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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

Planned Parenthood Arizona, Inc.; William Richardson, M.D.; and William H. Richardson, M.D., P.C., doing business as Tucson Women's Center, Plaintiffs, vs. Will Humble, Director of the Arizona Department of Health Services, in his official capacity, Defendants.	Case No. CV2014-006633 **MOTION FOR SUMMARY JUDGMENT** (Assigned to the Hon. J. Richard Gama) **(Oral Argument Requested)**

Pursuant to Ariz. R. Civ. P. 56(a), Plaintiffs Planned Parenthood Arizona, Inc. ("PPAZ"), William Richardson, M.D., and William Richardson, M.D., P.C. hereby move this Court for summary judgment against defendant Will Humble, Director of the Arizona Department of Health Services ("ADHS"), declaring that a portion of Arizona House Bill 2036 of 2012 ("HB 2036"), Section 2, codified at A.R.S. § 36-449.03(E)(6) ("the Statute"),

and the regulation implementing the Statute, A.A.C. R9-10-1508(G) ("the Regulation") are unconstitutional and/or unlawful; and, enjoining Defendant, and his employees, agents, and successor in office from enforcing each and every statute and/or regulation declared unconstitutional and/or unlawful. This motion is supported by the following Memorandum of Points and Authorities, the accompanying exhibits, and the entire record which is incorporated herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

Plaintiffs are Arizona health care providers who for more than a decade have offered their patients the option of an early, safe abortion using medications alone. [Pls.' Separate Statement of Facts ("PSOF") ¶ 1.] Arizona has enacted an abortion restriction that either entirely eliminates or drastically restricts access to this option, the only non-surgical alternative available. [*Id.* ¶ 2.] The regulation took effect April 1, 2014, but has been preliminarily blocked since April 2 by the U.S. Court of Appeals for the Ninth Circuit, in a suit brought under the Fourteenth Amendment to the United States Constitution. [*Id.* ¶ 3.] Plaintiffs filed the present suit on April 7, and personally served Defendant on April 15. [*Id.* ¶ 4.] Instead of responding, Defendant has moved for an indefinite stay; Plaintiffs' opposition to that motion is also being filed today. [*Id.* ¶ 5.]

The Court should grant summary judgment to Plaintiffs because the Statute and Regulation violate established principles of state law. First, both the Statute and the Regulation violate the Arizona Constitution because they delegate lawmaking authority to private companies and a federal agency. Second, the Department of Health Services enacted the Regulation without following its own policies and procedures, in violation of Arizona common law.

Factual Background

The Challenged Law and Regulation

On April 10, 2012, the Arizona Legislature passed HB 2036, and on April 12, 2012, Governor Brewer signed it into law. [PSOF ¶ 6.] HB 2036 mandates that the Director of the Arizona Department of Health Services ("ADHS") adopt a number of rules regarding abortion. [*Id.* ¶ 7.] In particular, HB 2036 directs ADHS to promulgate regulations requiring "[t]hat any medication, drug or other substance used to induce an abortion is administered in compliance with the protocol that is authorized by the United States Food and Drug Administration [("FDA")] and that is outlined in the final printing labeling instructions [("FPL")] for that medication, drug or substance." [*Id.* ¶ 8.] Section 10 of HB 2036 states, "[f]or the purposes of this act, the department of health services is exempt from the rule making requirements of title 41, chapter 6, Arizona Revised Statutes, for two years after the effective date of this act." [*Id.* ¶ 9.]

ADHS did not begin its rulemaking process for the Statute until late 2013. [*Id.* ¶ 10.] When it finally proposed rules to implement the Statute, it failed to follow its own policies and procedures for rulemaking.

ADHS maintains a website entitled "Office of Administrative Counsel & Rules: Rulemaking Process" that establishes an "Exempt Rulemaking Process" for rules that are "exempt from the rulemaking requirements in A.R.S § [sic] Title 41, Chapter 6 . . . if authorized by a specific statute or bill." [*Id.* ¶ 11.] In late 2013 and early 2014, when ADHS was developing the Regulation, the "Exempt Rulemaking" policy on the ADHS website required ADHS to provide the public and affected persons substantial opportunity for input into exempt rulemaking. [*Id.* ¶ 12.] The policy required ADHS to draft a proposed rule, post it for comment, meet with affected and interested persons, revise the draft based on comments received, post the revised draft, revise it again for

comments received, file a Notice of Public Information with the Secretary of State posting the revised draft, take further comments, further revise the draft based on those comments, and finally file a Notice of Exempt Rulemaking. [*Id.* ¶ 13.] In sum, the process required ADHS, after initially proposing the rules, to receive comments and make revisions ***three times***, including (during the first iteration) by ***meeting*** with affected and interested persons. [*Id.* ¶ 14.]

On November 21, 2013, more than a year and a half after HB 2036 was signed into law, ADHS posted "Draft Rules Issued for Abortion Clinics" online. [*Id.* ¶ 15.] Eight days later, the Secretary of State published a Notice of Public Information in the Arizona Administrative Register. [*Id.* ¶ 16.] ADHS did not open an Online Survey for comments until December 19, 2013. [*Id.* ¶ 17.]

Not even once thereafter did ADHS repost the revised proposed regulation, incorporate comments, and/or invite further comments – let alone do so three times. Neither did ADHS hold any public meetings about the proposed regulation.

On January 27, 2014, ADHS promulgated all of HB 2036's implementing regulations, including the Regulation, with an effective date of April 1, 2014. [*Id.* ¶ 18.] The Regulation repeats the language of the Statute essentially verbatim; it requires the medical director of a facility that is licensed as an abortion clinic to "ensure that any medication, drug or other substance used to induce an abortion is administered in compliance with the protocol that is authorized by the United States Food and Drug Administration and that is outlined in the final printing labeling instructions for that medication, drug or substance." [*Id.* ¶ 19.] Any clinic that fails to comply with the Regulation is subject to a civil penalty, license suspension or revocation, or other enforcement actions by ADHS. [*Id.* ¶ 20.]

On April 17, 2014, after Plaintiffs filed this case, ADHS removed the policy discussed above from its website and replaced it with a new one. [*Id.* ¶ 21.] Under the new policy, opportunities for public comment, meetings with stakeholders, and making revisions are optional, rather than mandatory – each is described as a step which ADHS "may" take. [*Id.* ¶ 22.] This change of policy was itself not provided in draft form for public notice and comment, nor discussed with affected persons, nor, indeed, publicized in any way.

The FDA's Drug Approval Process

The FDA is the federal agency charged with approving drugs for sale and marketing in the United States. [PSOF ¶ 23.] It is not authorized to, and does not, regulate how physicians use and prescribe medication once it has been approved for sale. [*Id.* ¶ 24.]

A manufacturer seeking approval to market a drug submits a New Drug Application ("NDA") to the FDA, including data demonstrating that the drug is safe and effective for its proposed use(s), and that its benefits outweigh its risks. [*Id.* ¶ 25.]

As part of the NDA, the manufacturer includes a proposed drug label, containing information such as the drug's indications, dosage, and route of administration. [*Id.* ¶ 26.] The FDA may propose changes. [*Id.* ¶ 27.] Once the NDA is approved, often after some back-and-forth between the manufacturer and the FDA, the label becomes known as the drug's Final Printed Labeling "FPL." [*Id.* ¶ 28.] Although the FDA must review and approve the FPL, the responsibility for its text lies entirely with the manufacturer, which is solely responsible for creating its content. [*Id.* ¶ 29.] In other words, the FPL is a drug company document—it does not constitute a federal law and does not impose binding obligations on physicians. [*Id.* ¶ 29.]

After a drug has been approved by the FDA, physicians may prescribe it for purposes and in doses other than those set forth in the FPL, which is known as "off-label" or "evidence-based" use. [*Id.* ¶ 30.] Evidence-based use is neither prohibited nor discouraged by the FDA. [*Id.* ¶ 31.] In fact, the FDA has repeatedly acknowledged that it is common and is sometimes required by good medical practice. [*Id.* ¶ 34.]

Any changes to a drug's FPL to reflect new uses or protocols are also proposed and drafted by the drug's manufacturer. [*Id.* ¶ 34.] Because these changes must be supported by further clinical study data, they are often purely commercial decisions, based on whether the cost of undertaking the studies is justified by the expected return from the new marketing opportunities. [*Id.*]

Argument

A "court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). "If the party with the burden of proof on the claim or defense cannot respond to the motion by showing that there is evidence creating a genuine issue of fact on the element in question, then the motion for summary judgment should be granted." *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). Because Plaintiffs' claims are based purely on law and facts that are beyond dispute, there are no material issues of fact for this Court to decide, and summary judgment is properly granted here.

I. The Arizona Law Represents an Unconstitutional Delegation of Legislative Authority to a Private Companies and a Federal Administrative Agency.

The Arizona Constitution provides that "[t]he legislative authority of the state shall be vested in the legislature." Ariz. Const., art. 4, pt. 1, § 1. Such "power can neither be relinquished nor delegated." *S. Pac. Co. v. Cochise Cnty.*, 92 Ariz. 395, 404, 377 P.2d 770, 777 (1963) (citations omitted); *see also State v. Marana Plantations, Inc.*, 75 Ariz.

111, 114, 252 P.2d 87, 89 (1953) ("It is fundamental that the legislative power thus entrusted cannot be relinquished nor delegated."); *Lake Havasu City v. Mohave Cnty.*, 138 Ariz. 552, 559, 675 P.2d 1371, 1378 (App. 1983) ("It is a well settled principle of law that the state legislature may not delegate its power to make laws.").

The legislature may not cede its authority to determine the law – and in delegating authority to others to put its laws into practice, the legislature must establish limits, standards, and restraints that ensure that only the legislature retains lawmaking judgment. *E.g. S. Pac.*, 92 Ariz. at 404, 377 P.2d at 777; *Marana Plantations*, 75 Ariz. at 114, 252 P.2d at 89; *Corella v. Superior Court In & For Pima Cnty.*, 144 Ariz. 418, 421, 698 P.2d 213, 216 (App. 1985); *see also 3613 Ltd. v. Dep't of Liquor Licenses & Control*, 194 Ariz. 178, 183, 978 P.2d 1282, 1287 (App. 1999) (explaining that the legislature's grant of authority to administer the law "is properly delegated if it is defined with sufficient clarity to enable the [delegee] to recognize its legal bounds"). Also, as the Arizona Supreme Court recently reaffirmed, "[a]n improper delegation of legislative authority may occur when a statute (and, by implication, a rule) incorporates later-developed standards not promulgated by the Legislature or an Arizona agency." *Gutierrez v. Indus. Comm'n of Ariz.*, 226 Ariz. 395, 398, 249 P.3d 1095, 1098 (2011).

The Statute and Regulation violate the Arizona Constitution's prohibition against the delegation of legislative authority in two separate ways. First, they codify as Arizona law a standard developed by private drug companies, and approved by a federal agency, unaccountable to the legislators and people of Arizona. Second, they impermissibly adopt any future changes in those standards as Arizona law without any input from Arizona legislators or voters.

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1. The Statute and Regulation Unconstitutionally Delegate Unlimited Lawmaking Authority to Drug Companies and a Federal Agency.

The purpose of the prohibition on the delegation of legislative authority is to ensure that legislators do not "substitute the judgment, wisdom, and patriotism of any other body," because it is to them alone that "the people have seen fit to confide [their] sovereign trust." *Lake Havasu City*, 138 Ariz. at 559, 675 P.2d at 1378 (quoting *Tillotson v. Frohmiller*, 34 Ariz. 394, 407, 271 P. 867, 871 (1928)). Thus, for example, *Southern Pacific* was a case concerning the legislature's delegation of authority to the State Tax Commission, to determine into which of various categories a piece of real estate was classified for purposes of the tax laws – an important power, as different classes of real estate are taxed at different rates. 92 Ariz. at 404, 377 P.2d at 776. The Supreme Court held that, while the legislature could empower the commission to determine into which category a given parcel fell, it could not delegate to the commission the power to alter the categories themselves, because to do so would establish an "unlimited regulatory power . . . with no prescribed restraints" – essentially, the power to amend the state's property tax laws with no say from the legislature. *Id.* Likewise, in *Corella*, the Arizona Court of Appeals found that a superior court could not fashion a new kind of statutory lien, as "the ability to create statutory liens . . . would be an unconstitutional delegation of the power to make law" – in this case to the courts. 144 Ariz. at 421, 698 P.2d at 216.

Here, the Statute and Regulation prohibit a physician from providing any drug used to induce an abortion except "as outlined in the final printing labeling instructions for that . . . drug. . . ." A.R.S. § 36-449.03(E)(6); A.A.C. § R9-10-1508(G). Those "instructions" are written by drug companies [SSOF ¶¶ 26-29, 34] and their contents are the result of a commercial decision. They are not written by the Arizona legislature, nor subject to any limits or standards imposed by the Legislature on writing them. Therefore, the Statute and Regulation delegate the power to make Arizona law regulating abortion-

inducing drugs to drug companies. It effectively converts drug-company-written FPLs into Arizona statutes.

The FDA is also, by definition, not subject to any limitations or restraints placed on it by Arizona lawmakers – it serves the purposes set by the U.S. Congress, not the Arizona legislature. *See State v. Williams*, 119 Ariz. 595, 599, 583 P.2d 251, 255 (1978) ("the Legislature exercises absolutely no control over Congress or its agencies"); *Cordray v. Planned Parenthood Cincinnati Region*, 911 N.E.2d 871, 875 (Ohio 2009) ("the purpose of the FDA is to regulate the marketing and distribution of drugs, not the practice of medicine in the state of [Arizona]").[1] Thus, by converting material written by drug companies and approved only by an unelected federal bureaucracy (which is also unaccountable to Arizona voters) into Arizona law, the Statute and Regulation violate the constitutional principle that the legislature may not substitute others' "judgment, wisdom, and patriotism" for that of their own.[2] The delegation here is far beyond even the laws struck down in *Southern Pacific*, *Corella*, and other cases – at least those involved improper delegation to other agencies of the Arizona government. The Statute and Regulation award Arizona legislative authority to private corporations and arguably a federal agency. They are therefore an unconstitutional abdication of the Arizona Legislature's authority to make the laws.

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[1] Indeed, the FDA has said regarding the very law at issue here: "This is a state practice of medicine issue. The FDA does not regulate the practice of medicine." Erica A. Phillips, *Arizona "Abortion Pill" Rule Faces Challenge*, WALL ST. J., Mar. 20, 2014 (quoting FDA spokeswoman on Plaintiffs' federal lawsuit), *available at* http://online.wsj.com/news/articles/SB10001424052702304026304579449623210456990 (last visited May 13, 2014).

[2] Although the Arizona Supreme Court has approved of incorporating federal regulations into state law (provided they are not subject to change), *see State v. Williams*, 119 Ariz. 595, 599, 583 P.2d 251, 255 (1978), as already discussed [SSOF ¶¶ 26-29, 34] a FPL is not a federal regulation. It is an informational document, written by a private company, which does not have legal force. *Id.*

2. The Statute and Regulation are an Unconstitutional Delegation of Legislative Authority because they Adopt as yet Unwritten Standards into Law.

Arizona's non-delegation doctrine also prohibits an Arizona statute or administrative rule from incorporating a changeable standard by reference. *Gutierrez*, 226 Ariz. at 398, 249 P.3d at 1098; *see also Williams*, 119 Ariz. at 598-99, 583 P.2d at 254-55 (reasoning that although it is permissible to "adopt *existing* federal rules, regulations or statutes as the law of this state," adopting as-yet-unknown *future* ones is improper because "it is universally held that an incorporation by state statute of rules, regulations, and statutes of federal bodies *to be promulgated subsequent to the enactment of the state statute* constitutes an unlawful delegation of legislative power") (emphasis added); *City of Tucson v. Stewart*, 45 Ariz. 36, 60, 40 P.2d 72, 81 (Ariz. 1935) (incorporating references to future standards of National Electrical Code and the National Electrical Safety Code into a City of Tucson ordinance was an unconstitutional delegation of ordinance power).

Adopting as a state standard of conduct the as-yet-unknown future content of an FPL developed by drug companies and the FDA – over whom "the Legislature exercises absolutely no control" – violates the non-delegation doctrine because "the adoption as state law of those bodies' prospective enactments is viewed as a complete abdication of legislative power." *Williams*, 119 Ariz. at 599, 583 P.2d at 255. The Arizona Constitution permits the incorporation in statute of future standards only when set by state agencies, because "the [Arizona] Legislature exercises complete dominion over its own agencies." *Id*. By contrast, legislative power is improperly delegated where it is impossible to know what changes a body not subject to the Arizona Legislature, and over whom the legislature exercises no ability to set policy, may later make. In those cases,

governing law may change without the exercise of legislative discretion, which amounts to the legislature abdicating its assigned role.[3]

[3] Decisions from other states are overwhelmingly in accord. *See Oklahoma City v. Okla. Dep't of Labor*, 918 P.2d 26, 29 (Okla. 1995) (holding section of Oklahoma Minimum Wages on Public Works Act adopting wage levels set by United States Department of Labor under the Federal Davis-Bacon Act impermissibly delegated legislative power in violation of state constitution); *Lee v. State*, 635 P.2d 1282, 1286 (Mont. 1981) (holding statute directing attorney general to proclaim a speed limit "not . . . less than that required by federal law" was unconstitutional delegation of legislative authority); *State v. Rodriguez*, 379 So. 2d 1084, 1086 (La. 1980) (holding statute providing that Secretary of Department of Health and Human Resources shall add a substance as a controlled dangerous substance if it is classified as a controlled dangerous substance by Drug Enforcement Administration of United States Government was unconstitutional delegation of legislative authority); *Gumbhir v. Kan. State Bd. of Pharmacy*, 618 P.2d 837, 843 (Kan. 1980) (finding unconstitutional a statute requiring a degree from a school accredited by a private organization from time to time); *State v. Dougall*, 570 P.2d 135, 138 (Wash. 1977) (finding an unconstitutional delegation for future federal designation of controlled substances to become controlled in Washington without affirmative state action); *Hogen v. S.D. State Bd. of Transp*., 245 N.W.2d 493, 496 (S.D. 1976) (finding unconstitutional statutory direction to an agency to comply with all future changes in federal billboard or junk yard laws); *Cheney v. St. Louis Sw. Ry. Co.*, 394 S.W.2d 731, 732 (Ark. 1965) (finding an unconstitutional delegation for a statute determining certain taxable income through incorporation of future Federal Interstate Commerce Commission regulations); *Idaho Sav. & Loan Ass'n v. Roden*, 350 P.2d 225, 228 (Idaho 1960) (finding unconstitutional provisions that delegated legislative power to the Congress and the Home Loan Bank Board to make future laws and regulations governing appellant's business); *Dawson v. Hamilton*, 314 S.W.2d 532, 536 (Ky. 1958) (finding unconstitutional a state statute to the extent it adopts time standards to be fixed in the future by the Federal Congress or the I.C.C.); *City of Cleveland v. Piskura*, 60 N.E.2d 919, 924 (Ohio 1945) (finding a city ordinance adopting future changes to federal law was an unlawful abdication of legislative authority); *Hutchins v. Mayo*, 197 So. 495, 498 (Fla. 1940) (finding invalid a Citrus Commission rule that adopted federal standards for citrus fruits "as thereafter amended"); *Holgate Bros. Co. v. Bashore*, 200 A. 672, 678 (Pa. 1938) (finding invalid a statute conforming working hours to schedule established by federal regulation as delegating power to a federal authority); *Darweger v. Staats*, 243 N.E. 290, 315 (N.Y. 1935) (finding an unconstitutional delegation where a New York statute adopted federal NRA codes); *State v. Intoxicating Liquors*, 117 A. 588, 590 (Me. 1922) (finding invalid a statute incorporating by reference future enactments of Congress establishing definition of intoxicating liquors); *Wagner v. City of Milwaukee*, 188 N.W. 487, 489 (Wis. 1922) (finding unconstitutional an ordinance setting wages for city contractors to those set in the union scale as it might change from time to time); *State v. Green*, 793 P.2d 912, 915 (Utah App. 1990) (holding that crime definition and penalty powers are essential legislative functions that cannot constitutionally be delegated through incorporation of U.S. regulations); *People v. Pollution Control Bd*., 404 N.E.2d 352, 356 (Ill. App.1980) (holding that legislative adoption of a private sporting group's sanction of events was an improper delegation of legislative authority); *People v. Kruger*, 121 Cal. Rptr. 581, 583

Williams involved an Arizona statute criminalizing the use of food stamps in violation of federal law. *Id.* at 597, 583 P.2d at 253. The Arizona Legislature's incorporation by reference was not limited to existing federal law, but encompassed unknown future changes thereto as well. The Arizona Supreme Court held this was improper because "any reference to future pronouncements of federal law . . . constitutes an unconstitutional delegation." *Id.* at 599, 583 P.2d at 255.

Here, as in *Williams*, the Act and Regulation are *not* limited to *existing* drug "protocols," but are broadly worded to encompass as as-yet-unknown *future* ones that it is impossible for the Arizona Legislature to evaluate in advance.[4] Thus, they are an unlimited delegation of legislative authority. Every time a drug label is modified based on the commercial decision of a drug company [SSOF ¶¶ 26-29, 34] Arizona law is modified as well. The Arizona Legislature exercises no discretion or oversight, as drug companies write and change labels, and the FDA approves or rejects them, without accountability to this state's voters.

The Statute and Regulation are thus effectively a blank check written to the FDA and drug companies to alter the practice of medication abortions in Arizona into the indefinite future: once a drug company proposes, and the FDA approves, any change to the FPL protocol of any "drug . . . used to induce abortions," then Arizona law regulating

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(Cal. App. Dep't Super. Ct. 1975) (invalidating a state regulation adopting future federal regulations on yellow fin tuna as unconstitutional).

[4] Both the Act and Regulation use the mandatory word "shall." A.R.S. § 36-449.03(E)(6); A.A.C. R9-10-1508(G). The director of ADHS has no discretion not to promulgate the Regulation, deviate from FDA drug "protocols," or decline enforcement of the Regulation. The Act and Regulation delegate legislative authority to the FDA and private enterprise to decide what Arizona law should be in this context. This is *not* a situation where an Arizona statute or administrative rule "merely *recommends* the[] use" of an external standard. *See Gutierrez*, 226 Ariz. at 398, ¶ 11, 249 P.3d at 1098 (holding administrative regulation *recommending* use of AMA Guides in rating degree of impairment from work-related injury was not improper delegation of legislative authority because such use was permissive and discretionary).

the practice of abortions changes too. The Statute and the Regulation thus constitute an unconstitutional delegation of legislative authority to the FDA.

II. The Regulation Is Invalid Because ADHS Promulgated It Without Following Its Own Notice-And-Comment Procedures.

"It is hornbook law that an administrative board must follow its own rules and regulations." *Tiffany ex. rel. Tiffany v. Ariz. Interscholastic Ass'n*, 151 Ariz. 134, 139, 726 P.2d 231, 236 (App. 1986); *see also Clay v. Arizona Interscholastic Ass'n, Inc.*, 161 Ariz. 474, 476 (1989) ("We begin our review of this case with the principle of administrative law that an agency must follow its own rules and regulations; to do otherwise is unlawful."); *Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323, 327, 271 P.2d 477, 479-80 (1954) ("The rule is that general rules and regulations of an administrative board or commission prescribing methods of procedure have the effect of law and are binding on the Commission and must be followed by it so long as they are in force and effect.").[5] This obligation does not arise under the Arizona Constitution or the Administrative Procedure Act but is rather a "principle[] of administrative law." *Tiffany*, 151 Ariz. at 139, 726 P.2d at 236; *accord Clay*, 161 Ariz. at 476. In reversing agency actions made in violation of their own policies, Arizona courts have called those actions variously "unlawful," *Tiffany*, 151 Ariz. at 139, 726 P.2d at 236, "arbitrary," *Clay*, 161 Ariz. at 476, and "void," *Dallas v. Ariz. Corp. Comm'n*, 86 Ariz. 345, 348, 346 P.2d 152, 154 (1959).

While HB 2036 was exempt from the rulemaking requirements in Title 41, Chapter 6, Arizona Revised Statutes, ADHS was subject to its own rulemaking policy for

[5] The Court of Appeals has found once in an unpublished memorandum disposition that this general rule can apply to a policy published in the form of a website (as is the case here), or differently from a policy published in a traditional printed medium. *Rockford Corp. v. Indus. Comm'n*, 2010 WL 5064323, No. 1 CA-IC 09-0091, at *2, ¶¶ 11-13 & n.7 (Ariz. Ct. App. Nov. 2, 2010) (unpublished mem. decision) (citing *Clay*, 161 Ariz. at 476, 779 P.2d at 351).

exempt rulemaking, which it held out to the public on its website as a policy that it would follow. But ADHS did not follow its own policy in promulgating HB 2036's implementing regulations. [SSOF ¶¶ 11-18, 21-22]. Instead it made shortcuts, ones which cut out the very type of public input and thoughtful examination of regulations that ADHS' policy was obviously intended to allow. *Id*. Therefore, the resulting regulations are entirely invalid under Arizona administrative law – they are arbitrary, unlawful, and void. Because ADHS' violation of its own policy is so complete and clear, the Court should grant summary judgment on this claim as well.

Conclusion

For the foregoing reasons, Plaintiffs' motion for summary judgment should be granted. Defendant should be permanently enjoined from enforcing the Statute and Regulation, and each should be declared, respectively, unconstitutional and unlawful.

RESPECTFULLY SUBMITTED this 15th day of May, 2014.

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