IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FALLS CHURCH MEDICAL CENTER, LLC d/b/a FALLS CHURCH HEALTHCARE CENTER, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 3:18-cv-00428-HEH
M. NORMAN OLIVER, Virginia Health Commissioner, et al.,	)	
Defendants.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Plaintiffs' response to our motion to dismiss clarifies their legal theories and challenges, but breaks no new ground. The complaint should thus be dismissed for the reasons given in the memorandum in support of that motion. See generally Mem. in Supp. of Mot. to Dismiss, ECF No. 21 [hereinafter Mem.].

Four aspects of plaintiffs' arguments do, however, warrant a response.

First, plaintiffs seriously over-read *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), by suggesting that it essentially eliminates all precedent in this area by establishing that prior decisions are "confin[ed] . . . to their facts and the records before the Court *in each case*." Opp. 1-2. The Supreme Court does not grant certiorari simply to engage in fact-bound error correction, see *United States v. Johnson*, 268 U.S. 220, 227 (1925) (stating that the Court "do[es] not grant a [petition for] certiorari to review evidence and discuss specific facts"), nor is it how federal courts are to apply Supreme Court decisions, see *Wynne v. Town of Greats Falls*,

376 F.3d 292, 298 n.3 (4th Cir. 2004) ("[W]ith inferior courts . . . carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."); accord *United States v. Walker*, 709 F. Supp. 2d 460, 465 (E.D. Va. 2010) (Hudson, J.) (relying on *Wynne*). This Court should adhere to long-standing precedent rejecting constitutional challenges to statutes like those that currently exist in Virginia.

Second, plaintiffs' response only confirms that their principal concern is with Virginia's current regulatory scheme for abortion providers. But those regulations are even more unsettled today than when defendants filed the motion to dismiss, which makes the case for abstention even stronger. See Mem. 8-9.

Third, plaintiffs attempt to preserve their challenge to Virginia Code § 18.2-73, Opp. 20-24, even though the statute does not apply to them, see Mem. 6-7.

Fourth, plaintiffs' response only highlights the legal and factual deficiencies necessitating dismissal of their Fourth Amendment claim. See Opp. 27-29.

For those reasons, as well as those set forth in the initial memorandum, the Court should grant the motion to dismiss.

1. As defendants explained, most of plaintiffs' claims involve matters that were previously addressed by the Supreme Court in directly analogous cases. See Mem. 2-7. Plaintiffs attempt to avoid that problem in two ways: (a) arguing that every Supreme Court precedent defendants cited was fact-bound and thus inapplicable to this case; and (b) relying on the Seventh Circuit's recent decision in *Planned Parenthood of Indiana & Kentucky, Inc. v. Comm'r of Ind. State Dep't of Health*, No. 17-1883, 2018 WL 3567829 (7th Cir. July 25, 2018).

a. To begin, this Court has stated that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Walker*,

709 F. Supp. 2d at 465 (internal quotation marks and citation omitted). Far from dicta, plaintiffs ask the Court to overlook the following *holdings* from the Supreme Court:

- "[O]ur prior cases 'left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions." *Mazurek v. Armstrong*, 520 U.S. 968, 974-75 (1997) (per curiam) (citation omitted);
- "[O]n the record before us, and in the context of this facial challenge, [the Court is] not convinced that the 24-hour waiting period constitutes an undue burden." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887 (1992);[1] and
- "We conclude that Virginia's requirement that second-trimester abortions be performed in licensed clinics is not an unreasonable means of furthering the State's compelling interest in 'protecting the woman's own health and safety.'" *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983).

The Supreme Court has forcefully instructed "that other courts should [not] conclude [the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997); see *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989). That requirement would be almost meaningless in this context if plaintiffs were right that Supreme Court cases about abortion are always "fact- and circumstance-dependent." Opp. 12. But nothing in either *Whole Woman's Health* or *Casey* suggests the Supreme Court simply is engaged in error correction as opposed to developing legal rules around the Constitution's guarantee that women have the right to access abortion services.

[1] Plaintiffs over-rely on the Supreme Court's reliance on the record in *Casey* because evidence in *Casey* is directly analogous to the burdens being alleged by plaintiffs in this case. Compare *Casey*, 505 U.S. at 881-86, with Compl. ¶¶ 205-24. Whether the burdens alleged are experienced in Pennsylvania or Virginia does not change the constitutional outcome.

b. Plaintiffs' reliance on a recent non-binding Seventh Circuit decision addressing a change to Indiana's informed-consent law also is misplaced. See Opp. 12-13 (discussing *Planned Parenthood of Indiana & Kentucky*).[2] The context of the Seventh Circuit's decision—a preliminary injunction based on a recent legislative change to Indiana's law that caused substantial, articulable harm to women seeking an abortion in Indiana, *Planned Parenthood of Indiana & Kentucky*, 2018 WL 3567829, at *1, *6-11—demonstrates the significant difference between that case and this one. Plaintiffs have not alleged facts of a similar magnitude as those at issue in *Planned Parenthood of Indiana & Kentucky*, and the Virginia-specific facts that plaintiffs do allege are not from the relevant time period or causally linked to the laws at issue. See Mem. 10-11. The fact that plaintiffs have not sought preliminary injunctive relief also is indicative of the difference in harm between the two cases.

Defendants agree that context matters when considering an undue-burden challenge. But even applying the factors relied on by the Seventh Circuit—"the number of physicians who perform abortions, the number of abortion facilities, the distances women must travel in order to reach an abortion facility, and the average income of women seeking abortions," *Planned Parenthood of Indiana & Kentucky*, 2018 WL 3567829, at *17—plaintiffs have not plausibly alleged that, under current doctrine, Virginia's statutes impose an *unconstitutional* obstacle to women seeking an abortion. To be sure, plaintiffs allege various burdens in connection with the physician-only and two-trip ultrasound requirements, but the non-specific allegations in the

[2] This case is more analogous to *A Woman's Choice-E. Side Women's Clinic v. Newman*, where the Seventh Circuit upheld Indiana's prior informed-consent law against a pre-enforcement constitutional challenge. 305 F.3d 684, 693 (7th Cir. 2002). In *Newman*, the Seventh Circuit agreed with our interpretation of *Mazurek v. Armstrong*, 520 U.S. 968 (1997), interpreting *Mazurek* as holding "it constitutional to prevent non-physicians from performing abortions without factual inquiries into whether other medical professionals could do the job as safely, and how much prices may be evaluated by a physician-only rule." *Newman*, 305 F.3d at 688 (citation omitted).

complaint pale in comparison to those made about Indiana's law or those at issue in *Whole Woman's Heath*.

For example, the plaintiffs in the Seventh Circuit case demonstrated that there were only six ultrasound centers in Indiana and that "women in the second largest city in Indiana, Fort Wayne, must now travel approximately 400 miles over two days to obtain an abortion." *Planned Parenthood*, 2018 WL 3567829, at *7. The plaintiffs challenging Indiana's new law also showed that low-income women in Indiana would be subject to increased expenses "constitut[ing] roughly 25% of their entire monthly budget." *Id.*; accord Mem. 10-11 (describing the factual allegations in *Whole Woman's Health*). By contrast, plaintiffs here have not provided any Virginia-specific facts that would support a finding of unconstitutionality. See Opp. 14-15 (asserting non-Virginia-specific burdens associated with a physician-only requirement), 18-19 (asserting non-Virginia-specific burdens associated with the two-trip ultrasound requirement). Absent factual allegations similar to *Whole Woman's Health* and *Planned Parenthood of Indiana & Kentucky*, plaintiffs' challenges to Virginia's statutes fail as a matter of law.

2. Plaintiffs' response to the motion to dismiss only underscores that their preeminent concern is with the *regulations* that apply to abortion clinics in the Commonwealth of Virginia. Indeed, those regulations are the centerpiece of plaintiffs' response. See Opp. 4-11 (addressing challenge to Virginia Code § 32.1-127(B)(1) and the regulations), 20-22 (addressing undue-burden challenge to Section 18.2-73), 24-25 (addressing vagueness challenge to Section 18.2-73), 27-29 (addressing Fourth Amendment challenge), 30 (addressing cumulative-burden challenge). As defendants already explained, those regulations are currently in considerable flux and abstention is warranted for that reason. Mem. 8-9. And the case for abstention has only grown stronger since the motion was filed.

In response to a vote by the Board of Health on June 7, 2018,[3] the Board issued on July 26, 2018—nearly two weeks after the motion was filed and the day before plaintiffs filed their response—a notice of intended regulatory action with respect to the Regulations for Licensure of Abortion Facilities, 12 VAC 5-412,. Those are *the same* regulations plaintiffs challenge here, Compl. ¶ 4.b, and this newly reinstated administrative process "seeks to assess all current regulation content and determine whether it should be amended or retained in its current form."[4]

Plaintiffs do not mention the new regulatory action in their response, but the ongoing state administrative process clearly "is potentially dispositive to [p]laintiffs' constitutional claims." Opp. 11. The Court should not rush to decide a substantial constitutional question—the validity of Virginia's regulations of abortion providers—when there is considerable reason to doubt that the current regulations will even exist in the near future, whether due to the ongoing litigation discussed in our initial memorandum or the now-ongoing regulatory process identified in this reply. See *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 264 (2011) ("[T]o the extent there is some doubt . . . [about] any other state-law issue that may be dispositive, federal courts should abstain under [*Pullman*].").

3. As defendants have explained, plaintiffs lack standing to challenge Section 18.2-73 because that statute does not apply to them. See Mem. 6-7. In response, plaintiffs: (a) suggest that defendants are wrong about how Section 18.2-73 applies, Opp. 20; and (b) argue that their licensure as hospitals itself harms them, see Opp. 22-23. The first argument is incorrect, and the second one is irrelevant to their standing to challenge Section 18.2-73.

[3] State Board of Health, Draft Meeting Minutes for June 7, 2018, at 8, http://www.vdh.virginia.gov/content/uploads/sites/4/2018/06/Minutes-June-2018-draft.pdf.

[4] Notice of Intended Regulatory Action, Agency Background Document, *Regulations for Licensure of Abortion Facilities* (July 25, 2018), http://townhall.virginia.gov/L/GetFile.cfm?File=58\5098\8350\AgencyStatement_VDH_8350_v2.pdf.

Plaintiffs contend that defendants' interpretation of Section 18.2-73 is inconsistent with prior practice in Virginia, asserting that "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." Opp. 20. Tellingly, plaintiffs cite no authority for that proposition, nor do they address the fact that the Attorney General opined in 2010 that they were hospitals under Virginia Code § 32.1-123, 2010 Op. Va. Att'y Gen. 140, 141, which is all that is necessary to render them exempt from coverage under Section 18.2-73. And, in any event, as defendants previously explained, plaintiffs (1) "satisf[y] exactly the definition of 'hospital' under Section 32.1-123," and (2) they are currently licensed as hospitals by the Department of Health. Mem. 7. Thus, plaintiffs simply are not subject to prosecution under Section 18.2-73.

Plaintiffs may believe that they are improperly licensed as hospitals and that the regulations to which they are subject because of that license violate their rights. But "standing is not dispensed in gross," *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation marks and citation omitted), and plaintiffs only have standing to challenge Section 18.2-73 *if they are injured by Section 18.2-73*. See Mem. 6; see also *Davis v. FEC*, 554 U.S. 724, 733-34 (2008) ("The fact that Davis has standing to challenge § 319(b) does not necessarily mean that he also has standing to challenge the scheme of contribution limitations that applies when § 319(a) comes into play"). Because plaintiffs are not subject to criminal prosecution under Section 18.2-73 if they perform a second-trimester abortion, they are not injured by that provision and thus lack standing to challenge it. (As noted above, defendants do not dispute the plaintiffs' standing to challenge the regulations or their statutory designation as a hospital;

instead, defendants argued that those claims should be dismissed for other reasons. See Mem. 4-7.)

4. Plaintiffs' attempt to save their Fourth Amendment claim simply highlights its deficiencies. See Opp. 27-29. As defendants have explained, there can be no Fourth Amendment violation when the complaining party consented to the search in question. Mem. 12. Plaintiffs' respond that any such consent is vitiated because, under 12 VAC 5-412-90, refusal of entry is "sufficient cause" to revoke their license.[5] Opp. 28. According to plaintiffs, their consent was thus "coerced" and invalid under *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973). Opp. 28. Because that regulation is under active review, the Court should abstain from deciding this issue for the same reasons given above. See *supra* 5-6. In any event, plaintiffs' argument is also wrong on the merits.

a. Virginia law does not require plaintiffs to relinquish their Fourth Amendment rights to maintain their license. There are no *necessary* legal consequences if plaintiffs refuse access and require officials to obtain a warrant—even the current regulations simply speak in terms of what is *sufficient* to revoke a license. 12 VAC 5-412-90. Plaintiffs are thus incorrect in viewing Virginia as providing that "withholding of such consent results in *immediate suspension*

[5] Plaintiffs' proposed analogy to *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), fails because the ordinance at issue in *Patel* is plainly distinguishable. In *Patel*, the hotels were *required* to open their guest records to police and no warrant was required in any case. *Id.* at 2448. By contrast, plaintiffs' premises cannot be inspected by state officials unless (1) plaintiffs consent *or* (2) the officials obtain a warrant. *See* Mem. 11-12. Thus, unlike in *Patel*, warrantless searches are not authorized by Virginia law. The same is true of the other decisions that plaintiffs argue are analogous to this case. See *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 549 (9th Cir. 2004) (addressing regulation "require[ing] that licensees 'ensure that the Department's director or director's designee is allowed immediate access to the abortion clinic during the hours of operation.' No limit to this permission for a warrantless search appears in the regulation . . . ."); *June Med. Servs., LLC v. Gee*, 306 F. Supp. 3d 886, 897 (M.D. La. 2018) (addressing La. Rev. Stat. § 40:2175.6(F), and stating that Louisiana law "permits unlimited warrantless inspections of abortion clinics without notice"); accord *Margaret S. v. Edwards*, 488 F. Supp. 181, 215 (E.D. La. 1980) (addressing similar provision of Louisiana law).

or revocation of a facility's license . . . without any opportunity for a hearing." Opp. 28-29 (emphasis added). That is not what 12 VAC 5-412-90 says, and to be clear, plaintiffs would have the opportunity to contest any revocation under Virginia's Administrative Process Act. See Va. Code Ann. § 32.1-135(A); 12 VAC 5-412-130 ("[T]he department may deny, suspend, or revoke the license to operate an abortion facility in accordance with § 32.1-135 of the Code of Virginia.").

b. Plaintiffs are right that voluntariness is ordinarily a factual question, see *Schneckloth*, 412 U.S. at 227, but that does not absolve a party of the need to plausibly allege facts to survive a motion to dismiss. The complaint is devoid of allegations that plaintiffs have ever refused consent and had their license revoked, or even that any facility's license has ever been revoked based on its refusal to consent to a search. See generally Compl. Nor does the complaint point to any official communication from defendants that threatened to revoke plaintiffs' license if they refused consent. To be sure, plaintiffs' response highlights why they view these searches as unnecessary and intrusive. Opp. 29. But plaintiffs have not plausibly alleged that their consent here was coerced.

* * *

Plaintiffs' response reiterates many of the salient policy objections raised in their complaint. But, as defendants have already explained, plaintiffs' constitutional claims fail as a matter of law under existing Supreme Court precedent, and this court is not the proper forum for addressing plaintiffs' policy concerns. For the reasons given here, as well as in the memorandum in support of the motion to dismiss, the complaint should be dismissed in its entirety.

Dated: August 2, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2018, a true and accurate copy of this paper was filed electronically with the Court's CM/ECF system, which will automatically effectuate service on:

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