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6
7 *Application for pro hac vice admission granted

8
9 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
10 TUCSON DIVISION

11 TUCSON WOMAN’S CLINIC; DAMON RAPHAEL, M.D.; X
12 OLD PUEBLO FAMILY PLANNING; WILLIAM :
13 RICHARDSON, M.D.; SHERRYLYN YOUNG, M.D.;; :
14 SIMAT CORP., d/b/a ABORTION SERVICES OF PHOENIX; :
ROBERT H. TAMIS MD, PC; and ROBERT H. TAMIS, :
15 M.D.; on behalf of themselves and their patients :
seeking abortions, :
16 Plaintiffs, :

17 vs. :

18 CATHERINE EDEN in her capacity as :
19 Director of the Arizona Department of Health :
20 Services; JANET NAPOLITANO, in her capacity as :
Attorney General of the State of Arizona; RICHARD :
21 M. ROMLEY, in his official capacity as County Attorney :
22 for the County of Maricopa, and as representative for all :
23 other prosecuting attorneys similarly situated throughout :
the State of Arizona, including without limitation all :
24 County, City and Town Attorneys, :
Defendants. :

25 _____ X

**FOURTH AMENDED
COMPLAINT**

Civil No. CIV 00-141 TUC RCC

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1 1. Plaintiffs, by and through their undersigned attorneys, bring this
2 complaint against the above-named defendants, their employees, agents, and
3 successors in office, and in support thereof allege the following:
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5 **I. Preliminary Statement**
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7 2. This is an action under 42 U.S.C. § 1983 and the United States
8 Constitution challenging: (a) Arizona Revised Statutes §§ 36-402, 36-449, 36-
9 449.01, 36-449.02, 36-449.03 and 36-2301.02, as revised by Arizona House Bill
10 2706 and Arizona House Bill 2647; and (b) Arizona Regulation Title 9, Chapter
11 10, Article 15, as amended.
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13 3. In 1999, the Arizona Legislature passed Arizona House Bill 2706
14 (hereinafter “the Act” or “HB 2706”), which amended Arizona Revised Statutes
15 §§ 36-402, 36-449, 36-449.01, 36-449.02, and 36-449.03 to require the licensing
16 and regulation of medical facilities that provide abortions. (A copy of the Act is
17 annexed hereto as Exhibit A).
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20 4. Prior to passage of the Act, the Arizona Department of Health Services
21 (hereinafter “Health Department”) was explicitly denied authority by the
22 Legislature to license, supervise, regulate or control any private office or clinic of
23 a licensed health care provider (hereinafter “physician practice”) unless that
24 practice kept patients overnight or treated them with general anesthesia. A.R.S. §
25 36-402(3).
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28 5. The Act amended this generally applicable licensing exception for
29 physician practices by excluding from it those physician practices in which five or
30 more first trimester abortions per month or any post-first trimester abortions are

1 performed (hereinafter the term to “perform abortions” will be used to refer to the
2 performance of five or more first trimester abortions per month or any post-first
3 trimester abortions) and requiring that those facilities meet all licensing
4 requirements for health care institutions (hereinafter “licensure laws”) by April 1,
5 2000.
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8 6. The licensure laws, A.R.S. §§ 36-421 *et seq.*, impose a licensing
9 application and enforcement scheme, authorize inspections of regulated facilities,
10 and provide for license suspension or revocation and both civil and criminal
11 penalties for failure to comply with applicable provisions.
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13 7. The Act also directed the Health Department to promulgate
14 administrative rules regulating all medical facilities, including physician practices
15 that perform abortions. On December 14, 1999, the Health Department issued
16 administrative rules for physician practices and other medical facilities that
17 perform abortions (hereinafter “the Regulations”). (A copy of the Regulations is
18 annexed hereto as Exhibit B). The Regulations set mandatory standards in
19 virtually all areas of the medical practice, including: administration, personnel
20 qualifications, staffing requirements, the abortion procedure, patient transfer and
21 discharge, medications, medical records, equipment, and physical facilities.
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25 8. The Regulations became effective on April 1, 2000. On March 23,
26 2000, pursuant to a stipulation between the parties, this Court enjoined
27 enforcement of the Act and the Regulations pending the Court’s resolution of
28 Plaintiffs’ motion for a preliminary injunction.
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1 9. In 2000, the Arizona Legislature passed Arizona House Bill 2647, which
2 made minor amendments to some provisions of the Act. (House Bill 2647 is
3 annexed hereto as Exhibit C). House Bill 2647 also added a new provision
4 requiring all physicians who perform abortions to send ultrasound prints for
5 review to a contractor with the Health Department whenever an abortion is
6 performed after the first trimester. See A.R.S. § 36-2301.02. Moreover, House
7 Bill 2647 required the Health Department to issue rules implementing the changes
8 and additions made by the bill. Pursuant to this mandate, the Health Department
9 amended the Regulations and issued them accordingly in the fall of 2000
10 (hereinafter the “amended Regulations”). (A copy of the amended portions of the
11 Regulations is annexed hereto as Exhibit D).

12 10. Plaintiffs refer to the Act, as amended by House Bill 2647, as well as
13 the Regulations, as amended by the Health Department in accordance with House
14 Bill 2647, as the “amended regulatory scheme.”

15 11. The amended regulatory scheme does not implicate the State’s interest
16 in the potential life of the fetus -- nothing in the scheme concerns informing the
17 pregnant woman’s choice on whether or not to abort. Therefore, the amended
18 regulatory scheme can only be justified if it furthers the State’s interest in maternal
19 health. The amended regulatory scheme is not reasonably related to furthering
20 that interest.

21 12. If required to become licensed and comply with the amended
22 Regulations, the Plaintiffs will be subject to: unannounced, warrantless, baseless
23 searches of both their facilities and patient records; vague regulations permitting
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1 arbitrary enforcement; and burdensome administrative, operating, and personnel
2 requirements that are medically unnecessary for simple surgery such as abortion
3 and that substantially intrude on physicians' ability to exercise their medical
4 judgment. Moreover, Plaintiffs will be unable to maintain the confidentiality of
5 their patients' identities or medical records, because they must provide those
6 unredacted records to the Health Department upon request.
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9 13. Arizona does not regulate any physician practice or other medical
10 facility on the basis of the particular surgical procedures it performs except in the
11 case of abortion. Nonetheless, the amended regulatory scheme does not identify
12 any aspect of abortion that distinguishes it from numerous other outpatient
13 surgical procedures and makes it appropriate for unique regulation. In fact,
14 abortion is comparable in terms of complexity, risk, and invasiveness to a range of
15 outpatient procedures regularly performed in unregulated physician practices in
16 Arizona.
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20 14. The amended regulatory scheme in its entirety is discriminatory,
21 burdensome and unnecessary. Enforcement of the scheme will have the
22 immediate effect of relegating Plaintiffs and their patients to a status below that of
23 all other medical providers and patients and subjecting them to unique regulatory
24 burdens not imposed upon similar providers and patients in Arizona. It will also
25 subject Plaintiffs to substantial intrusions into their practice of medicine and will
26 subject both Plaintiffs and their patients to intrusions into the physician-patient
27 relationship. The scheme's enforcement will thus immediately deprive the
28 Plaintiffs and their patients of equal protection of the laws.
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1 15. In addition, by requiring physician practices and other medical
2 facilities that perform abortions to consent to unannounced, warrantless, baseless
3 searches of their facilities and patient records and permitting the Health
4 Department to review unredacted patient records, the amended regulatory scheme
5 will immediately threaten patient confidentiality in Plaintiffs' practices. It will
6 also violate the right of patients in those facilities to informational privacy, and the
7 right of Plaintiffs and their patients to be free from unreasonable searches and
8 seizures.
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12 16. Moreover, Plaintiffs will have to expend both money and time to
13 comply with numerous unnecessary requirements of the amended Regulations, and
14 these expenses will ultimately be borne by their patients. The amended regulatory
15 scheme will also have the effect of needlessly reducing women's access to
16 abortion in Arizona by causing some physicians who provide abortions, like
17 Plaintiff Dr. Sherrylyn Young, to stop performing abortions in their private
18 practices if the scheme is enforced. The scheme's intrusions on the practice of
19 medicine and the physician-patient relationship will not promote, and will actually
20 threaten, patient health. Because the amended regulatory scheme's purpose and
21 effect are to harass and harm physicians who provide abortions and their patients,
22 rather than to promote a legitimate state interest, and because the scheme is not
23 reasonably related to serving a legitimate state interest, it violates the right to
24 privacy of Plaintiffs' patients.
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29 17. Finally, the amended regulatory scheme contains numerous vague
30 standards and terms that fail to give Plaintiffs adequate notice of how to conform

1 their conduct to the requirements of the law and subject Plaintiffs to the risk of
2 arbitrary enforcement in violation of Plaintiffs' right to due process.

3
4 18. Plaintiffs seek declaratory and injunctive relief against the challenged
5 statutes and regulations on the grounds that the amended regulatory scheme
6 violates their rights and the rights of their patients guaranteed by the Fourth and
7 Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

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9 19. Plaintiffs also seek preliminary relief against enforcement of the
10 amended regulatory scheme in order to maintain the status quo and prevent
11 irreparable harm to themselves and their patients pending resolution of their
12 constitutional claims.

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15 **II. JURISDICTION AND VENUE**

16 20. This court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3),
17 1343(a)(4), and the Fourth and Fourteenth Amendments to the United States
18 Constitution.

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20 21. Plaintiffs' action for declaratory and injunctive relief is authorized by
21 28 U.S.C. §§ 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil
22 Procedure.

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24 22. Venue in this court is proper under 28 U.S.C. § 1391(b), because a
25 substantial part of the events giving rise to this action occurred in this district.

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27 **III. PARTIES**

28 **A. Plaintiffs**

29 23. Plaintiff Tucson Woman's Clinic (hereinafter "TWC"), a professional
30 corporation, is a physician practice and reproductive health care facility in Tucson.

1 It provides a variety of reproductive health care services, including abortions up to
2 14 weeks of pregnancy as measured from the first day of the woman’s last
3 menstrual period (hereinafter “1mp”); contraceptive services; pregnancy testing;
4 referrals for appropriate health services at other facilities; and post-operative
5 examinations. TWC, through its physician, Dr. Damon Raphael, regularly
6 performs more than five first trimester abortions per month. TWC sues on its own
7 behalf and on behalf of its patients seeking abortions.
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10 24. Plaintiff Damon S. Raphael, M.D., is a physician licensed to practice
11 medicine in the State of Arizona. Dr. Raphael provides a variety of gynecological
12 services at TWC, his physician practice in Tucson, including abortions up to 14
13 weeks 1mp; contraceptive services; pregnancy testing; referrals for appropriate
14 health services at other facilities; and post-operative examinations. Dr. Raphael
15 regularly performs more than five first trimester abortions per month. Dr. Raphael
16 sues on his own behalf and on behalf of his patients seeking abortions.
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20 25. Plaintiff Old Pueblo Family Planning (hereinafter “OPFP”), a
21 professional corporation, is a physician practice and reproductive health care
22 facility in Tucson. It provides a variety of reproductive health care services,
23 including abortions up to 14 weeks 1mp; contraceptive services; pregnancy testing;
24 referrals for appropriate health services at other facilities; and post-operative
25 examinations. OPFP, through its physician Dr. William Richardson, regularly
26 performs more than five first trimester abortions per month. OPFP sues on its own
27 behalf and on behalf of its patients seeking abortions.
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1 26. Plaintiff William Richardson, M.D., is a physician licensed to practice
2 medicine in the State of Arizona. Dr. Richardson provides a variety of
3 gynecological services at OPFP, his physician practice in Tucson, including
4 abortions up to 14 weeks lmp; contraceptive services; pregnancy testing; referrals
5 for appropriate health services at other facilities; and post-operative examinations.
6 Dr. Richardson regularly performs more than five first trimester abortions per
7 month. Dr. Richardson sues on his own behalf and on behalf of his patients
8 seeking abortions.
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12 27. Plaintiff Sherrylyn Young, M.D., is a physician licensed to practice
13 medicine in the State of Arizona. Dr. Young provides a variety of gynecological
14 services at her physician practice in Tucson, including abortions up to 12 weeks
15 lmp; diagnosis and treatment of cervical dysplasia; cervical cone biopsies;
16 cryosurgery; dilation and curettage (“D&C”); hormonal replacement therapy for
17 post-menopausal women; endometrial biopsies; contraceptive services; pregnancy
18 testing; referrals for appropriate health services at other facilities; and post-
19 operative examinations. Dr. Young regularly performs more than five first
20 trimester abortions per month. Dr. Young sues on her own behalf and on behalf of
21 her patients seeking abortions.
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24 28. Simat Corp., d/b/a Abortion Services of Phoenix (“Simat”), is a
25 physician practice and reproductive health care facility in Phoenix that provides
26 abortions up to 19.5 weeks lmp. Simat, through its physician, Dr. Robert Tamis,
27 regularly performs more than five first trimester abortions per month. Simat sues
28 on its own behalf and on behalf of its patients seeking abortions.
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1 29. Robert H. Tamis, MD PC (“Tamis PC”), a professional corporation, is
2 a physician practice in Phoenix based in the Simat facility. Tamis PC provides a
3 variety of reproductive health care services, including abortions up to 19.5 weeks
4 imp; treatment of infertility; endometrial biopsies; D&C procedures for abnormal
5 bleeding; egg captures; contraceptive services; pregnancy testing; referrals for
6 appropriate health services at other facilities; and post-operative examinations.
7
8 Tamis PC, through its physician, Dr. Robert Tamis, regularly performs more than
9 five first trimester abortions per month. Tamis PC sues on its own behalf and on
10 behalf of its patients seeking abortions.
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13 30. Plaintiff Robert H. Tamis, M.D., is a physician licensed to practice
14 medicine in the State of Arizona. Dr. Tamis provides a variety of reproductive
15 health care services in his physician practices in Phoenix -- Simat and Tamis PC --
16 including abortions up to 19.5 weeks imp; treatment of infertility; endometrial
17 biopsies; D&C procedures for abnormal bleeding; egg captures; contraceptive
18 services; pregnancy testing; referrals for appropriate health services at other
19 facilities; and post-operative examinations. Dr. Tamis regularly performs more
20 than five first trimester abortions per month. Dr. Tamis sues on his own behalf
21 and on behalf of his patients seeking abortions.
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25 **B. Defendants**

26 31. Defendant Catherine Eden is Director of the Health Department, the
27 agency primarily responsible for enforcement of the challenged amended
28 regulatory scheme. A.R.S. § 36-406. Director Eden is sued in her official
29 capacity, as are her agents and successors.
30

1 32. Janet Napolitano is the Attorney General for the State of Arizona. The
2 Attorney General has authority to prosecute criminal violations of the amended
3 regulatory scheme, seek injunctive relief for violations of the scheme and enforce
4 the collection of penalties under the scheme. A.R.S. §§ 41-193(A), 36-430, 36-
5 431.01. Attorney General Napolitano is sued in her official capacity, as are her
6 agents and successors.
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9 33. Richard M. Romley is the County Attorney for Maricopa County,
10 which encompasses the City of Phoenix. He has authority to prosecute criminal
11 violations of the amended regulatory scheme occurring in Maricopa County, as
12 well as to enforce the collection of penalties for such violations. *See* A.R.S. §§
13 11-532(A), 36-431.01. Mr. Romley is sued in his official capacity, as are his
14 agents and successors. Mr. Romley is also sued on behalf of all members of the
15 Defendant class described in paragraph 34.
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18 **C. Class Action Allegations**
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20 34. This action is maintained as a class action under Rules 23(b)(1)(A),
21 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure, against a class of
22 Defendants described herein, because the prosecution of separate actions against
23 individual members of the class would, as a practical matter, be dispositive of the
24 individual interest of the other class members, not parties to the adjudication, or
25 would substantially impair or impede their ability to protect their interests; and
26 there is a risk of inconsistent or varying adjudications with respect to the
27 Defendant class which would establish incompatible standards of conduct for the
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1 Defendants and for other members of the class who are presently obligated to
2 enforce this statute if not enjoined.

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4 35. Prosecution against a class is proper under Fed. R. Civ. P. 23(b)(2)
5 because the members of the class will act on grounds generally applicable to the
6 Plaintiffs, thereby making appropriate final injunctive relief and corresponding
7 declaratory relief with respect to the class as a whole.

8
9 36. The class of Defendants consists of all County Attorneys, City
10 Attorneys and Town Attorneys in Arizona. All of those government attorneys
11 have authority to prosecute misdemeanors for which any element of an offense
12 occurs within their jurisdiction. A.R.S. §§ 11-532(A), 13-109, 22-402. Such
13 offenses may include: (1) violation of the amended regulatory scheme; (2) aiding,
14 abetting, acting as an accomplice for, or providing an opportunity to another for
15 the violation of the amended regulatory scheme; and (3) preparatory offenses for
16 violation of the amended regulatory scheme. *See* A.R.S. §§ 36-430, 36-431, 13-
17 109, 13-301. The City Attorneys and County Attorneys also have authority to
18 seek injunctions against medical facilities that are not in compliance with the
19 amended regulatory scheme. A.R.S. § 13-2917. On information and belief, there
20 are approximately 96 County Attorneys, City Attorneys and Town Attorneys with
21 authority to enforce the amended regulatory scheme. Thus the class of Defendants
22 is so numerous that the joinder of all members is impractical.

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28 37. Defendant Richard M. Romley will be able to fairly and adequately
29 represent the interests of the class of Defendants. His position as County Attorney
30 for Maricopa County places him in essentially the same position with respect to

1 this challenge as all other members of the Defendant class. Because the functions
2 of all prosecuting attorneys with respect to this statute are substantially the same,
3
4 Mr. Romley will be able to represent the interests of all County Attorneys, City
5 Attorneys and Town Attorneys authorized to enforce the amended regulatory
6 scheme.

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8 38. The questions of law and fact which Plaintiffs seek to litigate, in
9 particular the constitutionality of the amended regulatory scheme, are common to
10 the class of Defendants herein.

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12 **IV. ABORTION SAFETY**

13 39. Abortion is one of the safest surgical procedures and is especially safe
14 in the first-trimester.

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16 40. Abortion is as safe as, or safer than, many outpatient surgical
17 procedures routinely performed in physicians' offices, such as dilation and
18 curettage procedures and endometrial biopsies. However, unlike performance of
19 an abortion, performance of other particular procedures does not subject a
20 physician practice or other medical facility to the amended regulatory scheme.

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23 41. A critical factor in determining the safety of an abortion procedure is
24 the skill of the provider. In general, the greater the number of abortions a
25 physician provides on a regular basis, the safer the procedure.

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27 **V. THE AMENDED REGULATORY SCHEME**

28 42. The Health Department has authority to administer and enforce rules
29 for health care institutions that have been made subject to regulation by Arizona
30 statutes. A.R.S. § 36-406. Prior to the passage of the Act, this authority was

1 expressly limited to preclude regulation of “[p]rivate offices and clinics of health
2 care providers licensed under title 32 unless patients are kept overnight as bed
3 patients or treated otherwise under general anesthesia except where treatment by
4 general anesthesia is regulated by title 32, chapter 11.” A.R.S. § 36-402(3). As
5 amended by the Act, that section now authorizes regulation of physician practices
6 if they are facilities “in which five or more first trimester abortions in any month
7 or any second or third trimester abortions are performed.” A.R.S. §§ 36-402(3)(b),
8 36-449.01(2). The Act defines any medical facility (other than a hospital) “in
9 which five or more first trimester abortions in any month or any second or third
10 trimester abortions are performed” as an “abortion clinic.” A.R.S. § 36-449.01(2).

11
12 43. Article 2 of Arizona’s statutes sets forth the licensure laws governing
13 regulated health care institutions. A.R.S. §§ 36-421 *et seq.* As amended by the
14 Act, the Arizona statutes now require that “[b]eginning on April 1, 2000, an
15 abortion clinic shall meet” all of the licensure laws. A.R.S. § 36-449.02.
16 Accordingly, Plaintiffs’ physician practices, which were not previously licensed or
17 regulated by the Health Department, are subject to the licensure laws pursuant to
18 the Act.
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21 44. The licensure laws require, *inter alia*, that a health care institution: (a)
22 apply for a license and pay a licensing fee prior to operation, A.R.S. §§ 36-422,
23 424; (b) submit to an initial inspection of the facility by the Health Department,
24 A.R.S. §§ 36-424(B), 36-425(A); and (c) grant the Health Department consent and
25 “complete acquiescence” to entries and searches of the facility without a warrant
26 whenever the Health Department’s director determines “that there is reasonable
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1 cause to believe that a health care institution is not adhering to the licensing
2 requirements.” A.R.S. § 36-424(D).

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4 45. The licensure laws grant the Health Department authority to suspend or
5 revoke a health care institution’s license if the facility is in violation of any
6 provision of the licensing laws or the administrative rules applicable to that
7 institution, or if the person in charge of the facility refuses to consent to an
8 inspection by the Health Department. A.R.S. § 36-427(A), (B).

9
10 46. Operation of a regulated health care facility without a license violates
11 the licensure laws and is defined as a nuisance, against which the Health
12 Department director, through the Attorney General, may seek an injunction.
13 A.R.S. § 36-430. City and county attorneys are also explicitly authorized to bring
14 actions to abate or enjoin public nuisances. A.R.S. § 13-2917.

15
16 47. Knowing violation of the licensure laws is a criminal act, as is the
17 operation of a health care institution without a license. Both acts are defined as
18 class 3 misdemeanors, and each day of a violation constitutes a separate violation.
19 A.R.S. § 36-431. As Class 3 misdemeanors, each such violation is punishable by
20 up to 30 days imprisonment and a fine of up to \$500. A.R.S. §§ 13-707(A)(3), 13-
21 802(C).

22
23 48. Any violation of the licensure laws or applicable administrative rules is
24 also subject to civil penalties imposed by the Health Department. Each day of a
25 violation constitutes a separate violation for purposes of assessing civil penalties.
26 A.R.S. § 36-431.01(A). Both the Attorney General and County Attorney are
27 authorized to institute an action in the county in which a violation occurred to
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1 enforce the collection of civil penalties under the licensure laws. A.R.S. § 36-
2 431.01(C).

3
4 49. In addition to requiring that physician practices that perform abortions
5 comply with the licensure laws, the Act ordered the director of the Health
6 Department to promulgate administrative rules applicable to all “abortion clinics.”
7 Those rules were required to set standards for a multitude of specific topics
8 regarding the practices’ physical facilities, supplies and equipment, personnel,
9 medical screening and evaluation, the abortion procedure, recovery room, follow-
10 up visits, and incident reporting. A.R.S. § 36-449.03.

11
12
13 50. On December 14, 1999, the Health Department issued the Regulations
14 pursuant to that mandate. The Act subjects Plaintiffs’ physician practices and
15 other medical practices that perform abortions to these newly enacted regulations.
16 Plaintiffs’ physician practices were not previously subject to any Health
17 Department regulations.

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20 51. In the fall of 2000, in accordance with House Bill 2647, the Health
21 Department made small amendments to the Regulations. It also amended the
22 Regulations to include a new provision requiring physicians who perform
23 abortions to submit an ultrasound print for review to a contractor with the
24 Department of Health whenever the print shows a fetal gestational age of greater
25 than 12 weeks.

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28 52. The amended Regulations include provisions that permit substantial
29 invasions of the privacy of both physicians who provide abortions and their
30 patients. Moreover, the amended Regulations are not based on the particular

1 needs of abortion patients. To the contrary, while the requirements set forth in the
2 amended Regulations are imposed only upon physician practices and other
3 medical facilities that perform abortions, they are no more appropriate for a
4 facility at which abortions are performed than for an office or clinic at which other
5 relatively simple outpatient surgery is performed. Further, most of the
6 requirements address matters that, under accepted medical practice, are left to the
7 physician's exercise of his or her medical judgment as to how best to operate his
8 or her practice and serve his or her individual patients. In addition to being
9 burdensome and intrusive on the physician-patient relationship, these requirements
10 are unnecessary because the physician's exercise of medical judgment is already
11 monitored by the State's medical board. Moreover, in some cases, the
12 requirements do not follow accepted medical practice and even require
13 inappropriate measures. Finally, because many of the requirements are vague, a
14 physician has little ability to ensure compliance with them and risks arbitrary
15 enforcement by the Health Department.

21 53. The amended Regulations contain numerous provisions that threaten
22 the privacy of both physicians who provide abortions and their patients. For
23 example, the amended Regulations require physicians to send an ultrasound print
24 showing a gestational age of greater than twelve weeks for review to a contractor
25 with the Health Department. Ariz. Admin. Code R9-10-1508(H)(3). Because
26 ultrasound prints include the patient's name, this provision requires physicians to
27 reveal their patient's medical information to non-governmental employees, and it
28 therefore violates patient confidentiality. The amended Regulations also require
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1 the facility licensee to “[e]nsure that the Department’s director or director’s
2 designee is allowed access to the abortion clinic during the hours of operation.”
3
4 Ariz. Admin. Code R9-10-1503(B)(4). Compliance with this provision is required
5 regardless of whether: the director has a warrant; the physician believes that a
6 search at that time would threaten the health or the confidentiality of patients in
7 the facility; or the director has any legitimate basis for the search. This
8 requirement forces physicians to consent to unreasonable searches or risk civil and
9 criminal penalties for violation of the amended Regulations. It also forces
10 physicians to consent to warrantless, baseless searches even though there is no
11 reason for dispensing with the warrant requirement in this context. Moreover,
12 there is no justification for singling out physicians that perform abortions from all
13 other physicians for the imposition of warrantless and baseless searches.
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17 54. The amended Regulations also require that a licensee produce to the
18 Health Department medical records kept at the facility within two hours of a
19 request. Ariz. Admin. Code R9-10-1511(A)(4). Compliance with this provision is
20 required regardless of whether the Health Department has a warrant or a valid
21 basis for the search. Like the inspection provision, this requirement forces
22 physicians to consent to unreasonable searches or risk civil and criminal penalties
23 for violation of the amended Regulations. It also forces physicians to consent to
24 warrantless, baseless searches even though there is no reason for dispensing with
25 the warrant requirement in this context. Additionally, as with the inspection
26 provision, there is no justification for singling out physicians that performs
27 abortions from all other physicians for the imposition of warrantless and baseless
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1 searches of patient records. Moreover, the amended Regulations do not provide
2 for the deletion of identifying patient information from the medical records.

3
4 Although the amended Regulations purport to prohibit the release of such
5 identifying information by the Health Department, Ariz. Admin. Code R9-10-
6 1511(C), they do not specify which information from the records is protected; they
7 do not limit the use and sharing of that information within the Health Department;
8 and they do not prevent the Health Department from copying and maintaining the
9 identifying information in its files. Giving the Health Department this
10 unrestrained access to unredacted patient records infringes on patients' right to
11 informational privacy.

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14 55. The amended Regulations require that a multitude of written policies
15 and procedures be followed and developed in physician practices and other
16 medical facilities that perform abortions. Ariz. Admin. Code R9-10-1503(C).
17 These policies and procedures must be instituted in nine separate areas, including
18 personnel qualifications, infection control, and verification of the competency of
19 the physician performing abortions. These written policies and procedures will
20 cost both time and money to create, yet are unnecessary in the context of many
21 physician practices. Further, these policies and procedures are no more needed in
22 physician practices that perform abortions than in physician practices that perform
23 only other comparable procedures.

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26 56. The amended regulatory scheme also requires a number of specific
27 qualifications of physicians who perform abortions, even though physicians are
28 presumed, from the fact of their being licensed as physicians, to be competent
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1 professionals. Moreover, no such requirements are placed on physicians in other
2 settings. For example, the amended Regulations only allow licensed physicians
3 who perform abortions to do ultrasounds if they have met certain ultrasound
4 training requirements. Ariz. Admin. Code R9-10-1505 (3). By contrast,
5 physicians who use ultrasound in connection with other procedures, such as
6 checking for ectopic pregnancies, do not have to meet any special ultrasound
7 training requirements. Additionally, by requiring that physicians send ultrasound
8 prints showing a gestational age of greater than 12 weeks to Health Department
9 contractors, the amended Regulations single out abortion providers for review of
10 their medical assessments by the State without requiring review for other
11 physicians who perform ultrasounds, including those who perform cancer
12 screening. See Ariz. Admin. Code R9-10-1508(H)(3). The amended Regulations
13 also require that the physician overseeing patient recovery and discharge have
14 admitting privileges at a hospital in the State of Arizona. Ariz. Admin. Code R9-
15 10-1506(B)(2). This requirement is not reasonably related to promoting the
16 patient's health, and is not required of physicians performing comparable
17 procedures. Finally, at any physician practice or other medical facility where
18 abortions are performed, a license to perform abortions must be posted in a
19 location that is accessible and visible to patients and the public. Ariz. Admin.
20 Code R9-10-1503(B)(5), R9-10-1501(5). This requirement is imposed despite the
21 fact that no other physician practice or medical facility is required to post an
22 announcement of any procedures it performs, let alone procedures that are both
23 deeply personal to the patient and controversial in our society.
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1 57. The amended Regulations also intrude on the physician-patient
2 relationship in many respects. For example, the amended Regulations mandate
3 how and when the physician must follow up with the abortion patient by requiring
4 that a member of the patient care staff call the patient, if she consents, within 24
5 hours of the patient's discharge, and by requiring that the patient be offered a
6 follow-up examination, but not until at least three weeks after the procedure. Ariz.
7 Admin. Code R9-10-1508(I). Such requirements interfere with the ability of
8 licensed physicians to exercise their medical judgment as to how to provide
9 follow-up care to patients. Moreover, no such requirements are imposed on
10 providers of comparable medical procedures.
11

12 58. The amended Regulations contain a number of requirements that
13 impose measures that are not required by medical practice and may be invasive,
14 time-consuming, and/or costly. For example, the amended Regulations require
15 that a physician, nurse, nurse practitioner or physician's assistant monitor all
16 patients during recovery. Ariz. Admin. Code R9-10-1506 (B)(3). While such
17 staffing may be medically appropriate in some settings, in other settings it is
18 medically unnecessary, because a medical assistant working under the supervision
19 of the physician, monitors the recovery of the abortion patients. Also, the
20 amended Regulations include equipment requirements that are excessive and will
21 increase costs unnecessarily. Ariz. Admin. Code R9-10-1513. For example, the
22 requirement that a Health Department contractor review ultrasound prints will
23 force Plaintiffs to bear the expense of making additional ultrasound prints, as well
24 as require them to purchase new ultrasound machines in those circumstances
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1 where current equipment would not permit Plaintiffs to satisfy the amended
2 Regulations. Ariz. Admin. Code R9-10-1508(H)(3). Moreover, none of these
3 requirements is based on the particular needs of abortion patients; each is equally
4 applicable to patients undergoing comparable procedures.
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6 59. Other provisions of the amended Regulations subject Plaintiffs to
7 arbitrary enforcement due to lack of guidance in the requirements. For example,
8 the amended Regulations require the licensee to “ensure that there are a sufficient
9 number of patient care staff and employees to: 1. [m]eet the requirements of [the
10 amended Regulations]; 2. [e]nsure the health and safety of a patient; and 3. [m]eet
11 the needs of a patient based on the patient’s medical evaluation.” Ariz. Admin.
12 Code R9-10-1506(A). The amended Regulations provide the physician no basis
13 for determining whether his or her assessment of the “sufficient number” of staff
14 will be the same as the Health Department’s. Similarly, a licensee must “ensure
15 that . . . [p]hysical facilities: a. [p]rovide lighting and ventilation to ensure the
16 health and safety of a patient; b. [a]re maintained in a clean condition; c. [a]re free
17 from a condition or situation that may cause a patient to suffer physical injury; d.
18 [a]re maintained free from insect and vermin; and e. [a]re smoke free.” Ariz.
19 Admin. Code R9-10-1512(1). A physician cannot be sure that his or her
20 assessments about those matters will be the same as that of the Health Department.
21 Additionally, under the ultrasound review provisions, the contractor who reviews
22 the ultrasound print on behalf of the Health Department is required to indicate if
23 there was “a significant inaccuracy” in the estimated gestational age of the fetus.
24 A.R.S. § 36-2301.02(E)(1). Reports of “significant inaccuracies” are then
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1 forwarded to the appropriate professional regulatory board. A.R.S. § 36-
2 2301.02(E). But because the amended regulatory scheme does not specify what
3 constitutes a “significant inaccuracy,” the scheme does not protect Plaintiffs
4 against arbitrary enforcement of these provisions.
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6 60. The amended Regulations also require that an ultrasound be performed
7 on an abortion patient whenever information indicates that “the gestational age of
8 the fetus is greater than 12 weeks.” Ariz. Admin. Code R9-10-1508(D).

9 Gestational age, however, is defined to mean “the number of completed weeks of
10 the unborn fetus as calculated from the first day of the last menstrual period *or* the
11 date of fertilization.” Ariz. Admin. Code R9-10-1501(17) (emphasis added).

12 These are two incompatible methods of calculating gestational age. The first day
13 of the woman’s last menstrual period is generally estimated to occur two weeks
14 prior to fertilization. Therefore, a physician cannot tell whether the amended
15 Regulations require that an ultrasound be performed when the gestational age of
16 the fetus is between 12 and 13.9 weeks lmp (which is greater than 12 weeks as
17 measured from the first day of the last menstrual period, but less than 12 weeks as
18 measured from the date of fertilization). Similarly, because the amended
19 Regulations require that ultrasound prints showing a “gestational estimate of more
20 than 12 weeks” be sent for review to persons or corporations that have contracted
21 with the Health Department, physicians cannot tell whether they must send in
22 prints showing a gestational age between 12 and 13.9 weeks lmp. Ariz. Admin.
23 Code R9-10-1508(H)(3).
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1 61. The ultrasound review requirements contain at least one other vague
2 provision. The amended Regulations mandate that an “original ultrasound print”
3 be “interpreted” by a physician. Ariz. Admin. Code R9-10-1508(D)(3). But an
4 ultrasound machine performs the calculations that determine gestational age and
5 therefore an ultrasound print will itself provide the fetus’s gestational age. It is
6 therefore unclear what a physician is required to “interpret.”
7

9 62. Other vague provisions include the requirement that “if a physician is
10 not present,” a nurse, nurse practitioner or a physician assistant monitor each
11 patient during the patient’s recovery. Ariz. Admin. Code R9-10-
12 1506(B0000000)(3). The amended Regulations do not specify, however, whether
13 the term “present” means present in the recovery room, or merely in the physical
14 facility.
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17 63. The Regulations, as amended, also provide Arizona hospitals with the
18 power to decide which physicians may perform abortions. The amended
19 Regulations require that a physician with admitting privileges at a hospital must be
20 present in an abortion facility until each patient is ready to leave the recovery
21 room. See Ariz. Admin. Code R9-10-1506(B)(2). This provision, in effect,
22 requires that physicians who perform abortions have hospital admitting privileges.
23 This provision not only imposes unnecessary burdens on physicians who perform
24 abortions, but it also gives hospitals the ultimate authority to determine whether a
25 particular physician may perform abortions.
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29 64. As a whole, the amended regulatory scheme: (1) subjects physicians
30 who provide abortions and their patients to unwarranted burdens not imposed on

1 comparably situated medical providers and patients; (2) intrudes on the right of
2 physicians who provide abortions and their patients to be free from unreasonable
3 searches and seizures; (3) threatens patient confidentiality; (4) is not reasonably
4 related to promoting maternal health; and (5) has both the purpose and the effect
5 of harassing and harming physicians who perform abortions and their patients,
6 rather than promoting a legitimate state interest, and is not reasonably related to
7 serving such an interest.
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11 **VI. THE IMPACT OF THE AMENDED REGULATORY SCHEME ON**
12 **PHYSICIANS WHO PROVIDE ABORTIONS AND PATIENTS IN**
13 **ARIZONA**

14 65. Enforcement of the amended regulatory scheme will immediately
15 deprive Plaintiffs and their patients of the equal protection of the laws by singling
16 them out for a range of burdens that are not tailored to the nature of abortion
17 procedures or the needs of abortion patients, yet are not imposed on providers of
18 comparable medical procedures and their patients.
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20 66. Enforcement of the amended regulatory scheme will immediately
21 expose Plaintiffs to unreasonable searches and seizures and threaten the
22 confidentiality of their physician-patient relationships by requiring Plaintiffs to
23 submit to warrantless, baseless searches of their medical facilities.
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25 67. Enforcement of the amended regulatory scheme will also immediately
26 threaten the right of Plaintiffs' patients to informational privacy, and the right of
27 Plaintiffs and their patients to be free from unreasonable searches and seizures, by
28 permitting the Health Department to or its contractors review, copy and maintain
29 information from patients' confidential medical records.
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1 68. In addition, by imposing vague requirements with which Plaintiffs
2 cannot reasonably ensure compliance, enforcement of the amended regulatory
3 scheme will immediately deprive Plaintiffs of their right to due process of law.
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5 69. The amended regulatory scheme will also immediately deprive
6 Plaintiffs of their right to due process of law by illegally delegating physician-
7 licensing authority to a third party, in this case hospitals that control physicians'
8 admitting privileges.
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10 70. Further, enforcement of the amended regulatory scheme will impose
11 costly and time-consuming burdens on the provision of abortion that will not
12 promote maternal health. Such enforcement will also create governmental
13 intrusions on both the Plaintiffs' practice of medicine and the physician-patient
14 relationships in their facilities. Enforcement of the scheme will additionally cause
15 some Plaintiffs to stop providing abortions, reducing access to abortion in Arizona
16 and forcing some women to go to unknown physicians, rather than their own
17 practitioners for abortions. Because the scheme's purpose and effect is to harass
18 physicians who provide abortions and their patients, rather than to promote a
19 legitimate state interest, and because the scheme is not reasonably related to
20 serving a legitimate state interest, enforcement of the scheme will cause immediate
21 violations of Plaintiffs' patients' right to privacy.
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27 71. Moreover, the amended regulatory scheme is not even rationally
28 related to furthering maternal health because it imposes requirements and burdens
29 on physicians who perform five or more abortions per month but not upon
30 physicians who perform fewer abortions, despite the fact that physicians who

1 perform a greater number of abortions are likely to be more skilled and better
2 equipped to perform abortions.

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4 72. Each of these violations of constitutional rights constitutes an
5 irreparable harm to abortion patients, physicians who provide abortions, or both.

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7 **FIRST CLAIM FOR RELIEF**

8 73. Plaintiffs hereby reallege and incorporate by reference paragraphs 1
9 through 72 above.

10 74. The amended regulatory scheme violates the rights of Plaintiffs and
11 their patients to equal protection of the laws guaranteed by the Fourteenth
12 Amendment to the United States Constitution and 42 U.S.C. § 1983 by singling
13 out physician practices and other medical facilities that provide abortions and their
14 patients for burdens that are not based on the nature of abortion procedures or the
15 needs of abortion patients and that are not imposed on providers of comparable
16 medical procedures and their patients, including providers of less than five
17 abortions per month and providers who treat spontaneous abortions. This
18 classification impairs women's ability to exercise their fundamental right to
19 choose abortion, yet is not even rationally related to the State's purported goal of
20 promoting women's health.

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25 **SECOND CLAIM FOR RELIEF**

26 75. Plaintiffs hereby reallege and incorporate by reference paragraphs 1
27 through 74 above.

28 76. By requiring physician practices and other medical facilities that
29 provide abortions to consent to warrantless, baseless, nonconsensual searches of
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1 their offices and patient records, the amended regulatory scheme violates
2 Plaintiffs' and Plaintiffs' patients' right to be free from unreasonable searches and
3 seizures guaranteed by the Fourth and Fourteenth Amendments to the United
4 States Constitution and 42 U.S.C. § 1983.
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7 **THIRD CLAIM FOR RELIEF**

8 77. Plaintiffs hereby reallege and incorporate by reference paragraphs 1
9 through 77 above.

10 78. By failing to ensure the confidentiality of the physician-patient
11 relationship or of patient medical records, the amended regulatory scheme violates
12 Plaintiffs' patients' right to informational privacy as guaranteed by the Fourteenth
13 Amendment to the United States Constitution and 42 U.S.C. § 1983.
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16 **FOURTH CLAIM FOR RELIEF**

17 79. Plaintiffs hereby reallege and incorporate by reference paragraphs 1
18 through 78 above.

19 80. The amended regulatory scheme violates Plaintiffs' patients' right of
20 privacy under the Fourteenth Amendment to the United States Constitution and 42
21 U.S.C. § 1983 because the scheme's purpose and effect is to harass and harm
22 physicians who provide abortions and their patients, rather than to promote a
23 legitimate state interest, and because the scheme is not reasonably related to
24 serving such an interest.
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28 **FIFTH CLAIM FOR RELIEF**

29 81. Plaintiffs hereby reallege and incorporate by reference paragraphs 1
30 through 80 above.

1 82. The amended regulatory scheme violates Plaintiffs’ due process rights
2 under the Fourteenth Amendment to the United States Constitution and 42 U.S.C.
3 § 1983 because it contains vague and uncertain terms and thereby fails to give
4 adequate notice of conduct that will subject the Plaintiffs to criminal,
5 administrative and civil penalties and exposes Plaintiffs to arbitrary enforcement.
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9 **SIXTH CLAIM FOR RELIEF**

10 83. Plaintiffs hereby reallege and incorporate by reference paragraphs 1
11 through 82 above.
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13 84. The amended regulatory scheme violates Plaintiffs’ due process rights
14 under the Fourteenth Amendment to the United States Constitution and 42 U.S.C.
15 § 1983 because it illegally delegates licensing authority to a third party, in this
16 case hospitals that control physicians’ admitting privileges.
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20 WHEREFORE Plaintiffs respectfully ask this Court:

21 A. To enter a judgment declaring that: (1) the provisions of Arizona
22 Revised Statutes §§ 36-402, 36-449, 36-449.01, 36-449.02, 36-449.03 and 36-
23 2301.02, as revised by HB 2706 and HB 2647, violate the United States
24 Constitution to the extent that they govern the licensing and regulation of
25 physician practices that perform abortions; and (2) the provisions of Arizona
26 Regulation Title 9, Chapter 10, Article 15, as amended, violate the United States
27 Constitution;
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1 B. To enjoin the Defendants, their employees, agents and successors
2 from enforcing: (1) the provisions of Arizona Revised Statutes §§ 36-402, 36-449,
3 36-449.01, 36-449.02, 36-449.03, and 36-2301.02, as revised by HB 2706 and HB
4 2647, as against physician practices that perform abortions; and (2) the provisions
5 of Arizona Regulation Title 9, Chapter 10, Article 15, as amended;
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8 C. To award Plaintiffs their reasonable costs and attorneys fees
9 pursuant to 42 U.S.C. § 1988; and
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11 D. To grant such other and further relief as the Court deems just and
12 proper.
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16 Dated: January ___, 2001
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18 Respectfully submitted,
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21 _____
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*Application for pro hac vice admission
granted

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