UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

FALLS CHURCH MEDICAL CENTER, LLC ET AL } Civil Action No. 3:18 CV 428
v. }
M. NORMAN OLIVER ET AL }

September 6, 2018

COMPLETE TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE HENRY E. HUDSON
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

Jenny Ma, Esquire
Gail M. Deady, Esquire
CENTER FOR REPRODUCTIVE RIGHTS
199 Water Street, 22nd Floor
New York, New York 10038
and
Nate Asher, Esquire
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036

Counsel on behalf of Falls Church Medical Center, Whole Woman's Health Alliance, All Women's Richmond, Inc. and Dr. Jane Doe

Jennifer Sandman, Esquire
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William Street
New York, New York 10038

Counsel on behalf of Virginia League for Planned Parenthood

KRISTA L. HARDING, RMR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

APPEARANCES: (Continued)

Matthew R. McGuire, Esquire
Toby J. Heytens, Esquire
OFFICE OF THE ATTORNEY GENERAL
202 North 9th Street
Richmond, Virginia 23219

Counsel on behalf of M. Norman Oliver, Robert Payne, Faye O. Prichard, Theophani Stamos, Shannon L. Taylor, Anton Bell, Michael N. Herring and Colin Stolle

(The proceeding commenced at 11:07 a.m.)

THE COURT: Good morning.

MS. MA: Good morning.

MR. McGUIRE: Good morning.

THE COURT: Go ahead and call the case, Ms. Pizzini.

THE CLERK: Case Number 3:18 CV 428. *Falls Church Medical Center, LLC et al v. M. Norman Oliver et al.*

Plaintiff Falls Church Medical Center, Whole Woman's Health Alliance, All Women's Richmond and Dr. Jane Joe are represented by Ms. Jenny Ma, Ms. Gail Deady and Mr. Nathaniel Asher.

Plaintiff Virgina League for Planned Parenthood is represented by Ms. Jennifer Sandman.

Defendants, with the exception of Mr. Robert Tracci, are represented by Mr. Matthew McGuire and Mr. Toby Heytens.

Are the parties ready to proceed?

MS. MA: Yes, sir.

MR. McGUIRE: Yes.

THE COURT: You stand in U.S. District Court when you address the Court.

Mr. McGuire, I understand that Mr. Tracci filed an independent pleading because he did not feel he had a

chance to review your pleading in advance, but as I understand it you will be representing all of the Commonwealth Attorneys in their official capacity, is that right, Mr. McGuire?

MR. McGUIRE: Your Honor, for purposes of the motion to dismiss, Mr. Tracci has not agreed. He has the right under the Virginia Code to ask the Attorney General's Office to represent him, but until he makes that request we aren't able to represent him. And he has, as of yet, not agreed to our representation.

I understand it is currently still being negotiated. As Your Honor is aware, our substantive positions are essentially the same.

THE COURT: All right. I guess he can choose whatever course he wishes. Thank you very much, sir.

MR. McGUIRE: Thank you, Your Honor.

THE COURT: As I'm sure Ms. Belcher has explained to you, our proceedings today will have two components. Number one, I'm going to hear argument on the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Once that is concluded -- and I will not rule today. You will receive a written opinion in the next few weeks.

I am going to go ahead and proceed with the initial pretrial conference to kind of set the dates for

all the proceedings in this case, okay?

MR. McGUIRE: Thank you, Your Honor.

MS. MA: Thank you, Your Honor.

THE COURT: All right. Very well. Let's get right into the 12(b)(6) motion.

Let me say preliminarily that it is rare that this Court grants oral argument in a motion under Rule 12(b)(6). It's strictly because it is a fact-bound analysis based upon the four corners of the complaint. My analysis is both informed and constrained by the content of the complaint.

I kind of liken it sometimes to a physician looking at an x-ray. Either the bone is broken or it's not. Either the facts show a plausible claim or they do not. In my analysis of the facts, I've obviously got to view them in the light most favorable to the plaintiffs, but there is a necessity for showing a plausible claim in order to prevail.

I also look back on the -- I have read every case you-all have cited, and many many many more. And keep in mind that the burden versus benefits analysis that most courts have adopted are kind of constrained to the individual facts of those cases. And they have said that determining -- whether or not the burden outweighs the benefits is contextual and based upon a fact-based

inquiry. So all those teachings have kind of guided me in my analysis of the 12(b)(6) motion.

I've also taken away from this that there is a lot of precedent that is based upon a facial analysis of various statutes, but there's a much more finite well of authority with respect to the application to the individual facts in the case.

So with that predicate, I will go ahead and hear from you. Mr. McGuire, you're the movant. Go right ahead, sir. Nice to have you in court this morning.

MR. McGUIRE: Good morning, Your Honor.

May it please the Court, Matt McGuire on behalf of all of the defendants, except for Mr. Tracci.

As this Court is aware, this case involves a broad challenge to numerous Virginia laws, the majority of which have existed for decades, and including a statute that was previously upheld by the United States Supreme Court in a similar case.

THE COURT: Yes, but that was a facial challenge and not a as-applied challenge, was it not?

MR. McGUIRE: Your Honor, it was a facial challenge to the hospital requirement, but the basic facts that are being alleged here as applied to these plaintiffs are -- it's essentially the same. And I'm going to try this morning, Your Honor, to proceed sort of count by

count through the complaint to explain why.

THE COURT: Sure.

MR. McGUIRE: And I'm going to proceed in a different order than the counts are in in the complaint, if Your Honor will permit, to try to highlight what we think this case boils down to and why the Court should ultimately dismiss the entire complaint.

THE COURT: All right.

MR. McGUIRE: I do want to note one procedural thing for the Court. Since the motion to dismiss was filed, the plaintiffs have filed an amended complaint to add an additional party.

THE COURT: I have granted that motion, and the record will be amended to add Dr. Jane Doe.

MR. McGUIRE: Yes, Your Honor. And our position is that the amendment doesn't change anything with respect to the motion to dismiss briefing, so we would ask the Court to just apply --

THE COURT: We have reviewed every line of the amended complaint and determined there are no substantive changes whatsoever. And I wouldn't have permitted it under my order anyway.

MR. McGUIRE: Exactly. Thank you, Your Honor. I just wanted to make the record clear.

THE COURT: Yes, sir.

MR. McGUIRE: To avoid belaboring the points, I'm going to try to move fairly expeditiously through the various counts in our arguments, but I do want to highlight two legal standards to the Court that we think directly bear on the Rule 12(b)(6) motion.

The first is the undue burden standard itself applies, as Your Honor knows, to the merits of the plaintiffs' claims. And that was most recently addressed by the United States Supreme Court in *Whole Woman's Health*. And we think that is the right standard, and would implore the Court to use it. A couple of points are relevant here. The first is that the state has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient.

And the second is that a Constitutional --

THE COURT: That's the benefits side of the equation.

MR. McGUIRE: That's right, Your Honor.

And then the second side is that the Constitutional problem arises only if the challenge provision has the affect of placing a substantial obstacle in the path of a woman who is seeking an abortion. And so I think it's important for Your Honor to look at *Whole Woman's Health*, and how that analysis works.

The Court didn't say -- and take the surgical center requirements in that case, for example, where the Court suggests that there was very little benefit, if any, from those requirements in Texas. But the Court still went on to determine whether there was a substantial obstacle, not just that they constituted any burden, but that burden was substantial.

And the second legal rule that Your Honor has already alluded to this morning is that the United States Supreme Court is the only court that can overrule its prior cases. And we think that's instructive here because the U.S. Supreme Court isn't a court of fact-bound error correction.

I know the plaintiffs in their opposition make much of the fact that the record in those cases is specific. They are developed. You have facts. But the U.S. Supreme Court wasn't announcing the rules that -- the legal rules that control the case here exclusively based on those facts. The Court, when it takes a case on certiorari jurisdiction, as Your Honor knows, is laying out the legal groundwork around the Constitutional right. And we think that's critical here with respect to the plaintiffs' statutory claims.

And so with those two standards in mind, I just want to walk the Court briefly through the various counts.

And I want to begin with Count 6, which is the plaintiffs' cumulative burden claim. And in that claim, the plaintiffs are essentially saying the full panoply of Virginia's laws and regulations constitute an unconstitutional burden on a woman's ability to access an abortion.

Well, our principal response to that, Your Honor, is that the U.S. Supreme Court has never analyzed a case that way. If you look at the seminal case in *Casey*, in 1992 a full suite of Pennsylvania's laws were challenged. The Court announced the undue burden standard, and then proceeded to go provision by provision, claim by claim through the challenge to uphold some and invalidate others. And so in *Casey*, you didn't see a cumulative analysis even though one was available.

And then *Whole Woman's Health*, the most recent application of *Casey* by the U.S. Supreme Court, involved a single house bill from Texas, House Bill 2. And that bill had two provisions that were being challenged: The admitting provisions requirement and the surgical center requirement.

And the Court could have easily conflated them, since it found both of them unconstitutional, and said these two things came in the same bill. It's unconstitutional as a cumulative burden.

The Court instead, very clearly, considered them separately. There's a separate heading in the opinion for admitting privileges. There's a separate one for surgical center requirement. The Court did not consider them together.

THE COURT: Of course neither of those two decisions specifically say that a cumulative analysis is inappropriate. They just chose not to adopt that analysis, which you feel sends a message to lower courts?

MR. McGUIRE: Yes, Your Honor. That it's never been done before.

Take *Whole Woman's Health*, for example. The Court doesn't spend much time dealing with the admitting privileges requirement because it was pretty obvious that all of the clinics couldn't get admitting privileges in key places. So to the extent that that on its own constituted an undue burden, it would have been much simpler to deal with the surgical center requirement together. You would have saved quite a bit of analysis, quite a bit of facts, by doing a cumulative analysis. The Court just didn't do it.

And we think this case in particular would be a particularly bad one to start a cumulative analysis because the laws here weren't an omnibus law like Texas House Bill 2 was. These are laws that the Commonwealth

has enacted over the course of more than 30 years. They've come in piecemeal.

And so we just don't think this is -- if there is a cumulative burden type case, we don't think it's this one. And so with -- that's how we would say to address Count 6 is just there's not a cumulative burden type of claim.

THE COURT: All right.

MR. McGUIRE: And now having done that, I want to move now on to the specific statutory claims, if I could, beginning with Count 4, which is the challenge to Code Section 18.2-72.

THE COURT: The so-called physician-only law.

MR. McGUIRE: The physician-only requirement, Your Honor. Our position on that is that this exact requirement, and even the law itself, was mentioned by the U.S. Supreme Court in *Mazurek v. Armstrong.* M-A-Z-U-R-E-K. And in that case, we think the holding there is worth quoting to the Court because it's stark. Our prior cases left no doubt that to ensure the safety of the abortion procedure the states may mandate that only physicians perform abortions.

THE COURT: Once again, that was a facial challenge and they didn't rule out that has to -- that could also be subject to a benefits versus burden

analysis.

MR. McGUIRE: They didn't explicitly rule it out, Your Honor. But what the Court said is that the holding is clear. It says the states may do this. And that's a pretty clear holding from the U.S. Supreme Court about this exact type of law.

THE COURT: That it's facially Constitutional.

MR. McGUIRE: That's right, Your Honor.

What we would submit is that the plaintiffs, if you do look at the facts and you want to engage in an as-applied challenge, as you can see from the complaint, they don't allege facts that there's a dearth of physicians in the Commonwealth of Virginia available to perform abortion services.

THE COURT: Just outpatient clinics, basically, is what they're arguing.

MR. McGUIRE: Correct, Your Honor. I think there are 15 clinics in Virginia. I believe that's the right number. I would have to look back.

THE COURT: I think they say two in their pleadings, but go ahead.

MR. McGUIRE: Well, that would be for the second-trimester abortion.

THE COURT: I'm sorry. Okay.

MR. McGUIRE: And so if I could, I'd like to

deal with that as --

THE COURT: Fine. I'm sorry for confusing it. You go right ahead.

MR. McGUIRE: But you're right, the physician-only requirement applies to both first-trimester abortions, of which there are a number of clinics like the plaintiffs, as well as for second-trimester abortions. It does apply to both.

But I read Count 4 as principally challenging the first-trimester law.

THE COURT: Okay.

MR. McGUIRE: And so our position is that how the plaintiffs respond to Count 4 is emblematic of the problems with the case, which is for the Court to adopt their analysis and to sort of look past these clear holdings from the U.S. Supreme Court on a variety of these statutes. The Court would have to adopt two things, we think, first being that *Whole Woman's Health* really rewrote the law in this area and requires a completely new analysis. And the second being that stare decisis really doesn't apply very firmly here at all. We think both of those things are incorrect.

The first being that *Whole Woman's Health* really is just an application of *Casey*. It's clarifying that the Fifth Circuit legally was wrong by applying a rational

basis standard of review by overly deferring to legislative fact findings. It doesn't change the analysis that is conducted here. It just really deals, I think, with the standard of review that gets applied.

THE COURT: You're urging intermediate strict scrutiny, I assume, as Judge Wilkinson applied in the latest case before the Fourth Circuit?

MR. McGUIRE: So the case that I believe Your Honor is referring to I think was a First Amendment challenge, the provision of information. So I think the standard that gets applied is a little bit different. It's not rational basis. The Court made that clear. It's something else. I think it's a form of intermediate scrutiny. I don't know that *Whole Woman's Health* makes it exactly clear, but I think it's more searching than sort of *Williamson v. Lee Optical*.

And the second part about -- being about stare decisis is that the Supreme Court had the opportunity, even *in Whole Woman's Health*, to overrule one of these cases or say that it's no longer good law. In *Simopoulos* the Court addresses it, Texas argued it. The Court doesn't do so.

So we think the right way for the Court to approach a case like this one would be to apply what the U.S. Supreme Court has said in prior-related cases, and

that that sort of makes it clear, the application of the precedent, for the U.S. Supreme Court to decide if *Whole Woman's Health* has been a sea change in the law in this area.

And so with respect to Count 4, we would submit that *Mazurek* simply controls the claim because the law is no different than what was upheld there.

And with respect to Count 5, if I could move to that. This is the one that plaintiffs named the two-trip mandatory delay. It's a challenge to Code Section 18.2-76, which imposes a number of requirements. The three that the plaintiffs packaged together here are the 24-hour waiting period, the ultrasound requirement, and the information requirement.

THE COURT: Educate me on that in one respect. Are these requirements, entire panoply of requirements, are they voluntary? I mean, can the patient decline the ultrasound, the counseling from the physician and the information that the statute requires? Is that voluntary or is that mandatory?

MR. McGUIRE: Part of it's voluntary, Your Honor, and part of it is mandatory. The ultrasound requirement is the mandatory way to determine gestational age in this context. The information requirements are the physicians have to provide certain information about

gestational age, and resources, and offer certain information that the state publishes to the woman who is seeking an abortion. It is up to the patient to determine if she wants to receive that information. She can say no.

THE COURT: I probably shouldn't have asked the question because it takes us outside of the four corners of the complaint, but I was just curious. Go ahead.

MR. McGUIRE: Yes, Your Honor.

THE COURT: I won't integrate that into my analysis, but I just ask it by way of curiosity.

MR. McGUIRE: Yes, Your Honor. I do think you could integrate it because it's in the statute. It's a purely legal question on that side of it. And I would like to make one other point on this about what the statute requires. Plaintiffs point out that Pennsylvania's law in *Casey*, which is the case we think controls this claim, had an exception for medical emergencies. We think Virginia does too under Code Section 18.2-74.1.

THE COURT: Give me that again, please.

MR. McGUIRE: Section 18.2-74.1. Which exempts physicians from the criminal penalties in cases of medical emergencies. It doesn't list Code Section 18.2-76, but if you look at the way it's structured, it exempts criminal penalties for performing abortions generally.

So we would submit, Your Honor, that this law is pretty much exactly the same as what was at issue in *Casey* with the exception of the ultrasound requirement. And so to the extent Your Honor is looking for the delta between the two that would give reason not to grant a motion to dismiss, I think Your Honor should look at the facts around the ultrasound piece which although there are other ways to determine gestational age, *Casey* says states can limit physician discretion in this area and can impose sort of -- or these types of requirements.

And I don't read the complaint as saying why the ultrasound requirement in and of itself constitutes a substantial obstacle, which is the burden that the plaintiffs have to plead over. And so for those reasons, we think *Casey*, which upheld Pennsylvania law almost identical to this based on record evidence that very closely mirrors the pleadings in this case, controls Count 5.

THE COURT: Okay.

MR. McGUIRE: And so then, Your Honor, that brings us to Count 1, which is Code Section 32.1-127. And that code section defines providers of five or more first-trimester abortions per month as a category of hospital.

Our position with respect to this count is that

the designation in and of itself doesn't subject the plaintiffs to any amount of regulation. It guarantees that they will be regulated by the Department of Health and by the State Board, but it doesn't tell you what those regulations will say. And so the designation in and of itself simply can't be an undue burden.

And plaintiffs, in a sense, sort of showed this through their opposition brief where they talk about the licensing scheme where they conflate the designation under the statute with the regulations. And so we think you need to analyze those two provisions separately for the reasons I gave with respect to the cumulative burden analysis. And once you do so, there's no undue burden -- or unconstitutional undue burden designating anything as a hospital. What matters is what you then do as a result of that designation.

And so we think their Constitutional complaint here collapses into the regulation argument, which I'd like to address at the end.

So for that reason, we think this count should be dismissed, which brings us to Count 3, the hospital requirement that requires second-trimester abortions to be performed in a hospital regulated by the Department of Health. We think this count is subject to dismissal under both Rule 12(b)(1) for lack of subject matter

jurisdiction, alternatively under Rule 12(b)(6) for failure to state a claim. And how Your Honor would proceed with that depends on how the Court answers a threshold question - Does the statute affect the plaintiffs at all?

And our position is --

THE COURT: Well, your argument is that they qualify as a hospital under the statute, do you not?

MR. McGUIRE: That's correct, Your Honor. If the plaintiffs are --

THE COURT: Every one of the plaintiffs in this case qualifies as a hospital?

MR. McGUIRE: Except for the doctor, Your Honor. And our position with respect to the doctor is a little bit different. And I'll elucidate why. But with respect to the plaintiffs --

THE COURT: Every one of the plaintiffs in this case is qualified to perform first and second-trimester abortions?

MR. McGUIRE: What we would say, Your Honor, is that they are all not subject to criminal penalties under Code Section 18.2-73. The plaintiffs point out in their opposition that there's a regulation that would prohibit them from doing second-trimester abortions currently, but that would also be part of their Count 2 challenge. This

is just about whether or not they are subject to criminal penalties. And our position is that they are currently regulated as hospitals by the State Department of Health as a result of the designation.

Moreover, as the U.S. Supreme Court pointed out in *Simopoulos*, they fully meet the definition of hospital in Code Section 32.1-123, and so they are not -- they are not subject to criminal penalties under the statute. They say, and I think this is an important point, that defendants, and their predecessors, have enforced this section against them in the past. I would implore Your Honor to look at their opposition in which they don't cite anything in the complaint for that statement.

Moreover, there was a 2010 Attorney General opinion from the Attorney General of Virginia at the time that opined that they are in fact hospitals under 32.1-123. So we think they just -- they are not subject to this provision and so, therefore, they lack standing to challenge it.

THE COURT: All right. And you think that all the Commonwealth Attorneys are going to agree with you?

MR. McGUIRE: Your Honor, other than the one I don't represent, they've all had an opportunity to see the pleadings. And I've heard nothing but favorable things. So that's currently where that's at.

To the extent the Court disagrees and thinks the plaintiffs are harmed by Section 18.2-73, we would say that *Simopoulos* addressed this exact law, and upheld this exact law, and we would encourage the Court to rule under Rule 12(b)(6) for that reason.

Count 7, I'll be very brief with. That's the vagueness challenge to the same statutory provision. We think that claim fails for the same reasons I just gave with respect to Count 3.

And that brings us to the final two counts, Your Honor, that I want to address this morning, which is Count 2, which is the broad challenge to Virginia's Regulatory Scheme for abortion providers. And Count 8, which is the Fourth Amendment challenge to the searches conducted under that scheme.

We have offered merits arguments on both of those prongs that we think Your Honor could rule on under 12(b)(6). And I particularly would encourage Your Honor to look at *Whole Woman's Health* in the surgical center section in which the Court is laying out what Texas' scheme was before the surgical center was adopted. It looks similar to what the current regulations are. And the Court doesn't opine that those are unconstitutional, or casts any doubt on them at all.

But we think the proper way for the Court to

rule here would simply be to abstain from deciding any of the regulatory questions until after the situation settles in Virginia.

THE COURT: I could be dead by then. I mean, really. I've been in government all my life here in Virginia, and they're fine people and they work hard, but they don't always agree on things. And I couldn't -- it would be a disservice to the parties in this case for me to just stay this thing indefinitely.

What I'm going to do though is I'm not going to set the trial date until after this General Assembly session to give them a chance, if they want to take some action, to do so.

MR. McGUIRE: Well, Your Honor, if I could give you one reason why maybe you could consider abstaining, if I could, on the basis being the plaintiffs say in their opposition that it could be years, more than a year, before the state court case is resolved. That's not consistent with what's going on in that case.

THE COURT: Yes. But Judge Marshall, a fine Judge, is dealing with different issues than I am. When you have Constitutional claims, you have a right to have the federal judge make the decision. I'm not casting any aspersions on Judge Marshall. He's an excellent Judge. But he is focusing on state regulations. I'm focusing on

the constitutionality of this scheme.

That will be denied.

MR. McGUIRE: Okay. Then, Your Honor, we would ask you to consider it under Rule 12(b)(6) for the reasons we gave in our briefing, which I won't walk through here other than to say a lot of the plaintiffs' allegations would be considered speculative. There's a lot of "may" in the complaint. May hurt, may not. And it's not Virginia-specific.

And so we do think that under Rule 12(b)(6) we would still prevail under the regulations.

THE COURT: Okay.

MR. McGUIRE: And so for those reasons, and the ones in our brief, the defendant has asked the Court to dismiss the complaint in its entirety.

And unless the Court has further questions, I will --

THE COURT: I don't right now. As I analyze this, it is possible I may ask for further briefing on some issues, but I think I have a sufficient grasp. This is a very low bar at this point, and a lot of your arguments may have more thrust behind them on a more fulsome record.

MR. McGUIRE: Thank you, Your Honor.

THE COURT: All right, Ms. Ma.

MS. MA: Thank you, Your Honor.

Good morning, Your Honor.

THE COURT: Good morning, ma'am.

MS. MA: Jenny Ma for the plaintiffs.

THE COURT: Yes, ma'am.

MS. MA: I'd like to start at the heart of this matter. This case, at its core, is about the plaintiffs seeking to strike laws that are onerous and burdensome, that have no medical justification and are not evidence-based.

THE COURT: Let me just ask you a question right on that.

MS. MA: Sure.

THE COURT: Assuming that it may not be consistent with the overwhelming opinion of medical science -- or the medical profession that they're necessary, does that necessarily govern if you can't prove an undo burden or obstacle?

MS. MA: Your Honor, I want to emphasize, and I'll get to this later, but the abortion facilities are absolutely regulated. In fact, they're regulated just as any other physician's office. They're regulated by generally applicable licensure laws, tort laws, various health laws. They're governed by the Boards of Medicine, Pharmacy and Nursing.

And there is a separate entity in and of itself. There's a state agency called the Virginia Department of Health Professions that has broad regulatory and investigatory powers. So plaintiffs' contention is that what the Virginia Department of Health is doing with these licensing -- with the licensing statute and with the regulations is doubly and triply regulating these facilities unnecessarily.

And the broad evidence -- and that goes to, Your Honor, on the burden side, suggests that there is absolutely no reason to add additional, and micromanage these facilities. So these laws are not evidence-based and therefore fail the undue burden test and are unconstitutional under clear Supreme Court precedent.

And I'd like to, as you pointed out, Your Honor, that we're at the motion to dismiss phase. So I think the parties are very eager to get to the merits here, but that comes at a later time. And so plaintiffs ask this Court to dismiss the defendants' motion to dismiss for the following three reasons.

THE COURT: I would deny it and not dismiss it.

MS. MA: Deny. Yes, Your Honor.

So first the undue burden test, as Your Honor has mentioned, is the governing standard here. It is incredibly context specific fact based. It requires this

Court to review the evidence produced by both parties. To weigh the benefits that the state is purporting tied to each of the challenge laws, and then the benefits -- the burdens that -- the real-life burdens of the women who are being -- the women who experience these regulations.

THE COURT: Is the burden analysis based upon the burden to an individual or to the public at large?

MS. MA: It can -- it can be both. It's generally to the public. We'll produce evidence later in this case pertaining to Virginia-specific women, to national pictures, and we might also produce evidence with the individual. But, again, that speaks to the undue burden test, and how fact-specific it is and context driven. And so that's our second point.

Plaintiffs have also alleged concrete facts and injuries that flow specifically to these challenge restrictions that surpass the undue burden test. At this stage, the complaint is straightforward and its well pled and it shouldn't surpass this motion.

Second -- I'm sorry, third. Contrary to defendants' assertions today, these cases do not produce, per se, Constitutional broad rules as they suggest. I'll get into the --

THE COURT: As I mentioned, as I read them, a majority of them are facial review of whether or not on

its face it is unconstitutional, and they reserve for another day whether or not they're Constitutional as applied.

MS. MA: That's correct, Your Honor. And I'll also point to the facial as-applied distinction is a question of remedy. *Whole Woman's Health* is very instructive here. There the plaintiffs have alleged that those laws were unconstitutional as applied, but the Court, after reviewing all of the robust evidence produced in the district court below decided that that statute could not stand. That there's no iteration of the statute that could stand, and therefore struck it facially. So that's a question for a further day.

And I'll also contend that the cases, and I'll go into the language, but they're tied not only facially distinctive, but they have limiting language in and of themselves, and I will point to those. And no -- it's our contention that there's no abstention doctrine that can apply here. So having met these pleading standards, plaintiffs ask this Court for the opportunity to prove their case.

So as Your Honor mentioned, first I'd like to discuss the undue burden standard. The Supreme Court has made clear that this is a test that is fact-bound and fact-specific. It is strong, it is searching, and it is

record dependent. It was first adopted in *Casey*. And contrary to defendants' contention, we are not asking this Court -- *Whole Woman's Health*, we completely agree that that was not a new standard. *Whole Woman's Health* clarified the standard that was first announced in *Casey*.

And just by way of background, that case recognized that women have a right to dignity, to bodily autonomy, and the right to make child rearing decisions. And fundamentally because there is a question of what the meaning of "substantial obstacle" is, I will read from the case at 879.

An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion.

And so the Court then says a finding of an undue burden is a shorthand for a substantial obstacle.

So it actually defines it. And for this Court to make that determination, you must make an independent analysis and evaluate the evidence put forth by the parties on each side of the benefits and burdens analysis. And this is precisely what the Supreme Court clarified in *Whole Woman's Health*.

The Supreme Court said you must place considerable weight upon the credible evidence and

arguments at judicial proceedings and not automatically defer to the state and the legislature.

Now, defendants argue that plaintiffs are overreading *Whole Woman's Health*, but that's simply not the case. They point to perceived deficiencies in the complaint that were developed in *Whole Woman's Health* after robust evidence was produced there, after extensive expert reports, after trial testimony. And in fact, the Supreme Court had called it "extensive findings."

And they make that same error with regards to a case that we'd like to point out to Your Honor in the 7th Circuit in Planned Parenthood of Indiana and Kentucky. In that case, they also say, oh, we haven't alleged clinic closures, which we have, Your Honor, in the complaint.

So defendants are exact -- are trying to bootstrap merits arguments here at the pleading stage, and that's really impermissible. What we're actually talking about is the evidence that the parties will produce later after this stage.

And so facts and context really rule the day here with the undue burden analysis. The Supreme Court has made clear that abortion laws must be defended on their facts. And indeed, after the adoption of the undue burden test, after *Casey* you will -- it is rare for a court -- and they've refrained from dismissing plaintiffs'

claims in abortion cases at this stage where plaintiffs have alleged the kind of extensive burdens --

THE COURT: They have or -- you're correct with respect to as-applied challenges. They have in facial challenges, but not in as-applied.

MS. MA: In specific cases.

THE COURT: Right. Right.

MS. MA: And we are making both facial challenges as well as as-applied challenges to all of the laws but for the criminalization laws, which we argue are in conjunction with the challenge laws.

So, Your Honor, turning to the complaint. It is well pled. Plaintiffs have more than met their burden. This is simply not a barebones pleading. It lays out specific details of over 40 years spanning decades of various of the Commonwealth's laws. It's replete with sufficient -- specificity as to the burdens that have no corresponding benefit.

And just to list them, Your Honor, you know we have pled burdens as to logistical, financial and emotional burdens that women experienced, increased travel times and delays, including two trips to a medical facility that are unnecessary. Reduced individual attention and support, lack of providers, and these are just to name a few burdens.

THE COURT: I have read your complaint numerous times, okay?

MS. MA: Okay. Great.

And so this is -- these are precisely the type of burdens that the Supreme Court has broadly defined. It is not, as the defendants contend, just about clinic closures. And you'll find many cases where the undue burden standard has been used, and evidence has been shown outside of clinic closures and, however, plaintiffs have alleged that clinics have closed under these laws. And so to be clear again, Your Honor, plaintiffs are already subject to --

THE COURT: When you talk about the limited number of clinics out there, I think you mentioned two, one in Virginia Beach and one in Norfolk, but aren't hospitals also allowed to perform these procedures?

MS. MA: Hospitals can provide these procedures, Your Honor.

THE COURT: So there's more than just two facilities that are available, right?

MS. MA: There are two facilities that provide second-trimester abortions that we are aware of. There are other types of terminations where one could miscarry in a hospital or there might be an induced abortion, but for the purposes of --

THE COURT: Okay. Well, when we get to the facts, we'll explore this in more detail.

MS. MA: Sure.

And I just want to be clear, Your Honor, to make this point. Striking these laws would not leave abortion unregulated. It is simply not the case because it is already subject to a robust set of regulations. We are simply asking that the regulations -- we simply leave it as the regulations serve as the same manner of any other comparable outpatient medical care, and that they should be treated like any other physician's office.

THE COURT: Well, my analysis is not a public policy analysis. My analysis, as articulated in *Whole Woman's Health*, is strictly a contextual fact-based analysis of burdens versus benefits. That's what this case is really about.

MS. MA: Absolutely, Your Honor. But we would contend that this fact actually weighs with the burdens -- I'm sorry, with the benefits because the state has to show in their evidentiary presentation whether or not there are additional benefits, or any benefits, to doubly regulating abortion facilities because these facilities are already regulated in a multitude of ways.

THE COURT: We'll argue that in more detail later. I don't know that I totally agree with you, but

I'm going to hear you out, okay?

MS. MA: Sure.

THE COURT: Okay.

MS. MA: And let me get then to the per se Constitutional rules that defendants say are present here. These cases that defendants allege, *Casey*, *Mazurek* and *Simopoulos* have --

THE COURT: Once again, they're all facial cases in the main. Very few of them deal with the law as applied.

MS. MA: That's correct.

THE COURT: Because it's context specific.

MS. MA: Absolutely. And I want to give further distinctions, including first limiting language within those cases themselves, as well as factual distinctions. So if I can clarify?

THE COURT: You go right ahead.

MS. MA: So, for example, in *Casey* there are multiple references in the majority opinion as to evidence on this record, evidence before us. You can find that at 884 and at 901. And we think Justice Blackmun's concurrence is actually quite instructive.

THE COURT: Well, I have already indicated to both you and your colleague here that I think it's a context fact-based analysis, but I'll give you a chance to

talk me out of it if you wish.

MS. MA: I don't want to do that, Your Honor.

THE COURT: Okay.

MS. MA: But we just want to say that at those citations -- and similar language can be found in *Mazurek* at 971 and *Simopoulos* at 517, the Court explicitly says that these are not per se rules. That they were driven by the record before them.

And I want to just point to a few factual differences. In *Casey*, that was a pre-enforcement challenge. So plaintiffs in that case had no reason to show -- did not have robust burdens findings in that case. They had no occasion to show those burdens.

And here this is a postenforcement challenge. We will show through the evidence, and later in this case, about the robust burdens that Virginia women face that is specific to this state and that fall within the state's unique context, geography and --

THE COURT: What you're going to prove is not relevant. Let's stay to the four corners of the complaint, okay?

MS. MA: Okay.

With regard to *Mazurek*, Your Honor, aside from the distinction that you pointed out with as applied versus facial, that case was about an improper purpose,

not effect. We are bringing an effect claim.

And why that's important, again, speaks to the evidence that was produced that the appellate court looked at. They wanted to see if the Montana legislature had a bad motive. So some of the facts that the Court considered were who lobbied for the bill, who drafted that bill. They were not about the real world burdens.

Similarly with *Simopoulos* there are three distinctions. Defendants point to *Whole Woman's Health*, and the fact that Texas did argue that *Simopoulos* should apply in that case. But the majority in *Whole Woman's Health* did address *Simopoulos*, and at 2320 said, quote, Simopoulos cannot provide clear guidance because it is based on a trimester system, one that was abandoned in *Casey* following *Row*. And the trimester framework was replaced be the undue burden standard in *Casey*.

And so another point is that *Simopoulos* was decided before the undue burden test, and so petitioners never had the occasion to -- to argue burdens.

And finally one key fact distinction in *Simopoulos*, the Court repeatedly and explicitly warned that the law cannot depart from medical practice. And indeed in 1983, and when reviewing the way that the second-trimester abortions were performed in the late '70s and early '80s, most of those abortions did occur in

hospitals. The American Medical Association, the American College of Obstetricians and Gynecologists said that second-trimester abortions should happen in hospitals. That is not the case today. It is 35 years later. Medical advancements are an important fact that we plan to develop. And so *Simopoulos* just simply doesn't apply.

None of these rulings suggest that there are pro se rules.

THE COURT: Simply because physicians say it is not necessary doesn't in any way preclude the government from regulating it.

MS. MA: That's correct, Your Honor. But whether or not that actually serves a benefit is a question that this Court will have to make.

THE COURT: Okay.

MS. MA: So these are not per se rules, and they certainly aren't the basis for dismissal here.

And, Your Honor, I'd like to address just the standing question. Defendants contend that plaintiffs have no standing because of their definition of hospital, and that we may provide up until 13.6 weeks. But as defendants stated, there is a regulation in place that specifically limits abortion facilities to first-trimester abortions up to 13.6. And that's 5-412-230.

So what we really have here is a tension between

what the state's interpretation is, which has been provided in their briefs, versus regulations that are in place that say otherwise. The statute itself, the licensing statute itself, has a line that says that abortion facilities are hospitals for this purpose only.

THE COURT: "This purpose" being first-trimester abortions?

MS. MA: That's correct, Your Honor.

I'm sorry. For the purpose of this paragraph.

THE COURT: Okay.

MS. MA: So it limits it to --

THE COURT: And you're drawing from what statute?

MS. MA: That is the licensing statute, Your Honor, -

THE COURT: The licensing statute.

MS. MA: - that is being challenged by plaintiffs.

THE COURT: Okay.

MS. MA: And so this is a new interpretation coupled with decades of the way that the state has enforced it, limiting abortion facilities to procedures at or before 13.6.

And because of this tension, the risks are simply too high here, Your Honor. There is no guarantee

of nonenforcement besides what's been stated in the briefs and what's been stated today. There are no additional assurances. There is not a declaration from the Court or a consent decree or a declaratory judgment. The state may arrest and prosecute plaintiffs, --

THE COURT: I didn't see any of that in your brief. It's not in the complaint.

MS. MA: Your Honor, --

THE COURT: You're arguing a little bit outside the complaint.

MS. MA: And I apologize for that. We actually would ask for a sur-reply. We found out about this argument from defendants on their reply --

THE COURT: I don't need anymore briefings.

MS. MA: Sounds good.

So the risks are simply too high here, Your Honor. The state can arrest and prosecute plaintiffs' staff.

THE COURT: It's not a matter of briefing. It's a matter of what's in the complaint.

MS. MA: Your Honor, that is -- I believe that is in the complaint. I can find the exact paragraph about the criminal penalties that are tied to this.

THE COURT: I saw that.

MS. MA: Right. So there's no scienter

argument, no statute of limitations. And that is the worry here that we would be exposing plaintiffs' staff indefinitely without any assurances.

And at minimum, there's a tension here as to what the definition of "hospital" is. It's ambiguous and cannot be the basis for dismissal under 12(b) without any further discovery. And even if we are allowed to do second-trimester abortions in their abortion facility, the regulations that we are challenging here today would still apply, and so the underlying Constitutional defect would not be resolved.

In addition, as Your Honor is aware, we filed our amended complaint to add the physician plaintiff. And we certainly believe that she has standing in this case to pursue all of the challenge laws, including the hospital requirement.

With regards to abstention, Your Honor, I just want to point out that both --

THE COURT: I'm not going to abstain.

MS. MA: Okay. Thank you, Your Honor.

Would you like to hear a little about the *Melendez* and NOIRA process from plaintiffs?

THE COURT: Not really.

MS. MA: Okay. Sounds good.

And finally with regards to --

THE COURT: I think all that was in your brief.

MS. MA: That's correct, Your Honor.

THE COURT: I've read it. Believe me.

MS. MA: All right. Sounds good.

I just want to conclude with the Fourth Amendment analysis really quickly.

THE COURT: This is where you're going to have your toughest time in your argument is on the Fourth Amendment analysis because almost every type of occupation has regulation and periodic inspection, from a barbershop to a hospital. So go ahead.

MS. MA: Sure, Your Honor.

The key point with the Fourth Amendment analysis, as defendants have argued, is that there was actually consent. That the consent was voluntary. But that is inherently a fact-specific inquiry. To get over the 12(b)(6) motion, --

THE COURT: But all they have to do is say I refuse, then they have to go get an administrative warrant under Virginia law.

MS. MA: But, Your Honor, if they refuse, there is an immediate revocation of licensure for the facility. And there's no time frame within the statute that says that you must go within five days or 10 days to get that warrant.

THE COURT: Okay.

MS. MA: In fact, the state can say I'm going to get that in 25 years, and that would still be fine under the statute and, therefore, the plaintiffs' livelihood would be at stake here. And whether or not that consent is voluntary and freely given is a fact-specific inquiry and cannot be dismissed at this stage.

So to conclude, Your Honor, plaintiffs have pled sufficient facts, and should have the opportunity to present evidence in this case as to why their claims will ultimately succeed. And at this stage, for the reasons we've outlined, the Court should deny the motion to dismiss in its entirety.

Thank you so much.

THE COURT: All right.

Now, do I understand there are additional counsel that wish to argue?

MS. SANDMAN: Nothing from me, Your Honor, unless the Court has questions.

THE COURT: I may have misunderstood.

All right. Go right ahead.

Mr. McGuire, go right ahead with your argument.

MR. McGUIRE: Thank you, Your Honor. I will keep this extremely brief.

THE COURT: Well, touch on anything you think is

important.

MR. McGUIRE: Four quick points, Your Honor.

To the point the Court has raised about the U.S. Supreme Court decisions being largely based on facial challenge, as the plaintiffs admitted, they do bring a facial challenge here in addition to their as-applied challenge, so we would ask the Court to at least dismiss the facial aspects of this case for the reasons we gave in the motion to dismiss.

And then in terms of the as-applied challenge, what we would say is that if you look at the four corners of the complaint, for all of the burdens that are alleged, they are not Virginia-specific. They are generic burdens about travel, about child care, about other things which absolutely are burdens. Make no mistake about it.

THE COURT: But isn't that a matter of proof and not a matter of pleading? I had the same thought when I read it over, but they're only required to state a plausible claim, and I have to take all of the factual allegations as true. I don't know that they need to flesh it out with that level of specificity.

MR. McGUIRE: Well, Your Honor, we would submit that they do for as-applied challenges to Virginia. I mean, this case is brought on behalf of Virginia women. They need to flesh out, and they didn't plead facts to

flesh out, a burden to Virginia women as applied from these laws. And because the complaint lacks any sort of detail about the burden Virginia women face, I mean, our position, Your Honor -- our view would be that the plaintiffs are in the best position to know what the burdens are.

The defendants would be in the best position to articulate what the benefits of these laws would be. The burdens come from the plaintiffs, and they didn't properly present them in the complaint. So on the as applied side, we would ask the Court to really look at the complaint and look for where the Virginia-specific burdens are.

With respect to the argument about 18.2-73, the hospitalization requirement, even if 32.1 -- even if the licensing statute did not use the code phrase, even if the licensing does refer to first-trimester abortions, 32.1-123 is the actual definition of hospital, which the U.S. Supreme Court in *Simopoulos* said is the definition that the Virginia Supreme Court has applied to that statute as a matter of Virginia law.

The definition in 32.1-123 defines the term in the hospitalization statute, and for the reasons the prior Attorney General gave, these plaintiffs -- the plaintiff facilities fully satisfied that definition, and they are in fact being regulated. So they simply are not subject

to criminal prosecution under that statute.

THE COURT: For second-trimester abortions?

MR. McGUIRE: That's the second-trimester abortion criminalization, Your Honor. Yes. They correctly point out there is a regulation on the books that prohibit them from doing so, but that doesn't subject them to the criminal penalties under the statutory provision they have challenged.

We think those are two separate claims, and so the regulatory piece may be a problem under Count 2, but not with respect to Count 3.

And then last thing we would say, Your Honor, is on the Fourth Amendment argument, plaintiffs said that it results in immediate revocation of their license. What they said in the complaint and in their briefs, and what is actually true under the law, is that it's a sufficient basis to revoke the license.

In practice, they may have them revoked immediately. I don't think the complaint was fully clear on that. But it's actually legally sufficient. It's not necessary. And we think there is a distinction there.

So unless the Court has further questions, thank you for allowing us to argue this morning.

THE COURT: All right. I thank counsel very much.

I will try to get an opinion out in the next few weeks. It will probably take me, I'd say, no more than three or four weeks to get an opinion out. Hopefully faster. But as a result of your arguments today, I need to dig a little deeper into some of the aspects of the complaint, and I will certainly do that.

Okay, let's turn now to our pretrial conference. I assume you-all have had your Rule 26 conference, have you?

MR. McGUIRE: Yes, Your Honor.

MS. MA: We have.

MR. McGUIRE: Defendants are actually going to bring up Ms. Emily Scott, who's entered an appearance in the case for the pretrial conference purposes.

THE COURT: Sure.

MR. McGUIRE: We would advise Your Honor, from the Attorney General's Office, we are bringing in outside counsel to help with what we perceive to be burdensome discovery that would tax our capabilities, so Ms. Scott is going to represent the defendants for purposes of the pretrial conference.

THE COURT: All right. Very well.

Ms. Scott, have you-all had your Rule 26 conference?

MR. McGUIRE: Yes, Your Honor. I did that.

Yes.

THE COURT: Okay. You've done that?

MR. McGUIRE: Yes, Your Honor.

THE COURT: And you've worked out your discovery schedule, is that correct?

MR. McGUIRE: No, Your Honor. What we had agreed to was to ask the Court to suspend discovery until the motion to dismiss was ruled on with an agreement to come to the pretrial conference and raise that again with the Court, and go from there.

THE COURT: Okay. Well, what I want you to do is this. It's going to take a few weeks for me to hand down my opinion. The chances are very slim that the entire complaint is going to be dismissed. It may be pruned, but probably not dismissed.

So I suggest you go ahead and work out a discovery schedule, and if you wish to start discovery after the opinion is handed down, that is fine. But I would think if you began your discovery, say like the second week in October, you would be pretty safe. I want to get it on track. I don't want this case to go forever.

I also think that as soon as possible you ought to exchange the identity of the experts. Look at our local rules that require certain information to be provided because I'm sure there will be a number of expert

witnesses in this case, and I'm sure you will want to do your due diligence on them as quickly as you possibly can.

I'm going to set this for trial probably in March or April.

How long, Ms. Ma, do you think your side of the case will take to put on the evidence?

MS. MA: Your Honor, in total we think it will take seven to 10 days for both sides. So about three or four days.

THE COURT: All right. I was going to set this one for week, but I will set it for 10 days. Keep in mind that we do move cases quickly here in the Eastern District of Virginia. So I'll go ahead and set it for 10 days.

And, Ms. Belcher, if we start on Monday morning the 8th of April, do we have 10 days there that we can hold open?

MS. BELCHER: Yes, sir. We can begin April 8th and continue through the week of the 15th.

THE COURT: Is that compatible with your collective calendars?

MS. SCOTT: Yes.

THE COURT: All right. Then I'm going to do that.

We'll begin -- this is a trial without a jury, obviously. We'll begin promptly at 9:00 a.m. on the

8th of April.

I will set a final pretrial conference in the case.

Let's go ahead, Ms. Belcher, and pick a final pretrial conference date now.

MS. BELCHER: Thursday, March 28th, at 10:00.

THE COURT: Is that suitable?

MS. MA: Yes, sir.

THE COURT: Okay. Then I will set the final pretrial conference at 10:00 a.m. on March 28th, and we will begin the trial on Monday morning the 8th of April at 9:00 a.m. It is set for 10 days.

I do want you to submit to me your proposed findings of fact and conclusions of law at least 14 days prior to trial.

MS. MA: Your Honor, may I raise one quick question?

THE COURT: Yes, ma'am.

MS. MA: With regards to summary judgment briefing and the schedule, would it be appropriate to kind of talk with defendants about how long that might take? And considering the complex nature of this case, would it be possible to ask for a time frame that is slightly later?

THE COURT: I'm sorry. I can't hear you. I

apologize to you. Why don't you come on up to the podium.

MS. MA: Yes, sir.

THE COURT: My hearing's not that good at my age.

MS. MA: I apologize, Your Honor.

THE COURT: Yes, ma'am.

MS. MA: So in light of the complex issues that are in this case, and the potential for a vast summary judgment briefing, would it be appropriate to ask for a time sightly later, and to work it out with counsel, and alert Chambers or have a scheduling conference with Chambers?

THE COURT: You can do that. My thought would be to schedule the summary judgment argument about 60 days prior to trial.

MS. MA: Okay, Your Honor.

THE COURT: Which would put it in February.

MS. MA: Okay. I'd like to just confer with the various lawyers.

THE COURT: All right. What I want you to do -- it's going to be in February. You-all talk about it. I want you to call our Chambers and talk to Ms. Belcher. She controls the calendar. And you-all work out a date for summary judgment, okay?

MS. MA: Great. Thank you so much.

THE COURT: Yes, ma'am.

Anything further?

MR. McGUIRE: No, Your Honor.

MS. MA: No, sir.

MS. SCOTT: No, sir.

THE COURT: All right. Very well.

I thank you-all very much for your argument today. I will try to digest this just as quickly as possible and get an opinion out hopefully in three weeks, maybe four at the latest.

MR. McGUIRE: Thank you, Your Honor.

THE COURT: You-all have a pleasant day.

The Court will stand in recess.

(Recess taken.)

(The proceeding concluded at 12:03 a.m.)

REPORTER'S CERTIFICATE

I, Krista Liscio Harding, OCR, RMR, Notary Public in and for the Commonwealth of Virginia at large, and whose commission expires March 31, 2020, Notary Registration Number 149462, do hereby certify that the pages contained herein accurately reflect the notes taken by me, to the best of my ability, in the above-styled action.

Given under my hand this 17th day of September, 2018.

_____

Krista Liscio Harding, RMR
Official Court Reporter