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. **M. NORMAN OLIVER,** Virginia Health Commissioner, et al., Defendants.	))))))))))))	Case No. 3:18cv428-HEH

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Each of the counts on which Plaintiffs seek summary judgment comes before the Court in the form of an as-applied challenge to Virginia's law. As such, the question for this Court is not "is abortion safe?" or "can a nurse practitioner be trained to perform abortions?" Rather, the question before the Court is simply:

> Does Virginia's physician-only law or hospital requirement, as applied to the Plaintiffs in this case, place a substantial obstacle in the path of a Virginia woman seeking a pre-viability abortion?

Based on the record before this Court, the answer is "no." As such, Plaintiffs' Motion for Partial Summary Judgment should be denied.[1]

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[1] Defendants also move for summary judgment as to Counts III and IV of the Amended Complaint. ECF Doc. No. 84. Defendants' Motion rests on the fact that Plaintiffs have failed to show that a single Virginia woman is burdened—substantially or otherwise—by Virginia's physician-only law or hospital requirement, as applied to Plaintiffs. As noted in Defendants' Memorandum in Support of Motion for Summary Judgment (ECF Doc. No. 85), the facts upon which Defendants rely for their Motion are not in dispute.

I. <u>Plaintiffs' "Statement of Undisputed Material Facts" Includes Many Disputed and Immaterial Facts</u>.

In support of their Motion, Plaintiffs set forth forty-five paragraphs of "undisputed material facts." However, many of these "facts" are disputed and/or immaterial. In compliance with Local Rule 56, Defendants set out the following material facts on which Plaintiffs rely for which there is a genuine issue in dispute.[2] Next, Defendants contest other "facts" set out by Plaintiffs as immaterial to their as-applied challenge to the physician-only law and the hospital requirement. A fact is material when "its existence or non-existence could result in a different … verdict" from the finder of fact. *JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Finally, Plaintiffs have included "facts" that are unsupported by the citations provided, and should not be considered by the Court.

The following of Plaintiffs' "undisputed facts" are disputed by Defendants and should not be taken as true at this stage.

- **<u>Disputed Fact 1</u>:** "The Physician-Only Law does not provide any medical benefit." Pls.' Mem. ¶ 7.

Plaintiffs ascribe this "undisputed fact," in part, to Defendants' expert, Dr. Elizabeth Lunsford. Plaintiffs misrepresent Dr. Lunsford's testimony. Dr. Lunsford does acknowledge that there likely exist some advance practice clinicians ("APC") who "could be trained" to perform an aspiration abortion, but she in no way affirms Plaintiffs' conclusion that the physician-only law has no medical benefit:

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[2] While Defendants dispute many of the facts set forth in Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment ("Pls.' Mem."), ECF Doc. No. 95, those facts are not material to Defendants' arguments in support of their Motion, which this Court must review "separately on its own merits." *Branch Banking & Tr. Co. v. Witmeyer*, No. 3:10cv55-HEH-DWD, 2011 U.S. Dist. LEXIS 85056, at *9 (E.D. Va. Jan. 6, 2011).

> Q: Would you agree that certain APCs could more likely than not be trained to safely perform a first trimester aspiration abortion?
>
> A: I believe they could be trained to perform that, but again, they – I don't believe their training would support them managing complications. And, in general, APCs don't receive a lot of surgical training. . . . And so if there were any complications from that, they would not be able to manage with things like laparoscopy.

Lunsford Dep. 311:15-312:5; *see also* Lunsford Dep. 310:20-311:7 ("[APCs] probably haven't seen the volume of patients and the breadth of complications to know what to do with patients when there is a complication[.]"). Dr. Lunsford goes on to articulate a clear medical benefit to the physician-only law—the consistency and breadth of training physicians receive as compared to APCs:

> I'm just saying the training varies dramatically between [APCs], and so it would just have to be a lot of on-the-job training and oversight, whereas if you have somebody that has finished particularly an OB/GYN residency, they graduate with a certain volume of cases, and then they sit for board examination, so I would have more confidence in the provision of care from those providers.

Lunsford Dep. 312:11-19; *see also* Lunsford Dep. 313:6-10 (stating that she believes physicians "get much more training in managing complications in the actual D&C procedure than the majority of the APCs would receive."). Indeed, Plaintiffs themselves tacitly acknowledge the benefit of physician training when they advocate that APCs should be limited to medication and aspiration abortion. *See* Ramesh Dep. 117:3-21.

- **Disputed Fact 2:** The "Hospital Requirement provides no medical benefit." Pls.' Mem. ¶ 16.

The Hospital Requirement does provide a medical benefit to Virginia women. Plaintiffs themselves note that "risks [of abortion] increase as pregnancy progresses, as does the invasiveness of the procedure and the need for deeper levels of sedation." Pls.' Mem. ¶ 45. Second trimester abortions can include induction abortions, dilation and curettage abortions, and

dilation and extraction abortions. Requiring these procedures—with their attendant anesthesia risks—to be performed in a hospital ensures safety and appropriate resources to treat complications. *See* Lunsford Dep. 77:8-12, 84:1-85:1, 299:12-300:7; *see also* Expert Report of Dr. Lunsford ¶ 37 (noting that second trimester abortions carry the potential to "quickly turn into an emergency that requires additional resources such as blood transfusion or laparoscopy" and that in extreme circumstances, a woman may not have time to be transferred to a hospital facility if a serious complication arises).

- **Disputed Fact 3:** "The detailed sterile-operating-room requirements and other physical-plant specifications entailed by this requirement are irrelevant to the provision of modern second-trimester abortion care." Pls.' Mem. ¶ 17

Defendants dispute that the hospital requirements are "irrelevant" to the provision of second-trimester care, specifically induction abortions and dilation and evacuation abortions occurring post-viability. These procedures typically involve sedation or general anesthesia. Lunsford Dep. 89:20-90:1 (stating that "a lot of my patients want more anesthetics than Lidocaine or a local anesthetic, so they choose to go to the operating room."). As noted above, these second-trimester procedures carry additional risks which may necessitate emergency treatment of complications.

- **Disputed Fact 4:** "The Physician-Only Law restricts access to abortion by placing significant limitations on the locations and times at which abortion is available, particularly in medically underserved areas of Virginia." Pls.' Mem. ¶ 24.

The physician-only law itself imposes no limitation on access to abortion locations or times. Va. Code Ann. § 18.2-72. Although Plaintiffs speculate that "but for" the law, they would offer additional hours, days, or locations for abortion care, the record does not support Plaintiffs' assumption that there is a backlog of abortion-seeking patients in Virginia waiting to fill these yet-to-be-offered appointment slots. Rather, the record before the Court shows that

Plaintiffs are well-staffed with physicians who ably manage the abortion demand in Virginia. For example, Falls Church Medical Center, LLC ("Falls Church") employs four medical doctors who perform medication and aspiration abortions at its only location, and there is no delay in access for Virginia women seeking abortion appointments at that facility. C.T. Dep. 42:12-21; Codding Dep. 95:19-96:8. Whole Women's Health Alliance Charlottesville ("WWH-Charlottesville") employs only one physician at its only location, who works there part time. Miller Dep. 15:7-9. WWH-Charlottesville has no wait list for abortion appointments. *Id.* 50:9-11. Virginia League for Planned Parenthood ("VLPP") employs two full-time physicians, a physician medical director, and a contract abortion provider to service its three locations. Ramesh Dep. 20:18-21:11. VLPP represents that it is fully staffed and is able to hire additional physicians. McElwain Dep. 41:18-42:3.[3] Indeed, some Plaintiffs do not even advertise to recruit physicians, as physicians proactively approach Plaintiffs and "ask to be a provider of abortion care." *See e.g.*, Codding Dep. 41:15-42:3.

In addition, the record reveals that the abortion procedure itself—whether aspiration or medication—does not require a significant investment of physician time. Plaintiffs testified that the aspiration procedure takes their physicians only about ten minutes to complete. Ramesh Dep. 57:18-20; Dr. Doe Dep. 36:4-6. A medication abortion requires even less physician time, and can be done via Skype—meaning that the physician does not have to be in the same room (or even the same city) as the abortion patient. McElwain Dep. 25:10-26:6; Ramesh Dep. 42:18-43:4. Counseling, informed consent, the ultrasound, patient blood work, and procedure recovery care is already provided by APCs. Miller Dep. 21:14-20, 28:2-10, 54:18-55:20; 56:16-18; Ramesh Dep. 25:21-26:6, 26:10-16; C.T. Dep. 72:12-73:7, 77:4-22. Plaintiffs' assertion that

[3] The majority of VLPP's patients are not seeking abortion, but family medicine care, which is provided by APCs. McElwain Dep. 99:19-100:18.

Virginia's physician-only requirement unduly "restricts access to abortion" is not supported by the record.

- **<u>Disputed Fact 5</u>:** "For example, the Physician-Only Law deprives patients of consistent access to both medication and aspiration abortion at VLPP's Hampton health center, located in an underserved part of Virginia." Pls.' Mem. ¶ 26.

- **<u>Disputed Fact 6</u>:** "But for the Physician-Only Law, more patients could access abortion in the first trimester, including medication abortion (which is only available in the earliest weeks of pregnancy)." Pls.' Mem. ¶ 27.

The physician-only law does not deprive patients of consistent access to either medication or aspiration at VLPP's Hampton health center, nor is there any evidence in the record that Hampton is a medically underserved area of Virginia. Patients have access to medication abortion at VLPP's Hampton facility at least every Monday and Wednesday (and occasionally, Friday). McElwain Dep. 25:6-26:18. Presently, there is only minimal demand for medication abortion in Hampton – the facility averages about fifteen medication abortions per month. *Id*. 64:2-10. Given that a medication abortion takes ten to fifteen minutes of physician time, *id*. 97:14 -16, it seems improbable that any patients are being denied access to medication abortion. In addition, VLPP recently hired a new physician for the Hampton facility, which will further increase availability of abortion appointments. *Id*. 192:9-193:6.

Finally, Plaintiffs' citations to the record provide no evidence (1) that Hampton is underserved; or (2) that expanding access in Hampton would impact health centers across the Commonwealth. Instead, the citations show that VLPP's Richmond facility currently is crowded, in large part because a significant number of patients seek family medicine care from VLPP in Richmond. McElwain Dep. 62:16-63:21, 73:2-20, 99:19-100:10. VLPP plans to open a new facility in Richmond that will more than double its existing space in the city. *Id*. 195:16-198:3. VLPP will add an additional physician in its Virginia Beach and Hampton locations in

July, largely to address primary care needs. *Id.* 192:9-193:6. The record simply does not support the inference that the physician-only law prevents any Virginia patient from accessing abortion in the first trimester.

- **Disputed Fact 7:** "The Hospital Requirement limits the availability of generally-available second-trimester abortion care to only two sites in Virginia[.]" Pls.' Mem. ¶ 28.

Plaintiffs' analysis of the burdens imposed by the hospital requirement relies on the assertion that only two sites in Virginia provide "generally-available" second-trimester abortion care. In fact there are over one hundred and sixty licensed general or outpatient surgical hospitals in the Commonwealth which legally may provide second trimester abortions. Risser Decl. ¶ 4. Since the beginning of 2017, nine such hospitals have reported performing at least one second trimester abortion. Condrey Decl. ¶ 5. Plaintiffs acknowledge there are additional providers in the Commonwealth who perform second trimester abortions (*see* Ramesh Dep. 114:12-20; Miller Dep. 65:13-66:7) but work to obscure this fact by introducing the ambiguous caveat of "generally-available" in their memorandum to the Court. Pls.' Mem. ¶ 28. Plaintiffs also testified that they can—and do—form arrangements with local hospitals or outpatient surgical centers in order to provide second trimester abortions. VLPP has an outpatient surgical center in Virginia Beach where it performs second trimester abortions and an agreement with VCU hospital in Richmond to rent space to provide additional second trimester abortions. McElwain Dep. 27:3-8, 218:17-219:5. VLPP has not pursued such an arrangement for its Hampton facility. *Id.* at 93:12-14. Nor is there evidence in the record that WWH-Charlottesville or Falls Church has pursued partnerships with any nearby general hospitals or outpatient surgical centers where its physicians could perform abortions after 13 weeks 6 days. *See* Miller Dep. 74:15-19, Codding Dep. 26:22-27:6 (stating that Falls Church only provides first trimester abortions).

- **<u>Disputed Fact 8</u>:** "The Hospital Requirement has no exception for cases in which a patient needs an immediate abortion because her health is at risk." Pls.' Mem. ¶ 33**.**

  On the contrary, Virginia Code § 18.2-74.1 provides that

  > In the event it is necessary for a licensed physician to terminate a human pregnancy…by performing an abortion or causing a miscarriage on any woman in order to save her life, in the opinion of the physician so performing the abortion or causing the miscarriage, §§ 18.2-71, 18.2-73 and 18.2-74 shall not be applicable.

Virginia law explicitly provides an exception to the Hospital Requirement in order to save the life of a woman.

- **<u>Disputed Fact 9</u>:** "Both directly and in combination with Virginia's other abortion restrictions, the Physician-Only Law and the Hospital Requirement impose financial, logistical, and physical burdens on patients, delaying care and likely preventing some abortion patients from ever accessing abortion." Pls.' Mem. ¶ 34**.**

  The record before this Court provides no evidence of any Virginia woman whose care was delayed by the physician-only law or the hospital requirement. Likewise, the record provides no evidence of any Virginia woman suffering a financial, logistical, or physical burden as a result of the physician-only law or the hospital requirement. On the contrary, the record quite clearly reveals that Plaintiffs <u>could not find a single Virginia woman</u> for whom the physician-only law or the hospital requirement imposed a substantial obstacle on the ability to access a pre-viability abortion.

Plaintiffs also cite to "facts" which are immaterial to their as-applied challenge to Virginia's physician-only law and hospital requirement. For example, Plaintiffs allege that

- APCs at their health centers "routinely administer intravenous sedation" (Pls.' Mem. ¶ 14);

- The primary method of second trimester abortions in 1975 was induction abortion, not dilations and evacuation (Pls.' Mem. ¶ 18);

- Second trimester abortions are performed in physicians' offices in states other than Virginia (Pls.' Mem. ¶ 21);

- Other procedures "riskier" than abortion are performed in medical offices in Virginia (Pls.' Mem. ¶ 23);
- "Most patients who live less than one hundred miles from the health center where they are seeking abortion care must either make this trip twice or stay overnight near the clinic while they wait twenty-four hours between ultrasound and procedure, per Virginia's mandatory delay rule" (Pls.' Mem. ¶ 36); and
- "Every day that a patient carries an undesired pregnancy constitutes an additional physical burden" (Pls.' Mem. ¶ 45).

None of these facts is material to the question before this Court on Plaintiffs' Motion: whether Virginia's law limiting abortions to physicians or requiring second trimester abortions to be performed in facilities licensed as hospitals, as applied to the Plaintiffs in this case, places a substantial obstacle in the path of a Virginia woman seeking a pre-viability abortion. They should not be considered by the Court. Likewise, Defendants note that the declarations submitted in support of Plaintiffs' Motion of Partial Summary Judgment include opinion testimony and assertions of fact unrelated to the Plaintiffs' Motion.[4] To the extent each declaration contains assertions unrelated to Plaintiffs' statement of facts, these exhibits should be disregarded.

Finally, Defendants note that some of the Plaintiffs' "facts" are not actually supported by the citations provided. For example, the citation to Dr. Lunsford's deposition in paragraph 3 does not support the use of misoprostol by APCs, and the citations to Dr. Ramesh's deposition in paragraph 31 do not support Plaintiffs' contention that their patients might be displaced by emergency patients or cared for by hospital nurses who lack specialized training.

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[4] For example, only five of the seventy-three paragraphs of the Spetz Declaration are cited in the Motion. Similarly, only forty-one of the 129 paragraphs of the Nichols Declaration, forty-one of the eighty-eight paragraphs of the Collins Declaration, eighteen of the forty paragraphs of the Turan Declaration, and eighteen of the forty-two paragraphs of the Myers Declaration are cited by Plaintiffs in the Memorandum.

II. Plaintiffs Misstate the *Casey-Hellerstedt* Undue Burden Test.

Plaintiffs misstate the balancing test articulated by the U.S. Supreme Court in *Hellerstedt*. Plaintiffs claim that *Hellerstedt* requires only a simple balancing test to determine the constitutionality of the challenged statutes. According to Plaintiffs, a court need only consider whether the law confers a greater burden than benefit. If so, "those burdens are 'undue,' and thus unconstitutional." Pls.' Mem. at 16. As noted in Defendants' Memorandum in Support of Summary Judgment, courts applying the post-*Hellerstedt* undue burden test have not found the analysis to be quite so simple. Both the Fifth Circuit and the Eighth Circuit have determined that *Hellerstedt* requires an analysis of the degree to which a purported burden outweighs a regulation's benefit—and found 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.").

Importantly, and contrary to Plaintiffs' claim, the facts before the Court in this case are not at all similar to those before the district court in *Hellerstedt*. Pls.' Mem. at 17. In *Hellerstedt*, the district court considered Texas H.B.2, which required (1) abortion doctors to have active admitting privileges at a hospital within thirty miles of the abortion facility (as opposed to the prior requirement for a written protocol addressing medical emergencies) and (2) abortion facilities to meet the same minimum standards applicable to ambulatory surgical centers (a new requirement). *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). The

district court estimated that if H.B.2 took effect, the number of licensed abortion facilities in Texas would drop from more than forty to "only seven facilities and a potential eighth." *Id.* at 2301. The district court went on to note that if that many clinics closed, "over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities." *Id.* at 2302. The district court reasoned that the new requirements failed to make abortion in Texas any safer than it had been prior to the promulgation of H.B.2. *Id.* When considered against the burden imposed by a demonstrably radical decrease in facilities and subsequent clinic congestion, the district court found—and the Supreme Court affirmed—that each component of H.B.2 imposed a substantial obstacle to a Texas women seeking to terminate a pre-viability pregnancy.

But the facts of this case are not akin to those in *Hellerstedt*. As noted by Plaintiffs in the opening sentence of their brief, the two Virginia statutes subject to Plaintiffs' as-applied challenge have been in effect since 1975.[5] Neither statute has forced Virginia clinics to close. Neither statute has caused clinic congestion—let alone the type of congestion demonstrated in Texas. And despite months of discovery including an online advertisement seeking Virginia women burdened by Virginia's laws, Plaintiffs have been unable to identify a single Virginia woman for whom the physician-only law or hospital requirement has been a substantial obstacle to obtaining a pre-viability abortion. For these reasons, Plaintiffs' claims fail as a matter of law.

III. <u>Plaintiffs fail to demonstrate that the physician-only law, as applied to Plaintiffs, is a substantial obstacle for Virginia women seeking pre-viability abortion</u>.

As this Court has previously held,

> in the context of an as-applied analysis, the door remains slightly ajar as to whether the physician-only law in Virginia places an undue burden on the

[5] As each statute functions as an exception to Virginia's underlying felony abortion statute, it could be argued that both the physician-only law and the hospital requirement enlarge access to abortion, rather than restrict it.

> fundamental right to choose an abortion prior to viability. Otherwise, from a facial perspective, the physician-only requirement rests on firm precedential terrain. Thus, Count IV survives Rule 12(b)(6) as-applied review and may proceed on that particular footing.

Mem. Op., ECF Doc. No. 52, at 19. The U.S. Supreme Court repeatedly and unequivocally has held that states may limit the provision of abortion to physicians. *See, e.g., Roe v. Wade*, 410 U.S. 113, 165 (1973) (holding that the "State may define the term 'physician'. . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined"); *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (recognizing that '[e]ven during the first trimester of pregnancy, . . . prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference"); *City of Akon v. Akon Center for Reproductive Health*, 462 U.S. 416, 447 (1983) (stating "[W]e have left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions"); *Planned Parenthood v. Casey*, 505 U.S. 833, 885 (1994) (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"); and *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997) (collecting cases illustrating "our repeated statements . . . that the performance of abortions may be restricted to physicians"). Indeed, Virginia is one of forty-two states which restrict the provision of abortion to licensed physicians. This Court, recognizing there is no basis for a facial challenge, allowed the claim to proceed if Plaintiffs can show that as applied, the physician-only law restricts access to abortion care. Plaintiffs are unable to make such a showing.

In support of their motion, Plaintiffs argue that Virginia's physician-only law provides no medical benefit because "APCs could provide medication and aspiration abortion in the

Commonwealth with no increased risk to patient health or safety" and "in other states, APCs provide medication and aspiration abortion just as safely and effectively as physicians." Pls.' Mem. at 18. Plaintiffs even contend—without supporting evidence—that "the Physician-Only Law actively undermines patient safety by delaying abortion access." *Id.* at 19. To succeed on summary judgment, Plaintiffs must show that there is no dispute that the physician-only law undermines patient safety and/or delays abortion access for Virginia women. They have failed to do so. Instead, Plaintiffs recycle the same generic "burdens" offered in the Amended Complaint, adding only a declaration from their expert Jane Collins, Ph.D., a Professor of Community & Environmental Sociology at the University of Wisconsin, to substantiate these non-specific, hypothetical burdens allegedly faced by Virginia women.[6] Pls.' Mem. ¶ 37. After months of discovery, Plaintiffs can offer no more Virginia-based evidence than they set out in the September 4, 2018 Amended Complaint.

Plaintiffs' single attempt to provide Virginia-specific information only highlights this deficiency. Plaintiffs allege that the physician-only law "deprives patients of consistent access to both medication and aspiration abortion at [VLPP's] Hampton health center, located in an underserved part of Virginia. Expanding access at Hampton would reduce the clinic congestion—and resulting delays—at other health centers around the Commonwealth." Pls.' Mem. ¶ 26. In support of this allegation, Plaintiffs cite Dr. Ramesh, the medical director of VLPP, who testified that in her opinion, the APCs at the Hampton facility could be trained to provide medication and aspiration abortion (Ramesh Dep. 184:13-20), and Paulette McElwain, the director of VLPP, who testified that VLPP's current Richmond facility is crowded (an issue likely to be alleviated in early 2020 when VLPP opens its new Richmond facility and more than

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[6] At her deposition, Dr. Collins testified that she spoke to no Virginia women and no Virginia abortion providers in forming her opinion. Collins Dep. 10:7-10; 96:16-97:8; 98:4-99:12.

doubles its existing space). McElwain Dep. 196:8-198:18. Plaintiffs put forth no evidence to suggest that the Richmond facility is crowded with abortion-seeking patients from Hampton who were unable to schedule their procedures on the available abortion appointment days at VLPP's Hampton facility. There is, in fact, no evidence that any Virginia woman even has been inconvenienced—let alone substantially burdened—by Virginia's physician-only law. Lacking such evidence, Plaintiffs' as applied challenge fails, and this Court should deny Plaintiffs' motion for summary judgment on Count IV.

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

As discussed above, Plaintiffs inaccurately state the number of Virginia facilities at which a second trimester abortion is legally available. According to Plaintiffs, abortions after fourteen weeks are only available at two locations. Pls.' Mem. ¶ 28. Publicly available statistics from the Virginia Department of Health show otherwise. Under Virginia law, any licensed hospital in the Commonwealth may provide second trimester abortions. Since 2017, nine different facilities in Virginia have reported performing second trimester abortions. Condrey Decl. ¶ 5. There is no evidence in the record to support Plaintiffs' assertion that the hospital requirement "generates severe scheduling bottlenecks." Pls.' Mem. ¶ 43.

As with the physician-only law, Plaintiffs have no evidence of specific Virginia women for whom the hospital requirement is a substantial obstacle.[7] Instead, Plaintiffs offer conjecture about the potential effects on unspecified Virginia patients resulting from the possibility of having to wait for their procedure; the possibility of being at a "large general hospital and trauma center, surrounded by patients (including male patients) undergoing higher-risk procedures;" and

[7] Plaintiffs represented to the Court at the September 6, 2018 motion to dismiss hearing that they would "produce evidence later in this case pertaining to Virginia-specific women[.]" Sept. 6, 2018 Hr'g Tr. at 26-27. No such evidence has been forthcoming.

the possibility that hospital nurses will not be specially trained in abortion care. Pls.' Mem. ¶ 31. Plaintiffs claim that the physician-only law and the hospital requirement "regularly prevent patients from accessing their preferred [medication] abortion method." Pls.' Mem. ¶ 40. The hospital requirement applies only to abortions after 13 weeks 6 days LMP; medication abortions are only available to ten weeks. So the hospital requirement has no effect whatsoever on whether a Virginia woman can access a medication abortion. Plaintiffs repeatedly conflate their perceptions of patient preferences with the protected liberty interest at issue.

Nineteen states have hospital requirements for later-gestation abortions. Plaintiffs admit that the risks of abortion increase as gestational age increases. Pls.' Mem. ¶ 45; *see also id.* at 22. Defendants acknowledge that the trimester framework was abandoned by the U.S. Supreme Court in *Casey*, and as a result, Virginia's trimester-based statute should be revised to conform with applicable law. But after the point of viability, the requirement that the procedure take place on a hospital setting is constitutional. *See* Lunsford Dep. 83:9-84:11 (discussing how the requirement provides a benefit to patients through referrals to EVMS for D&E procedures).

V. <u>Conclusion</u>

Throughout this case, Plaintiffs have characterized abortion as a component of basic healthcare which is no different from any other office-based procedure like IUD insertion, skin tag removal, or colposcopy. From this premise flows Plaintiffs' argument that Virginia should allow APCs to perform abortions, rather than limit the pool of abortion providers to physicians. Similarly, Plaintiffs argue that Virginia should allow pre-viability abortions to be performed in physician offices, instead of in facilities (like Plaintiffs) licensed as hospitals. In so doing, Plaintiffs ignore decades of jurisprudence that repeatedly and unequivocally distinguishes "[a]bortion [as] inherently different from other medical procedures because no other procedure

involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980).

Indeed, Plaintiffs cannot identify any procedure "medically comparable" to abortion which has triggered nearly forty-five years of Supreme Court jurisprudence. The U.S. Supreme Court has made clear that the States have an important and legitimate interest in preserving and protecting the health of pregnant women, and that they also have an important and legitimate interest in protecting the potentiality of human life. *Casey*, 505 U.S. at 946. The States' authority is limited only when the benefits associated with their laws are substantially outweighed by the burdens imposed on women seeking an abortion. Notwithstanding the fact specific nature of this inquiry (Mem. Op., ECF Doc. No. 52, at 13), Plaintiffs have come forward with *no facts* that would support their claim that Virginia's physician-only requirement and hospital requirement pose a substantial obstacle to women in Virginia who are seeking an abortion. Plaintiffs' Motion for Partial Summary Judgment should be denied.

Dated: March 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 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.

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