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Legal Does Not Mean Rational: The Practicality of Treating First-Trimester Abortion Clinics the Same as Hospitals

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LEGAL DOES NOT MEAN RATIONAL:
THE PRACTICALITY OF TREATING FIRST-TRIMESTER
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INTRODUCTION

On August 20, 2010, Virginia Attorney General Ken Cuccinelli issued two official opinions: one to Ralph K. Smith, a member of the Virginia Senate, and the other to Robert G. Marshall, a member of the Virginia House of Delegates.¹ Both opinions answered similar questions posed by the two members of the Virginia General Assembly: whether the Commonwealth of Virginia can regulate clinics that perform first-trimester abortions, and, if so, to what extent the Commonwealth can regulate those clinics.² After referencing a challenge to South Carolina’s administrative regulations regarding abortion clinics that essentially placed the clinics on the same level of state regulation as hospitals (including regulation of staffing rules, equipment and laboratory availability, maintenance, and design and construction standards),³ Attorney General Cuccinelli concluded that the Commonwealth of Virginia could issue similar regulations for abortion clinics,

1. 2010 Op. Va. Att’y Gen. No. 10-012 (Aug. 20, 2010) [hereinafter 2010 Op. Va. Att’y Gen. No. 10-012], *available at* [http://www.oag.state.va.us/Opinions and Legal Resources /OPINIONS/2010opns/10-067-Marshall.pdf](http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/OPINIONS/2010opns/10-067-Marshall.pdf); 2010 Op. Va. Att’y Gen. No. 10-012 (Aug. 20, 2010), *available at* [http://www.oag.state.va.us /Opinions and Legal Resources/OPINIONS /2010opns/10-012 \(Smith\) - Marshall version.pdf](http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/OPINIONS/2010opns/10-012%20(Smith)%20-%20Marshall%20version.pdf). Senator Ralph K. Smith and Delegate Robert G. Marshall received identical letters from Attorney General Ken Cuccinelli.

2. 2010 Op. Va. Att’y Gen. No. 10-012, *supra* note 1, at 1.

3. *See Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 159–62 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

so long as the regulations complied with *Roe v. Wade*'s⁴ constitutional requirements.⁵ Attorney General Cuccinelli's stated intent was to protect women from the risks of abortion.⁶ These risks, though present, are uncommon.⁷ After Attorney General Cuccinelli issued his opinions, Delegate Marshall wrote a letter to Virginia Governor Robert McDonnell, requesting that the Virginia Governor implement Attorney General Cuccinelli's regulations on abortion clinics.⁸

The media quickly responded to Attorney General Cuccinelli's opinions.⁹ The response was varied, but for the most part, the response was negative.¹⁰ Newspapers cited the practical effect of such regulations: that they will effectively shut down the majority of abortion clinics not only in Richmond, the state capitol, but also throughout the Commonwealth.¹¹

Notwithstanding the negative press, the Virginia General Assembly quickly went to work. In March 2011, just seven months after Attorney General Cuccinelli's advisory opinions, the General Assembly passed, and Governor McDonnell signed, Senate Bill 924 into law.¹² This Bill amended the portion of the Virginia Code that governed the licensing of hospitals.¹³ Medical facilities in which five or more first-trimester abortions are performed are now categorized as a "hospital."¹⁴

4. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

5. 2010 Op. Va. Att'y Gen. No. 10-012, *supra* note 1, at 7.

6. *Id.* at 4; Tammie Smith, *Two of Area's Three Abortion Clinics at Risk*, RICHMOND TIMES DISPATCH, Aug. 27, 2010, at A1 (citing Robert G. Marshall, member of the Virginia House of Delegates).

7. Of first-trimester abortions (the kind of abortions that Attorney General Cuccinelli is referring to in his opinions), only one-half of one percent result in complications requiring any kind of hospitalization or surgery. A. Barton Hinkle, *Where's the Crying Need to Regulate Abortion Clinics?*, RICHMOND TIMES DISPATCH, Aug. 31, 2010, available at <http://www.tmcnet.com/usubmit/2010/08/31/4984225.htm>.

8. Anita Kumar, *Va. Allowed to Toughen Abortion Clinic Rules*, WASH. POST, Aug. 24, 2010, at A4.

9. Matthew Cella, *Cuccinelli: Virginia Has Right to Regulate Abortion Clinics*, WASH. TIMES, Aug. 23, 2010, <http://www.washingtontimes.com/news/2010/aug/23/cuccinelli-virginia-regulate-abortion-clinics/>; Hinkle, *supra* note 7; Kumar, *supra* note 8; Smith, *supra* note 6; Julian Walker, *S. Carolina Law Gives Glimpse of New Abortion Clinic Rules*, VIRGINIAN-PILOT, Aug. 29, 2010, <http://hamptonroads.com/2010/08/s-carolina-law-gives-glimpse-new-abortion-clinic-rules-va> [hereinafter Walker, *New Abortion Clinic Rules*]; Julian Walker, *Va. Can Regulate Abortion Clinics, Cuccinelli Says in Opinion*, VIRGINIAN-PILOT, Aug. 24, 2010, <http://hamptonroads.com/2010/08/va-can-regulate-abortion-clinics-cuccinelli-says-opinion> [hereinafter Walker, *Va. Can Regulate Abortion Clinics*].

10. Cella, *supra* note 9; Hinkle, *supra* note 7; Kumar, *supra* note 8; Smith, *supra* note 6; Walker, *New Abortion Clinic Rules*, *supra* note 9; Walker, *Va. Can Regulate Abortion Clinics*, *supra* note 9.

11. Kumar, *supra* note 8; Smith, *supra* note 6.

12. S.B. 924, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

13. *Id.*

14. VA. CODE ANN. § 32.1-127(B)(1) (2011).

These facilities were previously treated like doctors' offices.¹⁵ Because of the new classification of first-trimester abortion clinics, this bill now puts the Virginia Board of Health in charge of promulgating regulations to govern them.¹⁶ This is the first time in two decades that the Board of Health has regulated abortion clinics.¹⁷

Generally, the Board of Health takes up to two years to implement regulations.¹⁸ In this situation, the General Assembly gave the Board of Health less than half of that time: only 280 days.¹⁹ As a result, state officials "rush[ed]"²⁰ to implement the new "emergency regulations."²¹ No reason was given for the short and strict time limit.²² In the six months before introducing the regulations, the Board of Health researched abortion clinic regulations in twenty-two different states.²³ The regulations that were drawn up by the Board are modeled on the South Carolina abortion clinic regulations, mostly because the Fourth Circuit Court of Appeals has already upheld them.²⁴

On September 15, 2011, the Virginia Board of Health debated and passed the new regulations at their quarterly meeting.²⁵ There were only four-and-a-half hours of debate before the regulations were put to a vote.²⁶ Because of their classification as "emergency regulations," they were not subject to the normal process of public comment and review; instead, the Board heard from only thirty-two speakers.²⁷

15. Lena H. Sun & Anita Kumar, *Virginia Officials Prepare to Release Draft Abortion Regulations*, WASH. POST, Aug. 25, 2011, http://www.washingtonpost.com/local/dc-politics/virginia-officials-prepare-to-release-draft-abortion-regulations/2011/08/25/gIQAHFoheJ_story.html.

16. VA. CODE ANN. § 32.1-127 (2011).

17. See Anita Kumar & Lena H. Sun, *Draft Regulations for Va. Abortion Clinics Could Lead Some to Close, Operators Say*, WASH. POST, Aug. 26, 2011, http://www.washingtonpost.com/local/dc-politics/draft-regulations-for-va-abortion-clinics-could-lead-some-to-close-operators-say/2011/08/26/gIQAapB8gJ_story.html.

18. Anita Kumar, *Stricter Va. Rules on Abortion Gain*, WASH. POST, Sept. 16, 2011, at B1.

19. S.B. 924, 2011 Gen. Assemb., Reg. Sess. (Va. 2011).

20. Kumar, *supra* note 18.

21. David Sherfinski, Op-Ed., *Virginia Board OKs Stiff Rules for Abortion Clinics*, WASH. TIMES, Sept. 15, 2011, <http://www.washingtontimes.com/news/2011/sep/15/va-board-hears-heated-testimony-abortion-regulation/?page=all>.

22. See *id.* (stating no reason for the 280 day enactment requirement).

23. Prue Salasky, *Board Approves Tougher Abortion Clinic Regulations*, DAILY PRESS (Hampton Roads), Sept. 16, 2011, at 1.

24. *Id.*

25. *Id.*

26. Kumar, *supra* note 18.

27. Sherfinski, *supra* note 21. One doctor who specialized in women's health called the hearing "a kangaroo court where standard regulatory processes [were] cast aside." Wendy Klein, *Va. Board of Health's 'Kangaroo Court'*, DAILY PRESS (Hampton Roads), Sept. 19, 2011, http://articles.dailypress.com/2011-09-19/news/dp-oped-klein-00917-20110919_1_patient-safety-health-centers-health-hearing.

During this time, eighteen amendments were suggested, but all except for three were rejected.²⁸ One of the rejected proposals suggested that the Board of Health distinguish between medical abortions, in which patients take a pill that causes abortion, and surgical abortions.²⁹ Many of the suggested changes were rejected because it was said that they went beyond the authority that had been given to the Board.³⁰

Following the discussion at the meeting, the Board of Health voted twelve to one in favor of the regulations.³¹ They have already been called “some of the toughest in the nation.”³² One of the regulations allows a representative from the Office of Licensure and Certification to enter and inspect abortion clinics unannounced.³³ While there, the representative has access to all records, including medical records.³⁴ If, at the time of entry, no one is present who is authorized to provide the representative with the medical records, then an authorized person must arrive at the clinic within an hour.³⁵ The regulations also require that each abortion clinic create a governing body and enact bylaws.³⁶

Because the regulations were not passed in the way that regular, non-emergency regulations usually are,³⁷ they are not final at this time. Before these regulations go into effect, they must be approved by both the Attorney General’s office and by the Governor.³⁸ They are expected to go into effect in January of 2012.³⁹ After that, the Board of Health returns to the drawing board to create permanent regulations.⁴⁰

This Note explores the implications of Attorney General Cuccinelli’s official advisory opinions and the regulations of the Virginia Board of Health that occurred as a result of his opinions. It begins with an overview of background information necessary to understand the consequences of Attorney General Cuccinelli’s opinions, considering past and current Virginia regulation of abortions

28. Salasky, *supra* note 23.

29. *Id.*

30. *Id.*

31. *Id.* at 1.

32. Kumar, *supra* note 18.

33. 12 VA. ADMIN. CODE §§ 5-412-100, 110 (2012).

34. *Id.* § 5-412-110(B).

35. *Id.* § 5-412-110(C).

36. *Id.* § 5-412-140.

37. *See* Kumar, *supra* note 18.

38. Hugh Lessig, *Reaction Mixed to New Abortion Rules*, DAILY PRESS (Hampton Roads), Sept. 16, 2011, http://articles.dailypress.com/2011-09-16/news/dp-nws-abortion-regs-follo-20110916_1_new-abortion-rules-abortion-providers-first-trimester-abortions.

39. *Id.*

40. *Id.*

and an overview of the regulations in South Carolina, including the case upholding their regulations: *Greenville Women's Clinic v. Bryant*.⁴¹ It then continues with a discussion of whether the regulation of abortion clinics in Virginia would be constitutional under the standards currently in place under *Planned Parenthood v. Casey*.⁴² After concluding that such regulations would be constitutional, in the same way that the Fourth Circuit Court of Appeals found the South Carolina regulations in *Greenville Women's Clinic* to be constitutional, this Note explores the practical effects that such regulations would create in Virginia if they were put into place. Those practical effects include the lack of availability of abortion clinics and the increased costs of abortion that would be passed on to women. Ultimately, this Note concludes that although regulations imposing restrictions on first-trimester abortion providers would most likely be held constitutional in the Fourth Circuit Court of Appeals, the negative practical effects of implementing such stringent regulations on first-trimester abortion clinics outweigh any positive effect that those regulations would have on the safety of a woman undergoing an abortion.

I. BACKGROUND

A. *The Effects of Official Opinions of the Virginia Attorney General*

These regulations began as a result of Attorney General Cuccinelli's advisory opinions in August 2010. The Attorney General has the ability to issue advisory opinions on various legal issues when requested in writing by one of many members of the state government.⁴³ Governors, members of the General Assembly, judges, Commonwealth's Attorneys, court clerks, sheriffs, and heads of a state board or department can request advisory opinions from the Attorney General.⁴⁴ Unless the opinion is requested by the Governor or a member of the General Assembly, the subject of the question must be directly related to the duties of the official making the request.⁴⁵

The opinions issued by the Attorney General are advisory opinions and carry no binding force, in contrast to the opinions of a court

41. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 175 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

42. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992).

43. VA. CODE ANN. § 2.2-505(A) (2010).

44. *Id.*

45. *Id.* § 2.2-505(B).

of law.⁴⁶ They simply represent what the Attorney General believes is the present state of the law based on a review of currently existing law.⁴⁷ This understanding can be based on any source of law, including statutes, court opinions, and federal and state constitutions.⁴⁸ Because advisory opinions have no binding force, the Board of Health's regulations did not have to follow Attorney General Cuccinelli's opinion, and he could not have required the Board of Health to enact them.

B. Past and Current Virginia Regulation of Abortion Clinics

Although Virginia has a long history of regulating abortion, that regulation has not endured many changes.⁴⁹ The first abortion statute, enacted in 1848, prohibited abortion altogether unless it was done to preserve the life of the mother.⁵⁰ If the abortion was performed before quickening,⁵¹ it was a misdemeanor, but if it was performed after quickening, it was a felony.⁵² Within fifty years, Virginia eliminated the distinction made at quickening, and all abortions were classified as felonies unless they were performed "in good faith, with the intention of saving the life of [the pregnant] woman or [her unborn] child."⁵³ This remained the law until Virginia enacted a version of the Model Penal Code, which prohibited abortion unless performed in a hospital and done to protect the life or health of the mother, unless the child would be born with mental or physical defect, or unless the pregnancy was a result of rape or incest.⁵⁴ Following *Roe*, Virginia modified its abortion statute to adopt the trimester framework expressed in the court opinion.⁵⁵ This is the current state of Virginia's abortion legislation.⁵⁶

There are different requirements and prohibitions on pregnant women and abortion providers depending on the trimester of

46. Kumar, *supra* note 8, at A4.

47. *Id.*

48. *Official Opinions*, KENNETH T. CUCCINELLI, ATT'Y GEN. OF VA., [http://www.oag.state.va.us/Opinions and Legal Resources/OPINIONS/index.html](http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/OPINIONS/index.html) (last visited Feb. 13, 2012).

49. PAUL BENJAMIN LINTON, *ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS* 533–38 (2008).

50. *Id.* at 537 (citation omitted).

51. Quickening is the first recognizable movement of a fetus in the uterus, which usually occurs between the sixteenth and eighteenth week of pregnancy. *Roe v. Wade*, 410 U.S. 113, 132 (1973) (citation omitted).

52. LINTON, *supra* note 49, at 537.

53. *Id.* at 537–38 (alteration in original) (citation omitted).

54. *Id.* at 533–34 (citation omitted).

55. *Id.* at 538.

56. *See* VA. CODE ANN. § 18.2-73 (2010) (second-trimester abortions); VA. CODE ANN. § 18.2-74 (2010) (third-trimester abortions).

pregnancy.⁵⁷ Notwithstanding any of the statutory requirements, a licensed physician can perform an abortion when, in his or her professional opinion, doing so is necessary to save the life of the pregnant woman.⁵⁸ This is true in any trimester of pregnancy.⁵⁹

A pregnancy in the third trimester can only be aborted if the mother's physician and two other physicians (all three licensed by the Board of Medicine to practice medicine and surgery) certify that, in their medical opinion, the "continuation of the pregnancy is likely to result in the death of the woman or substantially and irretrievably impair the mental or physical health of the woman."⁶⁰ There is no provision about the health of the child.⁶¹ Additionally, the abortion must be performed in either "a hospital licensed by the Virginia State Department of Health [or in a hospital that is] operated by the Department of Behavioral Health and Developmental Services."⁶² If the fetus is viable after the procedure, measures for life support must be present and utilized.⁶³

The requirements for abortion during the second trimester of pregnancy are less stringent than those for abortions during the third trimester.⁶⁴ Like third-trimester abortions, second-trimester abortions must be performed in a hospital licensed by the State Department of Health or operated by the Department of Behavioral Health and Departmental Services.⁶⁵ All second-trimester abortions must be performed by a physician licensed by the Board of Medicine to practice medicine and surgery.⁶⁶ There is no requirement that continuation of the pregnancy cause serious physical harm to, or death of, the mother in order for a physician to be able to perform the procedure, nor does it require three separate physicians to examine the woman before the procedure, as the requirements for third-trimester abortions dictate.⁶⁷ There is also no requirement for life support procedures to be present and utilized if there is a chance of viability of the fetus.⁶⁸ The only

57. VA. CODE ANN. § 18.2-73 (2010) (second-trimester abortions); VA. CODE ANN. § 18.2-74 (2010) (third-trimester abortions).

58. VA. CODE ANN. § 18.2-74.1 (2010).

59. *Id.* § 18.2-72 (first-trimester abortions); *id.* § 18.2-73 (second-trimester abortions); *id.* § 18.2-72-4 (third-trimester abortions).

60. *Id.* § 18.2-74(b).

61. *See id.* § 18.2-72-4 (2010) (listing abortion procedures for the third trimester with no mention of the health of the child).

62. *Id.* § 18.2-74(a).

63. *Id.* § 18.2-74(c).

64. VA. CODE ANN. § 18.2-73 (2010).

65. *Id.*

66. *Id.*

67. *Id.* § 18.2-74.

68. *Id.* § 18.2-73.

substantive requirements for second-trimester abortions are that the doctor performing the procedure is licensed and that the procedure be performed in a licensed hospital.⁶⁹

Abortions performed in the second and third trimesters are regulated by statutes passed by the General Assembly and signed into law by the Governor,⁷⁰ however, first-trimester abortions are not regulated in the same way.⁷¹ The only provision in the Virginia Code regarding first-trimester abortions is the one that specifically makes them legal when performed by a licensed physician.⁷² Before Attorney General Cuccinelli's advisory opinions, the Virginia General Assembly had passed no provisions regarding the regulation of first-trimester abortions.⁷³ The main restrictions of first-trimester abortions are the licensing requirements that the Virginia Board of Health has imposed for all doctors:⁷⁴ the physician performing an abortion is the one who is responsible for a "diagnosis of pregnancy,"⁷⁵ and the abortion provider must counsel patients and instruct them about abortion procedure and methods of birth control.⁷⁶

In the Commonwealth of Virginia, it is a Class 4 felony for a physician to perform any abortion in violation of the statutory and administrative requirements.⁷⁷ There are six different classes, or levels of punishment, for felonies in Virginia.⁷⁸ Class 4 felonies are punishable by imprisonment ranging from two to ten years, and a fine of no more than \$100,000.⁷⁹ If a natural person, the physician, is charged with a violation of an abortion regulation, he or she is subject to either imprisonment alone or both imprisonment and a fine.⁸⁰ An individual physician must be imprisoned and cannot be punished with just a fine.⁸¹ However, if a legal person (not a natural person), such as a hospital or abortion clinic, is charged with such a crime, the court can only impose a fine.⁸²

69. *Id.*

70. *See* VA. CODE ANN. § 18.2-73 (2010) (regulating second-trimester abortions); *id.* § 18.2-74 (regulating third-trimester abortions).

71. *Id.* § 32.1-127.

72. *Id.* § 18.2-72.

73. Cella, *supra* note 9.

74. 18 VA. ADMIN. CODE § 85-20-120 to -122, 140 (2011).

75. *Id.* § 5-410-1270(D).

76. *Id.* § 5-410-1270(E).

77. VA. CODE ANN. § 18.2-71 (2010).

78. *Id.* § 18.2-09.

79. *Id.* § 18.2-10(d).

80. *Id.* § 18.2-10(g).

81. *Id.* However, this likely does not prohibit some alternative sentencing options, such as suspended sentences.

82. *Id.*

Physicians, hospitals, and other medical facilities are not required to admit a patient for the purpose of performing an abortion.⁸³ This is commonly referred to as a “[c]onscience clause.”⁸⁴ Any medical professional who submits, in writing, an objection to abortions in general, or to any specific “abortion[] on personal, ethical, moral or religious grounds,” is not required to participate in the abortion.⁸⁵ Medical professionals or medical facilities that invoke the conscience clause are exempt from any claim of damages resulting from their refusal to perform an abortion.⁸⁶

It is interesting to note that in the Virginia Code, all provisions regarding abortion are included in Title 18.2, the criminal section.⁸⁷ Other medical requirements are located in Title 32.1, Health, if they are in the Virginia Code, or in the Administrative Code of Virginia.⁸⁸ The Virginia General Assembly has clearly shown their feelings about abortions by including abortion regulations in the criminal code, rather than in the portion of the Virginia Code that deals with health issues.⁸⁹

Attorney General Cuccinelli’s advisory opinions are not the first Virginia Attorney General advisory opinions to deal with the Commonwealth’s abortion regulations.⁹⁰ Immediately after the United States Supreme Court’s *Roe* decision, members of the Virginia legislature became concerned about the possibility of abortion restrictions in the Commonwealth being declared unconstitutional.⁹¹ At the time, Virginia law dictated that all abortions be performed in hospitals.⁹² The Attorney General at the time, Andrew Miller, believed that the requirement was overbroad in that it included first-trimester abortions.⁹³

83. VA. CODE ANN. § 18.2-75 (2010).

84. *Id.*; Vicki Alexander, *The Future of Reproductive Rights*, in REFLECTIONS AFTER CASEY: WOMEN LOOK AT THE STATUS OF REPRODUCTIVE RIGHTS IN AMERICA 3, 3 (Dorothy M. Zellner & Nancy Scerbo eds., 1993) [hereinafter REFLECTIONS AFTER CASEY].

85. VA. CODE ANN. § 18.2-75 (2010).

86. *Id.*

87. *Id.* § 18.2-71 (2011) (listing the regulations passed by the Virginia legislature regarding abortion which are located in Title 18.2, Crimes and Offenses Generally, Chapter 4, Crimes against the Person, Article 9, Abortion).

88. Regulations made by the Board of Health are in the Administrative Code. See VA. CODE ANN. § 32.1-127 (2011); 18 VA. ADMIN. CODE § 85-20-120 (2011) (regulating medical requirements through the Code of Virginia and the Virginia Administrative Code).

89. See VA. CODE ANN. § 18.2-71 (2011).

90. OPINIONS OF THE ATTORNEY GENERAL AND REPORT TO THE GOVERNOR OF VIRGINIA: FROM JULY 1, 1972 TO JUNE 30, 1973 2–4 (1973) [hereinafter OPINIONS OF THE ATTORNEY GENERAL].

91. See *id.* at 1 (questioning the Virginia conscience clause which does not require hospitals to admit patients for abortions, nor doctors to perform abortions); *id.* at 2 (questioning Virginia abortion laws, which at the time required that all abortions be performed in a hospital, under the United States Supreme Court’s *Roe* decision).

92. *Id.* at 3–4 (citing VA. CODE ANN. § 18.1-62.1(b) (1973)).

93. *Id.* at 4.

He stated that “the result [of this opinion] is that the decision rests with the physician as to where he wishes to perform the procedure.”⁹⁴

The 1973 Attorney General opinion indicates that there was a point in Virginia history at which the Attorney General believed that the Commonwealth could not require that first-trimester abortions be performed in a hospital and could not impose hospital-like regulations on abortion clinics. This opinion is directly contrary to the current opinion of Attorney General Cuccinelli. Still, one must remember that these opinions are only advisory and do not create law.⁹⁵ Unlike court decisions, they do not have binding force,⁹⁶ so any reference to such an opinion in a court is likely to be dismissed. Attorney General Miller’s opinion was also made immediately after the *Roe* decision.⁹⁷ As discussed below, the trimester test from *Roe* has been replaced with a broader “undue burden” test by *Casey*.⁹⁸ The two attorney generals from different times obviously disagree about the constitutionality of the regulations,⁹⁹ but the different controlling constitutional tests at the time could be responsible for this difference in opinion.

C. South Carolina Regulation of Abortion Providers, Including Greenville Women’s Clinic v. Bryant

South Carolina health laws are seemingly more involved than those that were in place in Virginia; an entire Chapter of the South Carolina Code is devoted specifically to abortion.¹⁰⁰ South Carolina defines abortion as:

the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant for reasons other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.¹⁰¹

Instead of making an exception for abortion procedures performed for the purpose of saving a pregnant woman’s life, as Virginia has

94. *Id.*

95. Kumar, *supra* note 8.

96. *Id.*

97. OPINIONS OF THE ATTORNEY GENERAL, *supra* note 90, at 1.

98. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

99. Compare 2010 Op. Va. Att’y Gen. No. 10-012, *supra* note 1 (declaring that regulations on abortion clinics that would regulate them in a way similar to hospitals is constitutional), with OPINIONS OF THE ATTORNEY GENERAL, *supra* note 90, at 2 (declaring that a regulation that requires first-trimester abortions to be performed in hospitals is unconstitutional).

100. S.C. CODE ANN. § 44-41 (2010).

101. *Id.* § 44-41-10.

done,¹⁰² the South Carolina Code exempts such procedures from the definition of abortion altogether.¹⁰³

Similar to Virginia, South Carolina separates abortions into trimesters and has different requirements for each trimester.¹⁰⁴ The South Carolina abortion regulations build upon each other, in that each trimester has stricter regulations, but includes the regulations for the previous trimester.¹⁰⁵ Statutorily, abortion is legal in the first trimester if performed by a licensed physician with the consent of the pregnant woman and the abortion is in the physician's "professional medical judgment."¹⁰⁶ The South Carolina Department of Health and Environmental Control (SCDHEC) then has the power to license and certify facilities in which abortions are performed.¹⁰⁷ The regulations instituted by the SCDHEC are very detailed and concise.¹⁰⁸ They include requirements for licensing, administration, record keeping, training and supervision of all employees (not just those directly involved in the procedure), patient admissions criteria, drug storage, laboratories, emergency care, utensils that must be kept in each procedure room, storage of medical records and reports, periodic staff meetings, maintenance of the building, laundry, housekeeping, and design and construction of buildings.¹⁰⁹ These regulations are so detailed that they require abortion clinics to have mandatory fire drills every three months and to keep outside areas free of weeds.¹¹⁰

In South Carolina, abortions in the second trimester of pregnancy must be performed in a hospital or a clinic that is certified by the SCDHEC.¹¹¹ Abortions performed in the third trimester have many additional requirements. Notably, the abortion must be performed in a hospital.¹¹² If the pregnant woman is married and living with her husband, the husband must consent to the abortion.¹¹³ The

102. VA. CODE ANN. § 18.2-74.1 (2010).

103. S.C. CODE ANN. § 44-41-10(a) (2010).

104. *Id.* § 44-41-20.

105. *Id.*

106. *Id.* § 44-41-20(a).

107. *Id.* § 44-41-70.

108. S.C. CODE ANN. REGS. 61-12 (2010).

109. *Id.*

110. *Greenville Women's Clinic v. Bryant*, 66 F. Supp. 2d. 691, 703 (D.S.C. 1999), *rev'd*, 222 F.3d 157 (4th Cir. 2000).

111. S.C. CODE ANN. § 44-41-20(b) (2010).

112. *Id.* § 44-41-20(c).

113. *Id.* The United States Supreme Court declared a similar requirement unconstitutional when the requirement applied to all trimesters of pregnancy. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837, 844 (1992). The South Carolina legislation would likely be distinguished because it applies only in the third trimester, as opposed to throughout pregnancy, and thus the state has a strong interest in the potentiality of human life and can go so far as to prohibit abortion except in cases where the pregnancy "endanger[s] the woman's life or health." *Id.* at 846.

abortion must be necessary to “preserve the life or health of the woman,” as certified in writing, based upon the medical judgment of two physicians, the attending physician and a consulting physician, who are not related, and who are not engaged in private practice together.¹¹⁴ If the reason for the abortion is to preserve the mental health of the woman, an additional certification is required from a psychiatrist who is not related to or engaged in private practice with the attending physician.¹¹⁵

Similar to Virginia, South Carolina has a conscience clause, which allows hospitals and clinics to refuse to admit patients for the purpose of an abortion and exempts such hospitals from civil liability for such refusals.¹¹⁶ This conscience clause applies only to private or non-governmental hospitals and clinics, but it prohibits *all* hospitals and clinics “from refus[ing] an emergency admittance.”¹¹⁷ South Carolina also allows medical professionals of any kind to exempt themselves from performing or assisting in an abortion if they object in writing.¹¹⁸ A medical professional does not need to give a reason for his or her objection.¹¹⁹ Additionally, no medical professional can “be dismissed, suspended, demoted, or otherwise disciplined or discriminated against” because of his or her decision to not perform or assist in an abortion.¹²⁰

*Greenville Women’s Clinic v. Bryant*¹²¹ involved a challenge to the South Carolina regulations for abortion clinics in which second-trimester or five or more first-trimester abortions are performed.¹²² The regulations in question were the various first-trimester requirements discussed above.¹²³ After listing the various provisions in the regulations, continuing for seven pages,¹²⁴ the District Court held that the SCDHEC regulations were unconstitutional because they violated the Due Process and the Equal Protection Clauses.¹²⁵ The court found that the regulations treat abortion physicians and clinics differently than other physicians and medical facilities by imposing requirements

114. S.C. CODE ANN. § 44-41-20(c) (2010).

115. *Id.*

116. *Id.* § 44-41-40.

117. *Id.*

118. *Id.* § 44-41-50(a).

119. *Id.*

120. S.C. CODE ANN § 44-41-50(c) (2010).

121. *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

122. *Id.*

123. *See supra* text accompanying notes 104–107.

124. *Greenville Women’s Clinic v. Bryant*, 66 F. Supp. 2d 691, 698–704 (D.S.C. 1999), *rev’d*, 222 F.3d 157 (4th Cir. 2000).

125. *Id.* at 691, 744–45.

on them that are not imposed on other medical facilities or on first-trimester abortion providers that perform fewer than five abortions per month.¹²⁶ Most importantly for this Note, the District Court held that because the SCDHEC put numerous unnecessary requirements on abortion providers, they unduly burdened the fundamental right that all women have to abortion, thus violating the Due Process Clause of the Fourteenth Amendment.¹²⁷ The undue burden on women was in the form of increased costs, delays in obtaining abortions, a decrease in the number of abortion clinics (resulting in the need to travel further distances to obtain an abortion), and the possibility of unlimited inspections of clinics.¹²⁸ Although it was true that the abortion clinics complied with the majority of the regulations and they were good business practice, there were other, inseverable, regulations that went too far.¹²⁹

One of the main pieces of evidence that the court considered was the testimony of doctors who spoke about the effect that the regulations would have on the price of abortions.¹³⁰ The court recognized that the proposed regulations would “impose substantial start-up costs upon abortion providers in th[e] state, and substantial annual costs to maintain compliance.”¹³¹ Clinics would have no choice other than to pass the increased price on to women seeking abortions.¹³² Dr. Henshaw, deputy director of research at the Alan Guttmacher Institute in New York,¹³³ testified that a price increase in abortions of only twenty-five dollars can prevent one to two percent of low-income women seeking an abortion from being able to afford one.¹³⁴ Largely because of the testimony of Dr. Henshaw and other doctors, the District Court concluded that the South Carolina regulations on

126. *Id.* at 742.

127. *Id.* at 695, 735.

128. *Id.* at 735–36.

129. *Id.* at 695. Some of the detailed regulations provide that abortion clinics must keep their grounds free of grass and weeds, must perform fire drills every three months, and must have a specific number and size of procedure rooms. *Id.* at 703.

130. *Greenville Women’s Clinic*, 66 F. Supp. 2d at 714 (citing testimony of Dr. Stanley K. Henshaw made via videotaped deposition).

131. *Id.* at 717.

132. *Id.*

133. Dr. Henshaw’s job consists of conducting family planning and abortion studies. *Id.* at 714.

134. *Id.* (citing the testimony of Dr. Stanley K. Henshaw, made via videotaped deposition). At the time, an abortion cost between \$325 and \$480 depending on many factors, including how far along the woman was in the pregnancy. These regulations would increase the cost of abortion services at Charleston Women’s Medical Clinic, Inc. from \$36.48 to \$75.03, at Palmetto State Medical Center from \$93.09 to \$170.39, at Greenville Women’s Clinic from \$22.68 to \$32.39, and at Dr. William Lynn’s Practice, from \$115.67 to \$367.50. *Id.* at 717.

first-trimester abortion clinics placed an unconstitutional “undue burden”¹³⁵ on a woman’s right to an abortion.¹³⁶

On appeal, the Court of Appeals for the Fourth Circuit reversed, finding the price increase to abortions to be incidental and modest when considering the State’s purported purpose of protecting the health of women¹³⁷ who undergo abortions.¹³⁸ Directly contrary to the testimony of Dr. Henshaw, the court found that:

there is no evidence that the ability of any woman to obtain an abortion or to decide to obtain an abortion would be frustrated by these particularized costs. To conclude that any of the figures in this case would place an obstacle in the path of a woman’s right to choose to have an abortion would necessitate the formulation of an arbitrary cost threshold beyond which a price increase may not pass. This would irrationally hamstring the State’s effort to raise the standard of care in certain abortion clinics, the procedures and facilities of which do not adequately safeguard the health of their patients, simply because the clinics’ performance falls so far below appropriate norms that the expense of upgrading their practices and equipment exceeds the arbitrarily defined amount.¹³⁹

The court of appeals seemed to ignore the practical effects of what the regulations might do, and according to Dr. Henshaw would do, to a woman’s ability to get an abortion. Instead, the court required a more concrete and concise showing of the effects of such regulations on the ability of a woman to have an abortion with respect to cost.¹⁴⁰ The court of appeals was not satisfied with the “estimates by ‘experts’” such as Dr. Henshaw.¹⁴¹ The court required actual “data from South Carolina patients about the impact that particular costs had on their decision to seek an abortion.”¹⁴² Any and all expert testimony about the effects of the costs of the regulations was characterized as mere anticipation, and the court stated that this “is generally not an appropriate basis on which to strike down statutes and regulations.”¹⁴³

135. The undue burden test determines whether a state has imposed regulations that have substantially burdened a woman’s right to an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992); see *infra* notes 184–89 and accompanying text.

136. *Greenville Women’s Clinic*, 66 F. Supp. 2d at 695, 735.

137. Of first-trimester abortions, only one-half of one percent result in complications requiring any kind of hospitalization or surgery. Hinkle, *supra* note 7.

138. *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 171 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

139. *Id.*

140. *Id.* at 164.

141. *Id.*

142. *Id.*

143. *Id.*

This suggests that the Fourth Circuit Court of Appeals, the court to which Virginia federal cases are appealed,¹⁴⁴ will not sustain a facial challenge to an abortion regulation before it goes into effect as was done in *Greenville Women's Clinic*.¹⁴⁵ Rather, the court seems to require a challenged regulation to go into effect to hear actual data about the effects the regulation has had on the ability of a woman to get an abortion.

Another reason the court of appeals reversed the District Court in *Greenville Women's Clinic* is that the regulations put in place in South Carolina tracked published national medical standards and guidelines for outpatient facilities.¹⁴⁶ The organizations that published these guidelines included the American Institute of Architects, the American College of Obstetricians and Gynecologists, Planned Parenthood, and the National Abortion Federation.¹⁴⁷ Although the abortion clinics argued that compliance with these guidelines is not required—they are only recommendations—and that following these guidelines is not a necessity to improving the health of abortion patients or the probability of a safe and successful abortion, the court found these arguments unconvincing.¹⁴⁸ Instead, the court found that by following the recommendations put forth by these groups, the SCDHEC was ensuring that abortions would be safer for the women who undergo the procedure and would be “performed by medically competent personnel.”¹⁴⁹ This was true even though the South Carolina regulations exceeded the standards put forth by these various medical groups.¹⁵⁰ Before these regulations were put into place, there were fourteen abortion clinics in South Carolina.¹⁵¹ Only three remained after the regulations.¹⁵²

D. Abortion Regulation in Other States

There are other states that have dealt with abortion regulations which have produced effects similar to those in South Carolina. The Fifth Circuit Court of Appeals applied reasoning similar to that used

144. *Official Court of Appeals Websites*, FINDLAW, http://www.findlaw.com/10fedgov/judicial/appeals_courts_sites.html (last visited Feb. 13, 2012).

145. *Greenville Women's Clinic*, 222 F.3d at 164.

146. *Id.* at 167–70.

147. *Id.* at 167.

148. *Id.* at 169.

149. *Id.* at 168 (quoting *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 430 n.12 (1983)).

150. *Id.* at 169.

151. Sun & Kumar, *supra* note 15.

152. *Id.*

by the Fourth Circuit in *Greenville Women's Clinic*.¹⁵³ In *Women's Medical Center of Northwest Houston v. Bell*, the challenge was to a Texas statute that required medical offices that are "used primarily for the purpose of performing abortions" to be licensed by the State as an abortion facility.¹⁵⁴ Challenges to the statute were not brought under the Due Process Clause, but instead, under the Equal Protection Clause and the void for vagueness doctrine.¹⁵⁵ The court held that the regulation is proper if the regulation serves *any* legitimate state goal.¹⁵⁶ The state's legitimate goals in this case were protecting patient health and welfare, thus surviving a rational basis review.¹⁵⁷

There have been some courts that have rejected the Fourth Circuit's reasoning in *Greenville Women's Clinic* with respect to the effect of an increased cost of abortions.¹⁵⁸ The Ninth Circuit is one of these courts.¹⁵⁹ It has held that a significant increase in the cost of abortions can constitute an undue burden on the right to have an abortion if it affects a significant number of women.¹⁶⁰ At issue was a statute that required state licensing and regulation of medical facilities that provide five or more first-trimester abortions per month or any second- or third-trimester abortion.¹⁶¹ The evidence presented indicated that in order to comply with the regulations, the cost to individual abortion clinics would be in the area of "tens of thousands of dollars."¹⁶² In order to comply, clinics would be required to purchase cameras for ultrasound machines, hire nurses instead of medical assistants, and pay employees overtime to make follow-up calls on weekends.¹⁶³ Because of the regulations, one abortion provider in Arizona could have been forced to close entirely and another clinic was at risk of losing approximately two-thirds of its physicians.¹⁶⁴ Though the court did not decide whether the statute in question posed an undue burden on a woman's ability to get an abortion, the case was remanded for more fact-finding to make a clear determination of the increased cost to women.¹⁶⁵

153. *Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 416 (5th Cir. 2001) (holding that no undue burden was imposed and that benefits sought by state justified increased costs).

154. *Id.* at 413–14 (internal quotation marks omitted).

155. *Id.* at 413.

156. *Id.* at 420–21.

157. *See id.* at 421.

158. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004).

159. *Id.*

160. *See id.*

161. *Id.* at 536.

162. *Id.* at 542.

163. *Id.*

164. *Tucson Woman's Clinic*, 379 F.3d at 542.

165. *Id.* at 536.

II. DISCUSSION

A. *Could This Happen? Constitutional Concerns*

The Virginia Supreme Court has not decided whether the Virginia Constitution protects the right to abortion independently from the abortion right protected under the federal Constitution.¹⁶⁶ If the question were presented, however, it is unlikely such a right would be recognized.¹⁶⁷ Before *Roe*, the Virginia Supreme Court heard arguments concerning convictions for abortion statute violations, and there was no indication the prosecutions might have been unconstitutional.¹⁶⁸ Additionally, Virginia law has recognized the legal rights of unborn children in other legal contexts, such as criminal law, property law, and health care.¹⁶⁹ If there is no independent protection of abortion under the Virginia Constitution and *Roe* were overruled, the Commonwealth of Virginia would be able to freely regulate, and even altogether prohibit, abortions. It is for these reasons that analysis of this issue is based on the federal Constitution, not the Virginia Constitution.

The Supreme Court of the United States has held that a woman's right to have an abortion is part of her right to privacy, a protected liberty interest.¹⁷⁰ While the right to an abortion is constitutionally protected, it is in no way unlimited or absolute.¹⁷¹ States can regulate abortion clinics reasonably and impose reasonable requirements for a woman electing to undergo an abortion.¹⁷²

In the time that abortion cases have been before the Supreme Court, different tests have been used by the court.¹⁷³ In *Roe v. Wade*,

166. LINTON, *supra* note 49, at 533.

167. *Id.* As of 2008, almost 25% of states had recognized a right to abortion under state constitutions. *Id.* at 7.

168. *Id.* at 538 (citing *Russo v. Commonwealth*, 148 S.E.2d 820 (Va. 1966); *Mendoza v. Commonwealth*, 103 S.E.2d 1 (Va. 1958); *Anderson v. Commonwealth*, 58 S.E.2d 72 (Va. 1950); *Coffman v. Commonwealth*, 50 S.E.2d 431 (Va. 1948)).

169. *Id.* at 538.

170. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992); *Roe v. Wade*, 410 U.S. 113, 114 (1973). Professor B. Jessie Hill argues that U.S. courts should hold that a woman's right to an abortion should be protected as a right to health care, or more specifically, "as a right to noninterference by the government with individuals' access to appropriate health care," a negative right to make health care choice free from governmental interference. B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 504 (2009). Professor Hill bases this argument not just on U.S. law, but also on recent court decisions from Canada and South Africa: *Chaoulli v. Quebec*, [2005] S.C.R. 791 (Can.), and *Minister of Health v. Treatment Action Campaign (TAC)*, 2002 (10) BCLR 1033 (CC) (S. Afr.). *Id.* at 504.

171. *Roe*, 410 U.S. at 153–54.

172. *See id.* at 154.

173. *Compare id.* (instituting a test limiting restrictions on abortions based on what trimester of pregnancy the mother is in), with *Planned Parenthood of Se. Pa.*, 505 U.S. at

the first major Supreme Court case holding that a woman has a constitutional right to an abortion, the Court instituted a test in which the right to an abortion varied depending on which of the three trimesters of pregnancy the woman is in.¹⁷⁴ In the first trimester of pregnancy, “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”¹⁷⁵ “If that decision is reached, [an abortion can be performed] free of interference by the State.”¹⁷⁶ During this time period, permissible state regulations included licensing of physicians performing abortions and licensing of facilities providing abortions.¹⁷⁷ At the point between the first and second trimester, the State begins to have an interest in the health of the mother.¹⁷⁸ This interest is not present during the first trimester because at that time, an abortion is considered to be safer for a woman than carrying the child to term and giving a live birth.¹⁷⁹ It is after the end of the first trimester that the State can begin to more heavily regulate abortions and abortion clinics, but only “to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”¹⁸⁰ The Court found that the point between the second and third trimesters was the “compelling” point, after which a fetus is presumably capable of life outside the womb.¹⁸¹ At this point in time, a state could go so far as to completely prohibit abortions, except for when it was deemed necessary to save the life of the mother.¹⁸²

After *Roe*, there were many Supreme Court “cases that uncovered difficulties in applying *Roe* and created widespread confusion.”¹⁸³ In 1992, the United States Supreme Court in *Planned Parenthood v. Casey* reaffirmed that women have a constitutional right to an abortion subject to limited state interference.¹⁸⁴ However, the Court departed from *Roe*’s trimester test and instead instituted a new test.¹⁸⁵ A restriction on abortion is constitutional so long as it does not place

837 (affirming *Roe*’s underlying holding that a woman has a constitutional right to an abortion, but overruling the trimester test and replacing it with an “undue burden” test).

174. *Roe*, 410 U.S. at 163.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Roe*, 410 U.S. at 163.

181. *Id.*

182. *Id.* at 163–64.

183. *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 165 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

184. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

185. *Id.* at 874.

an “undue burden” on a woman’s right to an abortion.¹⁸⁶ The *Casey* Court defined undue burden as “the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹⁸⁷ This includes unnecessary health regulations.¹⁸⁸ Any such burden is to be weighed against the states’ “interests . . . in protecting the health of the woman and the life of the fetus that may become a child.”¹⁸⁹ Many critics argue that although *Casey* explicitly reaffirmed the holding in *Roe* that a woman has a constitutionally protected right to an abortion, the “undue burden” test substantially weakened this protection.¹⁹⁰ This is the test that any current challenges to regulation of abortions or abortion clinics must pass.

The Fourth Circuit Court of Appeals has already heard a case regarding strict, detailed, hospital-like regulations on first-trimester abortion providers.¹⁹¹ This is the same federal appeals court that would hear arguments against the Virginia regulations should they be challenged.¹⁹² The previous decision by the Fourth Circuit Court of Appeals provides an outline of how the court would decide Virginia’s similar regulations.¹⁹³ Unfortunately, there is not as clear an indication regarding how the United States Supreme Court would decide such a situation, because they denied review of the South Carolina case.¹⁹⁴

A determination of whether the recent Virginia regulations are constitutional would begin with an analysis of what burdens the regulations would place on women seeking an abortion. The most

186. *Id.*

187. *Id.* at 877.

188. *Id.* at 878.

189. *Id.* at 932 (Blackmun, J., concurring) (quoting the majority opinion of *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 846).

190. See, e.g., EARL E. POLLOCK, *THE SUPREME COURT AND AMERICAN DEMOCRACY: CASE STUDIES ON JUDICIAL REVIEW AND PUBLIC POLICY* 144 (2009) (“The *Casey* case, which upheld the ‘central’ abortion right, had come remarkably close to overruling *Roe v. Wade*.”); Alexander, *supra* note 84, at 3 (“[*Casey*] effectively destroyed abortion rights in the United States for all women.”); Rhonda Copelon, *From Rhetoric to Reality: The Challenge of Casey*, in *REFLECTIONS AFTER CASEY*, *supra* note 84, at 9, 10 (“*Casey* has significantly overruled *Roe v. Wade* even as it reaffirmed the right to abortion.”).

191. *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 160–62 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

192. See *Official Court of Appeals Websites*, *supra* note 144.

193. *Greenville Women’s Clinic v. Bryant*, 222 F.3d at 159.

194. *Greenville Women’s Clinic v. Bryant*, 531 U.S. 1191, 1191 (2001). In *Roe*, the United States Supreme Court suggested in dicta that regulations requiring second-trimester abortions to be performed in a hospital would be constitutional, but because of the change to *Planned Parenthood’s* undue burden test, it is unknown how that issue would be decided today. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

significant of these burdens would be increased cost of abortions and reduction in the number of abortion clinics.¹⁹⁵ According to testimony in *Greenville Women's Clinic* at the District Court, any increase in the cost of an abortion, however slight, can dissuade some poorer women from being able to get one.¹⁹⁶ These are the same burdens that were at issue in the South Carolina case.¹⁹⁷

Under the *Casey* test, abortion regulations are to be found unconstitutional if it is shown that the purpose or effect of these regulations is to create a substantial obstacle for a woman seeking an abortion.¹⁹⁸ If a court finds that the purpose in issuing these regulations is to create a substantial obstacle for women wanting an abortion, then they should obviously be struck down as unconstitutional. Assuming this is not the purpose of the regulations, the analysis would then turn to whether the effect of the regulations creates a substantial burden on a woman getting an abortion.

In *Casey*, the United States Supreme Court addressed the effect that price increases would have on the "undue burden" test:

Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.¹⁹⁹

A modest price increase is not enough to satisfy the undue burden test; instead the price increase must be enough to infringe on a woman's ability to make the decision about an abortion.²⁰⁰ This suggests that in order for a state abortion regulation to be unconstitutional, the price increase must be substantial. In *Greenville Women's Clinic*, the Fourth Circuit Court of Appeals stressed this, noting that a statute would be declared unconstitutional based on increased costs

195. Cella, *supra* note 9; Smith, *supra* note 6; Walker, *Va. Can Regulate Abortion Clinics*, *supra* note 9.

196. *Greenville Women's Clinic v. Bryant*, 66 F. Supp. 2d 691, 714 (D.S.C. 1999) (citing the testimony of Dr. Stanley K. Henshaw, made via videotaped deposition), *rev'd*, 222 F.3d 157 (4th Cir. 2000).

197. *Greenville Women's Clinic*, 222 F.3d at 192.

198. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

199. *Id.* at 874.

200. *See id.*

only if “in a large fraction of cases in which [it] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”²⁰¹ This is consistent with the Fourth Circuit requirement of concrete evidence of the effects of rising costs on a woman’s right to get an abortion.²⁰² To attain such evidence, a challenge to the regulation would have to wait until after the regulation is put into effect.²⁰³ After the regulation goes into effect, a woman seeking an abortion could actually testify in court about the effect that the price of an abortion had on her ability to get one. Such testimony would probably require a woman who sought an abortion to state that she was not able to get one because of the cost. It seems unnecessary to require this for a successful constitutional challenge. It would essentially force one or more women who desire or need an abortion to go without for the sole purpose of securing such testimony at a trial challenging the regulation. Based on statements in *Casey* and the outcome of the case in *Greenville Women’s Clinic*, it is unlikely that the increased price of abortions resulting from the regulations would have a significant impact on a court’s decision to invalidate the regulations.²⁰⁴ Rather, unless the price increase were substantial and affected a majority of women’s decisions about abortion, it would likely be dismissed as modest and consistent with the state’s interest in protecting the health of the woman.²⁰⁵

Another basis for the challenge is the fact that the majority of abortion clinics in Virginia could not comply with the new regulations and would have to close.²⁰⁶ Abortion clinics would have to close because they would not be able to afford the changes required to meet the structural requirements, a cost that could be as much as two million dollars.²⁰⁷ The regulations require that all abortion clinics satisfy building requirements as if they had been built in 2010, instead of being grandfathered into earlier requirements which were in place when they opened.²⁰⁸ There is a possibility that some abortion clinics would not be able to remodel to meet the new requirements, particularly if they rent their space.²⁰⁹ As a result of fewer abortion clinics,

201. *Greenville Women’s Clinic*, 222 F.3d at 164 (quoting *Planned Parenthood*, 505 U.S. at 895).

202. *Id.*

203. *See id.* (noting that the Court was not able to be given data regarding impact aside from estimates).

204. Hill, *supra* note 170, at 546.

205. *See supra* text accompanying note 200.

206. Walker, *Va. Can Regulate Abortion Clinics*, *supra* note 9.

207. Cella, *supra* note 9.

208. Salasky, *supra* note 23.

209. Sun & Kumar, *supra* note 15 (citing Laura Meyers, Chief Executive Officer of the Falls Church Planned Parenthood clinic, who stated that the clinic rents its facility and

women in Virginia would have to travel further to obtain an abortion. It is estimated that such building requirements would reduce the number of first-trimester abortion providers in the Commonwealth from the current twenty-one to only three or four.²¹⁰ It is undeniable that having less than five abortion clinics available in the Commonwealth would burden the ability of a woman to get an abortion, but the question is whether this is enough to satisfy the “undue burden” test. This is an argument that the court addressed and rejected in *Greenville Women’s Clinic*.²¹¹ Again, the problem lies in providing the court with concrete evidence that these clinics would close as a result of the regulation and that more clinics would not open in their place. Without that proof, there is no evidence that the regulation imposes an undue burden.

Because neither the purpose nor effect of these regulations would impose a “substantial burden” on the ability of a woman to get an abortion, at least not at the level that *Casey* requires, the Virginia regulations would be found constitutional.

B. Should This Happen? Practical Concerns

Many argue that, regardless of whether such regulations on first-trimester abortions are constitutional under modern standards in *Planned Parenthood v. Casey*, they should not be implemented for other reasons.²¹² The presence of more restrictive abortion regulations in various states has had a negative impact on the number of abortion procedures performed.²¹³ It is not surprising that when an abortion is more difficult to obtain, fewer abortions are performed in a state, but this also makes it more likely that children are born who would not have been but for the strict restrictions.²¹⁴ This is in contrast to the effects seen previously by the legalization of abortion.²¹⁵

There are many observable effects of the legalization of abortion in the United States. Most importantly, the availability of abortion

cannot allocate funding for remodeling). The clinic performed 800 abortions and assisted 5,000 patients in 2010. *Id.*

210. Walker, *Va. Can Regulate Abortion Clinics*, *supra* note 9.

211. See *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 172 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001) (finding that South Carolina’s new regulation made it more difficult and expensive to get an abortion but did not place an undue burden on the woman).

212. See, e.g., Hinkle, *supra* note 7 (declaring that the medical risks of an abortion are low, therefore such regulations are unnecessary); Walker, *Va. Can Regulate Abortion Clinics*, *supra* note 9 (quoting Tarina Keene of NARAL Pro-Choice Virginia).

213. Bisakha Sen, *State Abortion Restrictions and Child Fatal-Injury: An Exploratory Study*, 73 S. ECON. J. 553, 555–56 (2007).

214. *Id.* at 556.

215. See *id.*

has been associated with a decline in neonatal and infant mortality rates.²¹⁶ Convenient accessibility of abortions is also associated with fewer births to teenagers, single women, and non-white women; fewer children entering the adoption system; and a reduction in the reports of child abuse and neglect.²¹⁷

It is interesting to investigate the correlation between a state's regulation of abortion and the incidence of infant death²¹⁸ to determine what effect restrictive abortion regulation has on the well-being of the children in the state. One compilation of studies found that an increase in abortion restrictions results in not only more infant death by purposeful homicide, but also unintentional infant deaths.²¹⁹ States with parental consent laws²²⁰ have twenty percent more infant homicides of white children.²²¹ When there is a state on the border of the mother's state of residence that does not have a parental consent law, the number of infant homicides decreases by about six percent.²²² Mandatory delay requirements²²³ also have a correlation with infant homicides.²²⁴ In states that have mandatory delays, infant homicides occur approximately twenty-four percent more often to white children and thirty percent more often to black children.²²⁵

There is also a correlation between the lack of availability of abortions and increased incidence of physical abuse to children.²²⁶ This includes abuse not only from a mother, but also from other adults, most notably abusive boyfriends of the mother.²²⁷ These various studies show that the more a state restricts the availability of abortions, the more the children in the state suffer. This, in and of itself, should be a strong enough argument for tightly regulated states to lessen their restrictions on abortion, or at the very least, for states

216. *Id.*

217. *Id.*

218. *See id.* at 554 (finding a correlation between various state abortion restrictions—namely parental consent, mandatory delays, and a lack of public funding—and both homicide and unintentional fatal injuries in young children).

219. Sen, *supra* note 213, at 562–63.

220. Parental consent laws are those laws that require a minor to obtain the consent of a parent before getting an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 899.

221. Sen, *supra* note 213, at 562. “[T]he strongest predictors of infant homicide deaths included maternal age at birth less than 17 years.” *Id.* at 556.

222. *Id.* at 562.

223. Mandatory delay laws require a pregnant woman to meet with a physician to receive information about the procedure and safety of an abortion, and then return later, usually a different day, for the procedure to be done. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 170 (4th Cir. 2000).

224. Sen, *supra* note 213, at 562.

225. *Id.*

226. *See id.* at 556 (showing that legalization of abortion is associated with a decline in teenage mothers and that younger mothers have an increased incidence of child abuse).

227. *Id.* at 556–57.

like Virginia to keep abortion regulations constant and not impose more stringent restrictions on abortion clinics.

As a practical matter, the implementation of the proposed restrictions would result in the closure of the majority of abortion clinics throughout the state.²²⁸ Abortion clinics have already become progressively less available around the country, particularly for poor and young women.²²⁹ This effect was compounded during the Bush administration, as a result of the appointments of anti-abortion judges and other measures meant to limit women's access to reproductive services.²³⁰ In the two decades from 1982 to 2001 in the United States, the availability of abortion clinics fell by thirty-seven percent.²³¹ If one looks at Virginia specifically, the number of abortion clinics declined from 1996 to 2005.²³² Nationwide, the amount of women who live in a county without a medical facility that performs abortions has increased from just over one-quarter to just over one-third.²³³ Medical facilities that provide abortions are present in only about thirteen percent of all counties nationwide.²³⁴ About one-third of metropolitan areas and almost all non-metropolitan areas in the country do not have a single abortion provider.²³⁵ This results in women in non-metropolitan areas being able to get an abortion at half the rate of women in metropolitan areas.²³⁶

Of all abortions in the country done during all trimesters, only five percent were performed in hospitals in 2000.²³⁷ Because of the lack of abortion providers, about sixteen percent of women who had an abortion in a nonhospital setting had to travel between fifty and one hundred miles to obtain an abortion.²³⁸ It is estimated that eight percent of women had to travel over one hundred miles.²³⁹ These percentages are slightly lower for women in the Middle Atlantic, where Virginia is located, where eleven percent of women had to travel over fifty miles.²⁴⁰

228. Smith, *supra* note 6.

229. Stanley K. Henshaw & Lawrence B. Finer, *The Accessibility of Abortion Services in the United States, 2001*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 16, 16 (2003); *see also* Andrzej Kulczycki, *Ethics, Ideology, and Reproductive Health Policy in the United States*, 38 STUD. FAM. PLAN. 333, 333–34 (2007).

230. Kulczycki, *supra* note 229, at 334.

231. Henshaw & Finer, *supra* note 229, at 16.

232. Walker, *New Abortion Clinic Rules*, *supra* note 9.

233. Henshaw & Finer, *supra* note 229, at 16.

234. *Id.* at 22.

235. *See id.* at 16.

236. *Id.*

237. *Id.* at 17.

238. *Id.* at 18.

239. Henshaw & Finer, *supra* note 229, at 18.

240. *Id.*

These past trends in the availability of abortion clinics will be compounded in Virginia with the Board of Health's regulations. If estimates are correct, for a state that is over 39,500 square miles,²⁴¹ it would leave approximately only one abortion clinic per 10,000 square miles in the state, as compared to one abortion clinic per 1,880 square miles, as it currently stands.²⁴² In 2010, about 25,000 abortions were performed in Virginia.²⁴³ It is unknown during which trimester these abortions were performed, but it is fairly safe to assume that the vast majority of them were performed during the first trimester of pregnancy because that is when abortions are the most accessible.²⁴⁴ It is safe to assume that the number of abortions in Virginia would plummet if eighty-one percent²⁴⁵ of abortion clinics in the state were to close.

In his advisory opinions, Attorney General Cuccinelli makes the argument that these regulations on abortion clinics would lessen the risk of complications from the procedure, particularly the risk of "hemorrhage, cervical laceration, uterine perforation, injury to the bowels or bladder and pulmonary complications."²⁴⁶ These are possible complications of an abortion, but they are most prevalent in abortions that are performed in an unsafe manner, particularly those performed in developing countries.²⁴⁷ The argument about improving the safety of abortions would be more compelling if abortion was not already a fairly safe procedure. If an abortion is performed in the eighth week of pregnancy, the risk of death is one in a million.²⁴⁸ Compare this to the risk of death from a colonoscopy, which is one hundred in a million.²⁴⁹ "[A]bortions performed under safe conditions

241. *State & County QuickFacts: Virginia*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/51000.html> (last visited Feb. 13, 2012).

242. *Compare id.* (stating that Virginia is approximately 39,000 square miles), *with Walker, Va. Can Regulate Abortion Clinics*, *supra* note 9 (recognizing that there would be only approximately three or four abortion clinics left out of the current total of 21 clinics).

243. Sun & Kumar, *supra* note 15.

244. *Compare* VA. CODE ANN. § 32.1-127 (2010) (giving the Virginia Board of Health the responsibility for regulating first-trimester abortions), *with id.* § 18.2-73 (2010) (describing the General Assembly restrictions on abortions performed during the second trimester of pregnancy).

245. *See* Smith, *supra* note 6 (explaining that 17 out of 21 clinics would close as a result of implementing the regulations).

246. 2010 Op. Va. Att'y Gen. No. 10-012, *supra* note 1, at 4 (citing Eric R. Strasburg, *Abortion*, in *MANUAL OF CLINICAL PROBLEMS IN OBSTETRICS AND GYNECOLOGY* 6 (Michael E. Rivlin & Rick W. Martin eds., 4th ed. 1994)).

247. Janie Benson, *Evaluating Abortion-Care Programs: Old Challenges, New Directions*, 36 *STUD. FAM. PLAN.* 189, 189 (2005).

248. Klein, *supra* note 27.

249. *Id.*

have a very low rate of complications,”²⁵⁰ and are considered to be very reliable.²⁵¹ It is estimated that worldwide, forty-six million women undergo an abortion each year.²⁵² Over 1.3 million of these women are in the United States.²⁵³ There are approximately three million unplanned pregnancies each year in the United States and about half of those result in an abortion.²⁵⁴ This is a procedure that is performed everyday throughout the country.²⁵⁵ The safety of abortions is highlighted by the fact that the people who know the most about the procedure, physicians, are quick to turn to abortion to end an unwanted pregnancy.²⁵⁶ There is no need to further regulate abortion clinics to try to make the procedure safer when it is already safe.

In developed countries where women have good access to a safe abortion, “abortion is far less likely than an injection of penicillin to cause death; the comparative risk of death from abortion at 16 weeks or earlier is one-seventh of that related to pregnancy and childbirth.”²⁵⁷ It is estimated that only one in one hundred thousand women undergoing a safe abortion die from the procedure.²⁵⁸ A woman is much more likely to be harmed by an illegal abortion than by a legal one because the fatality rate for illegal abortions, performed by an unqualified individual or when the care received is substandard, is about seventy times higher than for a legal abortion.²⁵⁹ It is estimated that the risk of death from an unsafe abortion varies between one in one hundred and one in one thousand.²⁶⁰ Concerns about a woman’s safety during the abortion procedure must come from this misinformation or misunderstanding about the safety of legal abortions versus illegal abortions: “whereas virtually all legal abortions are safe, the vast majority of illegal abortions are unsafe.”²⁶¹ As a consequence of the holding in *Roe*, after which many states had to change their abortion regulations to make abortion legal and more accessible,

250. Benson, *supra* note 247, at 189.

251. *See Roe v. Wade*, 410 U.S. 113, 149 (1973); Benson, *supra* note 247, at 189.

252. Benson, *supra* note 247, at 189.

253. Kulczycki, *supra* note 229, at 338.

254. *Id.*

255. *See id.* (recognizing the widespread use of abortions and noting there are 1.3 million abortions performed in the United States each year alone).

256. *See* ANÍBAL FAÚNDES & JOSÉ BARZELATTO, *THE HUMAN DRAMA OF ABORTION: A GLOBAL SEARCH FOR CONSENSUS* 71 (2006) (“[A]lmost 80 percent of the unwanted pregnancies that occurred in female physicians themselves or in the partners of male physicians had ended in abortion.”).

257. Kulczycki, *supra* note 229, at 339 (citation omitted).

258. FAÚNDES & BARZELATTO, *supra* note 256, at 21.

259. Hannah Brown, *Abortion Round the World*, 335 *BRIT. MED. J.* 1018, 1018 (2007).

260. FAÚNDES & BARZELATTO, *supra* note 256, at 36.

261. *Id.* at 138.

there was a ninety-four percent decline in the number of deaths, from 251 to fourteen, in a decade.²⁶² Most unsafe abortions occur in countries that legally restrict abortions.²⁶³ It should not be surprising that the prohibition of abortions does not always dissuade women from undergoing the procedure, but instead pushes them to undergo illegal, unsafe procedures;²⁶⁴ this is consistent with other legal restrictions, such as Prohibition in the United States.²⁶⁵

A 2006 study of medical facilities that perform abortions showed that at the majority of such centers, pregnant teenagers were told of medical risks, including suicide, sterility, and breast cancer, that are not actually linked to safe abortions.²⁶⁶ This leads to women who are considering an abortion worrying about risks that are not present as a result of the procedure, denying them the right to make an informed choice.²⁶⁷ All of these statistics show that first-trimester abortions are already safe and there is no reason to impose regulations that would impede a woman's ability to get an abortion under the guise of making them safer.

Approximately three-fourths of women pay for an abortion with their own money or with money that they get from a family member or friend, rather than through an insurance provider.²⁶⁸ Because of the need to save money for an abortion, many abortions for women who might need them the most become delayed, even while those women do not have enough money to even raise the child.²⁶⁹ As a woman gets further into her pregnancy, getting an abortion poses more risks to the woman²⁷⁰ and an abortion gets progressively more expensive.²⁷¹ These facts strongly suggest that lowering restrictions on early abortions, or at the very least, keeping regulations constant, would benefit those women who most need them: women who cannot afford to raise a child and who would be hurt the most by an increase

262. COLIN FRANCOME & MARCEL VEKEMANS, *ABORTION: A WORLDWIDE PERSPECTIVE* 139 (2007).

263. FAÚNDES & BARZELATTO, *supra* note 256, at 21.

264. *See id.* ("Most unsafe abortions are performed in countries where they are legally restricted.")

265. *See* DRUGS AND SOCIETY: U.S. PUBLIC POLICY 48 (Jefferson M. Fish ed., 2006) (stating that Prohibition, and the prohibition of drugs in general, increased the use and availability of stronger and more dangerous drugs).

266. Kulczycki, *supra* note 229, at 339.

267. *Id.*

268. Henshaw & Finer, *supra* note 229, at 20.

269. *See id.* at 23.

270. David A. Grimes, *Second-Trimester Abortions in the United States*, 16 FAM. PLAN. PERSP. 260, 262 (1984) ("The two most important determinants of the risk of complications from abortion are gestational age and the abortion method used. In general, the earlier the abortion is performed, the safer it is." (citation omitted)).

271. Henshaw & Finer, *supra* note 229, at 18.

in the price of an abortion. These same women who cannot afford to raise a child would benefit in another way: on average, the cost of a safe abortion, performed early in pregnancy, costs less than delivery of a child.²⁷²

CONCLUSION

Virginia Attorney General Cuccinelli started the ball rolling fast. Within a year, the hospital-like regulation of abortion clinics has gone from suggestion to implementation by the Virginia Board of Health.²⁷³ Although the first-trimester abortion clinic regulations would likely be found constitutional by the Fourth Circuit Court of Appeals,²⁷⁴ and probably by the United States Supreme Court,²⁷⁵ it would be unwise, as a policy matter, to impose the regulations.

As a constitutional matter, the first-trimester regulations on abortion would be constitutional because of the weakening of the constitutional protection of abortion by *Casey* and because of the lack of concrete evidence about the effects of the regulation. The purpose of these regulations would not be to impose burdens on women seeking abortions, but to protect their health and safety when undergoing an abortion.²⁷⁶ It is necessary to inquire about the effects of these regulations. Because the Fourth Circuit Court of Appeals has seemed to require concrete evidence about these risks,²⁷⁷ a constitutional challenge would fail to prove that the effect of the regulations was to cause a substantial burden on women wanting to undergo an abortion, despite the increased costs.

Although the regulations would be found constitutional, there remain reasons why they should not be implemented. These regulations would lead to a decrease in abortion clinics in the Commonwealth.²⁷⁸ In fact, anti-abortion groups have called these regulations “a significant pro-life victory” because they are so stringent.²⁷⁹ The lack of

272. FAÚNDES & BARZELATTO, *supra* note 256, at 39.

273. *See* Cella, *supra* note 9 (noting that in 2010 Attorney General Cuccinelli issued an opinion on abortion clinics); Salasky, *supra* note 23 (stating that the Virginia Board of Health approved the regulations in 2011).

274. Salasky, *supra* note 23.

275. *See supra* notes 184–89 and accompanying text.

276. *See* Grimes, *supra* note 270, at 262–63 (finding that earlier abortions are safer, and even though a small percentage of abortions are performed in the second trimester, they account for about half of abortion-related deaths).

277. *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 164 (4th Cir. 2000), *cert. denied*, 531 U.S. 1101 (2001).

278. Smith, *supra* note 6.

279. Sabrina Tavernise, *Virginia Health Board Tightens Rules on Abortion Clinics*, N.Y. TIMES, Sept. 15, 2011, http://www.nytimes.com/2011/09/16/us/virginia-panel-tightens-abortion-clinic-rules.html?_r=1 (quoting the Family Foundation, an anti-abortion group).

availability of abortion clinics to women has been linked to increases in infant homicides, in children born to teenagers, and in children entering the adoption system.²⁸⁰ If the purpose is to protect citizens, then imposing these stringent requirements on abortion clinics will not have the desired effect. Making these regulations to protect women who undergo abortions,²⁸¹ a procedure that is already considered to be safe with the precautions currently in place,²⁸² would harm other, more vulnerable members of the community: children.²⁸³

Although it is unlikely that a constitutional challenge in the Fourth Circuit would be successful, this will probably not stop groups from trying to challenge the regulations. The Centre for Reproductive Rights has already said that they will consider action regarding these regulations.²⁸⁴

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280. Sen, *supra* note 213, at 556.

281. 2010 Op. Va. Att'y Gen. No. 10-012, *supra* note 1, at 5; Smith, *supra* note 6 (quoting Robert G. Marshall, member of the Virginia House of Representatives).

282. *Roe v. Wade*, 410 U.S. 113, 149 (1973); Benson, *supra* note 247, at 189.

283. Sen, *supra* note 213, at 556.

284. Chris McGreal, *Virginia Vote Threatens Abortion Clinics*, GUARDIAN (London), Sept. 15, 2011, <http://www.guardian.co.uk/world/2011/sep/15/abortion-usa> (citing Jordan Goldberg, legal counsel for the Centre for Reproductive Rights).

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