Defendants chiefly rely to suggest that a lower standard of scrutiny should govern this case. The plaintiffs in 511 Detroit St. were owners of establishments at which obscene materials were sold. *807 F.2d at 1294.* Prior to the enactment of a law criminalizing the dissemination of obscene materials by businesses at which the "obscene materials ... [were] a principle or substantial part of the stock in trade," the plaintiffs attempted to enjoin the state defendants from enforcing the statute against them. Id. Specifically, the plaintiffs alleged that the statute was unconstitutionally overbroad and vague because the words "principle," "substantial" and "stock in trade" were undefined within the statute. *Id. at 1295.* The portion of the law challenged by the plaintiffs was part of a larger, statutory prohibition against the dissemination of obscene materials generally. However, the plaintiffs failed to challenge either the statutory definition of obscenity or the criminalization of the act of disseminating obscene materials itself. Instead, the plaintiffs' challenge focused only on the degree of criminal conduct specified in the challenged portion of the Michigan statute. Id.

The Sixth Circuit ruled against the plaintiffs. Specifically, the Court found that, because the plaintiffs neither challenged the definition of obscenity nor the criminalization of the act of disseminating of obscene materials itself, the plaintiffs did "not appear to have a problem determining when their conduct is criminal, but ... [rather only] complained that they ... [could not] determine with sufficient precision just how criminal" their conduct was. Id. As such, the Court ruled that the plaintiffs knew their actions were within the scope of the law, stating that "any vagueness in the challenged language affects only the level of crime with which an actor might be charged, but does not affect the type of expression proscribed by the act." Id. In so doing, the Court declined to "require of the language ... [the] greater degree of specificity demanded" of laws threatening to inhibit the exercise of constitutional rights, and instead decided the issue of constitutionality simply by "reference to how ordinary people are likely to understand the terms" of the statute. *Id. at 1295-96.* Accordingly, the Sixth Circuit found that the words "substantial part of the stock in trade" were commonly-used words throughout the law and within the understanding of ordinary people, and that the law was not vague. *Id. at 1296.* See also *United States v. Brito, 136 F.3d 397, 407-08 (5th Cir. 1998)* (declining to hold statute vague where statute was not one "which renders felonious ... [an] otherwise wholly innocent" act, and where word "substantial" was merely an adjective used to separate degrees of criminal activity and "enhance the penalty for otherwise serious felonies").

The statutes in this case are substantively different from that considered by the Sixth Circuit in 511 Detroit St. Indeed, unlike the challenged statute in 511 Detroit St., which prohibited a certain level or degree of conduct already considered criminal, Sections 213 and 201(3) together "render[] felonious the otherwise wholly innocent" act of performing an abortion prior to fetal viability in a private physician's office. *Brito, 136 F.3d at 407.* Specifically, only those physicians' offices and facilities at which a "substantial number" of abortions are performed are considered ASTCs subject to the CON and licensing laws, and therefore only those physicians' offices and facilities at which a "substantial number" of abortions are performed are subject to the criminal penalties contained in Section 223. See Tenn. Code Ann. § § 68-11-201(3), 223. By stating plainly that any ASTC operating in violation of the CON and licensing laws shall be guilty of a Class B misdemeanor, Section 213(b)(2) actually distinguishes criminal from non-criminal conduct. Accordingly, the term "substantial number" as used in Tenn. Code Ann. § § 68-11-201(3) and 213 is not merely a descriptive phrase which distinguishes one level

of criminal conduct from another, but instead is the phrase upon which a criminal prosecution must be based. See id.; see also Tenn. Code Ann. § 68-11-213(b)(1), (2).

[*33]

c. Notice

Applying a heightened standard of scrutiny, the Court finds that the facts of this case demonstrate conclusively that Tenn. Code Ann. § 213(b)(2), as applied to Plaintiffs via Tenn. Code Ann. § 201(3), fails to provide ordinary persons with proper notice of conduct considered illegal. Plaintiffs and others similarly situated simply cannot know what conduct is proscribed because (i) the criteria upon which illegal conduct is based are not likely to be known to the public and are unavailable to the public; and (ii) the methodology by which the criteria defining illegal conduct are applied is undefined.

Turning first to the criteria upon which illegal conduct is based, the Court finds that neither THFC nor state law enforcement officials have any set criteria upon which they evaluate the term "substantial number" of abortions, and that such criteria are unavailable to the public. Defendants' submissions to this Court, and their Amended Complaint filed with the Chancery Court, indicate that the State considers any number of factors relevant to the definition of "substantial number," including the average number of abortions performed per month, the average number performed [*34] per year, the type of advertising used by a doctor and the public perception of such doctor's practice, and the percentage and amount of money physicians and facilities receive from abortions performed per year. (See Doc. No. 47 at 6-8; Doc. No. 64, Attach. Mot. to Amend. Compl., Tenn. Dep't of Health, et al., supra, at 5.) Similarly, Melanie M. Hill, the Director of Tennessee's Board for Licensing Health Care Facilities from 1996 - 1998, testified that THFC does not have a "broad definition" or a "list of procedures" for determining whether a doctor or facility performing abortions must obtain a CON under the statute, but instead that THFC considers a number of factors relevant, including

how the facility is holding itself out to the public, is it a doctor's office, is it advertising as a surgery center, what types of things they're doing there, if you're doing some minor removing a mole [surgery] or something like that. . . the Health Facilities Commission statute does not go into broad definition of a list of procedures.

(Doc. No. 27, Attach. Ex. C, Hill Dep. at 22.) Additionally, Ms. Hill testified that there is no "magic number" of abortions that need [*35] be performed by any one doctor or facility before the CON and licensing statues are triggered. (Id. at 20.)

Although several of the factors mentioned by Ms. Hill and those considered relevant by Defendants are the same, Defendants clearly consider factors relevant to the "substantial number" calculus that THFC did not consider relevant during 1996-1998. Moreover, none of the factors considered relevant by Ms. Hill and Defendant are published in any official THFC or TDH publication, or in any of the regulations governing either TDH or THFC. As Ms. Hill's testimony demonstrates, these criteria are part of an unofficial THFC policy. The lack of established, official criteria by which the term "substantial number" is evaluated creates a notice problem, because "persons of 'ordinary intelligence' - - the physicians at whom the act is directed - -. . . [do] not ... have access to" THFC's or state law enforcement officials' internal criteria, and therefore cannot know how the term is evaluated. *Richmond Med. Ctr., 1999 WL 507453*, at *48.

Furthermore, the Court finds that the criteria used by THFC and THC are not criteria that would be within the scope of [*36] the ordinary person's understanding or knowledge. The language of the statute indicates that those performing a substantial number of abortions are required to obtain a CON and a license, but that those performing an insubstantial number of abortions are excluded from the statutory licensing and CON requirements. Tenn. Code Ann. § 68-11-201(3). The Court doubts that the ordinary physician reading the plain language of the statute would consider such factors as how the facility is holding itself out to the public or how much money the facility makes from abortions relevant to the "substantial number" calculus. Such factors have little to do with the actual number, or even percentage, of abortions performed by any facility or doctor on a yearly basis.

However, even if Plaintiffs were able to determine the criteria used by THFC, there would still be a notice problem because there is no methodology in place to determine how or whether the factors listed above should be used by THFC. Indeed, even if the criteria utilized by the Defendants and THFC were published or known to the general public, none of these criteria would aid Plaintiffs or the Court in drawing the line between criminal [*37] and non-criminal conduct, because it would still be unclear *at what point* the number of abortions a physician or facility performs becomes either "insubstantial" or "substantial." For example, if former Plaintiffs Drs. Adams and Boyle had reduced the number of abortions performed per year at TWC from 80% or 90% to 50% of the total procedures performed per year at TWC, would this reduction enable them to escape

criminal liability under the CON and licensing scheme? Put another way, at what point would a physician who had previously performed an "insubstantial" number of abortions be deemed to perform a "substantial" number of abortions, thereby subjecting himself to the statutory scheme and its criminal penalties for non-compliance? There is no indication in the record of how these factors are applied, considered, or weighed in determining whether the activities of the facility or physician being evaluated fall within the scope of the CON and licensing statutes. Indeed, even Ms. Hill, the former director of THFC, indicated that she did not know exactly how the factors applied in any given case. (See Doc. No. 27, Attach. C, Hill Dep. at 22.) In this regard, the Court notes that [*38] it is unclear to what extent THFC uses criteria such as advertising and public perception to aggrandize the percentage or number of abortions performed per year to exclude or bring certain providers within the scope of the regulations.

The Court's concern regarding the criteria and lack of methodology used to determine whether private physicians and facilities performing abortions are subject to the licensing and CON cases is heightened in this case because there is little guidance from the state judiciary on the issue of what constitutes a "substantial number" of abortions. See *Parker, 417 U.S. at 756* (holding that the broad scope of the statue was narrowed by courts' interpretations, and that judicial interpretation gave guidance both to persons targeted by the statute and to law enforcement officials). The Court is unaware of, and Defendants have failed to cite, any judicial opinion discussing the phrase "substantial number," of abortions in the context of CON and licensing laws, except the unpublished opinion of the Chancery Court in *Tenn. Dep't of Health et al., supra.* Moreover, the Chancery Court's opinion only suggests, but fails to state directly, [*39] what type of measure an abortion provider or law enforcement official should use in determining whether an abortion provider performs a substantial number of abortions. As such, the Chancery Court opinion, even if it were precedential and published, can only aid the general public minimally in interpreting the term "substantial number" of abortions.

In sum, "the vagueness that [truly] dooms" these statutes "is not the product of uncertainty about the normal meaning of ... ['substantial number,'] but rather ... [the product of questioning] what ... [kind of conduct] is covered by the ... [statutes] and what is not." *Morales, 119 S. Ct. at 1859.* Indeed, the evidence in this case demonstrates that the "outer limits" of the term "substantial number". "could be interpreted in vastly different ways by fair-minded people." *Richmond Med. Ctr., 55 F. Supp. 2d 441, 1999 WL 507453* at *51 (citing, in support of its holding that Virginia's statute criminalizing partial birth abortions unconstitutionally vague, the fact that record contained two conflicting interpretations of the disputed phrase "substantial portion of a living fetus"), [*40] quoting *Carhart v. Stenberg, 11 F. Supp. 2d 1099, 1132 (D.Neb. 1998)* (holding Nebraska's partial birth abortion ban unconstitutionally vague); see also *Causeway Medical Suite et al. v. Foster, 43 F. Supp. 2d 604, 616-17 (E.D. La. 1999)* (holding that the phrases "living fetus" and "partially delivered or removed ... by vaginal means" and "specific intent to kill" "fail[] to provide the persons targeted by the [partial birth abortion laws] with a reasonable opportunity to know what conduct is prohibited so that they may act accordingly"). Accordingly, Section 213(b)(2), as applied to Plaintiffs via Section 201(3), "violates the Due Process Clause [of the Fourteenth Amendment] for failure to give [Plaintiffs] fair notice that ... contemplated conduct is forbidden." *Planned Parenthood Assoc. of Cincinnati v. City of Cincinnati, 822 F.2d 1390, 1399 (6th Cir. 1987)* (citations omitted).

d. Arbitrary Enforcement

The Court finds that the lack of legislative definition and the way in which Section 201(3) has been interpreted in practice allows law enforcement and administrative officials unbridled discretion to interpret the [*41] term "substantial number" in any number of ways, thereby "entrusting lawmaking to the moment-to-moment judgment of the policeman" or administrative official. *Kolender v. Lawson, 461 U.S. 352, 360, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983)* As discussed above, this statute criminalizes at some unknown point the otherwise legal act of performing, without a CON or license, abortions in a private facility or doctors' office. There are no guidelines established by the legislature, and THFC and Defendants have created unofficial factors to guide their interpretation of the statutory term. These unofficial factors are not readily known by or available to physicians or facilities performing abortions. Moreover, there is no way to tell how the unofficial factors are applied, and thus it allows law enforcement to criminalize, on a whim, otherwise legal activity. The problem is compounded because the state judiciary has not had the opportunity to interpret the statutory term at issue. See *Parker, 417 U.S. at 756* (noting that statute proscribing conduct unbecoming an officer was not vague in part because the military courts had interpreted the meaning of the phrase "conduct unbecoming an officer" [*42] numerous times, thereby giving guidance to law enforcement officials). As such, the "broad sweep" of the undefined statutory term "substantial number" "violates the requirement that a legislature establish minimal guidelines to govern enforcement" of criminal laws. *Morales, 119 S. Ct. at 1861,* quoting *Kolender, 461 U.S. at 358.*

In this regard, the Court notes that the record contains evidence suggesting that Defendants have indeed arbitrarily enforced the licensing and CON laws against former Plaintiffs TWC and Drs. Adams and Boyle. Specifically, former Plaintiff Dr. Boyle began practicing in Nashville in 1990 and incorporated TWC in 1992. (Doc. No. 2, Attach., W. Boyle Aff. 2 at 1.) TWC applied for a CON in 1991 because Defendants requested that it do so in order to alleviate what was perceived at the time by both the State and Dr. Boyle as a need for abortion services in the Nashville area. (Id., Attach. CON application; *W. Boyle Aff. 2 P 3.)* TWC obtained a CON from the State under the existing regulations in 1994. (*W. Boyle Aff. 2 P 6.)* However, only two years later, Defendants denied TWC's application for a license [*43] and TWC's CON eventually expired: (Doc. No. 5, Attach., *Tenn. Dep't of Health et al., supra,* Chancery Court Compl. P 22.) In 1998, TWC applied for another CON, but that application was denied. (Id. P 26) Although TWC's CON had expired in 1996, and although TWC's application for a license had been denied, TWC continued to operate for over two years without a CON or a license. Although Defendants knew that TWC was operating without a CON and a license, they failed to enforce the statutory scheme against them until May, 1999. (See generally id.) Defendants have failed to offer any explanation as to why they waited three years before enforcing the CON and licensing statutes against Plaintiffs. Under such circumstances, Defendants' failure to enforce the statutory scheme for three years could be construed as evidence of arbitrary enforcement.

In sum, Tenn. Code Ann. § 68-11-201(3), when read and applied in conjunction with § 68-11-213(b)(2), fails to provide Plaintiffs with proper notice of what conduct is considered illegal. The record demonstrates that there are several, conflicting and confusing ways in which the term "substantial number" of abortions is currently [*44] interpreted, and that physicians and facilities performing abortions do not generally have access to the unofficial criteria and methodology upon which those interpretations are based. Furthermore, the statute fails to distinguish adequately between criminal and non criminal conduct, and the term "substantial number" could in fact be interpreted differently among many fair-minded people. Similarly, the lack of legislative, judicial and administrative guidance with respect to the definition of the term "substantial number" confers on law enforcement a vast amount of discretion. Finally, those who violate the statutory scheme are subject to both criminal and civil penalties, and the criminal penalty attached to the statutory scheme fails to include a *mens rea* requirement. Lack of a *mens rea* requirement in a criminal law and confusion with respect to a crucial statutory term triggering a criminal penalty are grounds for holding a statute void for vagueness. See *Morales, 119 S. Ct. at 1858-59* (holding in part that the lack of a *mens rea* requirement and lack of common, accepted meaning of crucial statutory term were grounds to find statute void for vagueness); [*45] *Richmond Med. Ctr., 55 F. Supp. 2d 441, 1999 WL 507453* at *51 (holding that, in the context of ban on partial birth abortions, the confusion inherent in the term "substantial portion" of a fetus and the conflicting ways in which the term could be interpreted were grounds upon which to find the statute was void for vagueness); accord *Carhart, 11 F. Supp. 2d at 1132.* Finally, the undefined term, "substantial number," operates in this case to "impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).* Accordingly, Plaintiffs have demonstrated that they are likely to succeed on the merits of their vagueness claim with respect to the term "substantial number" of abortions set forth in Tenn. Code Ann. § 201(3).

2. Undue Burden n15

> n15 There is no need for further consideration of Plaintiffs' claims that additional portions of the statutory scheme are vague. Indeed, all of the challenged statutes are either triggered by or incorporate the definition of ASTC found within § 68-11-201(3). See Tenn. Code Ann. § § 68-11-106(a)(c), -111, -201(3), -213(a)(1), -213(b)(2) and -223. Similarly, the Court's ruling that Plaintiffs have demonstrated that Tenn. Code Ann. § § 68-11-201(3) is likely to be found unconstitutionally vague obviates the need for further consideration of any of the challenged statutes on the ground that they constitute an undue burden upon a woman's right to obtain an abortion prior to fetal viability. However, in the interest of judicial economy, the Court considers it.

[*46]

Women have a fundamental, constitutional right under the Fourteenth Amendment to the U.S. Constitution to have an abortion prior to the viability of the fetus and to obtain that abortion without undue interference from the State. *Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 845-47, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992).* However, "as with any medical procedure, the State may enact regulations to further the health or safety of a woman

seeking an abortion." *Casey, 505 U.S. at 879.* Additionally, the State may enact regulations furthering its "interest in [the] potential life" of a fetus. *Id. at 876.* Yet "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right" of a woman to obtain an abortion prior to fetal viability, and are therefore unconstitutional. Id.

CON and licensing laws have long been "recognized as a valid means of furthering ... [the] legitimate state interest[s]" of ensuring that health care services are made available to all citizens in an orderly, economical and safe [*47] manner. *Planned Parenthood of Greater Iowa v. Atchison, 126 F.3d 1042, 1048-49 (8th Cir. 1997)* (citing cases). As such, CON and licensing laws would not be "unconstitutional if ... [enforcement of those laws] merely has the incidental effect of making it more difficult or more expensive to procure an abortion." *Atchison, 126 F.3d at 1048-49.* Indeed, under Casey, enforcement of the CON and licensing laws would be unconstitutional only if the laws were enacted only to make abortions more difficult to obtain within the State of Tennessee, *see Oficinas Medicas, Inc. v. Carmen Feliciano de Melecio, 47 F. Supp. 2d 174, 181-82 (D. P. R. 1999)* (declining to hold CON statute constituted an undue burden because there was no evidence in the case suggesting that "abortion clinics have been targeted [capriciously for regulation] by the legislature of Puerto Rico via the ... [CON] requirement"), or if the effect of the law is to place a substantial obstacle in the path of a woman's choice to obtain an abortion. See *Atchison, at 126 F.3d at 1049* (affirming district court's finding that CON laws were undue burden on women's [*48] right to obtain an abortion because the record contained evidence of CON laws being used by the state intentionally to "impede[] or prevent[] access to abortions").

a. Purpose of the CON and Licensing Laws

Plaintiffs argue that the CON and licensing statutes in this case constitute an undue burden because (i) they regulate only those private physicians and facilities performing a substantial number of abortions, and (ii) they target those private physicians and facilities performing a substantial number of abortions for more strenuous regulation than other ASTCs. These arguments are directed at Tenn. Code Ann. § 68-11-201(3) and Tenn. Code Ann. § 68-11-223, respectively. Both arguments imply that Tenn. Code Ann. § 68-11-201 and § 68-11-223 were enacted solely to make it more difficult for a woman to obtain an abortion. In response to Plaintiffs' arguments, Defendants maintain that the statutory scheme regulates only doctors, and not a woman's access to abortion. (Id. at 9.)

The Court finds no evidence in this case suggesting that the CON and licensing statutes were enacted with the purpose or intent to restrict a woman's access to obtaining an abortion. Tennessee's [*49] CON and licensing laws were designed generally to insure that many kinds of health care services are made available to all citizens in an orderly, safe and economical manner. See Tenn. Code Ann. § § 68-11-102(4) (defining the term "health care institution" and describing those kinds of institutions covered under statutory scheme); -103 (setting forth policy behind CON and licensing statutes); -108 (setting forth purpose and necessity of CONs). As such, the statutes were "not meant to be applied to certain individuals or organizations only, but rather to set public policy in general to health - services providers." *Oficinas Medicas, 47 F. Supp. 2d at 181;* see Tenn. Code Ann. § 68-11-103 (setting forth public policy with respect to CON and licensing laws and applying that policy generally to health care facilities and services in Tennessee). Section 201(3) was enacted in part to regulate the granting of CONs and licenses to physicians and facilities at which a substantial number of abortions are performed. Section 223 was enacted to regulate further such physicians and facilities. The fact that these statutes bring physicians and facilities performing a substantial [*50] number of abortions within the scope of the CON and licensing laws alone, however, does not demonstrate that the statutes were enacted for the purpose of impeding a woman's ability to obtain an abortion. Indeed, a state may require that those persons performing abortions be licensed physicians, and such a requirement is not an undue burden as a matter of law. *Mazurek v. Armstrong, 520 U.S. 968, 117 S. Ct. 1865, 1866, 138 L. Ed. 2d 162 (1997)* (holding that Montana law requiring that only licensed physicians are allowed to perform abortions was not an undue burden).

In order to overcome the presumption of legislative legitimacy attaching to the statutes at issue, Plaintiffs would have to introduce at least "*some* evidence of ... improper [legislative] purpose." *Mazurek, 117 S. Ct. at 1867* (emphasis in original). However, Plaintiffs have failed to introduce any evidence of legislative intent suggesting that the legislature acted with the specific intent to restrict abortions by including private physicians and facilities performing abortions within the scope of the definition in Section 201(3) or Section 223. As such, they have not demonstrated, [*51] "*by a clear showing*" of evidence, that they are entitled to injunctive relief on the ground that Sections 201(3) and Sections 223 constitute an undue burden because they were enacted intentionally to restrict a woman's right to obtain an abortion prior to fetal viability. Id. (assuming that unlawful purpose would be grounds for enjoining law restricting performance of abortions to licensed doctors only, and holding that, because there was no evidence of

unlawful motive, preliminary injunction should not issue) (emphasis in original); see also *Atchison, 126 F.3d at 1048-49* (granting injunction and finding CON laws constituted an undue burden in part because the record contained evidence of the legislature responding improperly to actions of lobbyists).

Furthermore, the Court finds that there is no evidence in this case that the CON and licensing statutes are being used improperly by Defendants to intentionally "impede or prevent[] access to abortions." *Atchison, 126 F.3d at 1049.* For example, there is no evidence suggesting that abortion providers are regularly or singularly denied CONs or licenses simply because they provide abortions. n16 [*52] Moreover, Defendants have submitted evidence demonstrating that many other abortion providers have been granted CONs and licenses from THFC under the existing statutory scheme, including one in Elizabethton, Tennessee; one in Nashville, Tennessee; two in Knoxville, Tennessee; and three in Memphis, Tennessee. (Doc. No. 47 at 14; Doc. No. 49, Gammon Aff. at 1-2.) Such evidence indicates to the Court that, in fact, Defendants are not attempting to use the CON and licensing statutes as tools to systematically close abortion clinics in Tennessee. See *Mazurek, 117 S. Ct. at 1867* (stating that law at issue could not constitute undue burden, even if the evidence demonstrated that the law was designed to prohibit the single physician's assistant performing abortions in the state from performing those abortions any longer, where there were many other physicians performing abortions in the state who were unaffected by the law).

> n16 Such evidence would be support a finding that a CON statute unduly burdens a woman's right to obtain an abortion. See *Atchison, 126 F.3d at 1049* (affirming district court's decision to enjoin the defendant from enforcing CON statute against the plaintiff where evidence suggested that the plaintiff would not have been subjected to CON review if it had not intended to provide pregnancy termination services, and holding that, by requiring the plaintiff to undergo the CON review process, the defendants had created an undue burden on the right of access to abortion).

[*53]

Additionally, with respect to Section 223, the Court notes that the legislature made specific findings of fact supporting the increased restrictions on those ASTCs at which abortions are performed. See Tenn. Code Ann. § 68-11-223(a). With the possible exception of the requirement that all administrators of such ASTCs be of good moral character, the legislative findings in Section 223(a) are rationally related to the higher restrictions set forth in Section 223(b). Absent evidence of arbitrary, improper targeting by the Legislature, it is not within the province of this Court to upset legislative action rationally related to findings of fact set forth in such CON or licensing provisions. See *Oficinas Medicas, 47 F. Supp. 2d at 181* (holding that the CON requirements, which were rationally related to important state health objectives, were not unconstitutional when there was no evidence of targeting); *Mazurek, 117 S. Ct. at 1867* (admonishing courts not to "assume unconstitutional legislative intent even where statutes produce harmful results," especially where the record contains no evidence of unlawful motive on the part of the legislature). Accordingly, [*54] the Court finds that Defendants have not used the CON and licensing statutes to target or regulate capriciously abortion providers.

b. Effect of the License and CON Laws: the Closure of BRWC and Dr. Oliver's Office and the Resultant Burden on the Patients of BRWC and Dr. Oliver's Office.

Plaintiffs argue that the CON and licensing provisions constitute an undue burden in part because they would suffer economic harm if forced to close, and in part because closure of BRWC and Dr. Oliver's Office would cause BRWC's and Dr. Oliver's patients to "seek healthcare at a much greater expense if they can afford it outside the State of Tennessee." (*Doc. No. 27 at 4 P 7.)* Essentially, these arguments suggest that the statutory scheme constitutes an undue burden because it has the effect of placing a substantial obstacle in the path of women seeking abortions. In response, Defendants claim that the licensing scheme fails to constitute an undue burden simply because it may have the incidental effect of making an abortion more difficult or expensive to obtain. (Doc. No. 47 at 6-11;12-13.)

The Court agrees with Defendants. Although enforcement of the CON and licensing statutes [*55] against Plaintiffs in this case may in fact result in closure of Dr. Oliver's Office and / or BRWC, such closure would not constitute an undue burden in this case, even if the closure decreases the availability of abortions in Tennessee. See *Casey, 505 U.S. at 874* (holding in part that legitimate regulations which have the "incidental effect or increasing the cost or decreasing the availability of" abortions are not undue burdens). Moreover, even if the closure of BRWC and Dr. Oliver's Office would cause some women to travel longer distances or incur additional expenses in procuring an abortion, additional expense and longer travel distances are not undue burdens in this case. See id.; see also *Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 533 (8th Cir. 1994)* (discussing the issue of travel and holding that one trip to an abortion clinic, whatever the distance, does not

constitute an undue burden). Indeed, the evidence before the Court demonstrates that at least seven other facilities perform abortions in the State of Tennessee, and that two of these seven facilities are located close to BRWC and Dr. Oliver's Office. (Doc. No. 49, Gammon Aff. [*56] (noting that there is a Planned Parenthood in Nashville and a clinic in Elizabethton, Tennessee at which abortions are performed).) Furthermore, Plaintiffs have failed to provide any evidence to support their allegations that the existent, licensed facilities in Elizabethton and Nashville could not absorb the number of patients currently receiving abortions at BRWC and Dr. Oliver's Office. n17 See *Mazurek, 117 S. Ct. at 1867* (noting that party seeking preliminary injunction has higher burden of proof than even that of movant seeking summary judgment). Accordingly, the Court finds that Plaintiffs have failed to meet their burden of proof on the cost and travel issues, and that Plaintiffs' increased cost and travel distance arguments are meritless. n18

n17 Such evidence could include affidavits from the director of Planned Parenthood in Nashville, Tennessee, and the facility in Elizabethton, attesting to the fact that neither facility could absorb Plaintiffs' patients, or statistical evidence demonstrating the impossibility of those clinics being able to absorb Plaintiffs' patients. Such evidence could also include evidence demonstrating the average income of Plaintiffs' patients, which would bolster Plaintiffs' claims that the indignet women their offices service could not in fact obtain abortions elsewhere if their facilities were closed, because they could not afford to travel anywhere else. (See, e.g., Docs. No. 27, 39.) [*57]

n18 If the evidence presented had indicated that BRWC or Dr. Oliver's Office treated primarily indigent women who had no funds to travel, and also that the clinics in the surrounding areas could not have provided abortions for those women if BRWC or Dr. Oliver's Office were to close, such evidence might have affected the Court's analysis. However, there is no such evidence in the record. Similarly, had the facts presented indicated that BRWC or Dr. Oliver's Office were the only clinics in the State, or even in their respective regions of Middle and Eastern Tennessee, the Court's analysis might have been different as well.

Finally, with respect to the economic harm that BRWC and Dr. Oliver may suffer should enforcement of the CON and licensing laws cause BRWC and Dr. Oliver's Office to close, such harm does not constitute an undue burden on a woman's ability to obtain an abortion. The thrust of Plaintiffs' argument here, however, is aimed at the economic harm BRWC and Dr. Oliver might suffer should they be forced to comply with the regulations. This argument is irrelevant to the Court's undue [*58] burden analysis. Accordingly, the Court finds that neither Tenn. Code Ann. § 68-11-201(3) nor Tenn. Code Ann. § 68-11-223 unduly burden a woman's right to terminate her pregnancy before viability. Indeed, the only way in which closure of these facilities could constitute an undue burden would be if the impact of the closure would unduly burden a woman's right to terminate her pregnancy before fetal viability. See *Casey, 505 U.S. at 877.*

B. Irreparable Harm

"Potential irreparable injury in the form of a violation of constitutional rights" can constitute an irreparable harm. *Planned Parenthood Assoc. of Cincinnati, 822 F.2d at 1400.* As set forth above, Plaintiffs are likely to succeed on the merits of their vagueness claim, and therefore they have demonstrated that they are likely to suffer irreparable harm if the statutes at issue are not immediately enjoined. See id. (affirming district court's finding that statute was vague, and noting that a finding of substantial likelihood of unconstitutionality works in favor of finding the other three factors support the issuance of an injunction, including a finding of irreparable harm). Accordingly, [*59] the Court holds that this factor is satisfied in Plaintiffs' favor.

C. Public Interest

Although the State has a valid interest in issuing CONs and licenses to ASTCs, neither the public nor the State has any interest in enacting or enforcing standardless criminal laws. Indeed, when a statute is likely to be found unconstitutional, "it is questionable whether" the State has "any 'valid' interest in enforcing" the statute. Id. Instead, the public interest is served by ensuring the "prevention of enforcement of ... [statutes] which may be unconstitutional." Id. Accordingly, this factor, too, is satisfied in Plaintiffs' favor.

D. Harm to Others

Finally, with respect to whether there would be any harm to others should the injunction issue in this case, the Court finds that no harm to Defendant or the public can occur should the Court enjoin Defendants from enforcing against Plaintiffs only that portion of the statutory scheme which is likely to be found unconstitutional. See id. (holding that because the statute was likely to be found unconstitutional, no substantive harm could come to the City of Cincinnati, if the City

was prevented from enforcing [*60] it against the plaintiffs in that case). Moreover, since the Court recognizes that Defendants have a legitimate interest in and need to generally enforce the CON and licensing laws, see *Atchison, 126 F.3d at 1048-49* (describing legitimate concerns and interests of states in enforcing CON and licensing laws) and Tenn. Code Ann. § 68-11-108(b) (certificate of need granted to facilities when State determines that facility services are necessary to provide needed health care to State's citizens, and that the care can be economically accomplished and maintained, and that the care provided will contribute to the orderly development of adequate and effective health care facilities and/or services), the Court's remedy in this case need only affect those portions of the statutory scheme pertaining to Plaintiffs. As such, those sections of the CON and licensing scheme which do not pertain to Plaintiffs would continue to be valid. Accordingly, the last factor is satisfied in Plaintiffs' favor.

IV. CONCLUSION

Having considered the pleadings, the evidence presented, and the arguments of counsel, the Court concludes for the reasons set forth above that Plaintiffs have [*61] not demonstrated they are likely to be successful on the merits of their claim that the term "substantial number of medical or surgical pregnancy terminations," set forth in Tenn. Code Ann. § 68-11-201(3), is an undue burden on the right of a woman to obtain an abortion prior to fetal viability. However, Plaintiffs have demonstrated that they are likely to be successful on the merits of their claim that the term "substantial number of medical or surgical pregnancy terminations," set forth in Tenn. Code Ann. § 68-11-201(3), is unconstitutionally vague. Specifically, the term both fails to provide the kind of notice enabling ordinary people to understand what conduct it prohibits, and authorizes and encourages arbitrary and discriminatory enforcement of a criminal law and other penalties. Indeed, the provisions of the statutory scheme allowing Defendants to seek an injunction, to institute civil penalties, and to criminally prosecute Plaintiffs are either triggered by or incorporate the definition of ASTC found within § 68-11-201(3). See Tenn. Code Ann. § § 68-11-111, -201(3), -213(a)(1), -213(b)(2) and -223. Accordingly, the Court hereby GRANTS Plaintiffs' second Renewed Motion [*62] for a Temporary Restraining Order and Preliminary Injunction with respect to their vagueness claim, and ENJOINS Defendants from enforcing Tenn. Code Ann. § § 68-11-111, -201(3), -213(a)(1), -213(b)(2) and -223 against Plaintiffs.

It is so ORDERED.

Entered this the 14th day of April, 2000.

JOHN T. NIXON

UNITED STATES DISTRICT COURT

ORDER

Pending before the Court is Plaintiffs' second Renewed Motion for a Temporary Restraining Order and Preliminary Injunction, (Doc. No. 27), to which Defendants have replied, (Doc. No. 47). Plaintiffs, in turn, have filed a Response to Defendants' Reply. (Doc. No. 63.) For the reasons set forth in the contemporaneously filed Memorandum, Plaintiffs' Motion is GRANTED in part and DENIED in part. Specifically, Plaintiffs have not demonstrated they are likely to be successful on the merits of their claim that the term "substantial number of medical or surgical pregnancy terminations," set forth in Tenn. Code Ann. § 68-11-201(3), is an undue burden on the right of a woman to obtain an abortion prior to fetal viability. Accordingly, the Court hereby DENIES Plaintiffs' second Renewed Motion for a Temporary Restraining Order and Preliminary Injunction [*63] with respect to their undue burden claim.

However, Plaintiffs have demonstrated that they are likely to be successful on the merits of their claim that the term "substantial number of medical or surgical pregnancy terminations," set forth in Tenn. Code Ann. § 68-11-201(3), is unconstitutionally vague. Specifically, the term both fails to provide the kind of notice enabling ordinary people to understand what conduct it prohibits, and authorizes and encourages arbitrary and discriminatory enforcement of a criminal law and other penalties. Indeed, the provisions of the statutory scheme allowing Defendants to seek an injunction, to institute civil penalties, and to criminally prosecute Plaintiffs are either triggered by or incorporate the definition of ASTC found within § 68-11-201(3). See Tenn. Code Ann. § § 68-11-111, -201(3), -213(a)(1), -213(b)(2) and -223. Accordingly, the Court hereby GRANTS Plaintiffs' second Renewed Motion for a Temporary Restraining Order and Preliminary Injunction with respect to their vagueness claim, and ENJOINS Defendants from enforcing Tenn. Code Ann. § § 68-11-111, -201(3), -213(a)(1), -213(b)(2) and -223 against Plaintiffs.

It is so ORDERED.

Entered [*64] this the 14th day of April, 2000.

JOHN T. NIXON

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

PRO-CHOICE MISSISSIPPI, ET AL.

V. CIVIL ACTION NO.

F.E. THOMPSON, JR., ET AL.

BENCH OPINION

The following proceedings were held in Jackson, Mississippi, on September 1996 before the Honorable William H. Barbour, Jr., Chief United States District Judge.

APPEARANCES:

FOR THE PLAINTIFFS:

Deborah Goldberg
Louise Melling
Robert McDuff

FOR THE DEFENDANTS:

Hunt Cole
Mildred Morris
Paul Stephenson

REPORTED BY: DAVID A. SCOTT, C.S.R.
MISSISSIPPI C.S.R. NO. 1113

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BY THE COURT:

This case is before the court on the motion of the plaintiffs for a preliminary injunction enjoining the defendants from the enforcement of section 41-75-1 et seq. of the Mississippi Code as amended and the regulations enacted by the Mississippi State Department of Health thereunder. This statute is an attempt of the state of Mississippi to regulate providers of abortion services within the state.

The plaintiffs are Pro-Choice-Mississippi, an unincorporated association or coalition of citizens supporting the right of women to make choices in regard to whether or not to have abortions. The plaintiff Herbert H. Hicks is a physician practicing in Natchez, Mississippi, who practices family medicine but who also performs abortions. Plaintiff Joseph Booker, Jr., is a physician who is an obstetrician-gynecologist practicing in Gulfport, Mississippi who performs abortions in addition to providing other gynecological services. Gulf Coast Gynecology Clinic, Inc.; Center for Choice, Mississippi, Inc.; and Joseph Booker, Jr., MD, PA, are three corporations recently established by

plaintiff Joseph Booker, Jr., which have purportedly hired him to work as an individual physician for these three corporations so he could continue to provide abortions to the public in the Gulfport area. They obviously were set up by Dr. Booker in an attempt to avoid the recently passed amendments to the statute and the regulations.

The defendants are P.E. Thompson, Jr., the state health officer of the Mississippi State Department of Health; Mike Moore, the Attorney General of the State of Mississippi; and Kirk Fordice, the governor of the State of Mississippi. Essentially the state of Mississippi.

In 1991, the state legislature passed Section 41-75-1 et seq. and thereafter later that year the Mississippi State Department of Health published regulations thereunder which are known as Minimum Standards of Operation for Abortion Facilities. Thereafter, the plaintiff Booker filed a case in the Southern Division of this district known as Booker v. Thompson, Civil Action No. 1:93cv552GR. That case challenged the statute and regulations as they then existed. Judge Walter Gex of this court entered his opinion on April 10, 1995, in which he granted summary judgment for the state

defendants based on qualified immunity and 11th Amendment immunity and denied the plaintiff's cross motion for summary judgment. In so doing at page 16 of that unpublished opinion Judge Gex stated that although the court "need go no further," he went ahead and ruled on the validity and constitutionality of the statute and regulations as they then existed. The defendant in this case argued that at least the plaintiff Booker is either barred by res judicata or is collaterally estopped from questioning the validity of the statute and regulations insofar as they existed at that time. The court has reviewed Judge Gex's opinion and is of the opinion that the alternate ruling in regard to the validity of the statute and regulations was not essential to his judgment, and therefore the doctrine of res judicata and collateral estoppel do not apply to bar in this case Dr. Booker's challenge to the statute and regulations as they existed at that time.

In early 1996, the Mississippi legislature by Senate Bill 2817 amended the statute effective July 1, 1996. The Mississippi State Department of Health, after the statute was amended, amended the minimum standards, or regulations,

effective August 12, 1996. Following those amendments the State Department of Health notified the plaintiff Booker that it would investigate his office to determine whether he need apply for licensure as an abortion facility under the laws and regulations. That notification at least in part prompted this lawsuit.

The statute as amended defines an abortion facility as a doctor or organization providing abortion services to 10 or more patients in any one-month period of time, or 100 or more abortions during any calendar year. Also an abortion facility is defined as a facility providing the equivalent of 10 abortions per month if the facility operates on a part-time basis of less than 20 days per month, and if the abortions actually performed would create a ratio of 10 abortions per month on a 20 day month as compared with the days it actually operates. Also the statute defines an abortion facility as a facility which holds itself out to the public as an abortion provider by advertising.

The proof has shown that prior to the organization of his three new corporations, that Dr. Booker would have qualified as an abortion provider

under the statute and would have had to have complied with the statute and the regulations because he performed more abortions than 10 per month and 100 per year. The testimony has been that he provided well in excess of the numbers to qualify. In addition, his previous clinic advertised in the Yellow Pages in Gulfport, Mississippi, as providing pregnancy termination and/or abortions, so that this likewise would place him under the requirements of the statute and regulations.

Dr. Hicks, on the other hand, testified that he did not advertise, but did provide abortion services sometimes meeting or exceeding the 10 per month, and accordingly, unless he limited his abortion practice, would be required to comply with the statute and regulations. As stated, plaintiff Booker, in an attempt to avoid the operation of the statute and regulations, has recently organized three separate corporations. He testified that he intended to be an employee of each corporation and to assign patients through each corporation to himself so that none of the corporations would comply with the requirements of the statute by having more than nine patients in any one month so

that he would not reach the 10 level. Dr. Hicks says that he would simply limit his abortion practice to no more than nine in any one month and no more than 99 in any one year in order to avoid the statute.

Dr. Booker's practice is carried out in the same building where he has practiced for the last two or three years, and it is not clear as to how the division of patients is intended to be made among those three corporations. That is not here before the court here today.

Both doctors, on behalf of themselves and their patients, attack the statute and regulation as unconstitutional. Pro-Choice of Mississippi attacks the statute as unconstitutional on behalf of women who may desire to have abortions in the state of Mississippi. Since there is a six-month window for qualifying under the statutes and regulations, and since the regulations were effective August 12, 1996, neither of the doctor plaintiffs are immediately faced with having to qualify under the statute, and, accordingly, the attack made by the plaintiffs on the statute and regulations is a facial attack as opposed to an as applied challenge. Therefore the plaintiffs must prove that

under no circumstances could the statute and/or regulations be held to be constitutional.

Further, since this is a motion for preliminary injunction, the plaintiffs have the burden of proof to show by preponderance of the evidence the four issues recognized in this circuit for preliminary injunction: They must show, 1) a substantial likelihood of success on the merits; 2) that a failure to issue the injunction would be more harmful to the plaintiffs than the issuance of the injunction would be to the defendants; 3) that the issuance of the injunction favors the public interest; and, 4) that the plaintiffs would be caused irreparable harm if the injunction is not granted.

It is clear from several cases, including Planned Parenthood v. Casey, that the state can regulate abortion providers, but only so long as the statute and or regulations are reasonably directed to preserve maternal health, and if so, those statutes and regulations do not constitute a substantial obstacle to a woman's choice of whether or not to have an abortion. The court will first address the issue of whether the plaintiffs have proved by a preponderance of the evidence that there

is a substantial likelihood that they will prevail on the merits.

The court asked the plaintiffs counsel in closing argument to list the specific challenges made by plaintiffs, and she did so. There is a general challenge made to the statute and regulations and then there are specific challenges to parts of the statute and regulations. There are no challenges at this time to some portions of the statute and regulations. There is a challenge to the provision of the statute which prohibits the location of an abortion facility within 1500 feet of a church, school or kindergarten. The defendants have confessed the unconstitutionality of that particular provision. Accordingly, the court finds that that provision is in fact unconstitutional, primarily because there can be no spot zoning under the constitution of the State of Mississippi.

The state defendants have argued that the statute and regulations are subject to severability if the court should find some portions of the statute and/or regulations valid and others not valid. The court agrees with the state defendants that invalid portions of the statute may be severed because under Mississippi law there is a presumption

of severability in the absence of the legislature's stating otherwise in the statute. Authority for this is Wilson v. Jones County Board of Supervisors, 342 So.2d 1294. (Miss. 1977). Accordingly, since the court is going to find that portions of the statute and regulations are valid and constitutional, the court will sever other portions, including this 1500 foot zoning provision, which it finds invalid and unconstitutional.

The court finds that under the authority as stated above of the Casey case, that states can regulate abortion providers, and specifically finds in regard to the statute and regulation passed by the State of Mississippi and the Mississippi Department of Health, that this statute and its regulations as amended in 1996, except as hereinafter set forth, are reasonably directed to preserve the maternal health of those seeking abortions in Mississippi, and, except for the specific declarations which I will set forth, do not constitute a substantial obstacle to a woman's choice to have an abortion. Accordingly, the challenge to the statute and regulations as a whole fails.

The court now will address the specific

issues of challenge by the plaintiffs. Plaintiffs challenge the section of the statute and the corresponding section of the regulations defining those abortion facilities which must comply with the law and the regulations. Other than the general challenge, the plaintiffs raise no specific complaint about the definition which brings those facilities providing 10 or more abortions per month or 100 or more per year within the purview of the statute and regulations. Under Casey, the state can chose to regulate in a proper manner all abortion providers. Here, the State of Mississippi only chose to regulate those abortion providers operating substantially for the purpose of performing abortions and opted to have a bright-line definition of the term "substantially providing abortion services." The court will note at this time that the 1996 amendment to the statute changed this definition from "primarily providing abortion services" to "substantially providing abortion services." The court finds no unconstitutional infirmity with the state's choosing not to regulate those providers who perform fewer than the specified number of abortions.

The plaintiffs challenge the second part

of the definition, which addresses abortion facilities which provide abortions on fewer than 20 days per month-- in other words, part-time facilities-- on the basis that that definition is vague. The court disagrees. The court thinks that the statute is clear enough to show that the intent of the legislature was to regulate those part-time providers to provide the ratio equivalent of 10 per month.

The third definition of abortion facilities covers those facilities which hold themselves out to the public as abortion providers by advertising. The court finds that the challenge to this provision under the Fourteenth Amendment is not well taken, that the definition is reasonably directed to preserve maternal health by attempting to draw into the regulatory scheme those institutions so defined, and that the prohibition on advertising does not constitute a substantial obstacle to a woman's choice.

However, the doctor plaintiffs challenge this provision also on First Amendment free speech grounds. This obviously is a commercial speech issue, and as such must meet the intermediate scrutiny test, which states that the regulation must

directly advance a substantial government interest and that it be no more extensive than necessary. The court finds that although the advertising portion directly advances a substantial government interest, that is the regulating of those substantially engaged in providing abortions, it is more extensive than necessary, particularly regarding those who would choose not to seek a license to operate an abortion facility by limiting the number of abortions that they would provide. Accordingly, because it applies to all abortion providers and because there is this exception under the statute as to certain abortion providers that could operate without complying with the statute and regulations but for this infringement upon their right to free commercial speech, the court believes that this portion of the definition is constitutionally infirm under the First Amendment.

The plaintiffs complain about the requirement in the regulations that a registered nurse be on the premises of abortion facilities when abortions are provided. The court has heard proof which is conflicting. Medical expert, Dr. Helen Barnes, who testified for the plaintiff, testified that a registered nurse was not necessary because

most abortions do not have complications, and that trained personnel, even trained to a lesser degree than licensed practical nurses or certified nurse assistants, can adequately perform the task if the doctor is present on the premises. Dr. Hicks testified that in all events that he performs no more than one abortion at a time before a patient is dismissed from his office, and, accordingly, he is available at all times to attend to his patients, and that when he is not with them that he has an office assistant who he has trained to be there, and in his opinion that the requiring of a registered nurse on his premises would only add to the expense of the abortions and is not medically necessary.

On the other hand, the defendants presented Dr. Harvey Huddleston, a professor of obstetrics and gynecology from Shreveport, Louisiana, who testified that since this is a surgical procedure, that a registered nurse was essential to the proper care of the patient and that even though a doctor may be present on the premises, that a registered nurse was still necessary. The defendants also presented a registered nurse, Rita Wray, who testified that in any case where nursing assistance was given to a person that a registered

nurse should be on the premises, not necessarily to render the specific nursing services, but to plan them and to direct those nursing services, which might be performed by a licensed practical nurse or a nursing assistant.

The plaintiffs have tried to persuade the court that since the abortions are routinely done, since they take only a short period of time to actually perform and since in the overwhelming majority of cases there are no complications, that there is no medical necessity for a registered nurse. The testimony before the court is that practically all abortions performed in Mississippi are suction D&C abortions, at least in the first and early second trimesters. The proof has shown that gynecologists routinely do suction D&Cs on nonpregnant women for other purposes. The defendants' expert, Dr. Huddleston, testified that a woman's body changes during pregnancy by, among other things, having a much greater blood supply to the uterus, and that because of this, that pregnant women are much more susceptible to hemorrhage when they have an abortion by suction D&C than when nonpregnant women have a suction D&C to remove remaining menstrual tissue or the remains of a fetus

which has died or has partially aborted. Dr. Barnes for the plaintiff, on the other hand, equated the procedures as being equal. However, both Dr. Barnes and Dr. Hicks, as well as Dr. Huddleston, stated that suction D&Cs on nonpregnant women are performed in the overwhelming number of instances at hospitals or ambulatory surgical facilities. Primarily because of this, it would appear to the court that there is a reasonable medical rationale for requiring that RNs be present when this type of surgery is performed.

That leads the court, in regard to this issue, to move to the second prong of the test, whether the requiring of the RNs would constitute a substantial obstacle to a woman's choice to have an abortion. The testimony was that salaries for RNs are approximately $40,000 per year in the state of Mississippi and that this is approximately three times greater than the salaries of licensed practical nurses or nursing assistants which are used by the two doctors in this case. The law is clear that simple cost alone, even though it might be passed on to the patient in the form of some increased fees, is not enough to constitute a substantial obstacle to a woman's choice. Here the

plaintiffs have complained that if they are required to staff with an RN that it would make it economically unfeasible for them to continue to provide abortions. The court is not positive that it believes that testimony, and at any rate, finds that this will probably not constitute a substantial obstacle to the woman's right of choice. Accordingly the court finds in regard to the RN situation that the plaintiffs do not meet their burden showing that they are likely to succeed on the merits of this issue when the court finally addresses it. The court will not enjoin the enforcement of this requirement.

The next issue raised by the plaintiffs is the requirement of the regulations that the doctor providing the abortion at an abortion facility must have ob-gyn training through an American Medical Association-approved residency program. The plaintiffs presented proof that Dr. Hicks has been in practice for 22 years and has a gynecological practice, although he does not have residency training in that specialty, and that he had carried on an extensive obstetrics practice for a number of years until he decided to retire from that portion of his practice. The regulations do

not allow any type of grandfathering for those doctors who may not have attained a residency in ob-gyn. There was testimony by Dr. Huddleston, defendants' expert, that he felt that a doctor who had less than an ob-gyn residency could in fact be qualified to perform abortions. He did not think that a person without some specific training in ob-gyn should be allowed to perform abortions. He suggested that if a doctor doing a family practice residency chooses to do one of the three years of that residency in obstetrics and gynecology that that would be sufficient to meet the state's reasonableness and medical necessity guidelines. Based particularly on this, the court believes that the state cannot meet its burden in regard to the first prong by showing that there is a reasonable medical necessity directed to preserve the woman's health in requiring ob-gyn residency training for all physicians performing abortions. Accordingly, the court finds that there is a substantial likelihood that the plaintiffs will prevail on the merits on that portion of their challenge.

The plaintiffs have challenged the various requirements of the regulations in regard to the physical setup of doctors' offices which qualify

as abortion facilities. The state has advised the court that in essence it adopted the building requirements for ambulatory surgical facilities as the requirements for abortion facilities. The plaintiff specifically challenged the provisions that require six foot corridors; 44 inch doors; what appears to be a requirement for five separate bathrooms; separate locker rooms for male nurses and female nurses, including a bathroom in each of those locker rooms; supplemental emergency power for exit lights and lighting, in general, and backup lights in operating rooms; suction capability in operating rooms; several specific area designations for such rooms as recovery areas; and an alarm system for calling doctors. The court is of the understanding that most, if not all, ambulatory surgical facilities are designed for use by multiple doctors at any one time, and multiple patients undergoing a variety of procedures. The court does not think that the defendants can meet the showing that all of the specifics set forth in the building requirements of the regulations are reasonably directed to preserve maternal health. It would appear to the court that these building requirements are over-designed and, to the extent of such

over-design, are not necessary, and further, that these building requirements are so expensive that they could possibly place substantial roadblocks in allowing women the choice to have abortions. The court thinks that the state could adopt reasonable requirements for facilities that would pass constitutional muster. Perhaps the regulations could be redrafted in a less elaborate and more reasonable manner, perhaps by tying building requirements to the number of patients being attended to at any one time. The court notes that testimony has been received that Dr. Hicks does not provide but one abortion at a time, whereas at least on one occasion Dr. Booker had 33 women in his office recovering from abortions. Dr. Booker's situation would require more elaborate facilities than one where the doctor performs only one abortion at a time.

The plaintiffs have challenged the requirement in the regulations requiring a written transfer agreement with a hospital within a 30 minute automobile trip of the doctor's office. The court is well aware and takes judicial notice of the fact that there is wide-spread public opposition and protest to abortions in this state. Dr. Booker has

applied to four hospitals in his area for a written transfer agreement and the proof has shown that two hospitals have denied him such an agreement, ostensibly on the basis that he does not have admitting privileges. Two hospitals have not responded. The state has argued that this is a reasonable provision to protect women who happen to have complications and need hospitalization. The court agrees with the defendants that it is reasonable to have hospitalization available to abortion patients who develop complications during or immediately after the abortion. The court feels, however, that requiring a written transfer agreement as opposed to some other agreement will constitute a substantial obstacle to a woman's right to choice, because as a practical matter, local pressure can and will be brought upon hospitals to deny these written transfer agreements to abortion providers. Accordingly, as a practical matter, the hospitals then would have third-party vetoes over whether the abortion providers can obtain a license from the State of Mississippi. Accordingly, the court finds that there is a substantial likelihood that the plaintiffs will succeed on the merits on this issue.

Next, the plaintiffs object to the provision under Part III of the regulations entitled "Patient Care" which states: "For medical safety an abortion facility shall deal only with menstrual extraction, routine dilation and curettage and suction and dilation curettage." The plaintiffs object to the omission of the procedures known as dilation and evacuation and medical abortion from the services that can be performed at an abortion facility.

As the court understands it, dilation and evacuation is very similar to dilation and curettage except that dilation and evacuation, known as D&E, is used where a fetus has developed to a sufficient stage so that it can no longer fit into the suction device and has to be dissected in order to be removed. This procedure is a necessary substitute for D&C in most instances where the fetus has reached the age of 13 weeks. Under the law and the regulations, abortion facilities are prohibited from performing abortions on fetuses ages 16 weeks and over. Accordingly, the plaintiffs' objection to the omission of D&Es would pertain to abortions at abortion facilities by D&E in regard to fetuses of the age of 13 to 16 weeks. At 16 weeks, abortions

must be performed in hospitals or ambulatory surgical facilities.

The testimony is that there are presently existing two types of medical abortion. One is presently approved by the Federal Drug Administration, and the other has approval pending. Dr. Hicks testified that he would like to be able to provide medical abortions if any of his patients should request it, but that he would advise his patients to undergo surgical abortion by suction D&C rather than medical abortion.

The court sees no medical reason for the failure to include these two types of recognized abortion procedures within the regulations, and in fact believes that the state has not presented any proof showing medical necessity for this. Accordingly, failure to list these recognized methods in the regulations means that the plaintiffs have carried their burden of showing there is a substantial likelihood they will succeed on the merits on this issue.

Finally, the plaintiffs complain about the first sentence at the conclusion of the regulations at Section 404.1, which states: "Conditions which have not been covered in the

standards shall be enforced in accordance with the best practices as interpreted by the licensing agency." This challenge is on the basis that the provision is so vague as to not give the plaintiff doctors due process in understanding the criminal liability with which they might be faced. The statute imposes a $1,000 per day fine for failure to comply with the statute and regulations and states that each day's failure to comply constitutes a separate offense. Here the court cannot understand what this sentence means. Specifically, "conditions which have not been covered in the standards" is completely open, and subjects any abortion provider to whatever interpretation the State Department of Health might place on that phrase. Also, "best practices" is completely undefined and leaves that open matter to be interpreted by the licensing agency. Theoretically here, the State Department of Health could exclude a doctor for practically any reason from obtaining a license, and the court finds that indeed that provision is vague and, accordingly, improper. There is a substantial likelihood that the plaintiffs will prevail on the merits on this issue.

The end result of this recitation is that

the plaintiffs have shown that there is substantial likelihood of success on the merits in regard to all of the specific challenges made by them except as to the requirements that an RN be on the doctor's staff. The court finds that in regard to the RN issue that injunction should not be granted.

The court omitted a discussion of another issue raised by the plaintiffs, and that is the provision which requires abortion facilities to make available all patient records to the State Department of Health. That provision makes no provision for the redaction of names and addresses from those records. It further allows those records to be made public in matters involving the licensing of those abortion facilities.

The doctor-patient confidentiality privilege is one of the strongest noted in our laws. It goes to the heart of the doctor-patient relationship. Patients tell doctors things in confidentiality and expect them to remain confidential. The state law recognizes this confidentiality in specific statutes and also in case rulings. This regulation, for practical purposes, almost does away with doctor-patient confidentiality in regard not only to the patients

present presenting themselves to abortion facilities for abortions but also to those patients presenting themselves to abortion facilities for any other type of medical care and assistance. The testimony is that Dr. Hicks, for instance, has an active family and gynecological practice in addition to his abortion practice. This provision subjects all of his patients to an opening of their records to the public in any instance where his facility may be undergoing a licensing hearing. The court realizes that the purpose of this provision is to allow the health department the ability to investigate a doctor's office through his records in order to determine whether the doctor is falsely reporting the number of abortions he is performing in order to avoid regulation under the statute and regulations. However, because the provisions are so invasive of the doctor-patient privilege, the court thinks that it cannot stand constitutional muster and that there is a substantial likelihood that plaintiffs would prevail on the merits.

Accordingly, in regard to all of the issues on which the court has found that the plaintiffs would likely succeed on the merits, the court must further address the other essential

elements for the granting of a preliminary injunction. Would the failure to grant this injunction be more harmful to the plaintiffs than to the defendants if the injunction is issued? The court finds that the answer is yes. We are dealing here with substantial constitutional rights of women who under Roe v. Wade and its progeny have the right to obtain an abortion if that is their choice. There is a substantial disagreement in the public about that right, but it is the law of the land. Individual judges may disagree with that law; but that law is to be applied. Recently the Casey decision from the Supreme Court has upheld that right in the face of a substantial effort to reverse Roe v. Wade.

Is it in the public interest to issue the injunction? Where you have probable violations of constitutional rights, it is always in the public interest to grant the injunction. It is also recognized that violations of constitutional rights constitute irreparable harm. Accordingly, the plaintiffs have carried their burden of proving that the court should grant a preliminary injunction prohibiting the state defendants from enforcing the statute and the regulations insofar as set forth in

its opinion. An injunction does not issue in regard to the challenges to the statutory and regulatory scheme as a whole, in regard to the provisions regarding the necessity for a registered nurse or in regard to the definition of an abortion facility as set forth in the statute and regulations, except for the provision regarding advertising.

That completes this bench opinion containing findings of fact and conclusions of law. In the event this bench opinion is later transcribed for appeal or other purposes, the court will reserve the right to edit or amend the opinion. However, the substance of this opinion will not be changed. Are there any requests for clarification or requests for additional rulings by the plaintiffs?

MS. GOLDBERG: No, Your Honor.

THE COURT: From the defendant?

MR. COLE: No, Your Honor.

THE COURT: All right. That will conclude these proceedings. While you all are here, I don't know whether you're prepared at this time to advise the court as to what will be necessary before we hear the case on the merits. Perhaps the best thing to do would be to simply ask you to contact the magistrate judge and have a case management

conference which will determine the scheduling order to govern further proceedings in the case. Is that a satisfactory proceeding or suggestion? Does anybody have a contrary suggestion?

MR. COLE: No, Your Honor.

MS. GOLDBERG: No, Your Honor, that will be fine.

THE COURT: All right. Ms. Goldberg, just for our guidance and Mr. McDuff, will you be attending case management conferences or other conferences? Have you discussed it with your co-counsel or will local counsel do that?

MS. GOLDBERG: We haven't discussed the matter yet.

THE COURT: All right. Let me ask you this then. Let me ask you then on or before October 11th to confer and contact Judge Nicols for the purpose of setting up a case management conference. I am not directing that the case management conference be held by that date, but I would like for you to contact Judge Nicols in order to get a date set for a case management conference that would be convenient to him and to the parties. All right. If there is nothing further in regard to this matter this afternoon, let me ask the

plaintiffs since- I don't know who thinks they won today. I don't know whether the plaintiffs think they did or defendants think they did. I need the parties to confer about an order to be entered on the preliminary injunction, and would you volunteer to do that?

MS. GOLDBERG: I will volunteer to draft the order, Your Honor.

THE COURT: If you will draft an order and present it to counsel for the defendants for suggestion, if you can get together on an appropriate order-- just as to form; I don't expect you to agree with my rulings necessarily-- but if you get together on the form of an order and present it to me within 10 days as the local rules require. So if you can do that. If you have a problem with it I will be happy to have a telephone conference with you or have you come over and talk to you about it sometime next week.

If there is nothing further then the court will stand in recess.

[RECESS]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WOMEN'S MEDICAL CENTER OF N.W. HOUSTON, *et al.*,	§	
Plaintiffs,	§	
v.	§	
	§	**CIVIL ACTION NO. H-99-3639**
CHARLES E. BELL, Acting Texas Commissioner of Health, and JOHN CORNYN, Texas Attorney General, in Their Official Capacities,	§	
Defendants.	§	

ORDER

Plaintiffs in this case are Women's Medical Center of N.W. Houston, Austin Women's Health Center, P.A., and Drs. Robert P. Kaminsky, Lamar Robinson, Fred W. Hansen, and L.L. Tad Davis[1] (collectively "the Physicians"). The Physicians have brought this action on behalf of both themselves and their patients. Defendants in this case are the Acting Texas Commissioner of Health, Charles E. Bell, and the Texas Attorney General, John Cornyn, both in their official capacities ("the State"). Pending before the Court are the Physicians' Motion for Modification of Preliminary Injunction (Dkt. #76) and the State's Motion to Modify Preliminary Injunction (Dkt. #82). After considering the parties' arguments and the applicable law, the Court is of the opinion that the Physicians' motion should be denied and the State's motion should be granted.

[1] Also named as plaintiffs are the professional associations under which the Physicians practice. A fifth doctor, Mary E. Smith, and Denton Health Services for Women were initially parties to this suit but were dismissed while this case was on appeal because Dr. Smith stopped performing abortions at her private office in Denton.

FACTUAL AND PROCEDURAL BACKGROUND

The factual background of this case has already been set forth in extensive detail in the Court's order of December 29, 1999, *Women's Med. Ctr. v. Archer*, 159 F. Supp. 2d 414 (S.D. Tex. 1999), and the Fifth Circuit's opinion on interlocutory appeal of that order, *Women's Med. Ctr. v. Bell*, 248 F.3d 411 (5th Cir. 2001). Therefore, the factual and procedural history of this case will only be summarized here.

For years, Texas has required facilities that perform a large number of abortions to be licensed. The licensing requirement was initially enacted in response to fears that the volume of abortions being performed at some abortion clinics was causing patient care to deteriorate and endangering the health of women seeking abortions. Licensed facilities must meet a host of strict standards related to patient care, sterilization procedures, and internal administration in order to obtain and keep their licenses. Initially, only facilities that performed abortions for 51% or more of their patients each year were required to be licensed. However, some members of the Texas legislature became concerned that the 51% rule created a loophole by which doctors who performed a significant number of abortions could evade licensing and the strict standards that accompany it. In response to these concerns, the law was changed in 1999 to require any doctor who performed 300 or more abortions a year to obtain a license. Approximately twelve doctors, an estimated 20% of the abortion providers in the state of Texas, were subjected to the licensing requirement for the first time as a result of the 1999 amendments. Four of these doctors are parties to this suit.

Several of the doctors testified in the preliminary injunction hearing held before the Court on December 14, 1999. They stated that they had never had any problems with patient care and that the detailed administrative requirements that they would be subjected to under the Texas Department

of Health's ("TDH") licensing regulations were unnecessary given the small size of their offices. The doctors also claimed that the expense of complying with the regulations would result in increased costs for patients seeking abortions or, in one case, prevent the doctor from performing abortions at all. The Physicians also objected to the regulations' patient care standards. The regulations defined the requisite degree of care in terms of the patients' subjective treatment expectations.[2]

Several Texas legislators also testified as to the purpose of the 1999 amendments. Their testimony indicated that the amendments were made in response to public health and safety concerns and that the 300 abortion line was chosen after conferring with pro-choice advocates. There was no evidence that the law was amended in an effort to interfere with a woman's constitutional right to seek an abortion.

In its order of December 29, 1999 the Court held that the challenged regulations did not violate the Due Process rights of Texas women to seek abortions under the undue burden standard set out by the Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Court also held that the 300 abortion line lacked a rational basis and thus violated the Physicians' Equal Protection rights. The Court did not address the patients' Equal Protection rights because the Physicians had not raised an Equal Protection claim on behalf of their patients at that time. Finally, the Court held that the regulatory provisions defining quality of care in terms of the patients' subjective treatment expectations were unconstitutionally vague. Based on these holdings the Court

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[2] The regulations defined "quality," a term present throughout the regulations, as, "[t]he degree to which care meets or exceeds the expectations of the patient." 25 TEX. ADMIN. CODE § 139.2(41) (1998). The regulations also required abortion providers to ensure that their patients "are cared for in a manner and in an environment that enhances each patients' dignity and respect in full recognition of her individuality," *id.* at § 139.51(1), and "receive care in a manner that maintains and enhances her self-esteem and self-worth," *id.* at § 139.51(2). However, as one doctor pointed out, abortion is by its very nature an experience that very rarely enhances a woman's self-esteem.

granted the Physicians' motion for a preliminary injunction.

On interlocutory appeal, the Fifth Circuit affirmed the Court's vagueness holding. However, the Fifth Circuit concluded that there was a rational basis for the 300 abortion per year threshold and reversed the Court on that issue. Thus, after the Fifth Circuit's decision on the interlocutory appeal of this case, the only part of the Court's original preliminary injunction still in place is based on the vague provisions of the abortion facility licensing regulations.

After remand, the parties agreed to a grant of summary judgment on the Physicians' claim that the abortion licensing regulations were irrational and therefore violated their Equal Protection rights. The parties also agreed to allow the Physicians to amend their complaint to assert their patients' Equal Protection rights.

The Physicians now seek to have the preliminary injunction extended to the entire regulatory scheme. They argue that the portions of the regulations which the Court found to be vague in its earlier order are not severable and that the entire regulatory scheme is thereby rendered invalid. The Physicians also argue that because the regulations cannot be constitutionally enforced, the licensing statute itself is rendered unconstitutional as there are no standards for granting or denying a license. They also argue that the regulations violate their patients' Equal Protection rights. The State points out that after the Fifth Circuit's decision, the TDH revised the abortion facility licensing regulations in an attempt to eliminate the vague provisions.[3] 26 Tex. Reg. 5577-79 (2001), *adopted* 26 Tex. Reg. 9094 (2001) (codified at TEX. ADMIN. CODE §§ 139.2, 139.8, 139.49, and 139.51). It argues that the 2001 amendments to the abortion facility licensing regulations have eliminated any trace of unconstitutional vagueness. The State also argues that regulations affecting a woman's right to seek

[3] These amendments became effective on November 18, 2001.

an abortion are measured by the same constitutional standard regardless of whether they are challenged on Due Process or Equal Protection grounds. Both of these issues will be addressed below.

PRELIMINARY INJUNCTION STANDARD

In order to obtain a preliminary injunction a plaintiff must show: "(1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied, (3) that the threatened injury outweighs any damage that the injunction might cause defendants, and (4) that the injunction will not disserve the public interest." *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999) (citing *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)). As discussed in the Court's previous order, the primary dispute in the present case is whether or not the Physicians have a substantial likelihood of success on the merits. *Women's Med. Ctr.*, 159 F. Supp. 2d at 467-68.

ANALYSIS

I. Vagueness

A statute will be unconstitutionally vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Smith v. Gougen*, 415 U.S. 566, 572 n.8 (1974) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). A vague law raises the specter of arbitrary and discriminatory enforcement because of the unfettered discretion it grants government officials. *Id.* at 573. The Court held, and the Fifth Circuit agreed, that the regulations at issue in this case were unconstitutionally vague because their application was dependent upon the subjective expectations of patients seeking an abortion. As neither doctors nor state inspectors can determine the treatment expectations of every woman seeking an abortion, and because those expectations

might differ significantly between individual patients, the regulations would necessarily be prone to arbitrary and discriminatory enforcement. *Women's Med. Ctr.*, 248 F.3d at 421-22; *Women's Med. Ctr.*, 159 F. Supp. 2d at 466-67.

However, after the Fifth Circuit upheld the Court's decision that the abortion facility licensing regulations were vague, the TDH amended the regulations in an attempt to cure the regulations' constitutional defects. To this end, the requirement that abortion providers enhance their patients' dignity and self-esteem was eliminated. The subjective definition of "quality" was also deleted. In fact, the TDH appears to have engaged in an all out war on the word "quality" in the licensing regulations in an effort to eradicate the last vestiges of constitutional ambiguity from the regulations. This zealous editorial crusade appears to have been successful as the word "quality" now appears in the regulations only as part of the terms "quality assurance" and "quality improvement." "Quality assurance" is defined as "[a]n ongoing, objective, and systematic process of monitoring, evaluating, and improving the appropriateness, [*sic*] and effectiveness of care." 25 TEX. ADMIN. CODE § 139.2(41) (2002). "Quality improvement" is defined as "[a]n organized, structured process that selectively identifies improvement projects to achieve improvements in products and services." *Id.* § 139.2(42). These definitions are based on objective criteria and were not found to be vague by either this Court or the Fifth Circuit in the earlier preliminary injunction decision.

The precise manner in which an abortion facility's quality assurance program should operate is set out in detail in § 139.8. In this section the term "quality" has generally been replaced by the phrase "patient care and services issues." There is, however, one provision in this section which is still arguably vague. Section 139.8(f)(2)(A) provides that, "[d]epartment surveyors shall verify that:

the facility has a [Quality Assurance] committee which addresses concerns." Prior to the 2001 amendments, the regulations required licensed facilities to have a Quality Assurance committee "which addresses *quality* concerns." 25 TEX. ADMIN. CODE § 139.8(f)(2) (1998) (emphasis added). However, § 139.8(d)(1)-(7) set out in detail the issues which must be addressed by the Quality Assurance committee. Therefore, although § 139.82(f)(2)(A) is by no means a model of grammatical clarity, the unspecified nature of the "concerns" mentioned in that provision is unlikely to result in confusion or arbitrary enforcement.

The new regulations are based on objectively measurable factors and are sufficiently precise to describe what steps must be taken by abortion providers to avoid violating the licensing regulations and to properly constrain the discretion of state inspectors enforcing those regulations. Because the regulations as amended are not unconstitutionally vague, there is no need for the Court to address the Physicians' severability arguments.

II. Equal Protection

A. The Proper Standard of Review

Applying *Casey*'s undue burden standard, the Court previously held that the Texas abortion licensing regulations do not unconstitutionally impinge on the Due Process rights of Texas women to seek an abortion. After remand the Physicians amended their complaint to assert the Equal Protection rights of their patients and they now argue that a different standard, strict scrutiny, should apply to these claims. The Physicians argue that:

> [R]egarding a woman's actual *decision* to seek an abortion, states are permitted to legislate in a way that does not unduly burden the right to end a pregnancy. Nevertheless, when abortion is targeted as a fundamental right in matters not related to a woman's substantive due process right to choose abortion, the standard of scrutiny remains unchanged and independent of *Casey*.

Pls.' Opp'n to Defs.' Mot. to Modify Inj. and Reply in Supp. of Pls.' Mot. to Modify Inj. at 6 n.6 (emphasis in original) (citations omitted). The crux of the Physicians' argument seems to be that, even after *Casey*, abortion legislation that affects only a woman's decision-making process is subject to undue burden analysis, but other types of legislation regulating abortion, for example, laws that affect the actual availability of abortion, are still subject to strict scrutiny analysis.

In support of this argument, the Physicians cite only a single post-*Casey* decision, *Stenberg v. Carhart*, 530 U.S. 914, (2000). However, not only does *Stenberg* not support the Physicians' position, it actually suggests a contrary result. In *Stenberg* the Court held a Nebraska law outlawing "partial birth abortions" unconstitutional. The Nebraska law at issue in *Stenberg* made it a felony to "'deliberately and intentionally deliver[] into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the child.'" *Id.* at 922 (quoting NEB. REV. STAT. ANN. § 28-326(9) (1999)). This statute covered procedures known as "dilation and evacuation" ("D&E") and "dilation and extraction" ("D&X"). In a D&E the cervix is dilated and the body of the fetus is dismembered by the traction of the instruments used to remove the fetus and the counter-traction of the internal os of the cervix. *Id.* at 925. In a D&X the body of the fetus is drawn through the cervix before the skull of the fetus is collapsed and the body removed. *Id.* at 927. Although technically distinct this procedure can also be referred to as an intact D&E. *Id.* at 927-28. D&X and intact D&E are the safest methods of performing a second trimester abortion in some circumstances. *Id.* at 934-36. In reaching the conclusion that the Nebraska partial birth abortion law was unconstitutional the Supreme Court relied on "two independent reasons." *Id.* at 930. First, the Court held that "a statute that altogether forbids D&X creates a significant health risk" and "consequently must contain a

health exception" under *Casey*. *Id.* at 938. It is true, as the Physicians submit, that this section of the opinion did not rely on the undue burden test. However, the Court also found that because the law outlawed not only the D&X procedure, but also the more common D&E procedure, which is the most common procedure for second trimester, previability abortions, *id.* at 924, it placed a "'substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'"[4] *Id.* at 938 (quoting *Casey*, 505 U.S. at 877). The Nebraska law at issue in *Stenberg* outlawed a particular method of abortion, it did not merely seek to influence or constrain a woman's decision whether or not to have an abortion as the notification, waiting period, and informed consent provisions of the Pennsylvania statute involved in *Casey* did.

Both the joint opinion in *Casey* and other Supreme Court cases also undercut the Physicians' argument. In *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court held that, "the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely." *Id.* at 688. The *Casey* joint opinion is replete with references to a woman's right to decide to terminate her pregnancy. *See, e.g.*, *Casey*, 505 U.S. at 875-76. However, in the end the *Casey* joint opinion held that a state regulation that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" is unconstitutional. *Id.* at 877. Even if the distinction between regulations that affect the decision-making process and other abortion regulations advocated by the Physicians was to be found in the *Casey* joint opinion, *Casey* itself

[4] *Stenberg* was a 5-4 decision. Had the Nebraska law in *Stenberg* contained a health exception and been limited to the D&X procedure, it would have passed constitutional muster. *Id.* at 950 (O'Connor, J., concurring).

seems to have rejected such a distinction in the context of the present case: "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* at 878. No other standard for evaluating health regulations is even hinted at in *Casey*. Ultimately, the Physicians seem to forget that the right established in *Roe* and reaffirmed in *Casey* is itself only decisional in nature. The right to seek an abortion is grounded in the right to decide whether to bear or beget children. *Carey*, 431 U.S. at 688-89; *Whalen v. Roe*, 429 U.S. 589, 599-600 & n.26 (1977). There is no affirmative right or entitlement to abortion. *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). Women simply have the right to choose to have a previability abortion and to effectuate that choice without unnecessary interference from the state. *Carey* rejects the notion that these two rights are evaluated under different standards.

This conclusion also finds support in cases from other Circuits. In *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), a case closely analogous to the present lawsuit, the Fourth Circuit upheld a similarly comprehensive South Carolina regulatory scheme. The *Greenville* court held that the regulations did not impose an undue burden on a woman's right to seek an abortion and expressly declined to address the plaintiffs' Equal Protection arguments. *Id.* at 173. The *Greenville* decision strongly implies that whether an abortion regulation is evaluated under the Due Process or Equal Protection rubric, the outcome and standard for adjudication will not be affected.

The Physicians also place significant emphasis on decisions that describe abortion as a "fundamental right." *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983) ("[T]he Court repeatedly and

consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.") and cases cited therein. There is no doubt that the liberties from which the right to abortion is derived, the right to decide whether to bear or beget children and the right to bodily integrity, are among the most basic of constitutional and human rights. *See Casey*, 505 U.S. at 851, 859. The Physicians also argue, correctly, that laws that burden fundamental rights are subject to strict scrutiny analysis. *See e.g.*, *Rublee v. Fleming*, 160 F.3d 213, 217 (5th Cir. 1998). The Physicians conclude from this that laws that restrict abortion must pass the demanding strict scrutiny test.

As previously discussed, this argument appears to be contrary to the decision in *Stenberg*. In addition, while the Physicians' argument may be valid as a general, or perhaps nearly universal, proposition, "Abortion is a unique act," which has generated an equally unique body of law. *Casey*, 505 U.S. at 852. There are few situations in which some of the most basic values are placed in such stark conflict. The right to control one's own body is a right without which all other liberties would be merely empty phantoms. However, without a belief in the basic sanctity and value of individual human life, all discussion of personal autonomy would seem equally hollow. Moreover, "those trained in the respective disciplines of medicine, philosophy, and theology [have been] unable to arrive at any consensus" on the difficult issues of when life begins and how the rights of the fetus should be balanced against the rights of the mother. *Roe v. Wade*, 410 U.S. 113, 159 (1973); *see also*, *e.g.*, Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 THE MONIST No. 1, January 1973 (arguing that a fetus never has enough of the intellectual traits associated with personhood to override a woman's right to terminate an unwanted pregnancy); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. No. 1, at 47-66, 1971 (arguing that even if

the fetus is a person, a woman has a right to terminate her pregnancy because of the fetus's imposition on her body); John T. Noonan, Jr., *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 51-59 (John T. Noonan, Jr. ed., 1970) (arguing that conception is the most rational place for the line demarcating "the decisive moment of humanization" and therefore "abortion violates the rational humanist tenet of equality of human lives"). With such uncertainty as to the proper balance to strike between the essential moral values at issue in the abortion controversy, there would seem to be good reason to allow legislators more freedom in striking that balance than they are allowed when placing restrictions on other fundamental rights.

Although the decision in *Casey* was based on stare decisis, *Casey* still marked a significant departure from *Roe* and its progeny. The joint opinion of Justices O'Connor, Kennedy, and Souter rejected *Roe*'s strict scrutiny standard[5] stating that: "Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Casey*, 505 U.S. at 878. As discussed previously, in *Stenberg* a majority of the Court applied the undue burden test to abortion laws without restricting it to regulations which only affect a woman's decision-making process. The Physicians' argument that *Casey* applies only to laws that affect the decision-making process is both unpersuasive and unsupported. In effect, the physicians ask this Court to effectively eviscerate *Casey* and return a substantial part of abortion law to its status under *Roe*. It is not the

[5] There appears to be some doubt as to the exact standard of review for abortion regulations that was articulated in *Roe*. In the *Casey* joint opinion Justice O'Connor described the Supreme Court's early post-*Roe* abortion decisions as applying an undue burden test. *Casey*, 505 U.S. at 874 (citing *Maher v. Roe*, 432 U.S. 464 (1977)). Justice O'Connor also noted that "in the original *Roe* opinion the Court was not recognizing an absolute right," *id.* at 875, and that it was "an overstatement" in subsequent decisions to describe the right identified in *Roe* "as a right to decide whether to have an abortion 'without interference from the State.'" *Id.* (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 482 U.S. 52, 61 (1976)). On this view, *Casey* merely reaffirms the standard of review originally set forth in *Roe*.

place of this Court to perform a judicial end-run around the *Casey* decision, no matter how much the Physicians may desire that result.

B. Sex Discrimination

The Physicians also argue that the Texas abortion licensing regulations are invalid because they unconstitutionally discriminate on the basis of sex. Essentially, the Physicians argue that laws that burden abortion affect only women, because only women can have or need abortions, and thus laws related to abortion necessarily have a disparate impact on women. Laws that discriminate on the basis of sex must pass heightened scrutiny analysis, *United States v. Virginia*, 518 U.S. 515, 533 (1996), and under this standard the Texas abortion facility licensing regulations are unconstitutional. This argument is without merit and was explicitly rejected by the Supreme Court in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993):

> Respondents' case comes down, then, to 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. Our cases do not support that proposition. . . . [T]wo of our cases deal specifically with the disfavoring of abortion, and establish conclusively that it is not *ipso facto* sex discrimination. In *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), we held that the constitutional test applicable to government abortion-funding restrictions is not the heightened-scrutiny standard that our cases demand for sex-based discrimination but the ordinary rationality standard.

Id. at 271-73 (some citations omitted). The Court's decision in *Bray* was simply an extension of its decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974):

> 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 . . . . Absent a showing that distinctions based on pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis . . . .

Id. at 496 n.20; *see also Kazimer v. Widman*, 225 F.3d 519, 527 (5th Cir. 2000) ("[D]iscrimination on the basis of *pregnancy* . . . is not the same thing as . . . discrimination on the basis of *sex*. The Supreme Court has held that discrimination on the basis of pregnancy does not violate the Equal Protection Clause." (emphasis in original)). As noted in the Court's previous order, not only is there no evidence that the State was attempting to discriminate against women, there is no evidence that the State even intended to restrict women's access to abortion.

Even if the Court were to ignore the clear holding of the Supreme Court in *Bray* and *Geduldig*, the Physicians' argument would not affect the outcome of this case. Classifications based on sex are subject only to heightened scrutiny analysis. *Virginia*, 518 U.S. at 533 (1996). It does not appear that the heightened scrutiny standard reserved for classifications based on sex is any more demanding than *Casey*'s undue burden test. *Compare id.* at 524 ("[A] party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification." (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) *with Casey*, 505 U.S. at 876 (noting that the state has a "substantial interest" in protecting the potential life of the unborn fetus). Therefore, applying heightened scrutiny to the regulations at issue here would not result in a different outcome.

CONCLUSION

The 2001 amendments to the Texas abortion facility licensing regulations cured the unconstitutional vagueness of those regulations. The standard for reviewing laws that restrict a woman's right to seek and obtain a previability abortion is the undue burden standard articulated by the Supreme Court in *Casey*. Finally, the licensing requirement does not constitute sex discrimination. The Court has already held in its December 29, 1999 order that the challenged

regulations do not place an undue burden on a woman's right to seek an abortion. The Physicians have offered no reason for the Court to reconsider that decision or for the Court to modify its preliminary injunction.

For the foregoing reasons, the Physicians' Motion for Modification of Preliminary Injunction is DENIED and the State's Motion to Modify Preliminary Injunction is GRANTED. Moreover, because the only constitutionally objectionable portion of the Texas regulations have now been amended to cure the constitutional defects, there does not appear to be any reason to keep the preliminary injunction in force. Of course, if the State were to reinstate the vague portions of the regulatory scheme, the Physicians are always free to seek a new preliminary injunction. Therefore, the preliminary injunction imposed on the State by the Court on December 29, 1999 is dissolved pending final resolution of this case.

It is so ORDERED.

Signed this 29th day of March, 2002.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE