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' MOTIONS TO DISMISS[1]

[1] Plaintiffs' Memorandum of Law in Opposition addresses arguments made in the Motions to Dismiss Plaintiffs' Complaint and accompanying Memoranda of Law in Support by Defendants M. Norman Oliver, Robert Payne, Faye O. Prichard, Theophani Stamos, Shannon L. Taylor, Anton Bell, Michael N. Herring, and Colin Stolle (hereinafter "AG Br."), as well as Defendant Robert. N. Tracci (hereinafter "Tracci Br.") (together with AG Br., "Defs.' Brs."). Docket Nos. 20–23.

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PRELIMINARY STATEMENT

This case is about whether Virginians seeking to exercise a fundamental constitutional right, abortion prior to viability, may be impermissibly burdened by undue government interference. The Commonwealth's restrictions are medically unsound—they are outdated and inconsistent with the standard of care. And they fail to provide benefits sufficient to outweigh their burdens. Instead, they unnecessarily impede the ability of Virginians to access safe, common, and critical healthcare. In effect, the challenged laws hinder the core liberty, privacy, and dignity interests of women in the Commonwealth, and their deeply personal reproductive decisions.

Over the course of sixty pages, Plaintiffs present concrete facts and injuries that flow from the challenged restrictions individually, and through their interaction with each other, which result in an undue burden. The Complaint sets out a well-pled challenge alleging that the Commonwealth subjects abortion providers and patients to a maze of burdensome statutes and regulations that lack meaningful justification. It alleges that Defendants, by enacting and enforcing these laws—some of which are over four decades old and all of which fail constitutional muster—deprive Virginians of their right to form their families as they deem fit. At the pleading stage, prior to any party's opportunity to conduct discovery, such allegations present cognizable legal claims.

In urging dismissal, Defendants rely on a serious misconstruction of the applicable legal standard and the unremarkable proposition that district courts must follow precedent. *First*, the undue burden standard demands a fact- and context-specific inquiry that requires this Court to weigh the benefits of an abortion restriction against its burdens. That record-dependent analysis renders dismissal at this stage inappropriate. *Second*, none of the Supreme Court decisions cited by Defendants bar Plaintiffs' claims. The overarching legal principles laid out in these decisions did not create per se constitutional rules permitting a subset of abortion restrictions as a matter of law. To the contrary, they include limiting language explicitly confining them to their facts and

the records before the Court *in each case*. Plaintiffs' challenge is factually and legally distinguishable and therefore not foreclosed.

Nor can Defendants evade constitutional review by framing this case as about "the wisdom of policies." It is about the application of the U.S. Constitution and ongoing violations of Virginians' fundamental rights. The *only* issue on these motions is whether the Complaint is well-pled and states colorable legal claims that the Commonwealth's laws are subject to constitutional review. It clearly does. And the federal rules strongly favor allowing Plaintiffs an opportunity to fully develop and present their case, including factual and expert testimony, and not have the lawsuit short circuited at the first stage of the proceedings, before discovery has even begun. Defendants' motions should be denied.

ARGUMENT

I. Standard of Review

Motions to dismiss are "disfavored by the courts because of their res judicata effect." *Travelers Prop. Cas. Ins. Co. v. Bruner*, No. 3:07CV463-HEH, 2007 WL 3143333, at *1 (E.D. Va. Oct. 25, 2007). A complaint may not be dismissed pursuant to Rules 12(b)(1) or 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Bland v. Va. State Univ.*, No. 3:06CV513-HEH, 2007 WL 446122, at *2 (E.D. Va. Feb. 7, 2007). At this stage, a court "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses," but rather "must assume that the allegations of the complaint are true and construe them in the light most favorable to the plaintiff." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). The Court tests the sufficiency of the complaint against Rule 8, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Broccuto v. Experian Info. Sols., Inc.*, No. 3:07CV782-HEH, 2008 WL 1969222, at *5 (E.D. Va. May 6, 2008).

II. The Undue Burden Standard Applies to All of the Challenged Abortion Restrictions and Requires a Fact- and Record-Specific Balancing of a Law's Benefits With its Burdens.

Over four decades of Supreme Court precedent recognizes and affirms a woman's fundamental right to access abortion prior to viability. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). In evaluating the permissibility of an abortion restriction, courts rely on the undue burden standard as announced in *Casey* and clarified in *Whole Woman's Health*. Under this standard, "regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Whole Woman's Health*, 136 S. Ct. at 2309. A court must evaluate the record evidence to determine if the regulation *actually* advances its goal in a permissible way. *Id.* at 2309–10 (the "Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake."). It may not uncritically defer to the state's articulation of its interest or accept a pretextual reason for limiting access to abortion, but rather must "place[] considerable weight upon evidence and argument presented in judicial proceedings." *Id*.

Importantly, the undue burden test is searching and fact-intensive; it requires a court to evaluate whether the burdens a restriction imposes outweigh the benefits it confers. *Id.* at 2309. If the restriction's burdens are greater than its evidence-based benefits, it places a substantial obstacle in the way of a woman seeking an abortion and is unconstitutional regardless of the interest asserted. *Id*.; *see also Casey*, 505 U.S. at 877 (a "finding of an undue burden is a shorthand for. . . a substantial obstacle.").

III. Plaintiffs Allege Facts and Assert Valid Causes of Action that the Licensing Statute and Regulations Violate their Patients' Rights to Abortion.

A. Plaintiffs More than Sufficiently Allege that the Challenged Licensing Scheme Imposes Burdens that Outweigh Benefits.

Contrary to Defendants' assertions, Plaintiffs allege more than sufficient facts "to show that, under existing Supreme Court precedent, the administrative regulations pose a substantial obstacle to women seeking an abortion." AG Br. 10. A plaintiff states an undue burden claim by alleging facts showing that a restriction imposes burdens on access to abortion that are not justified by weightier benefits in furtherance of a legitimate state interest. *Whole Woman's Health*, 136 S. Ct. at 2309. Here, Plaintiffs allege that abortion is an extremely safe procedure—with lower complication rates than many common and safe outpatient procedures performed in OB/GYN or other physicians' offices in Virginia, which are neither licensed nor inspected by the Virginia Department of Health (VDH). *See* Compl. ¶¶ 50–63. And against this backdrop of indisputable safety, the Complaint alleges the many ways that the Licensing Scheme is unnecessary and inapposite to how abortion care is actually delivered. For example, the Licensing Scheme mandates protocols for equipment, medication, and anesthesia that are more prescriptive and extensive than those for hospitals, even though abortion requires no incision and does not need to be performed in a sterile environment, and medication abortion requires nothing more than the oral administration of medication. *Id.* ¶¶ 112–14. It also saddles providers with byzantine administrative requirements unrelated to how medical offices with limited staff actually function. *Id.* ¶¶ 115–17.

Plaintiffs also plead facts demonstrating that the Licensing Scheme burdens patients' access to abortion in a multitude of ways, including by limiting the pool of providers willing to take on the costly and onerous weight of compliance, which has contributed to the decline in the number of providers in Virginia and has forced patients to wait longer and travel farther to access

abortion care, *id.* ¶ 173; by allowing inspectors to have unfettered access to private and confidential medical and personnel information and to violate patients' privacy by observing procedures and listening to counseling sessions, *id.* ¶¶ 182–85; and by diverting Plaintiffs' time and resources away from patient care, which reduces individual attention, conversation, and emotional support for patients, *id.* ¶¶ 171–72—all of which are meaningful burdens that the Supreme Court has recognized. Indeed, Plaintiffs further allege that some patients may be denied the method of abortion they would otherwise choose or fully prevented from obtaining an abortion, because the Licensing Scheme impacts providers' ability to offer them timely abortion care. *Id.* ¶ 174. These allegations of burdens are more than sufficient to state an undue burden claim.

Defendants also seriously misconstrue the undue burden standard by contending that the challenge to the Licensing Scheme must be dismissed because "[u]nlike in *Whole Woman's Health*, plaintiffs' complaint contains no factual allegations that [the Licensing Scheme has] dramatically reduced the number of abortion providers in the Commonwealth." Defs.' Brs. 10. *Whole Woman's Health* in no way limits cognizable burdens to "dramatic" declines in the number of providers. Instead, the case takes a contextual approach to assessing burdens, broadly considered, including impact on patient care, *Whole Woman's Health*, 136 S. Ct. at 2318, and increased travel time, *id.* at 2313—all of which the Complaint alleges. That decision was also based on a review of a fulsome record that plaintiffs built after extensive discovery and expert testimony. *See Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 678 (W.D. Tex. 2014). Plaintiffs could not—nor were they required to—make a complete evidentiary showing at the pleading stage.

Additionally, Plaintiffs do allege that the Licensing Scheme caused some clinics to close, including Hillside Clinic in Norfolk in 2013, because of the prohibitory cost of compliance with the then-pending regulations. Compl. ¶ 95. Defendants quibble with Plaintiffs' allegations because

the closure trend spans 2009 to 2016, during which time the number of abortion facilities in Virginia declined by more than half. *Id*. ¶ 189. Contrary to Defendants' assertion, however, the time frame is relevant to the impact the Licensing Regulations (which first took effect in some form in 2011) had on clinic closures, both individually and in conjunction with the other challenged laws. At this stage of the litigation, this trendline is more than sufficient to allege that many medical facilities stopped providing abortion care after the Licensing Scheme was implemented, contributing to access reductions in Virginia.

B. *Simopoulos* is Inapplicable and Sufficient Facts Support that the Licensing Statute Obstructs Access to Abortion Without Conferring Any Benefits.

Defendants are incorrect that Plaintiffs allege that the challenged clause of the Licensing Statute, Va. Code Ann. § 32.1-127(B)(1), which classifies all facilities performing five or more first trimester abortions each month as a type of "hospital," is unconstitutional for "the mere fact that abortion providers are defined by statute as hospitals." Defs.' Brs. 5. Defendants contend that Plaintiffs' challenge is foreclosed by *Simopoulos v. Virginia*, 462 U.S. 506 (1983). *Id*. Defendants misinterpret both Plaintiffs' claim and *Simopoulos*' holding. As discussed below, Plaintiffs plead facts showing that the Licensing Statute is unnecessary because it confers no health or safety benefits beyond those already provided by generally applicable law, while unduly burdening Virginians seeking abortion. *Simopoulos* certainly did not hold that it is constitutionally permissible to subject first trimester abortion providers to a medically unnecessary and burdensome regulatory scheme. The question in that case was whether Virginia's requirement that all second trimester abortions take place in licensed hospitals was unconstitutional (in combination with pertinent statutory and regulatory definitions in place at that time). *Simopoulos*, 462 U.S. at 516–17. That decision did not touch first trimester abortion providers and has no bearing on any analysis of the constitutionality of the Licensing Statute.

Defendants also assert that the Licensing Scheme is permissible under the equal protection analysis in *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 174 (4th Cir. 2000), ignoring that Plaintiffs did not raise an equal protection claim, and any abortion restriction is still subject to the *Whole Woman's Health* benefits-burdens analysis. 136 S. Ct. at 2309–10. Plaintiffs plead sufficient facts showing the Licensing Statute imposes an undue burden, including that it confers no medical benefits beyond existing Virginia laws. Medical professionals who provide or assist with the provision of abortion care and the facilities in which they practice are already subject to the Commonwealth's robust professional licensure, health, and tort laws and regulations. Compl. ¶ 102. Healthcare facilities are also regulated and supervised by professional organizations. *Id*. Separate and apart from VDH, another agency, the Virginia Department of Health Professions ("VDHP"), has authority to regulate the practice of any healthcare provider licensed by the Boards of Medicine, Nursing, and Pharmacy. *Id.* ¶ 104. VDHP has extensive investigatory and enforcement powers, including conducting facility inspections, investigating statutory violations and complaints, taking disciplinary action and/or imposing monetary penalties, and referring practitioners for criminal prosecution. *Id.* ¶ 105. Additionally, the Boards of Medicine and Nursing have extensive enforcement powers to suspend and revoke physicians' and advance practice clinicians' licenses. *Id.* ¶ 106. Against this backdrop of extensive regulation and oversight, the Licensing Statute is wholly unnecessary and duplicative.

At the same time, the Licensing Statute burdens people who seek abortion care in Virginia and the providers who treat them. Plaintiffs allege that abortion providers must divert time and money away from patient care to comply with an entirely separate set of regulations arbitrarily imposed on them pursuant to the Licensing Statute. *Id*. ¶¶ 165–72. Compliance with these unnecessary regulations is a mandatory condition of licensure, yet detracts from patient care by consuming time and resources wholly unrelated to patient health or safety. The Licensing Scheme

also operates cumulatively with, and exacerbates the burdens of, Virginia's other challenged abortion restrictions by conditioning providers' facility licensure on their compliance with a thicket of criminal laws and regulatory restrictions that do not meaningfully improve patient health or safety, nor advance any other state interest. *Id.* ¶¶ 240–43.

C. *Burford* and *Pullman* Abstention Are Inappropriate.

Defendants' call for this Court to avoid constitutional adjudication by deploying *Burford* and *Pullman* abstention doctrines must fail. Federal courts have a "virtually unflagging" obligation "to adjudicate claims within their jurisdiction." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) (abstention remains "the exception, not the rule"). This case does not fall within any narrow exception to that duty.

Burford abstention represents an "extraordinary and narrow exception" to federal court jurisdiction that is "rarely" employed. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). It applies only where issues entangle federal courts in deciding "basic problems of [state] policy," *Burford v. Sun Oil Co.,* 319 U.S. 315, 332 (1943), not when they are asked to adjudicate constitutional claims. The objective of *Burford* abstention is to "ensure uniform treatment of essentially local problems," such as state land use and zoning regulations. *See MLC Auto. LLC v. Town of S. Pines*, 532 F.3d 269, 280 (4th Cir. 2008). Thus, the "mere presence of complex state administrative processes does not necessarily require abstention," and abstention is only appropriate in "exceptional cases." *Neufeld v. City of Balt.*, 964 F.2d 347, 349–50 (4th Cir. 1992). And it does *not* "require withdrawal of federal jurisdiction merely because resolution of a federal question might result in overturning state policy." *Id*. at 350.

To decide whether to abstain under *Burford*, "[c]ourts must balance the state and federal interests to determine whether the importance of difficult state law questions or the state interest in uniform regulation outweighs the federal interest in adjudicating the case at bar," and "[t]his

balance only rarely favors abstention." *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007). Interference justifying *Burford* abstention must not "consist merely of the threat that the federal court might declare the *entire state system* unconstitutional; that sort of risk is present whenever one attacks a state law on constitutional grounds in a federal court." *Bath Mem'l Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1013 (1st Cir. 1988) (emphasis in original).

Here, Plaintiffs' claims arise under the U.S. Constitution and 42 U.S.C. § 1983, not state law. Compl. ¶¶ 15, 244–60. Contrary to Defendants' contentions, *see* Tracci Br. 7; AG Br. 8, the "difficult" issue here is not one of state law at all, but whether the Licensing Scheme, as a whole, violates the U.S. Constitution—a question that is fully within the purview of this federal court, and in no way dependent on unsettled issues of state law. Courts reviewing similar challenges to the constitutionality of a state's regulatory scheme have found *Burford* inappropriate for that reason. *See, e.g., Neufeld*, 964 F.2d at 350–51 (declining abstention because plaintiff's claim that the local zoning scheme was preempted by FCC regulations and unconstitutional under the First and Fourteenth Amendments did not present "difficult questions of state law involving peculiarly local concerns," *id.* at 350); *June Med. Servs., LLC v. Gee*, 306 F. Supp. 3d 886, 895–96 (M.D. La. 2018) (declining to abstain under *Burford* because plaintiffs' "substantive due process claim arises exclusively under federal law," and "is based on the application of Louisiana's existing abortion law, not an inquiry into unsettled areas of state law," *id.* at 895); *Planned Parenthood League of Mass. v. Bellotti*, 868 F.2d 459, 466 (1st Cir. 1989) ("the simple existence of parallel state proceedings is *not* a reason to abstain").

In support of *Burford* abstention, Defendants point to *Melendez v. Va. State Bd. of Health*, No. CL17-1164 (Va. Cir. Ct. Henrico Cty.), a procedural challenge to the Licensing Regulations that has been pending in Virginia state court since April 2017, and will likely continue for years, unless it is mooted by VBH's pending regulatory action (which, historically, has taken years to

complete). Defendants erroneously assert that this Court should wait for *Melendez* to be resolved because it could invalidate the regulations on state law grounds, or otherwise make Virginia's abortion policy more "coherent." AG Br. 9; Tracci Br. 8. That contention in no way supports *Burford* abstention, which is inapplicable when claims concern ongoing violations of constitutional rights. And the *Melendez* plaintiffs only seek remedies that would make the regulations *more* burdensome. Compl. ¶¶ 96–99. That outcome would not resolve Plaintiffs' constitutional claims.

Defendants assert a second doctrine, *Pullman* abstention, to argue that federal courts are permitted to "abstain when the need to decide a federal constitutional question might be avoided if state courts are given the opportunity to construe ambiguous state law." Defs.' Brs. 8. But *Pullman* is disfavored, having "proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). *Pullman* abstention is also inappropriate "when a state statute is not fairly subject to an interpretation which will render unnecessary adjudication of the federal constitutional question." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984) (internal quotations omitted); *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983) (*Pullman* requires, at a minimum, an unclear issue of state law "the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive.")

Defendants' suggestion that this Court "allow Virginia to determine whether the existing regulations were enacted in a procedurally proper manner," AG Br. 9; Tracci Br. 8, is entirely irrelevant under *Pullman*. The Licensing Statute unambiguously mandates that VBH promulgate at least ten categories of regulatory standards which must "be in substantial conformity to the standards of health, hygiene, sanitation, construction and safety as established and recognized by

medical and health care professionals and by specialists in matters of public health and safety." Va. Code Ann. § 32.1-127(A), (B)(1); Compl. ¶ 126. Whereas these standards are normally applied to large hospitals and nursing homes, the Licensing Statute requires VBH to apply them to facilities providing a single, incredibly safe medical procedure: abortion. VBH thus codifies a standard of care for abortion that is inconsistent with governing medical standards, and enables Defendants to enforce that code through surveillance, civil fines, and criminal prosecution. *Id.* ¶¶ 76, 119, 122–24. The Complaint alleges, in detail, why the Licensing Statute, on its face and as enforced by Defendants, imposes an undue burden on access to abortion in Virginia. *Id*. ¶¶ 65–70, 101–26; *see also supra* § III.A.

Further, Defendants never assert that the Licensing Regulations present unclear issues of state law that could be resolved in a way that moots Plaintiffs' federal constitutional challenge. Instead, they again rely on *Melendez*—the pending state court challenge raising procedural claims—to argue for abstention. As Defendants well know, there are two possible outcomes in *Melendez*: the Licensing Regulations will remain as alleged in the Complaint, or they will become more burdensome. *Id.* ¶¶ 97–99. Neither outcome resolves an ambiguous question of state law, and neither outcome is potentially dispositive to Plaintiffs' constitutional claims. Moreover, abstaining from this case, potentially for years, will result in the continued imposition of an undue burden on abortion access in Virginia. That is why *Pullman* abstention is no longer favored by the Supreme Court, and why this Court should not abstain from adjudicating Plaintiffs' claims.

IV. The Physician-Only and Two-Trip Mandatory Delay Laws Are Not Per Se Constitutional and Case Law Does Not Foreclose Plaintiffs' Challenge to These Laws.

This Court should also reject Defendants' attempt to evade constitutional review of the Physician-Only and Two-Trip Mandatory Delay Laws. Neither *Mazurek v. Armstrong*, 520 U.S. 968 (1997), nor *Casey* announced an overarching legal principle that it is always constitutionally

permissible to prohibit non-physicians from providing abortion care or to impose waiting periods—no matter how medically unjustified the law or how much harm it causes patients. *Mazurek*, *Casey*, and *Whole Woman's Health* stand for the proposition that the undue burden analysis must be applied to all abortion restrictions in a fact-specific, record-dependent manner.

Defendants repeatedly emphasize the unremarkable contention that lower courts must follow Supreme Court precedent that "has direct application in a case," even if that precedent "appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989). However, *Casey* itself, and the Supreme Court's recent decision in *Whole Woman's Health* interpreting *Casey*, make clear that the undue burden standard is context-specific and record dependent. Accordingly, "*Casey* does not foreclose plaintiffs from bringing facial challenges to abortion regulations in other states that are similar to those found constitutional in *Casey*." *Karlin v. Foust*, 188 F.3d 446, 485 (7th Cir. 1999). Indeed, "litigants are free to challenge similar restrictions in other jurisdictions." *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1313 (1994). The mere fact that a lawsuit challenges the same or similar type of restriction as the Physician-Only or the Two-Trip Mandatory Delay Laws does not render *Mazurek* or *Casey* "directly applicable." Rather, the undue burden test is, and always has been, highly fact- and circumstance-dependent.

A recent Seventh Circuit case is instructive. There, the court rejected a nearly identical argument to the one Defendants make here. It chastised Indiana's attempt "to simplify the court's complex burden and benefit weighing to a more cookie cutter" argument that "*Casey* paved the way for an almost per se approval of all reasonable waiting periods." *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health*, No. 17-1883, 2018 WL 3567829, at *16 (7th Cir. July 25, 2018). "[O]ne of the primary lessons of *Whole Woman's Health*," the court emphasized, "is that the burden and benefit weighing is context-specific." *Id.* Thus, "a similar

provision in another state's abortion statute could well be found to impose an undue burden on women in that state depending on the interplay of factors." *Id.* at *17 (citing *Karlin*, 188 F.3d at 485). The case law "reflects that the facts and context rule the day when evaluating waiting periods. This is far from being a blanket stamp of approval on them." *Id.* Accordingly, dismissal when such a fact-intensive analysis is required would be inappropriate at this initial stage.

A. *Mazurek* Does Not Bar the Physician-Only Challenge.

Defendants incorrectly characterize *Mazurek* as holding that physician-only laws are per se constitutional. It does not. Because this case is factually and legally distinguishable, *Mazurek* is not controlling, and the motion to dismiss Count IV should be denied.

Mazurek upheld a physician-only requirement where the question before the Court was whether the law imposed an undue burden because it had an improper *purpose*. The Court rejected plaintiffs' purpose claim based on specific facts in that record, rather than a categorical presumption that such laws are always constitutional. In assessing the impact of the law to determine if it would support a finding of improper *purpose*, the Court held that "[t]here exists insufficient evidence in the record to support the conclusion [that] the requirement that a licensed physician perform an abortion would amount, 'in practical terms, to a *substantial obstacle to a woman seeking an abortion*.'"[2] *Mazurek*, 520 U.S. at 971 (second alteration in original) (citations omitted). Indeed, it was "uncontested" that the restriction did not pose a substantial obstacle to seeking abortion care, and the Court characterized it as "harmless" because it would not force a single woman to travel to a different clinic. *Id.* at 972. Here, Plaintiffs do not bring only a purpose

[2] That the *Mazurek* Court considered whether the restriction would pose a substantial obstacle "in practical terms" further demonstrates that physician-only restrictions are not per se constitutional; if such restrictions were categorically acceptable, practical effects would be irrelevant.

claim; instead, they allege that the *effect* of the Physician-Only Law is to impose a substantial obstacle to abortion access. *See infra* § IV.B. *Mazurek*'s holding makes clear that examination of the facts in a specific case, and the practical effects of such a restriction, is the proper line of inquiry for resolving Plaintiffs' claims, rather than a categorical presumption of constitutionality.[3]

Neither did *Casey* hold that physician-only requirements are per se constitutional. The Court in *Casey* upheld a physician-only *counseling* requirement—not a physician-only requirement—after determining that there was no evidence "on this record" that the requirement posed a substantial obstacle to abortion access. *Casey*, 505 U.S. at 884–85. Neither *Casey* nor *Mazurek* forecloses this case.

B. Plaintiffs Allege Sufficient Facts Showing that the Physician-Only Law Obstructs Access to Abortion Without Conferring Any Benefits.

Defendants' arguments also fail to account for the facts as they are today. As with other procedures, evidence-based medical advances and training since 1975 have rendered restrictions like the Physician-Only Law obsolete. Plaintiffs allege that advanced practice clinicians (APCs) can and do provide safe and effective abortion care throughout the country. Forbidding APCs from serving their communities burdens Virginians without any corresponding benefit.

As Plaintiffs allege, "[t]here is no statistically significant benefit, as measured by complication rates, failure rates, or any other outcome, when aspiration abortions are performed by physicians as compared to APCs. Indeed, peer-reviewed studies uniformly conclude that APCs can safely and effectively provide both aspiration and medication abortion, and leading medical

[3] Defendants invoke *Mazurek* to state 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*," 520 U.S. at 973 (quoting *Casey*, 505 U.S. at 885). This language was used in the context of foreclosing an inquiry into the statute's improper purpose, which is not at issue in this case.

and public health authorities agree." Compl. ¶ 161. By limiting the number and type of clinicians that Plaintiffs may employ, and prohibiting APCs from providing abortion services, the Physician-Only Law imposes burdens on Virginians seeking abortion care, particularly low-income Virginians and those living in rural areas. *Id*. ¶¶ 188–91. As alleged, restrictions like the Physician-Only Law contribute to a lack of providers, higher access costs, and burdensome travel requirements that create significant obstacles to accessing abortion care. *Id*. If "the Physician-Only Law were lifted, some of Plaintiffs' health centers would be able to go from providing abortions only one day a week to providing services three to five days a week." *Id*. ¶ 160. Patients would then be able to access care at earlier stages of pregnancy, when the risk of complication is even lower. *Id*. ¶ 231. In addition, increased access to care would help ensure that patients are able to choose the abortion method that they prefer—and avoid the psychological, financial, and emotional harms of being forced to stay pregnant against their will because of logistical difficulties in seeking abortion care. *Id*. ¶ 232. No state interest is served by prohibiting qualified, trained, and licensed medical professionals from providing common and safe healthcare.

C. Plaintiffs' Challenge to the Two-Trip Mandatory Delay Law is Factually and Legally Distinct from the Challenge in *Casey.*

Defendants' reliance on *Casey* to assert that Count V must fail as a matter of law is misplaced because Plaintiffs' challenge to the Two-Trip Mandatory Delay Law is factually and legally distinct. *See* 505 U.S. at 881–87. The *Casey* Court determined that Pennsylvania's two-trip "informed consent" statute did not amount to an undue burden in a pre-enforcement challenge, when it could not fully assess the law's burdens since it had not gone into effect, and as a result plaintiffs had been unable to build a record demonstrating its real-world burdens. By contrast, the Two-Trip Mandatory Delay Law has *been* in effect in Virginia since July 1, 2012, and the Complaint provides numerous factual allegations demonstrating how it has negatively impact, and

will continue to impact, patients in Virginia.

Moreover, the *Casey* Court considered evidence submitted before the undue burden standard was established, where plaintiffs planned their evidentiary presentation believing that the challenged restrictions were subject to strict scrutiny review. Under strict scrutiny, restrictions to protect fetal life were never permissible during the first trimester of pregnancy, altering the types of evidence plaintiffs produced. The Third Circuit invited a post-enforcement challenge once the Pennsylvania Act went into effect, acknowledging that the "fact-bound nature" of the undue burden standard "might yield a different result on its constitutionality." *Casey v. Planned Parenthood of Se. Pa.*, 14 F.3d 848, 863 (3d Cir. 1994). Further, the Supreme Court made clear that increased delays, travel distances, risk of disclosure, and exposure to anti-abortion harassment were part of the fact-specific analysis, writing that these "findings are troubling in some respects," though they did not constitute an undue burden "on the record before us." *Casey*, 505 U.S. at 885–87.

Here, the Two-Trip Mandatory Delay Law includes additional, onerous requirements that result in a more burdensome restriction than the law upheld in *Casey*, which required the medical provider to convey certain information to patients and offer state-published materials at least 24 hours in advance of their abortion. 505 U.S. at 844; 18 Pa. Cons. Stat. § 3205.[4] The Two-Trip Mandatory Delay Law requires more extensive information to be conveyed, coupled with a

[4] The Pennsylvania statute requires the physician performing the abortion or the referring physician to "orally inform[]" the patient of the nature, risks, and alternatives to the procedure, the probable gestational age at the time that the abortion will be performed, and medical risks to carrying the pregnancy to term. 18 Pa. Cons. Stat. § 3205(a)(1). Additionally, the physician or another health care worker must offer the patient state-published materials and describe their contents, which include a description of gestational development; information about medical assistance benefits; and that the father of the fetus is liable for child support.

compulsory ultrasound at least 24 hours before the abortion. Va. Code Ann. § 18.2-76(B).[5]

Significantly, unlike Virginia's statute, the Pennsylvania law included an exception permitting physicians not to offer the mandated information if they could demonstrate a "severely adverse effect on the physical or mental health of the patient" by a preponderance of the evidence. *Casey*, 505 U.S. at 883–84; *compare* 18 Pa. Cons. Stat. § 3205(c), *with* Va. Code Ann. § 18.2-76. The Supreme Court held that this exception assured that physicians could continue to use their best judgment in caring for patients. *Casey*, 505 U.S. at 883–84. There is no such exception here, forcing providers in Virginia to deliver the required message and materials regardless of the potential effect on patients (with a narrow exception for reported rape that applies only to the child support and ultrasound provisions). Defendants misconstrue Plaintiffs' allegations as being about limits on physician discretion. Defs.' Brs. 3–4. They are not. Rather, Plaintiffs allege that compulsory ultrasound and "informed consent" requirements impinge upon professional judgment by hindering providers' ability to avert harm to their *patients* and burdening their *patients'* right to abortion. Compl. ¶¶ 205, 209. Notably, the Fourth Circuit, evaluating an ultrasound requirement, relied on *Casey* to find that the lack of an exception to avert patient harm contravened core principles of permissible informed consent. *See Stuart v. Camnitz*, 774 F.3d 238, 254 (4th Cir. 2014).

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[5] Under Virginia law, the physician performing the abortion, referring physician, or agent must explain the nature, benefits, risks, and alternatives to abortion, the probable gestational age, and offer the patient the opportunity to review the state materials. Va. Code Ann. § 18.2-76(D). The provider must describe the materials' contents, including that they discuss gestational development and medical assistance benefits; and that the father of the fetus is liable for child support. *Id.* The statute also requires the provider to notify patients that they can withdraw consent any time before the procedure; can speak with the physician performing the abortion; and that the provider will perform an ultrasound prior to the procedure to confirm the gestational age. *Id.* The state materials that must be offered at least 24 hours before the abortion contain an additional statewide list of free ultrasound and fetal heartbeat auscultation providers. Va. Code Ann. § 18.2-76(D)(5)(v).

D. The Two-Trip Mandatory Delay Law Imposes Burdens Without Corresponding Benefits.

None of the components of the Two-Trip Mandatory Delay Law provide any benefits, health or otherwise. Mandating an ultrasound is inappropriate because an ultrasound is not always necessary, and some providers use other methods of determining pregnancy and gestational age, including but not limited to blood tests or pelvic exams. Compl. ¶ 205. Requiring an ultrasound 24 hours in advance of an abortion is even more unnecessary because many providers perform another ultrasound in conjunction with the provision of abortion services. *Id.* ¶ 206. Further, there is no benefit to requiring providers to give patients rigid categories of information that are dictated by the state, and offer additional materials containing inaccurate information, to obtain informed consent. *Id.* ¶ 211. The fact that these materials contain multiple inaccuracies and misleading statements renders them unable to advance any legitimate state interest. *Id.* ¶¶ 212–20. Plaintiffs also allege that the Two-Trip Mandatory Delay Law does not dissuade people from obtaining abortions, given that the vast majority of people are certain about their decision by the time that they arrive at their healthcare provider, and all receive patient education from trained staff, with multiple opportunities to ask questions and discuss any concerns. *Id.* ¶¶ 221–22. The stigmatizing, compulsory ultrasound and mandatory delay serve no legitimate purpose, regardless of what interest Defendants claim it furthers.

Plaintiffs furthermore allege facts showing that the Two-Trip Mandatory Delay Law imposes heavy burdens on abortion access. While Defendants seek to contradict these facts by contending that the law mandates a delay of "at most" 24 hours, Defs.' Brs. 2–3, this assertion can only be tested after discovery has been conducted. Contrary to Defendants' baseless claim, in practice (and as alleged), the law can result in delaying patients up to a few weeks before they can obtain an abortion. Compl. ¶ 229. Lengthy delays result because patients must coordinate time off

from work or school, arrange child care, and find transportation for a second visit to the clinic for an available appointment on a day when the clinic is providing abortions. *Id*. ¶¶ 226–34. Although the Two-Trip Mandatory Delay Law reduces the delay to two hours for people traveling more than 100 miles, this is insufficient to address the needs of those traveling less than 100 miles in each direction who still need to make two multiple-hour round trips. *Id*. ¶¶ 202, 228. Some patients are unable to access the abortion method that they prefer: for example, some become ineligible for a medication abortion, which is only available up to 10 weeks after a patient's last menstrual period (LMP), as a result of this delay. *Id.* ¶ 232. Some may delay care and become ineligible for first-trimester abortions, *id.* ¶ 233, and others may not be able to obtain care at all, *id.* ¶ 234. In addition to logistical burdens, the Two-Trip Mandatory Delay Law causes some patients to experience psychological, financial, and emotional harms from being forced to remain pregnant. *Id.* ¶ 232.

The undue burden standard requires courts to look at the particular burdens that the law poses in context. *Whole Woman's Health*, 136 S. Ct. at 2313, 2318. Plaintiffs also allege that the Two-Trip Mandatory Delay Law operates cumulatively with the other challenged laws, exacerbating its burdens in ways that were not addressed in *Casey*. Compl. ¶¶ 240–43. For example, the Two-Trip Mandatory Delay Law operating alongside the second trimester Hospital Requirement, Va. Code. Ann. § 18.2-73, compounds the burdens in a manner distinct from *Casey*. In Virginia, if a patient is unable to satisfy the compulsory ultrasound and "informed consent" requirements before 13 weeks, 6 days LMP, the cost of obtaining an abortion jumps considerably from $360-$635 to over $1,400 for an identical aspiration procedure at 14 weeks, 0 days LMP. Compl. ¶ 194. Even if patients can afford the cost of the procedure, they may not be able to shoulder the attendant costs to travel to one of the two second trimester providers in the Commonwealth. *Id*. ¶¶ 196–97, 233. The burdens stemming from the Two-Trip Mandatory Delay Law are further exacerbated by the State's Physician-Only Law, which, as alleged, limits some

Plaintiffs to providing care just one day a week, *id.* ¶ 160, meaning the 24-hour delay can expand into weeks. Plaintiffs allege detailed facts showing that the Two-Trip Mandatory Delay Law fails to further a valid state interest, *id.* ¶¶ 202–24, while imposing heavy burdens on patients seeking abortion care, *id*. ¶¶ 225–34. Nothing more is required at this stage of the litigation.

V. Plaintiffs State a Claim that the Hospital Requirement Imposes an Undue Burden on Access to Second Trimester Abortion Care and is Void for Vagueness.

A. Sufficient Facts Support Plaintiffs' Standing to Challenge the Hospital Requirement.

Defendants contend that Plaintiffs lack standing for certain of their challenges. Specifically, they argue that Plaintiffs are no longer at imminent risk of prosecution for violating the Hospital Requirement because the Commonwealth no longer enforces the Felony Abortion Statute against licensed abortion facilities, including Plaintiffs' facilities, that would provide second trimester abortion care. Defs. Brs. 5–7. Yet, Defendants and their predecessors have enforced the Hospital Requirement, in conjunction with the Felony Abortion Statute and several iterations of implementing regulations, against some Plaintiffs for years, and others for decades.

Virginia has an enduring history of changing statutory and regulatory interpretations for abortion restrictions. *See* Compl. ¶¶ 91–99. Plaintiffs allege that their facilities have long been excluded from the statutory definition of "hospital" because they have been considered physician's offices not "used principally for performing surgery." Va. Code Ann. § 32.1-124(v).[6] Even if this Court reads the Hospital Requirement in accord with Defendants' narrow interpretation, absent a court order or declaratory judgment enforcing that interpretation, Defendants or their successors

[6] None of the abortion procedures provided in Plaintiffs' facilities fall within Virginia's statutory definition of "surgery." *Compare* Va. Code Ann. § 54.1-2400.01:1 (2012) (limiting the definition of "surgery" to procedures that involve "the incision or cutting into of tissue"), *with* Compl. ¶¶ 41–49 (describing abortion methods, none of which involve an incision or "cutting into of tissue").

could still prosecute Plaintiffs "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). Given that the Hospital Requirement has been enforced for decades to prohibit Plaintiffs from providing second-trimester abortions in their current facilities, under threat of serious penalties; and that Defendants seek dismissal based on their interpretation of a state law that still puts Plaintiffs at risk of injury, Defendants' arguments cannot justify dismissal under Rule 12(b)(1).

B. Plaintiffs Licensed as "Abortion Facilities" Allege Article III Injury.

To demonstrate Article III standing, a plaintiff must satisfy three criteria: (1) a concrete injury in fact; (2) that is fairly traceable to the defendant's conduct; and (3) that can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). A plaintiff "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Plaintiffs also need not violate an allegedly unconstitutional law in order to challenge its constitutionality. *See, e.g., MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 128–29 (2007). Plaintiffs only need to demonstrate that they are faced with a choice between (1) obeying a law they believe to be unconstitutional or (2) suffering actual or imminent harm for disobeying it. *See id*. Courts have long recognized that abortion providers have standing to sue to enjoin restrictions on abortion. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 910 (7th Cir. 2015) ("The cases are legion that allow an abortion provider, such as [Plaintiffs], to sue to enjoin . . . state laws that restrict abortion."); *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999), *aff'd*, 224 F.3d 337 (4th Cir. 2000) (per curiam).

Plaintiffs have standing to challenge the Hospital Requirement's constitutionality,

regardless of whether their facilities qualify as "hospitals" licensed by VDH.[7] Plaintiffs allege that the Hospital Requirement, in conjunction with its implementing regulations, precludes Plaintiffs from providing second trimester abortions unless they meet licensing requirements, and Plaintiffs risk felony prosecution if they do not meet those requirements. Compl. ¶¶ 71, 127, 129, 200. Plaintiffs also allege that they face prosecution under Virginia Code § 32.1-27(A) for violating any Licensing Regulation, *id*. ¶ 238, which includes the regulation prohibiting licensed abortion facilities from providing second trimester abortion care, *id*. ¶¶ 129, 200; *see also* 12 Va. Admin. Code § 5-412-230(A) ("Abortions performed in abortion facilities shall be performed only on patients who are within the first trimester of pregnancy. . . ."). Defendants give no indication they will stop enforcing this regulation. Thus, if Plaintiffs begin providing second trimester abortion care in their facilities, they would face loss of licensure and risk civil fines and criminal prosecution. Compl. ¶¶ 127, 129, 200; 12 Va. Admin. Code § 5-412-110. This is the same type of injury Plaintiffs would incur for violating the Licensing Regulations, yet Defendants make no corresponding argument disputing Plaintiffs' standing to challenge the Licensing Scheme's constitutionality.

Second, assuming that becoming licensed as an Outpatient Surgical Center remains an option to comply with the Hospital Requirement, Plaintiffs allege that it is financially and logistically difficult—if not impossible—to do so. Compl. ¶¶ 127–51, 195, 200. Plaintiffs allege that they would have to expend significant resources to meet the Certificate of Public Need (COPN) and facility design and construction standards required to obtain an Outpatient Surgical Center license, which remains the minimum level of VDH "hospital" licensure not specifically

[7] Defendants do not challenge the sufficiency of Plaintiffs' allegations as to the second and third prongs of the standing inquiry—causation and redressability.

prohibited by regulation from providing second trimester abortion care. *Id*. ¶¶ 127–41.

Furthermore, Plaintiffs sufficiently allege both actual and imminent injuries sufficient for Article III standing even if this Court accepts Defendants' argument that Plaintiffs' "abortion facility" licenses would shield them from prosecution under the Hospital Requirement and Felony Abortion Statute, and even if Defendants stopped enforcing the regulatory prohibition on second trimester abortion care in licensed "abortion facilities." On its face, the Hospital Requirement demands that second trimester abortion care be provided in a "hospital" licensed by VDH. Plaintiffs allege this requirement is unconstitutional under any form of VDH "hospital" licensure, *id*. ¶¶ 248–50, 257–58, and the Complaint provides numerous allegations describing the multitude of onerous and medically unnecessary requirements Plaintiffs' medical offices must satisfy to avoid criminal prosecution by maintaining their current VDH licensure, *id.* ¶¶ 112, 164–187. For example, Plaintiffs allege that they risk losing their licenses if they fail to develop a "quality improvement committee" that supervises a mandatory "ongoing, comprehensive, integrated, self-assessment program of the quality and appropriateness of care or services provided." *Id.* ¶ 116. Plaintiffs must also "develop, implement, and maintain documentation for 16 different subcategories of policies and procedures," a requirement that nearly drowns Plaintiffs' small medical offices in a constant stream of needlessly bureaucratic paperwork. *Id.* ¶ 170. Plaintiffs allege that the constant struggle to cut through Defendants' zealously enforced red tape hurts their healthcare services and operations by siphoning time away from patient care. *Id*. ¶¶ 165–72.

Plaintiffs allege that they suffer ongoing injuries because they must comply with the unconstitutional licensing regulations, which is equally true whether they are providing first trimester or second trimester abortions. The Complaint contains ample facts demonstrating how the Hospital Requirement enables Defendants to threaten them with criminal prosecution unless they (1) continue to comply with VBH's onerous and medically unnecessary standards for

"hospital" licensure or (2) completely abstain from providing second trimester abortion care. And the Supreme Court has found that similarly coercive legal schemes satisfy the injury-in-fact requirement for Article III standing. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 194 (1976) (vendor sustained injury in fact because she was "obliged either to heed the statutory discrimination, thereby incurring a direct economic injury . . . or to disobey the statutory command and suffer" sanctions and potential loss of licensure); *Virginia v. Am. Booksellers Ass'n., Inc.*, 484 U.S. 383, 392 (1988) (bookseller had standing to challenge obscenity ordinance because law was aimed directly at booksellers and plaintiffs would have had "to take significant and costly compliance measures or risk criminal prosecution" under the challenged law).

Plaintiffs' allegations demonstrate that they have sustained, and will continue to be at risk of sustaining, an injury in fact sufficient to satisfy the first prong of the Article III analysis. Plaintiffs also satisfy causation and redressability, the two prongs unaddressed by Defendants.

C. Plaintiffs Allege Sufficient Facts to Support Standing to Challenge the Hospital Requirement as Void for Vagueness.

For the reasons outlined *supra*, Plaintiffs also allege sufficient facts to establish their standing to attack the Hospital Requirement on vagueness grounds. As alleged, the Hospital Requirement and its implementing regulations fail to specify what type of "hospital" may provide second trimester abortion care, and the removal of the term "abortion facility" from the regulatory definition of "outpatient surgical hospital" in 2013 increased this ambiguity. Compl. ¶¶ 145–51. The Complaint alleges significant, ongoing harms as a result of Defendants' continued enforcement of the Hospital Requirement, in conjunction with its implementing regulations and the Criminalization Laws, including risk of prosecution for providing second trimester abortion care in their facilities. Defendants' current position that Plaintiffs' facilities qualify as "licensed hospitals" in response to this lawsuit, even while VBH continues to enforce its regulation

prohibiting Plaintiffs from providing second trimester abortion care in their licensed abortion facilities, only illustrates the Hospital Requirement's vague language and renders it susceptible to arbitrary enforcement. Plaintiffs have standing to bring their vagueness claim.

D. *Simopoulos* is distinguishable.

As explained *supra*, district courts are only bound by directly controlling precedent. *Rodriguez de Quijas*, 490 U.S. at 484. *Simopoulos* upheld Virginia's Hospital Requirement with a completely distinguishable set of facts and under a different legal standard. The plaintiff in *Simopoulos* brought a challenge "limited to an assertion that the State cannot require all second-trimester abortions to be performed in full-service general hospitals." *Simopoulos*, 462 U.S. at 518.[8] The Court rejected this challenge because at that time, Virginia's statutory definition of "hospital," combined with regulations that explicitly permitted second trimester abortion to be provided in "outpatient hospitals," showed that licensure as an outpatient hospital permitted a facility to provide abortions. *Id*. at 512–16.

The Court noted that the plaintiff had "not attacked [the regulations for outpatient hospital licensure] as being insufficiently related to the State's interest in protecting health." *Id*. at 517. Accordingly, it assessed the health benefits of the regulations in a limited fashion, noting that it "need not consider whether Virginia's regulations are constitutional in every particular." *Id.* The Court held that while a state cannot "adopt abortion regulations that depart from accepted medical practice," the law in question "appear[ed] to comport with accepted medical practice," based on

[8] On that same day, the Supreme Court ruled on two other mandatory hospitalization requirements for second-trimester abortion, holding that those state's laws were unconstitutional because they mandated that "all second-trimester abortions must be performed in general, acute-care facilities." *Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 481–82 (1983); *see also City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 431–33 (1983).

policies that leading medical groups recommended *at that time*. *Id.* at 516–19. This limited, fact-specific holding in no way forecloses a challenge to a hospital requirement that departs from accepted medical practice, as Plaintiffs allege. Compl. ¶¶ 81–83, 127–28, 133–34. Instead, it supports it.

Simopoulos also fails to control because it preceded the Supreme Court's adoption of the undue burden standard, which gave the Court no occasion to balance benefits against burdens. Indeed, the *Simopoulos* petitioner alleged no burdens stemming from the regulations at all. Since that decision, the Court in *Whole Woman's Health* applied the undue burden standard to find unconstitutional a requirement that all abortion care (including second trimester abortions) be provided in ambulatory surgical centers. 136 S. Ct. at 2318. The Court explicitly distinguished *Simopoulos* on the grounds that (1) it was decided under the trimester framework overruled in *Casey* and no longer provides "clear guidance," and (2) "the petitioner in [*Simopoulos*], unlike petitioners [in *Whole Woman's Health*], had waived any argument that the regulation did not significantly help protect women's health." *Id.* at 2320.

Plaintiffs' challenge to the Hospital Requirement must accordingly be decided pursuant to the test established in *Casey* and *Whole Woman's Health*. The undue burden analysis is a context-based, record-specific inquiry that requires this Court to consider the Hospital Requirement's real-world impact on abortion access. *See id.* at 2309–10. Unlike the *Simopoulos* petitioner, Plaintiffs allege that the Hospital Requirement fails to advance the Commonwealth's interest in protecting patient health and does not provide meaningful health benefits. Specifically, Plaintiffs allege that the Hospital Requirement and Licensing Scheme single out first and second trimester abortion care for an excessive and medically unnecessary system of double regulation that harms, rather than benefits, patient health. Compl. ¶¶ 5–14, 101–10, 164–87, 192–201. Furthermore, Plaintiffs allege that requiring second trimester abortions to be performed in hospital or hospital-like outpatient

facility is contrary to contemporary standards of care. *Id.* ¶ 81–83, 127–28, 133–34. Unlike in *Simopoulos*, leading medical organizations now reject such policies. *Id.* ¶ 135. The Complaint also provides detailed allegations explaining the specific burdens the Hospital Requirement imposes on Virginians' access to abortion care after the first trimester of pregnancy, and how it imposes even greater burdens in conjunction with the other challenged restrictions in this case. *Id*. ¶¶ 11, 192–201, 233, 240–43.

These allegations require a record-specific inquiry different from that conducted in *Simopoulos*, which was based on a record that lacked any information on how many outpatient surgical hospitals were providing second trimester abortion care in Virginia, information about the COPN process, or whether it would be difficult in practice for an abortion provider to obtain such an outpatient surgical center license. *Simopoulos*, 462 U.S. at 517–19; *cf.* Compl. ¶¶ 129–31, 139–41 (describing process for obtaining outpatient surgical center licensure and noting that only two such facilities in Virginia regularly provide second trimester abortion care). It was also decided under a different legal standard and with no evidence of burdens. And the limited holding in *Simopoulos* rested on a regulatory definition that saved the statute from unconstitutionality, but which no longer exists. *Simopoulos* simply fails to direct the outcome of this inquiry.

VI. Plaintiffs' Facilities are Inspected Without a Warrant or Valid Consent, in Violation of the Fourth Amendment.

Warrantless administrative inspections performed without valid consent, exigent circumstances, or the opportunity for pre-compliance review—such as those performed by VDH pursuant to the Licensing Scheme, *see id*. ¶¶ 122–26, 175–87, 259–60; 12 Va. Admin. Code § 5-412-90—violate the Fourth Amendment. *City of L.A. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (enjoining warrantless inspections of hotel registers as unconstitutional). Courts have held warrantless searches of abortion clinics unconstitutional under the Fourth Amendment. *See,*

e.g., Tucson Women's Clinic v. Eden, 379 F.3d 531, 549–51 (9th Cir. 2004); *Margaret S. v. Edwards*, 488 F. Supp. 181, 214–17 (E.D. La. 1980); *see also June Med. Servs.,* 306 F. Supp. 3d at 896–97 (denying motion to dismiss Fourth Amendment challenge to warrantless inspections).

Defendants contend that Plaintiffs' Fourth Amendment rights are not violated because "(a) the owner or person in charge consents; or (b) the inspector has obtained a warrant," and argues that a warrantless search to which an individual consents is constitutionally valid. AG Br. 12; Tracci Br. 10. This argument ignores a fundamental piece of the regulation: "If the owner, or person in charge, *refuses entry*, this shall be sufficient cause for *immediate revocation or suspension of the license*." 12 Va. Admin. Code § 5-412-90 (emphasis added). A search conducted pursuant to valid consent is an exception to the Fourth Amendment's warrant and probable cause requirements, but Defendants ignore the key fact that in order to be valid, such consent *must* be given "freely and voluntarily," without coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973). Consent is not given freely where there is "duress or coercion, express or implied." *King v. Rubinstein*, 825 F.3d 206, 217 (4th Cir. 2016) (citations omitted); *see also Bumper v. North Carolina*, 391 U.S. 543, 548–50 (1968) ("Where there is coercion there cannot be consent.").

To the extent Defendants imply that they received "consent" from Plaintiffs and their patients to unannounced, invasive, disruptive inspections, and observation of medical procedures, the question "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances," *Schneckloth*, 412 U.S. at 227, and is thus inappropriate to adjudicate at this stage. Determining whether consent was freely and voluntarily given by each Plaintiff where withholding of such consent results in immediate suspension or revocation of a facility's license (and in turn,

staff's livelihoods), without any opportunity for a hearing,[9] is similarly a fact-based inquiry.

Plaintiffs allege that VDH conducts unconstitutional and unlimited "unannounced on-site inspections" that disrupt patient care for multiple days and occupy significant staff time and resources, during which they must "make available any records that the inspectors request, including patient records," and "grant inspectors access to interview employees, contractors, agents, and any person under the facility's control, direction or supervision" without a warrant, valid consent, exigent circumstances, limits on discretion, or any opportunity for pre-compliance review. Compl. ¶¶ 175–87. As alleged, the inspections are intrusive, disruptive and overbroad: personnel and patient files can be examined without safeguards limiting private, confidential and identifying information; medical documents can be copied and removed from the facility for arbitrary and unknown purposes; and all staff may be interviewed without limitation. *Id.* Most egregiously, inspectors insist on observing abortion procedures (approaching patients publicly in the waiting room seeking permission) and sitting in on private counseling sessions—requiring patients and staff to cede their privacy, confidentiality, and bodily integrity. *Id.* ¶¶ 182–84.

Simply put, laws that coerce facility owners to consent to warrantless searches constitute a violation of their Fourth Amendment rights. They raise factual issues that have yet to be determined; accordingly, the motion to dismiss Count VI should be denied.

VII. The Criminalization Laws Are Challenged by Plaintiffs as Enforcement Mechanisms for Other Unconstitutional Laws, and are Thus Unconstitutional as Applied.

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[9] The regulations contain no deadline for obtaining a warrant, so a facility owner's refusal to consent to an inspection could result in an indefinite suspension or revocation of the facility's license, during which time the facility and its owners, administrators, healthcare providers, and other staff would be subject to criminal penalties, civil fines, and/or disciplinary actions if the facility were to provide five or more abortions per month. *See* 12 Va. Admin. Code §§ 5-412-90, -130; Va. Code Ann. § 32.1-27(A).

Defendants acknowledge that Plaintiffs challenge the Criminalization Laws, Va. Code Ann. §§ 18.2-71, 32.1-27(A), 32.1-136, "in connection with each of their claims," yet then assert that these laws are not "facially unconstitutional." AG Br. 12; Tracci Br. 11. Defendants' argument misreads Plaintiffs' claims, as Plaintiffs do not challenge each criminal law on its face. Rather, Plaintiffs challenge the Criminalization Laws as enforcement mechanisms for the other challenged laws, noting that the harsh penalties imposed by the Criminalization Laws serve to exacerbate the burdens the challenged laws impose on Virginians accessing legal abortion care. Compl. ¶¶ 235–39, 244–58. Whether the U.S. Constitution "permits States to prohibit abortion in certain circumstances," AG Br. 12; Tracci Br. 11, is not the proper analysis; rather, statutes and regulations that are used to enforce criminal penalties for violations of unconstitutional laws are themselves unconstitutional as applied in those contexts. *See, e.g.*, *McCormack v. Hiedeman*, 694 F.3d 1004, 1020–22 (9th Cir. 2012) (holding unconstitutional a statute imposing criminal penalties, in conjunction with another statute defining when abortion is legal in Idaho).

VIII. Plaintiffs Allege a Justiciable Cumulative Undue Burden Claim.

Plaintiffs allege more than sufficient facts to establish a cumulative undue burden claim, which asks a court to evaluate whether two or more abortion restrictions impose burdens that, when either added together or considered synergistically, amount to a burden that is undue. As discussed *supra*, the Complaint alleges detailed facts reflecting the significant burdens that each law individually places on people seeking to access abortion care in Virginia. As also alleged, the burdens are inextricably linked to each other, and while each law is itself an undue burden, the cumulative impact of the challenged laws and regulations is to impose an undue burden that cannot be remedied by striking down individual laws. *See, e.g.*, *supra* §§ III.B; IV.D; V.D.

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss should be denied.

Dated: July 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss was served on counsel for Defendants via the Eastern District of Virginia's Electronic Filing System, and mailed to Defendant Robert N. Tracci pursuant to Federal Rule of Civil Procedure 5(b).

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