20 YEARS
CENTER FOR REPRODUCTIVE RIGHTS

Karen Remley, M.D.
State Health Commissioner
Virginia Department of Health
P.O. Box 2448
Richmond, Virginia 23218-2448

VIA U.S. MAIL and E-MAIL

September 5, 2012

Dear Commissioner Remley and Members of the Virginia Board of Health:

We understand that there is some confusion about the Board of Health's authority to adopt 12 Va. Admin. Code § 5-412-370 as amended on June 15, 2012, and that some have argued that Virginia law prohibits the "grandfather" amendment adopted by the Board. These arguments are mistaken. The Board has both the authority and the obligation to enact regulations that promote the public health and are consistent with medical evidence. In the form proposed prior to the June 15 meeting, and proposed again in anticipation of the September 14, 2012, meeting, 12 Va. Admin. Code § 5-412-370 ("Section 370") not only failed to meet that standard, but it also clearly violated the Federal Constitution and decisions of the United States Supreme Court. Plainly, Virginia law cannot provide authority for the Board of Health—or any other state official—to take actions that violate the Federal Constitution.

The Center for Reproductive Rights is a non-profit legal advocacy organization. We work around the world to advance reproductive freedom as a fundamental human right and to ensure that women have meaningful access to high-quality, comprehensive reproductive health care services. In the United States, we have litigated cases in federal and state courts to ensure that governments at all levels do not infringe upon the constitutionally-protected right of women to decide whether and when to bear children. We have successfully litigated several cases to prevent governments from imposing medically inappropriate regulations on abortion providers to the detriment of women seeking abortion care.

We urge the Board to reject or amend the draft of Section 370 on September 14, as it amended the last draft of that section, and to refuse to allow its rulemaking process and authority to be co-opted by those who are so opposed to abortion that they do not respect the Constitutional rights of the women who seek it.

120 Wall Street, 14th Floor
New York, New York 10005
Tel. 917 637 3600 **Fax.** 917 637 3666
www.reproductiverights.org

State Law Cannot Compel the Board of Health to Approve Regulations that Violate the Federal Constitution.

There is no interpretation of either Senate Bill 924 or of Va. Code Ann. § 32.1-127.001 that can authorize a regulation that violates the Constitution of the United States of America.[1] The Federal Constitution is unquestionably the "supreme Law of the Land." Art. VI, U.S. Const.; *see also* Va. Code Ann. § 1-248 (regulations "shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth."). The Constitution—and not state law—is the ultimate authority on the Board's ability to regulate reproductive health care facilities that provide first-trimester abortion care.

States may regulate facilities that provide first-trimester abortion care only to the extent that such regulation does not unduly burden a woman's ability to obtain an abortion. As the Supreme Court has made clear, however, such regulation is only permissible to the extent it is justified by medical evidence. *See City of Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416, 428-30 & nn.11-12 (1983).[2] Most recently, the Supreme Court explained that "as with any medical procedure," states may not impose "*unnecessary* health regulations that present a substantial obstacle to a woman seeking an abortion." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992) (emphasis added). The Court has consistently reaffirmed this core principle over the roughly forty years since it recognized, in *Roe v. Wade*, that the Constitution safeguards women's right to decide whether and when to have children. *See Roe v. Wade*, 410 U.S. 113, 163 (1973) (relying on medical evidence to determine permissible scope of state regulation based on state interest in maternal health); *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (holding that the Constitution was violated by a requirement that all abortions be performed in a licensed, accredited general hospital).

Medical justification is the touchstone for permissible state regulation of abortion. Without it, the Supreme Court has rejected regulations as unconstitutional. For example, the Supreme Court rejected an ordinance that would have subjected providers of second-trimester abortion care to standards designed for general hospitals, because of the total lack of any medical evidence supporting the challenged ordinance. *City of Akron*, 462 U.S. at 438 n.11. It follows logically that there is even less justification for imposing general hospital standards on first-trimester abortion providers than there is for imposing those standards on second-trimester abortions; under the Court's decision in *City of Akron*, such a regulation is plainly

---

[1] It is not correct to interpret Senate Bill 924 and/or Section 32.1-127.001 of the Virginia Code as requiring the Board to require existing health care facilities to comply with burdensome requirements for new construction absent medical justification. Senate Bill 924 requires the Board to promulgate regulations that include "minimum standards" for the construction and maintenance of abortion facilities, and Section 32.1-127.001 directs the Board to establish design and construction standards "consistent with the current edition of the [Guidelines]." The Guidelines, established on a periodic basis by the Facilities Guidelines Institute, specifically state that they are intended for *new construction only*. Without the Board's grandfather amendment, Section 370 is not consistent with the Guidelines and thus is not even consistent with Senate Bill 924 or Section 32.1-127.001.

[2] The holding in *City of Akron* on these points is unaffected by the Supreme Court's subsequent decision in *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992), because, among other things, the *Akron* Court applied a standard virtually identical to the "undue burden" standard later adopted in *Casey*.

unconstitutional.[3] First-trimester abortion is even safer and less complicated than second-trimester abortion.[4] Federal courts have recently prevented states from imposing standards for outpatient surgical hospitals (also referred to as "ambulatory surgical centers") on first-trimester abortion providers in Kansas[5] and Missouri.[6]

Without the grandfather amendment, Section 370 plainly runs afoul of these constitutional standards. With absolutely no medical justification whatsoever, Section 370 imposes standards on the Commonwealth's existing providers of first-trimester abortion care that are *far* more burdensome than the standards currently applied to existing general hospitals or even existing outpatient surgical hospitals. 12 Va. Admin. Code § 5-410-650 (hospitals); *id.* § 5-410-1350 (outpatient surgical hospitals).[7] In other words, Section 370 would force current providers of *first*-trimester abortion to meet stricter physical plant standards than current providers of *second*-trimester abortion in the Commonwealth. Worse yet, the draft permanent regulations for abortion facilities explicitly prohibit a permanent variance that would alleviate the burdens imposed by Section 370; this is a pronounced difference from the variance provisions in the regulations applied to every other regulated health care facility. Thus, not only is Section 370 medically unjustified, it simply makes no sense. There is no legitimate reason to impose unique and extremely onerous new construction standards on health care facilities that have been safely providing quality first-trimester abortion care to Virginia women for almost forty years, especially when *no other existing* entity is required to meet those standards.[8]

Forcing Reproductive Health Care Facilities to Close is Harmful to Women's Health.

Access to abortion care is a core component of women's constitutional rights; as the Supreme Court explained, "the urgent claims of the woman to retain the ultimate control over her destiny and her body [are] claims implicit in the meaning of liberty...." *Casey*, 505 U.S. at 869. Absent the Board's grandfather amendment, Section 370 will impose burdens so heavy that they will unquestionably force some of the Commonwealth's long-standing reproductive health care

---

[3] By contrast, the Supreme Court allowed the Commonwealth of Virginia to regulate providers of *second*-trimester abortion care according to standards for outpatient surgical hospitals—which are not as stringent as the standards for general hospitals—where the medical evidence indicated that the regulations were consistent with leading medical organizations' standards for providing such abortions in an outpatient setting, *and* the regulations allowed waivers of construction standards. *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983).

[4] Abortion is extremely safe: fewer than 0.3% of abortion patients experience a complication that requires hospitalization. *See* Guttmacher Inst., Facts on Induced Abortion in the United States, *available at*: http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited Sept.4, 2012).

[5] *Hodes & Nauser v. Moser*, No. 11-2365-CM (D. Kan. 2011) (enjoining irrational regulations imposed after unfair regulatory process); *see also Hodes & Nauser et al v. Moser*, No. 11C1298, Nov. 10, 2011, (3rd Judicial District Court of Kansas), Order Granting Temporary Restraining Order (this order, in parallel state court proceedings, was later converted to a preliminary injunction at the agreement of the parties).

[6] *Planned Parenthood of Kansas v. Drummond*, 2007 WL 2811407 (W.D. Mo. Sept. 24, 2007) (granting preliminary injunction).

[7] In fact, *no other* regulated health care entity is required to bring an existing facility into compliance with standards for new construction. 12 Va. Admin. Code § 5-371-410 (nursing homes); *id.* § 5-391-440 (hospices).

[8] Surely, if there were some legitimate public health reason to require existing health care facilities to comply with new construction standards, it would be more urgent to apply those standards to the facilities at which more complicated medical procedures are performed than to providers of first-trimester abortion.

facilities to close their doors. The diminishment of access to abortion care will disproportionately harm women in groups that already face significant barriers in accessing health care, such as young women, women without adequate health insurance, rural women, and those who have experienced sexual assault and/or intimate partner violence. Further, Virginia's providers of first-trimester abortion care do much more, in addition: they offer a variety of essential services, including pap smears, breast cancer screening, and contraception. There is no legitimate reason to obstruct women seeking reproductive health care, and countless good reasons not to do so.

We urge you to reject the version of Section 370 that the Department of Health has asked you to approve at the September 14 meeting, and to promulgate regulations that are consistent with constitutional standards as well as the public health.

Sincerely,

Michelle Movahed*
Staff Attorney
Center for Reproductive Rights
mmovahed@reprorights.org

*admitted in New York and Illinois

Jordan Goldberg*
State Advocacy Counsel
Center for Reproductive Rights
jgoldberg@reprorights.org

*admitted in New York and New Jersey

cc: Joe Hilbert
Bruce Edwards
Paul Clements
Kay R. Curling
Eric Deaton
John DeTriquet
James H. Edmondson, Jr.
Steven R. Escobar
H. Anna Jeng
Charles K. Johnson
Bennie Marshall
Mary McCluskey
John W. Seeds
M. Catherine Slusher
Gail Taylor
Amy Vest