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

FALLS CHURCH MEDICAL CENTER, LLC, d/b/a FALLS CHURCH HEALTHCARE CENTER, et al.;	)	
Plaintiffs,	)	
v.	)	Case No. 3:18cv428-HEH
M. NORMAN OLIVER, Virginia Health Commissioner, et al.,	)	
Defendants.	)	

DEFENDANTS' REPLY

I. Defendants Correctly Articulate the *Casey-Hellerstedt* Undue Burden Test.

Plaintiffs seek to reduce the principles articulated by the U.S. Supreme Court in *Casey* and *Hellerstedt* to a simple "more-likely-than-not" balancing test—arguing that if a regulation's alleged burdens even slightly outweigh its benefits, then that alone constitutes an unconstitutional substantial obstacle standing in the path of Virginia women seeking to access pre-viability abortion. But as noted in Defendants' memoranda, other courts applying *Hellerstedt*'s principles to facts like those here—i.e., facts considerably less stark than those at issue in *Hellerstedt*—have not found the analysis as simple as Plaintiffs would have this Court believe. Both the Fifth and Eighth Circuit Court of Appeals have determined that *Hellerstedt* requires an analysis of *the degree* to which a purported burden outweighs a regulation's benefit. And both courts concluded that only when the "benefits are *substantially outweighed* by the burdens" is the regulation unconstitutional. *Planned Parenthood of Southeastern Ark. and East. Okla. v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017) (emphasis added); *see also June Med.*

Servs., L.L.C. v. Gee, 905 F.3d 787, 803 (5th Cir. 2018) (holding that the *Hellerstedt* undue burden test is "not a 'pure' balancing test under which *any* burden, no matter how slight, invalidates the law. Instead, the burden must still be substantial. . . . A minimal burden even on a large fraction of women does not undermine the right to abortion.").

Plaintiffs seek to discount these cases as non-binding and their findings as mere dicta. Indeed, there are substantive differences, but the differences highlight why Virginia's laws are constitutional. For example, the district courts in *June Medical* and in *Jegley*—as in *Hellerstedt*—addressed restrictions recently passed by the state legislatures. By contrast, Plaintiffs' challenge is to statutes in effect in Virginia since 1975. But even if the factual differences between the cases did aid Plaintiffs, it is notable and instructive that in both instances, the appellate courts required more than the pure balancing test Plaintiffs argue *Hellerstedt* imposes.

In sum, Defendants urge this Court to follow the analysis articulated by the Fifth and Eighth Circuits in *June Medical* and *Jegley*: in balancing the benefits of a restriction against the alleged burdens, a statute is constitutional unless the burdens imposed *substantially outweigh* the benefits provided. Stated differently, if the Court "conclu[des] 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," that regulation is an unconstitutional undue burden. *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1994). And when, as some courts have noted, a challenged regulation "provides no demonstrated benefit compared to prior law, but places no substantial obstacles in the path of a large fraction of women to whom it is relevant," the regulation may stand. *Jackson Women's Health Organization v. Currier*, 320 F. Supp. 3d 828, 841 (2018).

II. Plaintiffs fail to demonstrate that Virginia's physician-only requirement, as applied to Plaintiffs, creates a substantial obstacle for Virginia women seeking to terminate a pre-viability pregnancy.

Plaintiffs seek to re-litigate a settled issue of law and ask this Court to overrule a principle repeatedly reaffirmed by the U.S. Supreme Court: that states may limit the provision of abortion to physicians. *See, e.g., Casey*, 505 U.S. at 885 (noting that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others"); *Roe v. Wade*, 410 U.S. 113, 165 (1973); *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975); *City of Akon v. Akon Center for Reproductive Health*, 462 U.S. 416, 447 (1983); *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997). Importantly, Defendants here are not asking this Court to uphold Virginia's physician-only law based on "legislative findings explicitly set forth in the statute." *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). On the contrary, Defendants ask the Court to consider whether Plaintiffs have set out sufficient evidence in the record before the Court to show that *as applied to the Plaintiffs in this case,* the physician-only law places a substantial obstacle in the path of any Virginia woman seeking to terminate a pre-viability pregnancy. Plainly, they have not.

Defendants do not doubt that suspension of Virginia's physician-only requirement has the potential to be financially beneficial to the Plaintiff clinics. Advanced practice clinician salaries, on the whole, are lower than the rates commanded by physicians. *See* Codding Decl. ¶ 11. But "the question is whether the law creates a burden on *women* seeking abortions, not the . . . clinics providing them." *Jackson Women's Health*, 320 F. Supp. 3d at 839 (emphasis added)

(citing *Hellerstedt*, 136 S. Ct at 2309). Plaintiffs have not shown that Virginia women are burdened—substantially or otherwise—by Virginia's physician-only requirement.

Finally, it is undisputed that both the physician-only law and hospital requirement were enacted in 1975. And both statutes were in effect in 2009 when—according to Plaintiffs—there were forty-one (41) facilities providing abortion in Virginia. Pls.' Mem. in Opp'n to Defs.' Mot. Summ. J. (ECF No. 106) at 6. Plaintiffs provide absolutely no evidence to show that any reduction in the number of facilities *since 2009*—the focus of Plaintiffs' complaint here—is due to the physician-only law. Nor can they provide such evidence. Virginia's physician-only law has been in effect nearly as long as *Roe v. Wade* itself—and there is no causal connection between the physician-only law and any reduction in access to abortion. Plaintiffs fail to establish that Virginia women face a substantial obstacle to pre-viability abortions because Virginia requires that such procedures be performed by physicians. This Court should enter summary judgment on Count IV in favor of Defendants.

III. Plaintiffs fail to demonstrate that the hospital requirement, as applied to Plaintiffs, is a substantial obstacle for Virginia women seeking pre-viability abortion.

Although Defendants acknowledge that the trimester terminology used in the Virginia Code's hospital requirement is anachronistic, Defendants maintain that none of Plaintiffs have standing to challenge the hospital requirement. Defs.' Mem. in Sup. Mot. Summ. J. (ECF No. 85) at 20-21. If this Court disagrees, however, then Defendants further acknowledge that this Court could find that the hospital requirement, as currently written, has both constitutional and unconstitutional applications, depending on whether the abortion during the second trimester is occurring pre- or post-viability.

With respect to *pre-viability abortions* that occur during the second trimester, Defendants' position is that the U.S. Supreme Court's jurisprudence precludes states from

mandating that such procedures occur in the equivalent of an acute care hospital or surgical center. *Hellerstedt,* 136 S. Ct. at 2318. If the Court finds that Plaintiffs have standing to maintain this claim, then by default the Court must have concluded that the definition of "hospital" for purposes of Virginia Code § 18.2-73 is far narrower than what Defendants and the U.S. Supreme Court have stated. *Simopoulos v. Virginia*, 462 U.S. 506, 512-15 n.4 (1983). That interpretation, however, threatens to invalidate the constitutional application of the hospital requirement to *post-viability abortions* that occur during the second trimester. As compared to pre-viability abortion, states have a comparatively stronger interest in regulating abortion after the point of viability. *See Stenberg v. Carhart*, 530 U.S. 914, 930 (2000). In this case, the clear benefits of the hospital requirement with respect to maternal health outweigh any alleged burdens. **Exhibit 1,** Expert Report of Elizabeth Lunsford, M.D. at ¶ 37; Lunsford Dep. 77:8-12, 84:1-11. Indeed, Plaintiffs themselves recognize that after fifteen to sixteen weeks, even pre-viability abortion procedures require different equipment and provider skills. Pls. Mem. in Supp. of Pls.' Mot. Summ. J. (ECF No. 95) ¶ 5. At a minimum, the hospital requirement is constitutional as applied to post-viability abortions that take place during the second trimester.

So, if the Court concludes that Defendants are wrong about the definition of "hospital" and Plaintiffs have standing, Defendants believe that the Court should limit the invalidation of Virginia's law to pre-viability abortions. As Defendants explained in their Memorandum in Support of Summary Judgment (ECF No. 85), this Court may narrow the Virginia statute to avoid constitutional issues, under *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006). Here, Virginia Code § 18.2-73 could be conformed to *Casey*'s framework by narrowing the statute as follows:

> Notwithstanding any of the provisions of § 18.2-71 and in addition to the provisions of § 18.2-72, it shall be lawful for any physician licensed by the Board

> of Medicine to practice medicine and surgery, to terminate or attempt to terminate a human pregnancy or aid or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman during the second trimester of pregnancy and prior to ~~the third trimester of pregnancy~~ *viability* provided such procedure is performed in a hospital licensed by the State Department of Health or operated by the Department of Behavioral Health and Developmental Services.

Alternatively, the Court could certify the question of whether Virginia Code § 18.2-73 can be narrowed in light of *Hellerstedt* and *Casey* to the Supreme Court of Virginia, under Rule 5:40 of the Rules of the Supreme Court of Virginia.

Defendants submit that either of those approaches is preferable to the Court invalidating the entirety of Virginia Code § 18.2-73. The circumstances leading to the Fourth Circuit's recent decision in *Toghill v. Clark*, 877 F.3d 547 (4th Cir. 2017), demonstrate why that is the case. In *Toghill*, the Fourth Circuit was confronted with the question of what happens when a federal court of appeals (there, the Fourth Circuit) declares that a state law is facially unconstitutional (there, Virginia Code § 18.2-361 in *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013)), but the state's highest court (there, the Supreme Court of Virginia) subsequently rejects the facial invalidation and narrows the state statute. *Toghill*, 877 F.3d at 553-55. Notwithstanding its earlier decision finding Virginia's criminal law facially invalid, the Fourth Circuit concluded in *Toghill* that it was bound by the Supreme Court of Virginia's subsequent narrowing construction of the Virginia statute, which saved the statute from facial invalidity. *Id.* at 562. The Fourth Circuit acknowledged that only state courts can supply the authoritative construction of a state statute, and noted that "in some circumstances, the Supreme Court has indicated that the better course is to *seek* an authoritative, narrowing construction from the state supreme court *before* ruling upon the constitutionality of a state statute that has constitutional and unconstitutional applications." *Id.* at 558 n.9 (citations and quotations omitted).

As in *Toghill*, the relevant statute (Virginia Code § 18.2-73, the hospital requirement) was constitutional when passed. As in *Toghill*, a subsequent U.S. Supreme Court opinion arguably made certain applications of the statute unconstitutional. To avoid the same sequence of events that led to the Fourth Circuit's decision in *Toghill*, Defendants suggest that, at a minimum, this Court certify the question of how to interpret Virginia Code § 18.2-73 to the Supreme Court of Virginia before invalidating the law on its face.

IV. The Parties have a fundamental legal dispute regarding Count II (Licensing Regulations); i.e., whether the licensing regulations are severable.

Also before the Court is a fundamental dispute of law regarding Plaintiffs' omnibus challenge to Virginia's abortion facility licensing regulations, Title 12 Va. Admin. Code, Section 5-412 *et seq*. Plaintiffs challenge "the set of regulations as a whole," (Am. Compl. ¶ 120) which, they allege, exempts them from articulating any burden imposed by any specific regulatory requirement. Defendants counter that (1) severability is a question of state law; (2) Virginia law clearly supports severability; (3) Plaintiffs have failed to show any specific burden imposed by individual regulations (with the possible exception of Title 12 Va. Admin. Code, Section 5-412-90, see below); and that as a result (4) this Court should enter judgment in Defendants' favor on Count II of the Amended Complaint.

Severability is a matter of state law, and Virginia law unequivocally supports severing the regulations. The Virginia Code specifically provides that "provisions of all regulations are severable unless (i) the regulation specifically provides that its provisions are not severable or (ii) it is apparent that two or more regulations or provisions *must* operate in accord with one another." Va. Code § 2.2-4004 (emphasis added). Neither exception is applicable here. The licensing regulations contain no prohibition on severability. Nor is it apparent, either on the face

of the regulations or as Virginia has reviewed, revised, and applied them, that two or more regulations *must* operate together such that the provisions cannot be separated.

The plain language of the licensing regulations supports Defendants' position. Title 12 Va. Admin. Code, Section 5-412-80 states that if "the enforcement of one or more of these regulations would be clearly impractical, *the commissioner shall have the authority to waive*, either temporarily or permanently, *the enforcement of one or more of these regulations*, provided safety and patient care and services are not adversely affected." (Emphasis added.)[1] Likewise, Virginia law requires the Board of Health to identify with specificity (*e.g.*, by title, agency, chapter, and provision) each individual regulation being considered for revision. *See* Va. Code § 2.2-4007.01 ("[A]n agency shall (i) provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation[.]"). If a published Notice of Intended Regulatory Action ("NOIRA") fails to identify an individual regulation for regulatory action, the Board of Health is *prohibited* from amending it. *Melendez v. Virginia Board of Health et al.*, Judge John Marshall Letter Op. Jan. 23, 2019, p. 2. Indeed, the Circuit Court of Henrico County in *Melendez* specifically rejected the argument Plaintiffs make here—*i.e.*, that Title 12 Va. Admin. Code, Section 5-412 should be treated as a single regulation as opposed to thirty-nine separate regulations—and held that the failure to identify an individual regulation for review invalidated the subsequent revisions to that regulation. In *Melendez*, the court suspended thirteen individual regulations which the Board of Health failed to list in its December 7, 2014 NOIRA. Case No. CL17-1164, Order on Appeal

[1] Plaintiff Falls Church was awarded just such a variance in October 2014. **Exhibit 2**, DEFENDANTS 00163041-42 (granting Falls Church Healthcare Center a temporary licensure variance).

from Regulations ¶ 1, Feb. 21, 2019. The court did not find that the licensing regulations rose or fell together, as Plaintiffs have alleged. The result should be no different here.

As the Fourth Circuit explained in *Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, in considering the question of severability a court should ask whether the "deletion of the invalid provision . . . alter[s] the effect of the ordinance in fulfilling the purpose expressed." 288 F.3d 610, 628 (4th Cir. 2002) (quoting *Jones v. Murray*, 962 F.2d 302, 311 (4th Cir. 2002)). This inquiry also serves to highlight an important distinction between the case before this Court and *Whole Woman's Health v. Hellerstedt*, which Plaintiffs argue forecloses the issue of severability with respect to Virginia's licensing regulations. In *Hellerstedt*, the U.S. Supreme Court considered whether or not to sever the individual Texas regulations governing Ambulatory Surgical Centers ("ASC") and determine which, if any, could be constitutionally applied to Texas abortion facilities. In declining to do so, the Court noted that H.B.2 was intended to bring all Texas abortion facilities (only some of which were licensed as ASCs at the time) into compliance with "integrated surgical-center standards" already applicable in Texas. *Hellerstedt* 136 S. Ct. at 2319-20. The Court noted that in order to consider which surgical center requirements could be constitutionally applied, the Court would be required first to "go through the individual components of the different, surgical-center statute, . . . [and then review] the individual *regulations* governing surgical centers to see whether those requirements are severable from each other as applied to abortion facilities." *Id.* The Court declined to do so, noting that the Texas legislature directed abortion facilities to meet all surgical center standards, and "[f]acilities subject to some subset of those [surgical center] regulations do not qualify as surgical centers." *Id.* But here, the Virginia legislature passed a licensing statute directing the Board of Health to promulgate new regulations for first trimester abortion facilities. The Board

of Health did so, and included within the regulations a provision specifically allowing for the granting of a variance excusing compliance with one or more regulatory requirements. Under the "Licensing Scheme" challenged by Plaintiffs here, severing the regulations to determine which abortion facility regulations can be constitutionally applied to abortion facilities is exactly what Virginia law requires.

Indeed, the very existence of Count VIII belies the validity of Plaintiffs' omnibus challenge and patently demonstrates that Plaintiffs clearly can—and do—single out specific burdens imposed by specific regulations when it suits them. Plaintiffs' Count VIII is based on the specific burdens allegedly imposed by a single regulation within Virginia's so-called "Licensing Scheme"—Title 12 Va. Admin. Code, Section 5-412-90, Right of Entry. Plaintiffs complain that this specific regulation imposes a specific burden on the provider clinics and their patients and asks this Court to invalidate the regulation as a violation of their Fourth Amendment rights. Yet when faced with Defendants' discovery requests asking them to identify a specific burden imposed by each of the other Virginia regulations, Plaintiffs claimed they had no obligation to identify any regulation-specific burden and refused to articulate specific facts in support of their claims. Plaintiffs cannot have it both ways. If, as Plaintiffs now argue, Count II is an omnibus challenge to Virginia's regulations, there is no need to bring an independent count disputing the constitutionality of Title 12 Va. Admin. Code, Section 5-412-90, Right of Entry, and that claim can be incorporated into Count II's omnibus challenge. If Defendants are correct, and the regulations must be considered individually, then there can be no dispute that but for a single regulation, Plaintiffs offer no evidence to show that any Virginia regulation imposes a substantial obstacle to a pre-viability abortion.

This Court should find that the regulations are severable as a matter of law. As such, the record before the court is clear and undisputed: Defendants have articulated a benefit specific to each regulation. With the possible exception of Title 12 Va. Admin. Code, Section 5-412-90, Right of Entry, Plaintiffs have offered no evidence at all that any specific regulation imposes any unconstitutional burden. In fact, each and every Plaintiff clinic holds an active abortion facility license. Each Plaintiff clinic is in compliance with the licensing regulations. Plaintiffs' challenge to the Licensing Regulations fails as a matter of law. The Court should enter summary judgment in Defendants' favor on Count II.[2]

V. Plaintiffs consent to VDH's inspections and lack standing to assert Fourth Amendment claims on behalf of their patients.

Plaintiffs agree that consent is a valid basis for a warrantless administrative search. Plaintiffs acknowledge that they "allow inspectors to enter, and cooperate with inspections." Pls.' Mem. in Opp'n to Defs.' Mot. Summ. J. (ECF No. 106) at 27-28. However, Plaintiffs argue that their consent to these inspections is coerced by the *possibility* that their licenses could be revoked or suspended if they refuse. Plaintiffs' argument ignores that there is no evidence in the record of any negative action against any facility's license (Plaintiffs' facilities or any other) because the facility refused entry to Department of Health inspectors. What the record does show is that Plaintiffs are well-versed in the regulations (*see* **Exhibit 3**, Codding Dep. 51:7-11; McElwain Dep. 123:19-124:6; Miller Dep. 97:14-98:1) and aware of their rights to refuse access to inspectors. Marissa Levine, M.D., the Commissioner of Health for the Commonwealth from February 2014 to April 2018 testified that on occasion, facilities asked inspectors to wait to begin an inspection, "which is fine because they may not have had some of the personnel they needed.

[2] At a minimum, Defendants ask the Court to issue a ruling addressing whether or not the regulations should be considered as a whole or individually for purposes of the May trial of this matter.

But I don't—I don't remember—maybe it happened, but I don't remember an outright disallowance of our staff going in." **Exhibit 4**, Levine Dep. 320:16-25.

Plaintiffs now provide a declaration from Rosemary Codding, owner of Plaintiff Falls Church Medical Center, LLC, stating that the facility only "allow[s] VDH inspectors into the Center to conduct an inspection . . . based on our understanding that if we do not do so, we risk immediate, indefinite suspension or revocation of the Center's license." Codding Decl. ¶ 4. See also McElwain Decl. ¶ 4, Miller Decl. ¶ 4. But the record before the Court contains no evidence to support Ms. Codding's "understanding" that the facility's license was actually at risk. Plaintiffs can point to no instance of license suspension or revocation based on a refusal to consent to an inspection. Nor is there any evidence in the record that inspectors pressured facilities into giving consent or made false claims of lawful authority– the typical instances of coercion that make consent involuntary. *See United States v. Azua-Rinconada*, 914 F.3d 319, 324 (4th Cir. 2019) (comparing cases). Plaintiffs ask this Court to rule based on what might have happened if a clinic refused entry to an inspector. This hypothetical injury is far too speculative to support a Fourth Amendment violation.

Plaintiffs also argue that the unannounced inspections violate their patients' Fourth Amendment rights. But courts have not extended the third-party standing enjoyed by abortion clinics seeking to enforce their patients' Fourteenth Amendment rights to a challenge brought under the Fourth Amendment. On the contrary, it is well-established that the Fourth Amendment right to be free from unlawful search and seizure is a personal right. *See Alderman v. United States*, 394 U.S. 165, 174 (1969); *Plumhoff v. Rickard*, 572 U.S. 765, 778 (2014) ("Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.") To the extent that Plaintiffs bring a Fourth Amendment claim on behalf of their patients due to warrantless

searches of Plaintiffs' clinics, Plaintiffs have no standing and judgment on Count VIII should be entered for the Defendants.

V. Conclusion.

For the reasons set forth above, Defendants M. Norman Oliver, Robert Payne, Faye O. Prichard, Theophani Stamos, Anton Bell, Michael N. Herring, Colin Stolle, and Robert Tracci, by counsel respectfully request entry of summary judgment in their favor as to Counts I, II, III, IV, VII and VIII of the Amended Complaint filed against them by Plaintiffs.

Dated: April 1, 2019

Respectfully submitted,

M. NORMAN OLIVER, ROBERT PAYNE, FAYE O. PRICHARD, THEOPHANI STAMOS, ANTON BELL, MICHAEL N. HERRING, COLIN STOLLE, and ROBERT N. TRACCI

/s/ Emily M. Scott
Courtney Moates Paulk (VSB No. 45523)
Emily M. Scott (VSB No. 71435)
Jaime B. Wisegarver (VSB No. 81095)
John P. O'Malley (VSB No. 92439)
HIRSCHLER FLEISCHER,
A PROFESSIONAL CORPORATION
The Edgeworth Building
2100 East Cary Street
Post Office Box 500
Richmond, Virginia 23218-0500
Telephone: 804.771.9500
Facsimile: 804.644.0957
E-mail: cpaulk@hirschlerlaw.com
escott@hirschlerlaw.com
jwisegarver@hirschlerlaw.com
jomalley@hirschlerlaw.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April 2019, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of Court for the Eastern District of Virginia, Richmond Division, using the Court's CM/ECF system, which thereby caused the above to be served electronically on all registered users of the Court's CM/ECF system.

/s/ Emily M. Scott
Courtney Moates Paulk (VSB No. 45523)
Emily M. Scott (VSB No. 71435)
Jaime B. Wisegarver (VSB No. 81095)
John P. O'Malley (VSB No. 92439)
HIRSCHLER FLEISCHER,
A PROFESSIONAL CORPORATION
The Edgeworth Building
2100 East Cary Street
Post Office Box 500
Richmond, Virginia 23218-0500
Telephone: 804.771.9500
Facsimile: 804.644.0957
E-mail: cpaulk@hirschlerlaw.com
escott@hirschlerlaw.com
jwisegarver@hirschlerlaw.com
jomalley@hirschlerlaw.com

Counsel for Defendants

11082060.3 043679.00001