IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FALLS CHURCH MEDICAL CENTER, LLC, *et al.*,

Plaintiffs,

v.

M. NORMAN OLIVER, *et al.*,

Defendants.

CASE NO: 3:18-CV-428-HEH

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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CROSS-REFERENCE BETWEEN DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS AND PLAINTIFFS' RESPONSES[1]

Defendants' Statement of Undisputed Material Facts	Disputed by Plaintiffs
1	✓
2	
3	
4	✓
5	✓
6	
7	
8	✓
9	✓
10	✓
11	
12	✓
13	✓
14	✓
15	
16	
17	
18	
19	✓
20	✓
21	
22	
23	

[1] In their Statement of Undisputed Material Facts, ECF 85, Defendants provided bulleted paragraphs, rather than numbered ones. Attached as Exhibit A is an exact copy of Defendants' bulleted Statement of Undisputed Material Facts with numbers inserted. Plaintiffs provide the above chart for reference as to which facts Plaintiffs contest.

24	✓
25	
26	
27	✓
28	✓
29	✓
30	✓
31	
32	
33	✓
34	✓
35	✓
36	✓
37	
38	
39	✓
40	✓
41	✓
42	✓
43	✓

INTRODUCTION

Reaffirming the Constitution's robust protection of the right to abortion, the Supreme Court recently reiterated that under the undue burden test—the standard for over a quarter-century governing laws that would infringe on that right—an abortion restriction can be upheld only if its benefits justify its burdens. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). Defendants' Motion for Partial Summary Judgment fails because they have not identified any undisputed material facts showing that the benefits of the restrictions that Plaintiffs challenge outweigh the burdens they impose. Rather than make such a showing, Defendants propose a different standard, one that runs afoul of Supreme Court precedent.

Aside from advocating the wrong legal standard, Defendants' motion rehashes several of the same unsuccessful arguments rejected at the motion to dismiss stage. Beyond these stale attempts, and without a scintilla of relevant or credible evidence, Defendants assert a panoply of state interests to justify the challenged laws, including regulation of the medical profession, protection of medical ethics, maintenance of medical professional standards, and protecting women's health and safety. Yet Defendants do not, and cannot, demonstrate how the challenged laws *actually* further any of those asserted interests.

In fact, Defendants' witnesses, including their medical expert and the Commissioner of the Virginia Department of Health, concede there is no medical benefit to any of the challenged laws. Plaintiffs, having shown uncontroverted evidence that these laws impose burdens on patients, therefore seek summary judgment on Counts III and IV of the Amended Complaint. *See* ECF 95. Because disputed material facts exist as to the remaining claims on which Defendants move (Counts, I, II, VII, and VIII), those claims should be adjudicated at trial.

RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

1. **Disputed**. Va. Code Ann. § 32.1-127(B)(1) does not on its face *require* any facility to be licensed, including facilities providing five or more first trimester abortions per month.

4. **Disputed**. Virginia League for Planned Parenthood ("VLPP") CEO testified that most hospitals in Virginia do not provide abortions. McElwain Dep. 217:14–20, Ex. B. She did not testify to the *number* of licensed hospitals in the Commonwealth. Further, the record evidence demonstrates that few licensed hospitals in Virginia provide abortions to the general public outside narrow circumstances. Doe Dep. 20:1–3, 38:10–39:14, 100:22–101:2, 209:21–210:1, Ex. C; McElwain Dep. 236:6–13. Indeed, 15 of 20 facilities providing abortions in Virginia in 2016 were licensed abortion facilities. PLAINTIFF-0019181, Ex. D; Myers Decl. ¶ 10 n.2, ECF 99.

5. **Disputed**. Plaintiffs provide numerous examples of specific regulations that are medically unnecessary and burdensome. *See, e.g.*, Codding Dep. 39:8–40:3, 238:15–239:1, Ex. E; Doe Dep. 128:7–14; Nichols Dep. 79:20–80:14, 88:5–89:13, Ex. F; Ramesh Dep. 148:21–149:11, 150:20–151:6, Ex. G.

8, 12. **Disputed**. The physicians who provide abortion care at Falls Church Healthcare Center ("FCHC") and Whole Woman's Health ("WWH") are independent contractors, not employees. Codding Decl. ¶ 11, Ex. H; Miller Dep. 20:7–9, Ex. I.

9. **Disputed.** The cited testimony, Codding Dep. 41:15-42:1, states that sometimes providers reach out wanting to provide abortion care, not that this occurs "often" or frequently.

10, 13. **Disputed**. The cited FCHC testimony explains there is no *waiting list* for abortion appointments at FCHC, not that women do not have to wait for appointments. Codding Dep. 95:16–18; C.T. Dep. 100:1–13, Ex. J. Defendants also ignore that insurance carriers require FCHC to see a patient who calls for an appointment within three days, Codding Dep. 95:22–96:5, and that patients' ability to coordinate one appointment is hard enough; coordinating a second appointment within three days is often impossible, such that they may not be able to come back for a second appointment the next day or within the same week. C.T. Dep. 100:1–13; Miller Dep. 51:10–52:8, 60:16–61:4.

14. **Disputed**. The described services are designed for patients who especially fear disclosure or face significant hurdles, such as the threat of domestic violence, transportation difficulties, or child care needs, and thus require an appointment that takes as little time as possible. Miller Dep. 81:12–82:7, 85:12–86:21.

19. **Disputed**. At VLPP's Hampton facility, more than nine out of ten patients present for primary care. McElwain Dep. 100:11–15.

20. **Disputed**. VLPP's nurse practitioners, registered nurses, and licensed practical nurses provide services not *only* to "its many family medicine patients" but also to abortion patients, such as pre- and post-abortion care. Ramesh Dep. 25:15–28:19. Plaintiffs also dispute that this "allows VLPP's four physicians to devote most of their time to performing first and second trimester abortions." Defs.' Mem. S.J. ("Defs. SJ") 10. Only one of VLPP's physicians focuses primarily on abortion care and that physician only works at VLPP two days per week. McElwain Decl. ¶ 8, Ex. K.

24. **Disputed**. While VLPP has hired an additional physician whom it expects will join the Virginia Beach health center in July, it currently has only one dedicated physician at that location. McElwain Dep. 28:2–6, 192:9–193:9.

27. **Disputed**. WWH, FCHC, and VLPP's Richmond and Hampton facilities are only classified as "a category of hospital" for purposes of VBH regulation under Va. Code Ann. § 32.1-127(B)(1).

28. **Disputed**. Plaintiffs' exposure to criminal liability under Va. Code Ann. § 18.2-71 is a legal conclusion, not a fact to dispute. Plaintiffs' Response to Interrogatory No. 12 addressed criminal prosecutions by the Defendant Commonwealth Attorneys *only*, Defs. SJ, Ex. 7, 31, and does not support Defendants' claim that no clinic has been criminally prosecuted in Virginia.

29. **Disputed**. Substantial record evidence shows that both the individual regulations and the regulatory scheme as a whole impose significant burdens. *See, e.g.*, Doe Dep. 128:7–14; Codding Dep. 238:5–239:1; Nichols Dep. 88:5–89:13; Ramesh Dep. 144:7–145:22, 146:22–148:4, 150:18–151:6; Turan Dep. 60:9–21, 68:17–22, Ex. L; McElwain Dep. 49:21–50:12, 52:21–60:14, 160:22–162:16, 163:12–164:3.

30. **Disputed**. Defendants have repeatedly failed to demonstrate how any of the laws and regulations challenged in this case advances the purported state interests. Defs. SJ, Ex. 9, 7–20.

33. **Disputed.** FCHC does not welcome VDH inspections; the purpose of FCHC's staff trainings is to help the staff cope with a tense, punitive situation. Codding Decl. ¶ 7.

34, 35. **Disputed**. McElwain testified that VDH inspectors have tried to begin their inspection immediately, in violation of a Licensing Regulation. These situations have required "intervention by [McElwain] or a senior staff member to explain the law to [inspectors], that we have a certain number of hours before the inspection begins." The inspectors have then tried to "convince the staff that's not true," and to prove it was correct VLPP has had to "show them the regulations every time." McElwain Dep. 123:19–124:6. On at least one occasion, inspectors refused to wait until an administrator arrived, in violation of the regulations then in effect. McElwain Decl. ¶ 5.

36. **Disputed**. None of the citations on which Defendants rely support the voluntariness of Plaintiffs' consent. McElwain Dep. 123:19–124:6 (description of inspector arrival and having to tell inspectors they are not entitled to immediate entry without an administrator on site); Codding Dep. 51:7–11 (testifying she is "aware" of the regulation for right of entry after being presented with the statute); Miller Dep. 97:14–98:1 (describing that the clinic maintains staff trained to address compliance with Virginia statutes).

39. **Disputed**. The deposition testimony Defendants cite merely acknowledges that Plaintiff clinics have been surveyed or inspected by organizations including National Abortion Federation ("NAF") and Planned Parenthood Federation of America ("PPFA"), specialists in abortion care.

40, 41. **Disputed**. The record describes significant differences between NAF and PPFA surveys and VDH inspections. *See, e.g.*, Codding Dep. 110:1–111:9, 120:9–15, 121:5–16; McElwain Dep. 106:20–107:22, 164:10–165:7.

42, 43. **Disputed**. VDH inspectors do not obtain "written" permission "every" time they observe patient care, as reflected in the record, see Miller Decl. ¶¶ 7–8, Ex. M; Defs. SJ, Ex. 8, 299, ECF 85-6, and the passages Defendants cite do not support this proposition.

PLAINTIFFS' STATEMENT OF ADDITIONAL FACTS

Physician-Only Law

1. Abortion is one of the safest medical procedures available; complication rates are especially low for medication and aspiration abortion, and are equally low whether performed by a trained and qualified advanced practice clinician ("APC") or by a physician. Nichols Decl. ¶¶ 14, 20, 21, 62–65, ECF 96; Spetz Decl. ¶¶ 56–61, ECF 97; Nat'l Acads. of Sci., Eng'g & Med., *The Safety and Quality of Abortion Care in the United States* (2018), ("Nat'l Acads. Report"), PLAINTIFF-0069997–70197, Ex. N.

2. Complications from medication abortion occur only after patients leave the clinic, because patients complete the procedure at home. Nichols Decl. ¶ 37; Nat'l Acads. Report, at 56–57.

3. Dr. Lunsford acknowledged that complication management is learned by seeing "a volume of patients," and that APCs "get a lot of on-the-job training." Lunsford Dep. 311:1–14, Ex. O. Thus, while APCs would require "on-the-job training and oversight," before they could provide abortion, she "had no reason to believe" that unqualified APCs would offer abortion care. *Id*. 310:2–20; 312:8–19.

4. Dr. Lunsford speculated that APCs "probably haven't seen" sufficient abortion patients or complications, Lunsford Dep. 311:1–7, but some APCs in Virginia who have been trained to evaluate and treat complications are doing so currently, Ramesh Dep. 23:22–24:22, 33:7–21; Lunsford Dep. 71:13–22, 72:15–19, 76:13–17, 308:15–309:2.

5. VLPP and FCHC each have four physicians but none that is full-time and solely dedicated to abortion care. McElwain Dep. 29:19–37:1; Codding Dep. 29:21–30:3; 39:3–17.

6. VLPP's Hampton location is staffed by five nurse practitioners and no physicians. McElwain Dep. 26:19–21, 38:8–11; Ramesh Dep. 64:11–13. VLPP also employs APCs at its health centers in Richmond and Virginia Beach. McElwain Decl. ¶ 9.

7. VLPP lost a highly trained APC because she wanted to practice in a state that allowed her to provide abortion care. McElwain Decl. ¶ 9.

8. Because of the Physician-Only Law, the Hampton health center can offer only medication abortion, not aspiration abortion, and only extremely intermittently, by telemedicine, when staff can coordinate the limited availability of a remote physician with that of an on-site nurse practitioner. McElwain Dep. 24:22–25:14, 26:13–27:2; Ramesh Dep. 184:6–16, 199:10–200:4.

9. Without the Physician-Only Law, patients in the Tidewater area could consistently access both medication and aspiration abortion at VLPP's Hampton health center. Ramesh Dep. 183:15–184:20, 199:10–200:4; McElwain Decl. ¶ 9. These patients would be spared the stress, logistical

burdens, and delay of having to travel outside of their communities for that care. Ramesh Dep. 186:13–20.

10. Patients are not always able to take the second appointment time that is offered, and are "[n]ot infrequently" delayed a week because of limited appointment availability. McElwain Dep. 234:13–235:11.

11. WWH contracts with one part-time physician who provides abortions on Tuesdays, Thursdays, and some Saturdays. Defs. SJ 9; Doe Dep. 13:22–14:4. WWH cannot offer abortions except on the three days a week that Dr. Doe is able to provide them, even though WWH is open five days a week and every other Saturday. Miller Dep. 14:14–15:9.

12. But for the Physician-Only Law, WWH would hire an APC to offer abortion services on additional days. Miller Decl. ¶ 9; Pls.' Objs. & Resp. to Defs.' Interrog. 1 ("Pls. Interrog. 1"), ECF 101–11.

13. FCHC currently trains APCs in miscarriage management techniques that are identical to early abortion. Some of these APCs move out of Virginia so they can provide abortion care. Codding Decl. ¶¶ 9–10. Two of the APCs FCHC trained intended to join FCHC's staff. However, because these clinicians cannot provide any abortion care, FCHC could not offer them full-time positions, and they did not join the FCHC staff. *Id.* ¶ 10.

14. FCHC would hire one full- or two part-time APCs to provide abortion care within their gynecology practice and scope of training at least four days a week. FCHC does not currently employ any clinicians full-time. Codding Decl. ¶ 11. If able to hire an APC to provide abortion care, the clinic could offer additional hours on Monday afternoon, Tuesday morning, Friday morning and Saturdays. *Id*.

Hospital Requirement

15. Per VDH, a facility is not a "hospital" until VDH licenses it as one. Hilbert Dep. 143:4–16, Ex. P.

16. Defendants interpret the term "surgery," *see* Va. Code Ann. § 54.1-2400.01:1, which includes "incision or cutting" but not "the scraping or brushing of live tissue," to exclude all forms of first and second-trimester abortion care, which involve no incisions or cuts. Oliver Dep. 143:9–144:8, Ex. Q.

17. Plaintiffs have historically understood the Hospital Requirement to prohibit them from providing second-trimester abortions in their licensed facilities. *See, e.g.*, Codding Dep. 26:22–27:3; Dr. Doe Dep. 219:6–12; McElwain Dep. 216:22–217:4.

18. Defendants admit the Hospital Requirement provides no medical benefits. Oliver Dep. 176:4–7, 201:20–202:1.

Licensing Statute and Regulations

19. VDH admits that it does not have authority to license physician's offices, Hilbert Dep. 129:1–14, 130:11–14; only regulates abortion providers because it is required by statute, *id*. 170:16–17; and does "not have the authority to regulate any other type of physician office which may perform any manner of surgical procedures," *id*. at 170:18–21.

20. The Licensing Statute was passed pursuant to a nationwide strategy to enact laws purported to protect health, but in fact intended to cut off access to legal abortion care. Haugeberg Decl. ¶¶ 16, 76–80, Ex. R; Oliver Dep. 132:3–133:9, 135:18–136:1; Bodin Dep. 244:10–22, Ex. S.

21. Defendants admit that first-trimester abortion care was safely provided in unlicensed physician's offices in Virginia both before and after the Licensing Statute was enacted in 2011, and no public health emergency or evidence-based threat to health or safety existed. Oliver Dep. 176:1–7, 185:14–186:19; Hilbert Dep. 145:18–146:1, 162:16–164:20, 169:9–20; Bodin Dep. 127:1–128:13, 153:12–154:2; *see also* Edmondson Dep. 64:2–3, Ex. T; Levine Dep. 100:4–22, 104:3–20, 107:3–12, 202:12–204:14, Ex. U.

22. The Virginia Board of Medicine ("VBM"), Board of Nursing ("VBN"), Board of Pharmacy ("VBP") and the Virginia Department of Health Professions ("VDHP") extensively regulate all physicians and licensed healthcare professionals involved in the provision of abortion care, including through professional licensure, disciplinary processes, office-based anesthesia regulations, and on-site complaint investigations. Va. Code Ann. 54.1-2506; 18 VAC § 85-20-320; Oliver Dep. 211:11–214:16.

23. Months before the Licensing Statute was passed, a VBM *ad hoc* committee concluded that no further regulation beyond the existing office-based anesthesia regulations was necessary to ensure the safety of office-based surgical procedures in Virginia—including invasive plastic surgery procedures riskier than abortion. Dec. 2010 Min. Bd. of Med. Ad Hoc Comm. Office-Based Surgery, PLAINTIFF-0088870-97, Ex. V; Harp Dep. 95:19–96:10, Ex. W (noting that VBM only received about one complaint every two years about an abortion provider).

24. First-trimester abortion care is the only medical procedure for which Defendants promulgate and enforce regulations based on the number of and particular procedures performed. Oliver Dep. 176:1–7, 179:2–9, 202:2–6; Hilbert Dep. 144:3–8; Harp Dep. 94:7–95:18; Edmondson Dep. 64:2–3.

25. The number of facilities providing abortion care in Virginia has shrunk from 41 in 2009 to 20 in 2016. *See* PLAINTIFF-0019158, Ex. X; PLAINTIFF-0019181.

26. Unnecessary regulatory schemes artificially cause abortion providers to specialize and cluster in urban areas, despite economic theory predicting that they would distribute across the state similarly to primary care services. Myers Dep. 142:16–22, 146:16–20, 147:10–20, 174:5–11, Ex. Y.

27. Medically unnecessary and duplicative laws contribute to the "exceptionality" of abortion and convey the message that abortion is unique and different from other medical services, perpetuating perceptions that abortion is "morally wrong," and labeling women who have abortions as deviating from appropriate behavior. Turan Decl. ¶¶ 35, 40, ECF 100; Ramesh Dep. 45:17–46:9. The resulting stigma harms both patients and providers. Turan Decl. ¶ 36; Ramesh Dep. 47:17–48:8, 200:14–204:9.

28. Stigma directly impacts abortion access. Patients fear asking their doctors whether they provide abortion care or where abortion is available. Doe Dep. 98:18–99:3. Medical personnel are reluctant

to work at abortion clinics for a variety of reasons, Ramesh Dep. 45:3–11, 194:20–195:6, and because they fear protesters and judgment from their other employers, which creates clinic staffing difficulties, Codding Dep. 107:1–5, 109:10–16; Ramesh Dep. 195:6–196:14.

29. The Licensing Regulations have been subject to political interference since their inception, Hilbert Dep. 419:14–420:9; Bodin Dep. 244:10–22, fulfilling the improper purpose of the Licensing Statute. *See generally* Haugeberg Decl. ¶¶ 17, 89.

30. The Licensing Regulations are not necessary for the safe provision of abortion in Virginia. Nichols Dep. 41:3–16, 79:20–80:14, 88:5–89:13, 147:18–148:2; Oliver Dep. 168:2–171:8, 174:5–176:18.

31. The Licensing Regulations disrupt patient care by requiring unannounced inspections with observation of procedures, Codding Dep. 52:2–16; Miller Dep. 118:15–119:18, 121:2–124:9, 126:3–19; Doe Dep. 128:7–14; C.T. Dep. 126:14–129:2; Ramesh Dep. 146:22–147:11; McElwain Dep. 49:21–50:12, 141:17–142:12; imposing unnecessary medical standards that impede healthcare providers' professional discretion, Nichols Dep. 32:8–16; C.T. Dep. 181:9–182:6; through extensive and unnecessary paperwork requirements that reduce time for patient care, Codding Dep. 238:5–239:1; Nichols Dep. 88:5–89:13; increasing or even doubling the amount of time a provider must spend going over paperwork with a patient, Doe Dep. 205:10–18; and creating a hyper-regulated environment discouraging providers from providing abortion care, Myers Decl. ¶ 23; Codding Dep. 85:7–87:12; Haugeberg Decl. ¶¶ 81–82; McElwain Dep. 52:21–60:1.

32. If a facility violates one provision of the Licensing Regulations, it automatically violates two other provisions that require compliance with the whole regulatory scheme. Bodin Dep. 272:21–273:19.

33. Significant evidence shows that the challenged laws burden the right to abortion in Virginia. *See*, *e.g.*, Myers Dep. 15:14–21, 169:14–17, 194:11–19; Ramesh Dep. 45:20–46:9, 47:17–48:8, 49:13–51:11, 180:6–183:5; C.T. Dep. 150:14–22.

Fourth Amendment

34. Plaintiffs do not refuse entry to VDH inspectors because it is their understanding that if they do, VDH can immediately suspend or revoke their license. Codding Decl. ¶¶ 4–7, Miller Decl. ¶¶ 4–6, McElwain Decl. ¶¶ 4–7. Plaintiffs consent to these inspections only because they feel coerced to do so. *Id*. FCHC does not welcome the inspections. Codding Decl. ¶¶ 4–7.

35. VDH and OLC officials testified that they do not request or obtain consent or permission to enter and inspect licensed abortion facilities, nor do they believe they need to do so. *See, e.g.*, Hilbert Dep. 394:16–395:9; Marion Dep. 64:21–65:13, Ex. Z.

36. To WWH's knowledge, VDH inspectors observed procedures at WWH's Charlottesville facility without securing the patient's written permission. Defs. SJ, Ex. 8, 299; Miller Decl. ¶¶ 7–8.

37. NAF and PPFA surveys of Plaintiffs' facilities minimize disruption to patient care, are conducted by experts in abortion care, and are designed to improve patient care. Codding Dep. 110:1–111:9, 120:9–15, 121:5–16; McElwain Dep. 106:20–107:22, 164:10–165:7.

ARGUMENT

Summary judgment is proper only if no genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A "genuine" issue concerning a "material" fact only arises when the evidence, viewed in the light most favorable to the nonmoving party, is sufficient to allow a reasonable jury to return a verdict in the moving party's favor. *Id*. at 248–49.

I. The Supreme Court's Undue Burden Test Applies

For over twenty-five years, the Supreme Court has held that a law restricting abortion imposes an undue burden and is unconstitutional if the "'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion'" prior to viability. *Whole Woman's Health*, 136 S. Ct. at 2300 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992)). As the Supreme Court recently explained, the undue burden analysis requires a court to evaluate whether an abortion restriction furthers the state's asserted interests, and to balance any demonstrated benefits against the burdens the law imposes. *Id.* at 2309. Under this straightforward balancing, a law fails the undue burden test if it does not confer "benefits sufficient to justify the burdens upon access." *Id.* at 2300. By definition, a law that fails the undue burden test is a substantial obstacle. *Casey*, 505 U.S. at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").

Because of the "constitutionally protected personal liberty" interest at stake, the undue burden standard demands close judicial scrutiny of the state's asserted justifications. *Whole Woman's Health*, 136 S. Ct. at 2309. A court must not uncritically defer to the state's articulation of its interest, but rather must review credible and reliable evidence to determine whether a restriction actually furthers a valid interest and confers benefits that outweigh its burdens. *Id.* at 2309–10. When a state asserts that a law benefits health or safety, the "existence or nonexistence

of medical benefits" is central to the analysis. *Id.* at 2309. As this Court previously stated, "[t]his precept [should] guide the Court's analysis." MTD Op. 11, ECF 52.

Defendants now ask this Court to adopt a standard that diverges from *Whole Woman's Health* and would find an abortion restriction unconstitutional "only if the law's *articulated* benefits are *substantially outweighed* by the alleged burdens it imposes." *See* Defs. SJ 3 (emphasis added). Their proposed standard defies Supreme Court precedent, not only by inserting the adverb "substantially" into the undue burden balancing test, but also by requiring courts to credit a state's mere articulation of benefits, even if record evidence does not support their validity. Essentially, Defendants argue for the very "rational basis" test that the Supreme Court has already rejected. *Whole Woman's Health*, 136 S. Ct. at 2309 (it "is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty" with rational basis review).[2]

Defendants invoke opinions from the Fifth and Eighth Circuits for their proposed "substantially outweigh" test. But neither case is binding on this Court, and indeed, their precedential value is dubious: the mandate has been stayed in the Fifth Circuit case, and the Eight Circuit language that Defendants cite was speculative dicta. After the Fifth Circuit upheld a law identical to the one the Supreme Court struck down just two years before in *Whole Woman's Health* in *June Medical Services v. Gee*, 905 F.3d 787 (5th Cir. 2018), the Supreme Court recently granted an emergency request to stay the Fifth Circuit's mandate pending plaintiffs' petition for certiorari. *See* 586 U.S. ___, 139 S. Ct. 663 (2019).[3] The case therefore has little to no precedential value.

[2] Indeed, one of the dissents in *Whole Woman's Health* faulted the majority for *rejecting* a standard that would turn on whether a law "substantially impedes" access to abortion, instead of balancing burdens against benefits. 136 S. Ct. at 2324–26 (Thomas, J., dissenting).

[3] Such stays are rare and granted only where the applicant has shown there is "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

And the Eighth Circuit's opinion merely described *Whole Woman's Health* as invalidating a law whose "numerous burdens substantially outweigh[ed] its benefits." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 958 (8th Cir. 2017). On that basis, the *Jegley* panel speculated in a footnote that a "substantially outweigh" test may apply to the challenge at hand should it reach the merits, which it did not. *Id.* at 960 n.9 (using "substantially outweigh" in dicta). Nowhere in the Supreme Court's jurisprudence does that standard appear.

Defendants are also incorrect that the undue burden standard demands evidence of "specific women" who are impacted by abortion restrictions. Defs. SJ 11, 27. The Supreme Court has never required such evidence, including in *Whole Woman's Health*. The undue burden analysis recognizes a range of types of evidence, and places particular weight on credible expert analysis. *Whole Woman's Health*, 136 S. Ct. at 2301–03. Reference to individual women is neither necessary nor sufficient to determine whether a law's burdens outweigh its benefits, a determination that must rest on the totality of reliable evidence, not individual anecdote.

II. The Physician-Only Law Does Not Survive Balancing Under the Undue Burden Test

As this Court noted, *Mazurek v. Armstrong*, 520 U.S. 968 (1997) upheld a physician-only requirement because the Court found in that case found no improper *purpose*, based on a starkly different evidentiary record, and without considering whether such a restriction would have the *effect* of imposing a substantial obstacle to abortion access. *See* MTD Op. 17–19. *Mazurek* does not cut against *Casey* and *Whole Woman's Health*, which require a case-specific, evidence-based assessment of whether Virginia's Physician-Only Law places burdens on abortion access that exceed its benefits. *See Whole Woman's Health*, 136 S. Ct. at 2309. The record here, as detailed in Plaintiffs' Motion for Partial Summary Judgment and summarized below, demonstrates concrete, uncontroverted burdens on abortion access with no evidence that the law is justified by any benefits. ECF 95. Defendants' invitation to adopt a legal standard in which burdens must

"substantially outweigh" benefits to render a law unconstitutional—and their failure to argue that the law would survive under the *actual* undue burden test—reinforces that the Physician-Only Law fails on the undisputed facts.

A. It Is Undisputed that the Physician-Only Law Confers No Benefits

Defendants contend that there is "undisputed evidence that the physician-only requirement provides benefits to Virginia women," Defs. SJ 11, but include no facts supporting that assertion. This is because there are none. In fact, the law's lack of benefits is uncontested. *See* Pls.' Mem. Partial S.J. ("Pls. SJ") ¶¶ 7–15; *see* Nat'l Acads. Report 102–05, 165. Critically, Defendants' own medical expert concedes there is "no medical reason why [advanced practice clinicians or APCs] couldn't be trained" to safely provide medication and aspiration abortion in Virginia, as they already do in other states, Lunsford Dep. 310:2–20, 311:15–19, and that APCs in Virginia already provide medical services comparable or identical to abortion in technique and risk, *id.* 71:13–22, 72:15–19, 76:13–17, 308:15–309:2. It is likewise uncontested that abortion is one of the safest medical procedures available, and complication rates are especially low for medication and aspiration abortion, and equally low whether performed by a qualified APC or by a physician. Nichols Decl. ¶¶ 14, 20, 21, 62–65, ECF 96; *cf*. Spetz Decl. ¶¶ 56–61, ECF 97.

Defendants admit as much but contend that they have met their burden based solely on Dr. Lunsford's speculation that physicians might have more experience managing complications. Defs. SJ 11. But it is uncontested that APCs at some of Plaintiffs' facilities are *already* trained to evaluate and treat abortion complications *and are already lawfully doing so*. *See* Ramesh Dep. 23:22–24:22, 33:7–21 (nurse practitioners at VLPP "see our patients for medication abortion follow-up, any complications the patient may be experiencing," and those nurse practitioners have been

specifically trained and credentialed to provide that care).[4] Similarly, Dr. Lunsford admitted that she herself works with APCs who perform procedures comparable to aspiration abortion, and that these APCs are fully capable of recognizing complications and consulting her as needed. Lunsford Dep. 311:1–14. She also acknowledged that complication management is learned by seeing "a volume of patients," and that APCs "get a lot of on-the-job training." *Id.* 311:1–4. Accordingly, while she speculated that APCs might require "on-the-job training and oversight" before they could provide abortion care (compared with a physician who *may have* learned to manage abortion complications in residency), she "had no reason to believe" that, even absent the Physician-Only Law, APCs would offer abortion care in Virginia unless they were trained and qualified to do so. *Id.* 312:8–19.

Taken together, the medical benefit Defendants assert—far from being "undisputed"—is nothing more than empty speculation that extensive record evidence contradicts. For this reason alone, the Court should deny their summary judgment motion as to Count IV.

B. Plaintiffs Have Demonstrated Significant Undisputed Burdens

Record evidence contradicts Defendants' contention that the "undisputed facts demonstrate that Virginia's physician-only requirement imposes no impediment to the abortion care provided by Plaintiffs." Defs. SJ 8. Plaintiffs' undisputed facts show that because they cannot employ qualified APCs to provide abortion care, Plaintiffs must limit where and when abortion care is available. *See* Pls. SJ ¶¶ 24–25. VLPP's Hampton location is staffed by five nurse practitioners and no physicians. McElwain Dep. 26:19–21, 38:8–11; Ramesh Dep. 64:11–13. Because of the

[4] Complications from medication abortion occur only after patients leave the clinic, because patients complete the procedure at home. Nichols Decl. ¶ 37; Nat'l Acads. Report at 56–57. When those complications occur, the Physician-Only Law does not require that they be managed by physicians. Accordingly, Defendants have not even offered a theory by which the Physician-Only Law provides any benefit in the context of medication abortion.

Physician-Only Law, the Hampton health center can offer only medication abortion, not aspiration abortion, and can provide this care only intermittently, by telemedicine, when staff are able to coordinate the limited availability of a remote physician with that of an on-site nurse practitioner. McElwain Dep. 24:22–25:14, 26:13–27:2; Ramesh Dep. 184:6–20, 199:10–200:4.

Without the Physician-Only Law, patients in the Tidewater area could consistently access both medication and aspiration abortion at the Hampton health center. Ramesh Dep. 183:15–184:20, 199:10–200:4. These patients would be spared the stress, logistical burdens, and delay of having to travel outside of their communities for that care. *Id.* 186:13–20. More patients could access medication abortion (which is only available in the earliest weeks of pregnancy). *Id.* 199:21–200:4; McElwain Decl. ¶ 9. VLPP also employs APCs at its health centers in Richmond and Virginia Beach; if they were permitted to provide early abortion care, patients at these centers would have more scheduling options and be less likely to be rescheduled and delayed when physicians become sick or otherwise unavailable. *Id*.

In addition to ignoring these facts, Defendants downplay the harmful effects of the Physician-Only Law by overstating Plaintiffs' physician capacity. VLPP and FCHC each have four physicians but none that is full-time and solely dedicated to abortion care. McElwain Dep. 29:19–37:1; Codding Dep. 29:21–30:3, 39:3–17. WWH contracts with one part-time physician, Dr. Doe, who provides abortions on Tuesdays, Thursdays, and some Saturdays. Defs. SJ 9; Doe Dep. 13:22–14:4. WWH cannot offer abortion care except on the three days that Dr. Doe is there, even though the clinic is open five days a week and every other Saturday. Miller Dep. 14:14–15:9. But for the Physician-Only Law, Plaintiffs would hire APCs to provide abortion and other health care on additional days, and could better serve patients by increasing appointment availability. Pls. Interrog. 1; Codding Decl. ¶ 11; Miller Decl. ¶ 9.

While acknowledging that VLPP employs several APCs (who could provide abortion care but for the Physician-Only Law), Defendants call into question whether the other Plaintiffs could hire APCs and train them to provide abortion care. But FCHC currently trains APCs in miscarriage management techniques that are identical to early abortion. Codding Decl. ¶ 9. Two APCs recently trained at FCHC, and would have joined FCHC's staff but for the Physician-Only Law. *Id*. ¶ 10. Similarly, VLPP lost a highly trained APC because she wanted to practice in a state that allowed her to provide abortion care. McElwain Decl. ¶ 9. Thus, it is undisputed that the Physician-Only Law significantly restricts the pool of clinicians available to provide abortion care in Virginia, thereby limiting the times and locations where patients can access care.

Defendants have not contested Plaintiffs' expert evidence that limitations on locations, days, and times of abortion availability that stem from the Physician-Only Law impose burdens and harms on patients—delaying care and likely preventing some patients from ever accessing abortion, and imposing financial strain, loss of medical options, medical risk and other harms on patients. *See* Pls. SJ ¶¶ 34–45. Rather than address these burdens or explain why they are justified under the undue burden balancing test, Defendants merely note that Plaintiffs generally are able to *offer* patients *some* appointment time when they call, as opposed to automatically placing them on a waiting list. Defs. SJ 8–10. But this misses the point. Women with low incomes often are unable to fit into such limited time slots because they are juggling severe constraints related to transportation, childcare, and work, *see* Pls. SJ 34-42; *see also* McElwain Dep. 234:13-235:11 (patients "[n]ot infrequently" pushed past a week because of limited appointment times). And if APCs were permitted to provide care, Plaintiffs would have far more capacity to meet these women's needs in a timely way.

III. The Hospital Requirement Fails the Undue Burden Standard and This Court has Already Found that Plaintiffs Have Standing to Challenge It

Defendants provide no material facts to support moving for summary judgment as to the Hospital Requirement, Va. Code Ann. § 18.2-73. Notably, they do not even argue that this requirement would survive the undue burden standard—which it indisputably would not. Pls. SJ. 19–26. Defendants instead rehash the standing argument that this Court properly rejected in their motion to dismiss—which focuses on the Hospital Requirement's statutory basis while ignoring related regulatory restrictions—or else inexplicably ask this Court to rewrite the statute.

A. Defendants Provide No Argument Whatsoever as to Whether the Hospital Requirement Survives the Undue Burden Standard

The undisputed facts, detailed in Plaintiffs' brief in support of their Motion for Partial Summary Judgment, show how the Hospital Requirement severely limits where and when second-trimester abortion care is available in Virginia, and that reduced access harms patients. *See* Pls. SJ 12–14. Defendants admit the statute provides no medical benefits. Oliver Dep. 176:4–7, 201:20–202:1. Because they fail to dispute any material facts (or put forth any defense on the merits at all) to demonstrate how the Hospital Requirement survives constitutional scrutiny under the undue burden test, Defendants' motion should be denied—and Plaintiffs' motion should be granted—as to Count III.

B. Whether the Hospital Requirement Is Vague Is Factually Disputed

A law is impermissibly vague if it "fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement." *Johnson v. United States,* 135 S. Ct. 2551, 2556 (2015). This is especially true where uncertainty "threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). The Hospital Requirement, a strict liability penal statute, suffers from this constitutional defect. Defendants argue that, under Virginia law, licensed abortion

clinics are clearly "hospitals" for purposes of the Hospital Requirement. Not so. They ignore that the statutory definition of "hospital" exempts first-trimester abortion clinics, that VDH has *not* historically treated abortion clinics as a type of hospital, and that Defendants' subsequent litigation position has compounded the disputed facts as to Count VII.

First, Virginia has a broad statutory definition of "hospital" which includes "any facility . . . in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including . . . outpatient surgical [hospitals.]"[5] Va. Code Ann. § 32.1-123. But Virginia law has long exempted from this definition any "office of one or more physicians" not "used principally for performing surgery." *Id.* § 32.1-124(v). Thus, for decades, medical offices providing first-trimester abortion care were explicitly excluded from any hospital licensing statutes and regulations unless VDH had determined the office was used principally for surgery. And the term "surgery" was statutorily defined in 2012 to include "incision or cutting," but not "scraping or brushing of live tissue." Va. Code Ann. § 54.1-2400.01:1(A). This definition excludes all forms of first and second-trimester abortion care, which involves no incisions or cuts. Oliver Dep. 143:9–144:8.

Second, the history of how abortion facilities have been regulated only compounds the Hospital Requirement's ambiguity. Beginning in 2011, facilities providing five or more first-trimester abortions per month were singled out as a "category of 'hospital'" *for the limited purpose* of one paragraph of one statute, which instructed VBH to promulgate regulations setting minimum

[5] The definition of "outpatient surgical hospital" in the Hospital Regulations, 12 VAC § 5-410 *et seq.*, explicitly included "outpatient abortion clinics" until 2011; however, the Hospital Regulations were not enforced against any physician's office providing first-trimester abortion care. *See Simopoulos v. Virginia*, 462 U.S. 506, 514 n.8 (1983).

facility standards.[6] *Id*. § 32.1-127(B)(1). Yet these facilities are *not* classified as a "category of 'hospital'" for the purposes of the statute mandating hospital licensure, *id*. §§ 32.1-126(A), -136, or in any other statute in the Code.[7] Instead of licensing first-trimester abortion facilities as "hospitals," VBH used its authority under Virginia Code § 32.1-12 to create a new category of licensure specifically for "abortion facilities," 29 Va. Reg. Regs. 2329–41 (May 20, 2013), and to remove the term "outpatient abortion clinics" from the Hospital Regulations, *id.* at 29–30. The Licensing Statute thus gave Defendants authority to *regulate* Plaintiffs' facilities "as a category of hospital" Defendants chose to *license* them as "abortion facilities." *Id*.

Third, Defendants' current interpretation—revealed for the first time in response to this lawsuit—compounds the Hospital Requirement's vagueness. Plaintiffs believe the provision of second-trimester abortion care in their facilities would incur criminal penalties. *See* Codding Dep. 26:22–27:3; Dr. Doe Dep. 219:6–12; McElwain Dep. 216:22–217:4. Defendants now say otherwise, contradicting how they have enforced the statute since its inception while offering no assurances that neither they nor their successors will prosecute those who provide second-trimester abortions in a licensed abortion facility for violating the Hospital Requirement (a penal statute without a scienter requirement). This is the precise definition of an unconstitutionally vague criminal law. *Colautti v. Franklin*, 439 U.S. 379, 394–97 (1979).

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[6] The Licensing Statute, challenged in this lawsuit, states: "*For purposes of this paragraph*, facilities in which five or more first trimester abortions per month are performed shall be classified as a category of 'hospital.'" Va. Code Ann. § 32.1-127(B)(1) (emphasis added). This classification does not apply to Va. Code Ann. § 32.1-127(B)(3), which authorizes VBH to provide for hospitals to be licensed "by type or specialty of service."

[7] Adding to the confusion, there are at least three categories of hospitals in Virginia: general, special, and outpatient surgical hospitals, each of which is subject to specific licensing and Certificate of Public Need requirements. 12 VAC § 5-410 *et seq.*; Va. Code Ann. § 32.1-102.1. Licensed "abortion facilities" are exempt from those requirements.

In sum, the shifting meaning of the term "hospital," the licensure status of "abortion facilities," and Defendants' newly announced position, make it impossible for Plaintiffs and other abortion providers to "know what is prohibited" under the Hospital Requirement, *Johnson*, 135 S. Ct. at 2556–57, heightening the possibility of "arbitrary and discriminatory" enforcement, *id.* A genuine issue of material fact exists as to whether the Hospital Requirement is unconstitutionally vague, and Defendants are not entitled to summary judgment on Count VII.

C. No New Evidence Merits Reconsideration of Plaintiffs' Standing to Challenge the Hospital Requirement

This Court already rejected Defendants' standing challenge as to the Hospital Requirement. MTD Op. 9–10. Yet Defendants again contend that Plaintiffs face no risk of prosecution because Defendants have chosen, in response to this litigation, to stop enforcing the penalties against licensed abortion facilities should they provide care after 13 weeks and 6 days LMP. Defs. SJ. 20–21. Absent a court order or declaratory judgment enforcing Defendants' new interpretation of the term "hospital," Defendants or their successors could still prosecute Plaintiffs, including Dr. Doe, "for violating the statute as broadly construed, because the enforcement of the statute would not have been enjoined." *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268, 270 (4th Cir. 1998). Moreover, Defendants concede that Plaintiffs are independently barred by *regulation* (as a condition of licensure) from providing second-trimester abortion in their licensed abortion facilities, and offer no argument as to why Plaintiffs would lack standing to challenge this regulatory restriction. Defs. SJ at 13.

Further, Plaintiffs remain subject to actual and imminent injuries even if Defendants stop enforcing the regulatory prohibition on second-trimester abortion care in licensed "abortion facilities." Plaintiffs must comply with the Licensing Regulations to avoid criminal prosecution under the Hospital Requirement, and compliance is injurious whether they are providing first- or

second-trimester abortions. MTD Op. 7–10. Defendants' renewed request to dismiss Count III for lack of standing should be denied.

D. The Court Should Decline Defendants' Invitation to Rewrite the Hospital Requirement Statute

Defendants ask the Court to rewrite the Hospital Requirement ostensibly to comply with *Casey*, which overruled *Roe*'s trimester framework. Defs. SJ 21–22. Far from "narrowing" the restriction, Defendants' proposal would criminalize all abortions provided between viability and the third trimester,[8] as those procedures would no longer fall within any statutory exception from felony penalties. Thus, post-viability second-trimester abortion could not be provided in a Virginia hospital or anywhere else—even if necessary to protect the woman's health.[9] For that reason alone, Defendants' proposal fails.

Defendants also fail to identify how replacing "third trimester" with "viability" would render the Hospital Requirement constitutional under *Whole Woman's Health*. They offer no analysis of undue burden balancing under their proposed rewrite, let alone evidence that the benefits of a rewritten law would outweigh the burdens that the Hospital Requirement imposes. And courts typically refrain from "rewrit[ing] a law to conform it to constitutional requirements," unless a statute is "readily susceptible" to such a limiting construction. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 884-85 (1997). Nothing in the Hospital Requirement's text or legislative

[8] Defendants ignore that their proposed rewriting conflicts with a separate Virginia statute, which is not challenged in this litigation and permits abortion "after [the] second trimester of pregnancy" under very limited conditions. *See* Va. Code Ann. § 18.2-74.

[9] Nor do Defendants address (as Plaintiffs explained in their Motion for Partial Summary Judgment) that while states may ban abortion care after viability, they must make an exception for abortion necessary to preserve the woman's life or health. Pls. SJ 25–26. It is uncontested that the Hospital Requirement lacks a health exception.

history suggests an intent to adopt Defendants' argument. *See Legend Night Club v. Miller*, 637 F.3d 291, 301 (4th Cir. 2011).

Finally, Defendants' suggestion that this Court certify "this question" to the Supreme Court of Virginia (without actually specifying what question should be certified) is a nonstarter. The constitutionality of Va. Code Ann. § 18.2-73 is governed by federal law, specifically by the standard clarified by the Supreme Court in *Whole Woman's Health*, and should therefore be determined by this Court.

IV. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Challenge to the Licensing Statute and Regulations

A. First-Trimester Abortion Providers Would Not Be Subject to Facility Licensure or to Regulation by Defendants Absent the Licensing Statute

Defendants contend that it is undisputed that the Licensing Statute does not unduly burden abortion access because facilities providing abortions were already classified as "hospitals" before 2011. Defs. SJ 23. This argument directly conflicts with Virginia law, which has never permitted Defendants to license, regulate, or warrantlessly inspect medical offices absent statutory authority.

As discussed *supra*, before the Licensing Statute was enacted in 2011, facilities providing first-trimester abortion care were exempt from the statutory definition of "hospital." *See* Va. Code Ann. § 32.1-124(v). Indeed, VDH admits it does not have authority to license physician's offices, Hilbert Dep. 129:1–14, 130:11–14; only regulates abortion providers because it is required by statute, *id*. 170:16–17; and does "not have the authority to regulate any other type of physician office which may perform any manner of surgical procedures," *id.* 170:18–21. The 2010 Attorney General Opinion upon which Defendants rely merely recognizes authority to define the term "abortion clinic" and to investigate whether first-trimester abortion facilities were in fact "used principally for performing surgery." 12 Op. Att'y Gen. 3 n.22 (2010); *see also* 29 Op. Att'y Gen., 2007 WL 2188743, at *2 (2007) (McDonnell, R.) ("definition of hospitals in the Virginia Code

does not include abortion clinics," which are "exempt from the current state statutory and regulatory framework of hospitals because they are treated as 'an office of one or more physicians or surgeons'"). It is only the Licensing Statute that allows Defendants to target first-trimester abortion providers for regulation as distinct from other physician's offices.

B. The Licensing Statute Was Intended to and Has the Actual Effect of Burdening Access to First-Trimester Abortion Care in Virginia

The Licensing Statute was passed pursuant to a nationwide strategy to enact laws purporting to protect women's health, but in fact intended to cut off access to legal abortion care. Haugeberg Decl. ¶¶ 16, 76–80; Oliver Dep. 132:3–133:9, 135:18–136:1; Bodin Dep. 244:10–22. In fact, Defendants admit that first-trimester abortion care was safely provided in unlicensed physician's offices both before and after the Licensing Statute was enacted, and provide no evidence that the Licensing Regulations have made first-trimester abortion safer in Virginia. Oliver Dep. 176:1–7, 185:14–186:19; Hilbert Dep. 145:18–146:1, 162:16–164:20, 169:9–20; Bodin Dep. 127:1–128:13, 153:12–154:2; *see also* Edmondson Dep. 64:2–3 ("[a]bortions were not unsafe before 2011 and they are not unsafe since"); Levine Dep. 100:4–22, 104:3–20, 107:3–12, 202:12–204:14. The Licensing Regulations have been subject to political interference since their inception, Hilbert Dep. 419:14–420:9; Bodin Dep. 244:10–22, thus fulfilling the improper purpose of the Licensing Statute. *See generally* Haugeberg Decl. ¶¶ 17, 89. And Defendant Oliver agrees with Plaintiffs' medical expert that the Licensing Regulations are not necessary for the safe provision of abortion care in Virginia. Nichols Dep. 41:3–16, 79:20–80:14, 88:5–89:13, 147:18–148:2; Oliver Dep. 168:2–171:8, 174:5–176:18.

It is undisputed that the Virginia Boards of Medicine, Nursing, Pharmacy, and VDHP—a separate state agency from VDH—extensively regulate all physicians and licensed healthcare professionals involved in the provision of abortion care through professional licensure and

disciplinary processes, as well as through office-based anesthesia regulations and on-site complaint investigations, including inspections of their premises when necessary. Va. Code Ann. § 54.1-2506; 18 VAC § 85-20-320; Oliver Dep. 211:11–214:16. Indeed, mere months before the Licensing Statute was passed, a VBM *ad hoc* committee concluded that no further regulation beyond the existing office-based anesthesia regulations was necessary to ensure the safety of office-based surgical procedures in Virginia—including some that are riskier than abortion. Dec. 2010 Min. Bd. of Med. Ad Hoc Comm. Office-Based Surgery, PLAINTIFF-0088870–97; Harp Dep. 95:19–96:10 (noting that VBM only received about one complaint every two years about an abortion provider). The Licensing Statute nevertheless *requires* Defendants to single out first-trimester abortion providers by imposing minimum standard regulations for construction and maintenance, operations, equipment, staffing (including qualifications and training), infection prevention, disaster preparedness, and security. In other words, first-trimester abortion care is the *only* medical procedure for which Defendants must codify nearly every aspect of the standard of care, creating a medically unnecessary scheme of double regulation that is enforced through warrantless inspections with severe penalties for non-compliance. Oliver Dep. 176:1–7, 179:2–9, 202:2–6; Hilbert 144:3–8; Harp Dep. 94:7–95:18; Edmondson Dep. 64:2–3; Levine 100:4–22, 104:3–20, 107:3–12, 202:12–204:14.

Defendants present no facts showing that the Licensing Statute has increased the safety of abortion care or otherwise improved women's health and safety since 2011. On the other side of the scale, ample evidence demonstrates that the Licensing Statute directly burdens women's access to abortion in Virginia. The practical effect of the Licensing Statute is to reduce the number of physicians willing and able to provide abortion care in Virginia. In the eight years since the Licensing Statute was enacted, the number of facilities providing abortion care in the Commonwealth has shrunk from 41 in 2009 to 20 in 2016. *See* PLAINTIFF-0019158;

PLAINTIFF-0019181. Unrebutted expert evidence shows that medically unnecessary regulatory schemes artificially cause abortion providers to become specialized and to cluster in urban areas (as they have in Virginia) despite economic theory predicting that they would distribute across the state as primary care providers do. Myers Dep. 142:16–22, 146:16–20, 147:10–20, 174:5–11.

Unrebutted expert evidence also shows that medically unnecessary and duplicative laws like the Licensing Statute contribute to the "exceptionality" of abortion and convey the message that abortion is unique and different from other medical services. Turan Decl. ¶ 35, ECF 100; Ramesh Dep. 45:17–46:9. Such laws perpetuate perceptions that abortion is "morally wrong," labeling women who have abortions as deviating from appropriate behavior. Turan Decl. ¶ 40; Ramesh Dep. 45:17–46:9. The resulting stigma affects both patients and providers. Turan Decl. ¶ 36; Ramesh Dep. 47:17–48:8, 200:14–204:9. Stigma directly affects abortion access. Patients are afraid to ask their own doctors whether they provide abortion or where abortion is available. Doe Dep. 98:18–99:3. Doctors are afraid to provide abortion care because of the associated stigma. Ramesh Dep. 45:3–11, 194:20–195:6. Medical personnel are reluctant to work at abortion clinics because they fear protesters and judgment from their other employers, which creates challenges in hiring. *See* Codding Dep. 107:1–5, 109:10–16; Ramesh Dep. 195:6–196:14. All these provider burdens in turn burden patients by restricting access to care. *See* Pls. SJ 17. Genuine disputes of material fact remain about the ways in which the Licensing Statute imposes these burdens on Virginians.

C. The Licensing Regulations Are Properly Challenged and the Record is Replete with Disputed Material Facts

1. Plaintiffs Properly Challenge the Entire Body of Licensing Regulations

Plaintiffs' challenge to an entire body of regulations is far from novel. In *Whole Woman's Health*, as here, plaintiffs sought declaratory and injunctive relief from a statute regulating abortion

providers and facilities—including a law that required the health department to promulgate regulations mandating that abortion facilities meet medically unnecessary requirements. *See* 136 S. Ct. at 2992. The agency, in turn, issued a series of "lengthy and detailed" and "numerous" implementing regulations. *Id*. at 2350, 2352 (Alito, J., dissenting). Plaintiffs challenged the scheme as a whole without seeking "to parse out specific aspects . . . that they f[ou]nd onerous or otherwise infirm." *Id*. at 2342 (citing *Whole Woman's Health v. Cole*, 790 F.3d 563, 582 (5th Cir. 2015)).

The Supreme Court struck the regulatory scheme as a whole. *See* 136 S. Ct. at 2319–20. In doing so, it rejected the State's argument that "instead of finding the entire surgical-center provision unconstitutional, [the court] should invalidate (as applied to abortion clinics) only those specific surgical-center regulations that unduly burdened the provision of abortion, while leaving in place other surgical-center regulations." *Id*.; *see also* Br. Resp'ts 52–53 (arguing for the approach Defendants advocate here: that many of the requirements, including that facilities shall be clean and maintained, "cannot possibly be regarded as undue burdens on abortion access"). The Supreme Court explained that "[t]he statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof," and therefore the Court would not assess each regulation "piecemeal." *Whole Woman's Health*, 136 S. Ct. at 2319.

Defendants here rehash the same arguments the Supreme Court explicitly rejected. The Licensing Regulations work as a single scheme—if abortion facilities in Virginia fail to fulfil a subset of the regulations (or even just one), they risk revocation or indefinite suspension of their license. *See* 12 VAC §§ 5-412-130, -140(A). *Whole Woman's Health* makes clear that an undue burden claim is not limited to a subset of restrictions when they operate as a unified scheme, and Plaintiffs need not separately enumerate burdens stemming from each regulation. 136 S. Ct. at 2319–20. Consistent with that holding, courts routinely hear as-applied challenges to statutes as implemented and enforced through unified regulatory schemes. *See, e.g.*, *Kalish v. Milliken*, No.

1:09-cv-1333-CMH-TRJ (E.D. Va. Apr. 5, 2010), ECF 13 (facial and as-applied constitutional challenge to entire vocational school regulatory scheme); *Bukvic-Bhayani v. Mitchell*, No. 3:17-cv-508 (W.D.N.C. Mar. 8, 2018), ECF 30 (First Amendment challenge to an enabling statute and implementing regulations that precluded a makeup school from opening); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

Defendants' invitation for this Court to sever regulations from each other similarly fails. There is no explicit or implicit severability clause in the Licensing Regulations. And significantly, although Va. Code Ann. § 2.2-4004 makes "the provisions of all regulations" severable, it *exempts* situations in which it is "apparent that two or more regulations or provisions must operate in accord with one another." Plaintiffs' facility licensure requires compliance with *all* of the Licensing Regulations; those regulations operate in accord with one another. [10]

Even if the Licensing Regulations are severable under Virginia law, the Supreme Court addressed this exact issue in *Whole Woman's Health*, explicitly holding that the Texas law's severability clause did not save its extensive scheme of implementing regulations, given that "facilities subject to some subset of those regulations do not qualify as surgical centers" and "the risk of harm caused by inconsistent application of only a fraction of interconnected regulations counsels [against severance]." *Whole Woman's Health*, 136 S. Ct. at 2320. at 2319. "Indeed, if a severability clause could impose such a requirement on courts, legislatures would easily be able to insulate unconstitutional statutes from most facial review." *Id*. at 2319 (citing *Reno*, 521 U.S. at 884–85 n.49). The Supreme Court rejected the State's "invitation to pave the way for legislatures to immunize their statutes," *Whole Woman's Health*, 136 S. Ct. at 2319, and this Court should do

[10] Defendant OLC admits that if a facility violates one provision of the Licensing Regulations, it automatically violates two other provisions that require compliance with the whole regulatory scheme. *See* Bodin Dep. 272:21–273:19; *see also* 12 VAC §§ 5-412-130(A), -140(A).

the same. Indeed, Defendants' insistence that each regulation be considered on its own, or severed from the others, would impermissibly allow the Commonwealth "to transform unconstitutional action into constitutional action by splitting the action into separate statutes or regulations." *See June Med. Servs., LLC v. Gee*, 306 F. Supp. 3d 886, 893 (M.D. La. 2018). A state cannot "attack abortion providers in a death-by-a-thousand-cuts strategy, evading review by legislating in a piecemeal fashion." *Id*.

2. Whether the Regulations' Benefits Outweigh Their Burdens Is Disputed

Defendants argue that the Court should award them summary judgment on the Licensing Regulations challenge because Defendants have "articulated a benefit associated with each regulation." Defs. SJ 28. First, that is not enough under the undue burden standard, which rejects deference to mere articulations of benefits. *Whole Woman's Health*, 136 S. Ct. at 2309–10. Second, Defendants offer no undisputed facts indicating the Licensing Regulations actually benefit women's health and safety. *See supra* Section IV.B.

Not only do the Licensing Regulations fail to benefit health and safety, but they also burden Virginia women's access to abortion. The Regulations harm patients in numerous ways by: disrupting their care with unannounced inspections and by requiring Plaintiffs to find patients who will consent to inspectors observing them undergoing an abortion procedure, Codding Dep. 52:2–16; Miller Dep. 118:15–119:18, 121:2–124:9, 126:3–19; Doe Dep. 128:7–14; C.T. Dep. 126:14–129:2; Ramesh Dep. 146:22–147:11; McElwain Dep. 49:21–50:12, 147:17–142:12 (describing how having state inspectors present undermines patients' trust in their provider); imposing medically unnecessary standards that impede healthcare providers' professional discretion, Nichols Dep. 32:8–16; C.T. Dep. 181:9–182:6; imposing extensive and unnecessary paperwork requirements that reduce time for patient care, Codding Dep. 238:5–239:1; Nichols Dep. 88:5–89:13; increasing or even doubling the amount of time a provider must spend going over paperwork

with a patient, Doe Dep. 205:10–18; re-codifying and exacerbating the Physician-Only Law, Hospital Requirement, and Two-Trip Mandatory Delay Law's burdens, *see* Pls. SJ 2, 25; and contributing to a regulatory environment that discourages the provision of abortion care in Virginia, Myers Decl. ¶ 23, ECF 99; Codding Dep. 85:7–87:12; Haugeberg Decl. ¶¶ 81–82; McElwain Dep. 52:21–60:1. They also stigmatize patients' healthcare choices, as discussed *supra* Section IV.B, which directly burdens their access to abortion. Significant evidence shows that these laws, on their own and as enforced through the Licensing Regulations, burden the right to abortion in Virginia. Pls. SJ 2; *see, e.g.*, Myers Dep. 15:14–21, 169:14–17, 194:11–19; Ramesh Dep. 45:20–46:9, 47:17–48:8, 49:13–51:11, 180:6–183:5; C.T. Dep. 150:14–22.

Plaintiffs raise genuine issues of material fact as to whether the Licensing Regulations impose an undue burden on abortion access in Virginia, and this Court should deny Defendants' motion for summary judgment on Count II of the Amended Complaint.

V. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Fourth Amendment Claim

A. Whether Plaintiffs Validly Consent to Inspections Is a Disputed Material Fact

Warrantless administrative searches are only permissible if there is valid consent, exigent circumstances, or the opportunity for a pre-compliance review. *City of L.A. v. Patel*, 135 S. Ct. 2443, 2451–52 (2015). In seeking summary judgment on Plaintiffs' Fourth Amendment challenge, Defendants ignore the inherently coercive nature of the abortion facility licensing regulation, which states that "[i]f the owner, or person in charge, *refuses entry*, this shall be sufficient cause for *immediate revocation or suspension of the license*." 12 VAC § 5-412-90 (emphasis added). And there is no time limit or deadline for VDH to apply for and obtain a warrant to conduct the inspection. The regulation's plain language goes beyond what is permitted under Virginia's

inspection statute, which states that, if denied entry, an inspector may apply for a warrant, but does not allow for immediate, indefinite punitive measures. *See* Va. Code Ann. § 32.1-25.

The Court specifically highlighted that threat in its ruling on the motion to dismiss. Defendants attempt to downplay the threat by asserting that "nothing in the regulation or authorizing statute suggests that revocation or suspension is an immediate or inevitable consequence." Defs. SJ 19. Given that the plain text of the regulation explicitly allows for *immediate* revocation or suspension of the license upon refusal of entry, it is sheer speculation—unsupported by anything in the record—that the regulation will not be enforced as written, and certainly does not cure its constitutional deficiencies. Ignoring the clearly coercive nature of this regulation, Defendants suggest that Plaintiffs' claim fails because they "voluntarily" consent to each inspection. Defs. SJ 17–18. Not so. Plaintiffs allow inspectors to enter, and cooperate with the inspections, only because it is their reasonable understanding that if they do not, VDH can immediately suspend or even revoke their license indefinitely. *See* Codding Decl. ¶¶ 4–7; Miller Decl. ¶¶ 4–6; McElwain Decl. ¶¶ 4–7. Such conduct does not constitute voluntary consent. *See United States v. Guess*, 756 F. Supp. 2d 730, 747 (E.D. Va. 2010) ("If consent is to be truly voluntary, a defendant must have the option to either grant consent, or . . . refuse to allow the search with no negative evidentiary impact."); *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 227 (1973) (consent must be given "freely and voluntarily," without coercion).

Defendants also ignore unequivocal testimony by VDH and OLC officials that they do not believe they need to—nor do they—request or obtain consent to enter and inspect licensed abortion facilities. *See, e.g.*, Hilbert Dep. 394:16–395:9 (the inspection regulation "was drafted to ensure, to make it clear to everyone that we had the right of entry into these facilities and if we tried to show up at the facility to inspect them for whatever reason, they couldn't keep us out and tell us to come back tomorrow. We have a right of entry. . . In other words, it's not a situation where we

have to get their consent before we're able to enter a facility."); *see also* Marion Dep. 64:21–65:13 (noting, as to inspections, "We don't ask permission, no."). In sum, whether Plaintiffs provide voluntary consent is disputed and presents a genuine issue of material fact.

B. Plaintiffs Have Standing to Assert Fourth Amendment Claims on Behalf of Themselves and Their Patients

Through their warrantless searches, Defendants review vast amounts of private, highly confidential information—such as sexual and medical history, images of the insides of women's bodies, and staff personnel files. In claiming that Plaintiffs do not have standing to assert Fourth Amendment claims on behalf of their patients, Defendants misconstrue Plaintiffs' claim, which asserts that VDH's warrantless, intrusive inspections themselves constitute Fourth Amendment violations of Plaintiffs' and their patients' rights, including but not limited to inspectors' observations of procedures and access to patient medical records.[11] Plaintiffs' third-party standing here is consistent with other cases involving Fourth Amendment claims brought by providers on behalf of patients. *See Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 549–53 (9th Cir. 2004) (granting summary judgment on Fourth Amendment claims brought by physicians on both their own behalf and on behalf of patients).[12] The only case Defendants cite, *Rakas v. Illinois*, 439 U.S. 128 (1978), is readily distinguishable in that it denied third-party standing to criminal defendants in the context of a suppression motion. It had nothing to do with the fundamental right to abortion.

[11] Defendants' assertion that written permission is obtained each and every time a VDH inspector observes a procedure is a material fact contested in the record. *See* Defs. SJ, Exh. 8, 299; *see also* Miller Decl. ¶¶ 7–8. And Defendants' contention that Plaintiffs' NAF or PPFA certification inspections render VDH's warrantless inspections constitutional is illogical and ignores record evidence describing the differences between those surveys and VDH inspections. *See* Codding Dep. 110:1–111:9, 120:9–15, 121:5–16; McElwain Dep. 106:20–107:22, 164:10–165:7.

[12] Decades of Supreme Court precedent also recognizes the appropriateness of allowing physicians to bring claims on behalf of their patients. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976).

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion for partial summary judgment (Counts I–IV and VII–VIII), and award partial summary judgment to Plaintiffs as to the Hospital Requirement and Physician-Only Law (Counts III and IV).

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Respectfully submitted,

/s/ D. Sean Trainor
D. Sean Trainor (VSB No. 43260)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
Phone: (202) 383-5114
Fax: (202) 383-5414
Email: dstrainor@omm.com

Leah Godesky*
Nathaniel Asher*
O'MELVENY & MYERS LLP
7 Times Square
New York, NY 10036
Phone: (212) 326-2000
Fax: (212) 326-2061
Email: nasher@omm.com

Nicole Gloria Tortoriello (VSB No. 91129)
Eden B. Heilman (VSB No. 93554)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Email: ntortoriello@acluva.org

Attorneys for all Plaintiffs

Jenny Ma*
Gail M. Deady (VSB No. 82035)
Amy Myrick*
Michelle K. Moriarty*
Rabia Muqaddam*
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, New York 10038
Phone: (917) 637-3600
Fax: (917) 637-3666
Email: jma@reprorights.org
Email: gdeady@reprorights.org

Attorneys for Plaintiffs Falls Church Medical Center, LLC; Whole Woman's Health Alliance; and Dr. Doe

Alice Clapman*
Hannah Swanson**
PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.
1110 Vermont Ave. NW, Suite 300
Washington, DC 20005
Phone: (202) 973-4800
Fax: (202) 296-3480
Email: alice.clapman@ppfa.org

Attorneys for Plaintiff Virginia League for Planned Parenthood

* Admitted Pro Hac Vice
**Motion for Admission Pro Hac Vice to be filed

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019 a copy of the foregoing has been served upon all counsel of record in this action by electronic service through the Court's CM/ECF system.

/s/ D. Sean Trainor
D. Sean Trainor (VSB No. 43260)