

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-030230

06/13/2011

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
D. Harding
Deputy

PLANNED PARENTHOOD ARIZONA INC, et
al.

LAWRENCE J ROSENFELD

v.

TERRY GODDARD, et al.

CARRIE J BRENNAN

PETER A GENTALA
DAVID J CANTELME

MINUTE ENTRY

Oral argument was held on Defendants' Motions to Dismiss and Supplemental Motions to Dismiss, and Joinders therein, (collectively, "Motions") on May 18, 2011.¹ The parties were granted leave to file supplemental briefing, after which the Court took this matter under advisement. Having considered the memoranda, the supplemental memoranda, and oral argument, the Court issues the following ruling. Defendants' Motions are granted in part and denied in part.

Background

In 1999, the legislature enacted House Bill 2706, which went into effect May 1999 as A.R.S. § 36-449 *et seq.* (the Abortion Clinic "Licensing Statutes"), requiring that an "abortion clinic" be licensed and that it comply with rules that Defendant Arizona Department of Health

¹ Defendants Thomas C. Horne, Attorney General of Arizona; Arizona Medical Board and its Executive Director, Lisa Wynn; Arizona Board of Osteopathic Examiners in Medicine and Surgery and its Executive Director, Elaine LeTarte; and Arizona Department of Health Services and its Director, Will Humble (the "State Defendants" or the "State") and Intervenor-Defendant Andrew M. Tobin, Speaker of the Arizona House of Representatives, are referred to collectively as "Defendants."

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Services (“DHS”) was directed to promulgate (the Abortion Clinic “Licensing Regulations,” A.A.C. R9-10-1501 *et seq.*) *See generally* A.R.S. § 36-449.03. Beginning on April 1, 2000, an abortion clinic would be required to comply with the Licensing Statutes and Regulations (collectively, the “regulatory scheme”). *See* A.R.S. § 36-449.02(C).

In March 2000, several physicians who provided abortions in their private medical practices brought suit challenging the constitutionality of certain provisions of the Licensing Statutes and Regulations, and enforcement of the regulatory scheme was stayed. *See generally Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 537 (9th Cir. 2004). In 2008, prior to trial, the parties agreed to a settlement pursuant to which DHS agreed to begin the rulemaking process to amend the Licensing Regulations. In April 2010, DHS promulgated amendments to the Licensing Regulations, effective November 1, 2010.

There are two types of first-trimester abortions: medication and surgical. Medication abortion, sometimes referred to as RU-486 or the abortion pill, is available through nine weeks of pregnancy. Surgical abortion, also known as aspiration abortion, is available through the first trimester, or approximately 14 weeks of pregnancy. It is Plaintiffs’ practice to use a qualified registered nurse-practitioner (“RNP”) to perform surgical abortions.² This practice was approved by the Arizona State Board of Nursing (“BON”) in May 2008, which determined it to be “within the scope of practice of a nurse practitioner to perform a first-trimester aspiration abortion provided the procedure is within the nurse practitioner specialty certification population; the nurse practitioner has met the education requirements of A.A.C. R4-19-508(C); and there is documented evidence of competency in the procedure.”

Plaintiffs filed this action for declaratory and injunctive relief on October 28, 2010, challenging the constitutionality of provisions in the Statutes and Regulations to the extent those provisions prohibit RNPs from providing certain tasks ancillary to performing first-trimester aspiration abortions.³ Specifically, Plaintiffs challenge the following, collectively referred to as the “Physician Participation Provisions:”⁴

² Plaintiffs Planned Parenthood Arizona, Inc. (“Planned Parenthood”) and DeShawn Taylor, M.D. (“Dr. Taylor”) are referred to collectively as “Plaintiffs.”

³ In *Planned Parenthood v. Goddard*, Maricopa County Superior Court No. CV2009-029110, Judge Daughton preliminarily enjoined enforcement of A.R.S. §§ 36-2153(C) and 36-2155(A), which expressly limit the provision of first-trimester aspiration abortions to physicians. (9/29/09, 9/30/09 Minute Entries).

⁴ Plaintiffs do not interpret the Statutes and Regulations to directly require a physician to perform and/or to directly prohibit an RNP from performing first-trimester surgical abortions. However, Plaintiffs allege that all or some Defendants may so construe these provisions. *See* A.R.S. § 36-449.03(C)(2) (medical director of abortion clinic shall establish rules requiring that “[p]hysicians performing surgery are licensed pursuant to title 32, chapter 13 or 17, demonstrate competence in the procedure involved and are acceptable to the medical director of the abortion clinic.”) Plaintiffs also challenge these provisions, referred to as the “Physician-Only Provisions,” to the extent they directly prohibit qualified RNPs from providing first-trimester surgical abortions.

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* a physician must perform a physical examination of a patient prior to the abortion that includes a bimanual examination to estimate uterine size and palpation of adnexa. A.A.C. R9-10-1508(A)(2).

* a physician is responsible for estimating the gestational age of the fetus based on the ultrasound examination (or last menstrual period and bimanual exam) and documenting it in the medical record. A.R.S. § 36-449.03(D)(5); A.A.C. R9-10-1508(C); A.A.C. R9-10-1511(A)(1)(e).

* a physician must interpret the original ultrasound print of any patient whose tests indicate she is greater than 12 weeks pregnant. A.A.C. R9-10-1508(D)(3)(a).

* a physician is responsible for recommending any laboratory tests on the basis of the physical examination; also, the decision to order Rh typing depends on whether the patient provides written documentation acceptable to a physician. A.A.C. R9-10-1508(A)(3).

* a physician must discuss RhO(d) immune globulin with each patient for whom it is indicated, assure that it is offered to patients for whom it is indicated, and document any refusal to receive this medication. A.R.S. § 36-449.03(F)(5); A.A.C. R9-10-1508(B)(1).

* a physician with admitting privileges at an accredited hospital in Arizona⁵ must remain on the premises of the abortion clinic until all patients are stable and ready to leave. A.R.S. § 36-449.03(F)(4); A.A.C. R9-10-1506(B)(2).

* a physician must sign the discharge order and be readily accessible and available until the last patient is discharged. A.R.S. § 36-449.03(F)(4); A.A.C. R9-10-1509(B)(1).

* a physician must assure that a licensed health professional make a good faith effort to contact the patient by phone within 24 hours of the abortion. A.R.S. § 36-449.03(F)(8).

* if after a follow up visit a continuing pregnancy is suspected, a physician who performs abortions shall be consulted. A.R.S. § 36-449.03(G)(2).

(Verified Amended Complaint at ¶ 15.)

⁵ This is defined to include having a written transfer agreement with a physician who has admitting privileges. A.A.C. R10-1501(4)(b).

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Implicit in the BON determination that it is within the scope of practice of an RNP to perform a first-trimester aspiration abortion, according to Plaintiffs, is the determination that it is within the scope of practice of an RNP to perform those tasks assigned to physicians by the Physician Participation Provisions. If they have to comply with the Physician Participation Provisions, Plaintiffs allege that it will be functionally unworkable to use RNPs to provide aspiration abortions.

Analysis

I. Statute of Limitations.

Defendants argue that Plaintiffs' claims are barred by A.R.S. § 12-821, which provides that "[a]ll actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." Defendants contend that this limitation applies even to Plaintiffs' constitutional claims, relying on *Rutledge v. State*, 100 Ariz. 174, 180, 412 P.2d 467, 472 (1966) and *Landgraff v. Wagner*, 26 Ariz. App. 49, 54, 546 P.2d 26, 31 (1976). Plaintiffs restrict these cases to actions where the claimant sought to recover monetary relief. See *Rutledge, id.*; *Landgraff, id.*; see also *Ranch 57 v. City of Yuma*, 152 Ariz. 218, 222-23, 731 P.2d 113, 117-18 (App. 1986).

Initially, the Court agrees that such a restriction is unfounded. Section 12-821 reasonably regulates the time within which "all" actions against a public entity must be filed. *Flood Control Dist. of Maricopa County v. Gaines*, 202 Ariz. 248, 252, 43 P.3d 196, 200 (App. 2002). "The word 'all' means exactly what it imports....A more comprehensive word cannot be found in the English language." *Id.* (internal quotation and citation omitted). "A court of equity is equally bound with a court of law by the statute of limitations." *Fleming v. Black Warrior Copper Co. Amalgamated*, 15 Ariz. 1, 8, 136 P. 273, 275 (1913). Not even the United States Supreme Court has drawn the distinction between monetary damages and equitable relief in holding that federal constitutional rights may be time-barred by a state statute of limitations. See *Ranch 57, id.* at 222, 731 P.2d at 117, citing *Bd. of Regents v. Tomanio*, 446 U.S. 478 (1980).

In any event, Plaintiffs' argument continues, a constitutional challenge to the validity of a statutory scheme is not affected by a statute of limitations. *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997), citing *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd in part on other grounds*, 496 U.S. 498 (1990). Because they contend that the Licensing Statutes and Regulations inflict an ongoing violation of constitutional rights, Plaintiffs assert the statute of limitations "begins anew each day that the statutory scheme remains in effect." (Response at 4.)

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With respect to statutory or regulatory challenges, there is a juxtaposition between a statute or regulation that continues to be applied to persons within the limitations period, on the one hand, and harm to a plaintiff stemming only from the initial application of the regulatory prohibition, on the other. *Nat'l Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1167 (4th Cir. 1991), comparing *Va. Hosp.*, 868 F.2d at 663 with *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983). A continuing violation arises from a challenged statute's "repeated enforcement against different individuals or even the same parties," but not from "a statute applied once to a discrete set of individuals with a foreseeable, ascertainable impact." *Nat'l Adver.*, *id.* at 1168. This is in accord with the Ninth Circuit, which has "repeatedly held" that "mere continuing *impact* from past violations is not actionable." *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) (emphasis in original; internal quotations omitted). The focus is on the time of the unconstitutional acts, "not upon the time at which the consequences of the acts become most painful." *Id.*, citing *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979); see also *Mayer Unified Sch. Dist. v. Winkleman*, 219 Ariz. 562, 567, 201 P.3d 523, 528 (2009) (state land commissioner's failure to obtain compensation for use of easements did not constitute continuing violation).

In *National Advertising*, the plaintiff had challenged an ordinance that restricted the use of its property. In finding that the continuing violation exception to the statute of limitations was inapplicable, the Fourth Circuit discussed whether unfairness would result thereby.

[Plaintiff] was aware of the 1983 ordinance from at least the date of its enactment. [Plaintiff] participated in rulemaking proceedings prior to adoption of the ordinance and clearly knew of its terms in 1983....Upon the adoption of the ordinance, [plaintiff] was in a position to challenge it. "[A] 'continuing wrong' theory should not provide a means of relieving plaintiff from its duty of reasonable diligence in pursuing its claims." *Ocean Acres*, 707 F.2d at 107.

947 F.2d at 1168 (alterations added; quotation alterations in original).

The Court does not find that enforcement of the Licensing Statutes and Regulations amounts to a continuing wrong. As Defendants point out, Plaintiffs' challenge to the Statutes and Regulations is a facial one. Any harm to Plaintiffs arose from the initial application of the regulatory scheme to them with its foreseeable and ascertainable impact, not from the scheme's repeated enforcement against them.

Turning then to the issue of accrual, although it was to have taken effect on April 1, 2000, U.S. District Judge Raner Collins entered an Order on March 23, 2000 staying enforcement "of the Abortion Clinic Regulatory Scheme," in accordance with a stipulation among the *Tucson Woman's Clinic* parties, including the State. In the event the regulatory scheme was upheld, the stay provided for a 45 day moratorium "on the Defendants ability to

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enforce the regulatory requirements...to allow sufficient time for the regulated parties to comply with the application process.” *Tucson Woman’s Clinic v. Schamadan*, CV 00-141 TUC-RCC, Order at 2 (D. Ariz. Mar. 23, 2000). The stay continued in effect in some form throughout the *Tucson Woman’s Clinic* litigation. Pursuant to the *Tucson Woman’s Clinic* settlement, DHS promulgated amendments to the Licensing Regulations on April 30, 2010. Judge Collins lifted the stay on May 6 or 7, 2010.⁶ The amended regulatory scheme became effective November 1, 2010.

In determining when Plaintiffs’ cause of action accrued under A.R.S. § 12-821, the Court focuses on when Plaintiffs “discover[ed] or reasonably should have discovered that an injury was caused by the government’s action.” *Canyon Del Rio Investors, L.L.C. v. City of Flagstaff*, 2011 WL 2162558, at *3 (Ariz. App. May 24, 2011), citing *Stulce v. Salt River Project Agric. Improvement & Power Dist.*, 197 Ariz. 87, 90, 3 P.3d 1007, 1010 (App. 1999); see *Flood Control Dist.*, 202 Ariz. at 254, 43 P.3d at 202. The Court would find that that time was no later than April 1, 2000, except that at that time there was no actual, tangible risk of injury to Plaintiffs. Defendants do not argue that the *Tucson Woman’s Clinic* stay did not extend to stay the State’s enforcement of the regulatory scheme against Plaintiffs, leading the Court to conclude that it did; moreover, Defendants do not argue that the State in fact enforced the regulatory scheme post-April 1, 2000 against any abortion clinic, leading the Court to conclude that it did not.

The Court finds that Plaintiffs’ cause of action accrued *no earlier* than *either* April 30, 2010 or May 6/7, 2010. Under either date, Plaintiffs’ Complaint filed October 28, 2010 was timely filed. Defendants’ Motions to Dismiss based on statute of limitations are denied.

II. Jural Entities.

Defendants Arizona Medical Board (“AMB”), Arizona Board of Osteopathic Examiners (“BOE”), and DHS argue they should be dismissed from this action because they are nonjural entities. “[A] governmental entity may be sued only if the legislature has so provided.” *Braillard v. Maricopa County*, 224 Ariz. 481, 487, 232 P.3d 1263, 1269 (App. 2010) (dismissing MCSO as a nonjural entity); *Schwartz v. Superior Court*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996) (powers of state administrative agency limited to those granted by statute); see also *Kimball v. Shofstall*, 17 Ariz. App. 11, 13, 494 P.2d 1357, 1359 (1972) (Arizona State Board of Education not an autonomous body with right to sue and be sued; members of Board only necessary parties).

⁶ The parties’ supplemental briefing on this issue differs on this date.
Docket Code 019

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Plaintiffs argue that they seek injunctive and declaratory relief against the state agencies that possess enforcement authority with respect to the Licensing Statutes and Regulations, and that no Arizona case has barred such an action on the basis that the enforcing agency is nonjural. In this regard, Plaintiffs cite to state appellate decisions involving actions brought by or against AMB, BOE, and/or DHS without challenge to that entity's participation in the judicial proceedings.⁷ Although the enabling statutes pertaining to AMB, BOE, and DHS do not contain language allowing these entities to sue or be sued, Plaintiffs argue that these entities have contractual authority, and therefore are jural entities.

The Court disagrees with Plaintiffs. *See Yamamoto v. Santa Cruz County Bd. of Supervisors*, 124 Ariz. 538, 539, 606 P.2d 28, 29 (App. 1979) (court has no jurisdiction over party who is not legally capable of being sued). “[T]here is no doctrine of jural status by estoppel, at least without detrimental reliance in the case at hand.” *Brillard, id.* (quotation omitted). To the extent that Plaintiffs’ identification of these entities is a technical error, Plaintiffs urge amendment of the caption to change these Defendants’ identity to “State of Arizona *ex rel.* ...” *Simon v. Maricopa Med. Ctr.*, 225 Ariz. 55, 59, 234 P.3d 623, 627 (App. 2010) (applying Ariz. R. Civ. P. 10(f) when plaintiff improperly names nonjural entity but properly serves jural entity).⁸

The Court finds that AMB, BOE, and DHS are nonjural entities and should be dismissed from this action. Accordingly, IT IS ORDERED granting the State’s Motion to Dismiss AMB, BOE, and DHS without prejudice.

III. Enforcement by Board Defendants.

Defendants AMB and BOE and their directors, Lisa Wynn and Elaine LeTarte, (the “Board Defendants”) argue they should be dismissed because they do not enforce the Licensing Statutes and/or Regulations, relying on *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 487, 626 P.2d 1115, 1119 (App. 1981) (burden on plaintiff to show likelihood that defendant will engage in conduct sought to be enjoined). Plaintiffs respond that these Defendants have authority to enforce some of the Statutes and/or Regulations by investigating and disciplining physicians who violate them; thus, Plaintiffs contend, these Defendants are proper party-defendants without whom Planned Parenthood’s physicians cannot be afforded complete relief. The Court agrees. The State’s Motion to Dismiss on this basis is denied.

IV. Standing.

⁷ Plaintiffs also point out that this issue was not raised in CV2009-029110 before Judge Daughton, despite near identity of parties and counsel.

⁸ After this issue was raised in Defendants’ Motions to Dismiss, Plaintiffs filed an Amended Complaint, but did not amend Defendants’ identity.

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The initial Complaint in this matter was filed by Planned Parenthood. Defendants moved to dismiss, arguing that Planned Parenthood lacked standing to raise claims on behalf of its Medical Director, staff physicians, and RNPs, relying on *Kerr v. Killian*, 197 Ariz. 213, 217, 3 P.3d 1133, 1137 (App. 2000). Plaintiffs' Amended Complaint added Dr. Taylor as a Plaintiff and alleged:

DeShawn Taylor, M.D., is a physician licensed to practice in Arizona and California, and is a board-certified obstetrician-gynecologist. Dr. Taylor is the Medical Director of Planned Parenthood. As Medical Director, Dr. Taylor is responsible for maintaining Planned Parenthood's compliance with the Abortion Clinic Licensing Statutes and Regulations. She is also responsible for the quality of medical care provided at Planned Parenthood health centers.

Planned Parenthood and Dr. Taylor sue on behalf of: themselves, the physicians and RNPs who provide, or seek to provide, abortion services at Planned Parenthood's health centers; and their patients.

(Verified Amended Complaint at 3 ¶¶ 5, 6.) Defendants supplemented their Motions, arguing that Dr. Taylor lacks standing (i) with regard to the AMB, to challenge the constitutionality of the Licensing Statutes and Regulations because any alleged harm to her is too speculative;⁹ (ii) as to DHS and BOE (and its director, LeTarte), because neither agency can take any action against her; and (iii) to raise claims on behalf of Planned Parenthood's staff physicians and RNPs under *Kerr*.¹⁰

Responding to Defendants' "speculative injury" argument, Plaintiffs counter that Planned Parenthood seeks to continue to use RNPs to provide aspiration abortions, and the goal of this action is to challenge any legal impediment thereto; Dr. Taylor is the Medical Director of Planned Parenthood. Thus, Plaintiffs contend, Dr. Taylor has standing to assert claims challenging the Licensing Statutes and Regulations to the extent they prevent her from authorizing the use of RNPs to perform aspiration abortions at Planned Parenthood. *See Singleton v. Wulff*, 428 U.S. 106, 112-13 (1976); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976). Defendants reply that, although the Amended Complaint might allege *Planned*

⁹ Defendants also note that the Amended Complaint asks only for an injunction regarding the Licensing Statutes and Regulations, not an injunction enjoining the AMB from prosecuting a complaint for unprofessional conduct against Dr. Taylor based on a violation of the DHS-enforced Licensing Statutes and Regulations. Thus, Defendants argue, Dr. Taylor lacks standing because the requested relief will not address her alleged injury—i.e., discipline by the AMB for unprofessional conduct. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (relief from injury must be likely to follow from favorable decision).

¹⁰ Defendants do not challenge Planned Parenthood's standing to assert claims on its own behalf or on behalf of its patients.

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Parenthood's actions and intentions, it simply fails to allege that *Dr. Taylor's* sufficient to establish her standing.

The Court need not belabor analysis of Defendants' arguments. Assuming without deciding that Defendants are correct, the Court finds an exception to the Arizona rule of judicial restraint in this case that is of great public importance or is likely to recur. *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 217 n.1, 714 P.2d 386, 387 n.1 (1986).

In addressing the question of standing,...we are confronted only with questions of prudential or judicial restraint. We impose that restraint to insure that our courts do not issue mere advisory opinions, that the case is not moot and that the issues will be fully developed by true adversaries. Our court of appeals has explained that these considerations require at a minimum that each party possess an interest in the outcome.

Armory Park Neighborhood Ass'n v. Episcopal Comm. Serv. in Ariz., 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) (citations omitted). Given the circumstances of this case, Planned Parenthood and Dr. Taylor have a legitimate interest in an actual controversy involving the constitutional rights and interests of the physicians and RNPs who work for Planned Parenthood, whose rights are inextricably intertwined with the rights of Planned Parenthood's patients to continue to receive timely abortion services in Arizona. *See supra* n.10; *Kerr, id.*¹¹ The Court finds that judicial economy and administration is promoted by allowing representational appearance. *See Armory Park, id.*

Accordingly, Defendants' Motions to Dismiss based on standing are denied.

V. Special Laws.

Plaintiffs' Amended Complaint alleges that the Licensing Statutes and Regulations are special laws to the extent these provisions grant a special or exclusive privilege or franchise to physicians to perform tasks ancillary to aspiration abortions, and potentially to perform

¹¹ In *Kerr*, the Court of Appeals concluded that a party may have standing to assert the constitutional rights of a non-party if the party has a substantial relationship to the non-party, the non-party is unable to assert the constitutional rights on his/her own behalf, and failing to grant the party standing would dilute the non-party's constitutional rights. 197 Ariz. at 217, 3 P.3d at 1137. *Kerr* relied on a footnote in *State v. B Bar Enterprises, Inc.* to that effect. 133 Ariz. 99, 101 n.2, 649 P.2d 978, 980 n.2 (1982). However, that same footnote in *Bar B Enterprises* went on to note that Arizona has no analog to the case or controversy doctrine of the U.S. Constitution, and thus "standing is not a constitutional jurisdictional requirement in the state courts of Arizona," but rather is "solely a rule of judicial restraint." *Id.*

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aspiration abortions. *See* Ariz. Const. Art. 4, Part 2, § 19. Defendants move to dismiss, arguing that the Licensing Statutes and Regulations are general, not special, laws.¹²

“The purpose of proscribing special or local legislation is to prevent the legislature from providing benefits or favors to certain groups or localities.” *State Comp. Fund v. Symington*, 174 Ariz. 188, 192, 848 P.2d 273, 277 (1993).

Such a prohibition also confines the power of the legislature to the enactment of general statutes conducive to the welfare of the state as a whole, to prevent diversity of laws on the same subject, to secure uniformity of law throughout the state as far as possible, and to prevent the granting of special privileges. In addition, it prevents the enlargement of the rights of persons in discrimination against others’ rights.

Id. (internal quotations and citations omitted); *see Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 149, 800 P.2d 1251, 1257 (1990) (proscription against special laws seeks to avoid evils created by patchwork type of legal system). To qualify as a general law, as opposed to a special law, a statute must meet three criteria: (1) the classification it creates must have a rational basis; (2) the classification must be “legitimate,” encompassing all members of the relevant class; and (3) the classification must be elastic, allowing members to move into and out of the class as their circumstances change. *Republic Inv. Fund, id.*; *Tucson Elec. Power Co. v. Apache County*, 185 Ariz. 5, 13, 912 P.2d 9, 17 (App. 1995). A law that does not meet all three criteria is a special law; if a law meets all three criteria, it is a general law even though it may have limited application. *Tucson Elec. Power, id.*

Plaintiffs contend that the Physician Participation Provisions, and any Physician-Only Provisions, violate both the first and second criteria. *See In re Cesar R.*, 197 Ariz. 437, 439, 4 P.3d 980, 982 (App. 1999) (rational basis prong “overlaps” inclusiveness prong); *City of Tucson v. Woods*, 191 Ariz. 523, 530, 959 P.2d 394, 401 (App. 1997). Plaintiffs assert that there is no rational relationship between the challenged provisions and the State’s legitimate interest in abortion safety because the classification created—physicians—does not encompass all members of the relevant class—physicians *and* RNPs for whom it is within the scope of practice to perform all tasks ancillary to aspiration abortions and to perform aspiration abortions. Plaintiffs allege that medical and scientific evidence, including Plaintiffs’ own first-hand experience, and the BON determination establish that RNPs can perform first-trimester aspiration abortions safely, and thus are certainly competent to safely perform tasks ancillary to aspiration abortions.

¹² Judge Daughton denied a motion to dismiss the special laws claim brought in CV2009-029110. (2/17/10 Minute Entry at 1-2.)

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The legislature may not “permit one class of practitioners to do a certain thing, *while prohibiting another class which is equally qualified*, so far as the protection of the public health is concerned, from doing that same thing.” *State v. Borah*, 51 Ariz. 318, 329, 76 P.2d 757, 761 (1938) (emphasis added); *State v. Childs*, 32 Ariz. 222, 232-33, 257 P. 366, 369 (1927); *see also In re Marxus B.*, 199 Ariz. 11, 13, 13 P.3d 290, 292 (App. 2000) (“law must apply equally to those similarly situated who come within its scope”); *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006). Reasonableness of a classification is determined by “whether there is a substantial difference between those within and those without the class.” *State Comp. Fund*, 174 Ariz. at 194, 848 P.2d at 279 (quotation omitted). In ruling on Defendants’ Motions to Dismiss, the Court assumes that the allegations in the Amended Complaint are true and will grant the motions only if Plaintiffs can prove no set of facts that would entitle them to relief on their claim. *Phx. Newspapers, Inc. v. Dep’t of Corrections, State of Ariz.*, 188 Ariz. 237, 242, 934 P.2d 801, 806 (App. 1997). Taking Plaintiffs’ factual allegations as true, the Court finds that Plaintiffs’ Complaint states a claim upon which relief can be granted.

Accordingly, Defendants’ Motions to Dismiss based on failure to state a claim for violation of the constitutional prohibition on special laws.

Dated: June 15, 2011

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.