THE RUTHERFORD INSTITUTE

INTERNATIONAL HEADQUARTERS
Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 - 1789
www.rutherford.org

September 14, 2011

Via E-mail and Fax

Joseph Hilbert, Director,
Governmental and Regulatory Affairs
109 Governor Street
Richmond, VA 23219

Re: Public Comment on Proposed Abortion Facility Regulations

Dear Director Hilbert:

In considering the implementation of abortion clinic safety regulations, the Virginia Board of Health undertakes a significant responsibility that should not be tainted by the sensitive political and emotional nature of the abortion issue. The Rutherford Institute finds the proposed regulations to be in substantial conformity with those specifically upheld by the United States Court of Appeals for the Fourth Circuit in *Greenville Women's Clinic v. Commissioner*, and consistent with the United States Supreme Court's abortion jurisprudence.[1] Without the implementation of appropriate clinic health and safety regulations, there exists a serious risk that these mainstream facilities will become the *de facto* "back-alleys" of abortion. We therefore urge the Board to ensure the protection of women undergoing abortion through the adoption of appropriate regulations.

Legal Underpinnings and Need for Clinic Safety Regulations

The Supreme Court has noted that "abortions are inherently different from other medical procedures..."[2] This is why federal courts have repeatedly affirmed that states have a legitimate interest in regulating abortion clinics more stringently than other medical facilities. As Virginia's Attorney General Ken Cuccinelli has pointed out, state regulations that serve a valid purpose, such as furthering health and safety, and "do not

[1] 317 F.3d 357, 361 (4th Cir. 2002), *cert. denied* 538 U.S. 1008 (2003).
[2] *Harris v. McRae*, 448 U.S. 297, 325 (1980).

strike at the [abortion] right itself," are valid and within the states' constitutional authority to enact.[3] Federal courts have repeatedly recognized such regulations as legitimate exercises of state power to protect the public's health and welfare.[4]

In the Commonwealth of Virginia, however, many centers in which abortions are performed have heretofore been treated as regular doctors' offices and not even subject to basic licensing requirements. The Rutherford Institute submits that, in light of the serious, invasive nature of abortion and the well-recognized state interest in promoting public health and welfare, the Commonwealth has both the authority and an obligation to its citizens to adopt reasonable, common-sense regulations such as those upheld by the Fourth Circuit in 2002.[5]

Abortion is certainly different than other medical procedures that are routinely performed in doctors' offices. Potential complications include permanent damage to reproductive and other vital organs, dysfunction of the cardiovascular or respiratory system, internal bleeding or hemorrhaging, embolism, and allergic reactions.[6] In addition to the more immediate complications of abortion, voluminous studies prove that abortion carries many long-term health risks.[7]

Because of the lack of standard reporting requirements within the Commonwealth and across the nation, it is impossible to accurately assess the frequency with which these serious complications actually occur. For instance, the Center for Disease Control reports that seven women died from complications of legalized abortions in 2005.[8] Yet the CDC report explicitly recognized that its data are compromised due to a known, significant under-reporting of the number of abortions performed nationwide.[9] The CDC report contained no information regarding abortion complications other than death, as this information is apparently not reported or collected in many states, including Virginia. While we know that the risks abortion poses to women's health are many and serious, it is likely that additional regulations, including certain reporting requirements, would help us to understand them better.

The known risk factors, combined with the simple fact that abortion is an invasive, surgical procedure, are incongruent with the treatment of abortion facilities as

---

[3] *See Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992).

[4] *See, e.g., Roe v. Wade*, 410 U.S. 113, 150 (1973) (recognizing legitimate state interest in seeing that abortion is performed under circumstances that maximize patient safety); *Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 428-29 (1983) (citing state's legitimate concern for health of women undergoing abortions); *Greenville Women's Clinic, supra.*

[5] *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health*, 317 F.3d 357, 361 (4th Cir. 2002), *cert. denied* 538 U.S. 1008 (2003).

[6] *See A Woman's Choice – East Side Women's Clinic v. Newman*, 305 F.3d 684, 702 (7th Cir. 2002) (Coffey, C.J., concurring).

[7] See, e.g., J. S. Brown, Jr., T. Adera, S. W. Masho, "Previous abortion and the risk of low birth weight and preterm births," *Journal of Epidemiology and Community Health* (Vol. 62, Issue 1).

[8] Center for Disease Control, "Abortion Surveillance – United States, 2006," *Morbidity and Morality Weekly Report*, available at http://www.cdc.gov/mmwr/PDF/ss/ss5808.pdf.

[9] Id.

mere doctors' offices. However, as Attorney General Ken Cuccinelli explained in his 2010 opinion, that is precisely how many such abortion facilities are currently classified. While outpatient abortion clinics are specifically included within the definition of outpatient hospitals under one regulation, a separate law makes the hospital licensure regulations specifically inapplicable to physicians' offices unless they are used "principally" for performing surgery.[10] Thus, many clinics that provide other services in addition to performing abortions simply classify themselves as "physicians' offices," and thereby escape the most basic regulations that apply to other outpatient surgical centers.

The nature of the abortion procedure and its inherent risks are reason enough for increased regulation of abortion clinics in the Commonwealth. But courts have identified a more fundamental reason for regulating these facilities even more stringently than other outpatient surgical centers. Abortion is different, the Supreme Court has found, "because no other procedure involves the purposeful termination of a potential life."[11]

Whatever one's position on the emotionally-charged abortion issue, intellectual honesty demands the recognition that abortions—even in the first trimester—are fundamentally different from any other type of medical procedure. It cannot be ignored that the surgery extinguishes the life of a developing human being. One need not be an embryologist to understand this. Indeed, a popular series of articles on WebMD called, "Your Pregnancy Week by Week," states:

> By the end of the third month, your baby is fully formed. Your baby has arms, hands, fingers, feet and toes and can open and close its fists and mouth. Fingernails and toenails are beginning to develop and the external ears are formed. The beginnings of teeth are forming.[12]

Surely the Commonwealth of Virginia has significant interests in seeing that the termination of pregnancies at this stage is not treated with as little oversight as the routine removal of warts. The United States Supreme Court has recently reaffirmed the importance of the state's interest in "promoting respect for human life at all stages in the pregnancy."[13]

One way in which Virginia law already recognizes the gravity and inherent uniqueness of any abortion procedure is through the use of a heightened informed consent requirement.[14] The statute specifically requires that at least 24 hours prior to an abortion, a licensed physician or nurse provide the patient with basic information including a full medical explanation of the risks of and alternatives to the procedure; an instruction that the patient may withdraw her consent at any time prior to the abortion; a statement of the probable gestational age of the baby; and an offer to review materials

---

[10] See 12 VA. ADMIN. CODE § 5-410-10 (defining "outpatient hospitals"); VA. CODE ANN. § 32.1-124 (making hospital licensure requirements inapplicable to physicians' offices unless used principally for performing surgery).

[11] *Harris v. McRae*, 448 U.S. 297, 325 (1980)

[12] http://www.webmd.com/baby/guide/your-pregnancy-week-by-week-weeks-9-12?page=2.

[13] *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

[14] VA. CODE ANN. § 18.2-76.

designed to inform the woman about the alternative of adoption and about resources available to assist her in the event that she chooses to continue her pregnancy.[15] While the law subjects physicians who fail to comply with its provisions to a $2,500 penalty, without further regulations—including licensure and inspection requirements—it could be difficult to ensure that this heightened standard of informed consent is being observed.

Addressing the Opposition

For the past several years, the Virginia General Assembly has considered various bills designed to regulate abortion clinics.[16] These proposals have been treated as political footballs, generally supported by conservative, pro-life legislators and opposed by those who support abortion rights. The health and welfare of women and the public interest in promoting respect for human life have been the losers. When political considerations are cast aside, the facts speak for themselves. And they testify to the urgent need for reasonable regulation.

The Institute is aware of two stated justifications for the opposition to clinic safety regulations. First, some claim that a large percentage of abortion centers will be forced to close their doors if they are subjected to safety requirements. Second, it has been suggested that abortion will be made prohibitively expensive if centers are forced to comply with the regulations. These excuses are unsatisfactory where, as here, the proposed regulations are reasonable and aimed squarely at enhancing the public health and safety.

The first claim—that abortion facilities will be forced to close because they will not be in compliance with the safety regulations—only highlights the necessity for the regulations: if genuine, it is, in effect, an admission that current conditions at abortion clinics are inadequate. Surely no one would suggest that health and safety regulations not be imposed upon a hospital because its current practices might be found inadequate. The Institute believes that women who seek abortions are no less entitled to regulated protections of health and safety than those who obtain medical care at other centers where outpatient medical procedures are performed.

With regard to the second claim—that the regulations will make abortion prohibitively expensive, a little dose of real numbers exposes it to be a gross exaggeration. In a legal challenge to the remarkably similar regulations upheld by the Fourth Circuit, the evidence showed that the estimated increase in patient cost would range from only $23-$75 per abortion. The cost, in other words, of enhancing patient safety, amounts to no more than the approximate cost of dinner and a movie for two.

If abortion is to be "safe, legal, and rare" the implementation of clinic health and safety regulations such as those currently before the Virginia Board of Health is essential.

---

[15] Id.

[16] During the 2010 General Assembly session, for instance, Del. Matt Lohr (R-26), sponsored HB 393, a measure for the licensure and regulation of abortion clinics. The bill failed in the Senate Education and Health Committee.

Looking Ahead—Suggestions for Tighter Permanent Regulations

While the proposed, emergency-basis regulations are sure to enhance the safety and health of women who undergo abortions, there are several ways in which improvements might be made before the regulations become permanent. Each of these proposals would still allow Virginia's regulations to remain within the safe harbor of the Fourth Circuit's prior ruling.

1. Documentation of informed written consent.

As explained earlier, current Virginia law appropriately raises the standard of informed consent for abortion.[17] While the currently-proposed regulations mirror this requirement[18], the Institute suggests that abortion facilities should be required to document such details as will allow inspectors to determine whether the required information and materials have, in fact, been provided by the appropriate persons and within the time frames already imposed by law.

2. Ultrasonography.

While the current regulations refer to the use of ultrasonography under certain conditions, there is no mention of qualifications with regard to the person operating this type of test.[19] The Institute recommends that the permanent regulations require the person operating this testing to have documented evidence of completion of a training course in ultrasonography.[20]

3. Medical Records.[21]

Abortion facilities should be required to include in patients' medical records their documentation of such details as will allow inspectors to determine whether the required informed consent has been obtained and that the necessary information and materials have, in fact, been provided by the appropriate persons and within the time frames already imposed by law. Facilities should be further required to include detailed findings of the patient's pelvic examination and the estimated gestational age of the unborn child to ensure compliance with proposed regulation 12 VAC 5-412-230, related to the limitation of services to be offered. Finally, medical records should include the date of the initial examination and the date of the abortion.

4. Reports.[22]

---

[17] VA. CODE ANN. § 18.2-76.
[18] See Proposed Regulation 12 VAC 5-412-190.
[19] Proposed regulation 12 VAC 5-412-240(A)(1).
[20] Cf. S.C. Code Regs 61-12 § 205(F).
[21] Proposed regulation 12 VAC 5-412-310. Cf. S.C. Code of Regs 61-12 § 401.
[22] Proposed regulation 12 VAC 5-412-330. Cf. S.C. Code of Regs. 61-12 § 403(B).

In addition to being required to report patient deaths, abortion facilities should be required to report patient complications that are serious enough to require hospitalization. As explained above, this type of recordkeeping is essential to enable a full and accurate understanding of the risks and rates of complications associated with abortion.

We hope this information has been helpful to you. If we can provide further assistance, please do not hesitate to contact us.

Sincerely,

/s/

Rita M. Dunaway

cc: Dr. Karen Remley