IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AMY BRYANT, M.D., M.S.C.R.; BEVERLY GRAY, M.D.; ELIZABETH DEANS, M.D., on behalf of themselves and their patients seeking abortions; and PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its staff and its patients seeking abortions, Plaintiffs, v. JIM WOODALL, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B; ROGER ECHOLS, in his official capacity as DA for PD 14; ELEANOR E. GREENE, M.D., M.P.H., in her official capacity as President of the North Carolina Medical Board; RICK BRAJER, in his official capacity as Secretary of the North Carolina Department of Health and Human Services; and their Employees, agents and successors, Defendants.	)	CIVIL ACTION NO. 1:16-CV-01368-UA-LPA

DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR VERIFIED MOTION FOR AN ORDER DEFERRING ANY FURTHER BRIEFING ON AND POSTPONING ANY HEARING OR DECISION ON THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT UNTIL THE DEFENDANTS HAVE HAD AN OPPORTUNITY TO CONDUCT LIMITED, EXPEDITED DISCOVERY AND TO GATHER DOCUMENTS AND EVIDENCE NECESSARY TO ALLOW THEM TO RESPOND TO THE PLAINTIFFS' SUMMARY JUDGMENT MOTION

In their February 9, 2017 Brief in opposition to the defendants' discovery Motion [Docket # 27], the plaintiffs advance four arguments in support of their position that the defendants should not be permitted to take *any* discovery in this case or even be given a brief period of time to finish gathering evidence from their own sources to enable them to prepare a

response to the plaintiffs' summary judgment motion. As demonstrated below, not one of the plaintiffs' arguments has merit.

First, the plaintiffs assert that the defendants are not entitled to any relief under Rule 56(d) because they (the defendants) have allegedly not demonstrated that they will be able to dispute what the plaintiffs claim is the only material issue in this case – *i.e.*, that the statutes under challenge prohibit some pre-viability abortions. (Plaintiffs' Brief at 2, 5) This assertion is not true. At pages 4 (¶ 6(d)) and 7 (¶ 21) of their discovery Motion [Docket # 21], the defendants informed this Court that they need limited, expedited discovery and a concurrent, brief period of time to finish their informal fact-gathering in order to determine, *inter alia,* "whether any post-twenty week unborn fetuses are 'viable'…, and, if so, how many …." (Emphasis supplied) In other words, the defendants intend to engage in expedited discovery and informal fact-gathering in an attempt to obtain evidence, *inter alia,* that all post-twenty week abortions involve a viable fetus. *See also* pages 9-10 of the defendants' discovery Motion (¶ 28), where they informed this Court that, based on the results of their informal fact-gathering as of January 25, 2017, they believed that they would be able to present this Court with "competent and probative evidence that directly conflicts with and contradicts the plaintiffs' affidavit assertions as to when fetal viability begins, which is a central, core feature of the plaintiffs' argument as to why the three statutes at issue in this case are allegedly unconstitutional." Under these circumstances, the defendants have demonstrated that the discovery they seek is aimed at enabling them to directly dispute the matter that the plaintiffs themselves claim is "the only material fact in this case." Accordingly, the plaintiffs' first argument in opposition to the defendants' discovery Motion is without merit and should be rejected.

Second, the plaintiffs argue that "every federal appellate or state high court faced with a law prohibiting abortions before viability, with or without exceptions, has ruled that it violates the Fourteenth Amendment." The defendants take this argument to mean that the statutes under challenge in this case are, in the plaintiffs' view, "clearly" unconstitutional and do not merit being subjected to the normal adjudicatory process contemplated by the Federal Rules of Civil Procedure (to say nothing of due process). On its face, this argument is without merit. In addition, insofar as the defendants are aware, only one abortion-related statute like the statutes under challenge in this case has been subjected to judicial scrutiny before. That was the Arizona statute challenged in *Issacson v. Horne*, 884 F. Supp. 2d 961 (D. Ariz. 2012), *reversed,* 716 F.3d 1213 (9th Cir. 2013), *certiorari denied,* __ U.S. __, 134 S. Ct. 905, __ L. Ed. 2d __ (2014). But the district court in *Issacson upheld* the constitutionality of the Arizona statute and, although the Ninth Circuit reversed the district court, the Supreme Court declined to hear and decide the case. Insofar as the defendants are aware, neither the Supreme Court nor the Fourth Circuit has ever ruled on an abortion-related statute like that involved in this case or in *Issacson.* The defendants believe that the statutes under challenge in this case are constitutional and simply ask the Court to allow them to make a factual record that will enable them to demonstrate that fact to the Court – and, if necessary, to subsequent appellate courts.

Third, the plaintiffs argue that the latest medical and scientific evidence concerning fetal pain and suffering and the significantly increased health risks to the pregnant woman in late-term abortions is immaterial as a matter of law because of what the plaintiffs term the central holdings of *Roe* (1973) and *Casey* (1992), but the plaintiffs ignore the Supreme Court's decision in *Gonzalez v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007), where the Court made clear that the government has a vital and constitutionally legitimate interest in precisely

these matters. *See, e.g., id.,* 550 U.S. at 156-58. In addition, if the plaintiffs were to succeed in persuading this Court to prevent the defendants from putting the latest scientific and medical information on these matters into the record in this case, then they would succeed in preventing any subsequent appellate court, including the Supreme Court, from even being able to exercise, as the plaintiffs put it, "its prerogative of [modifying] its own decisions." (Plaintiffs' Brief at 7 and cases cited therein) This argument is without merit and should be rejected.

Finally, the plaintiffs argue that the defendants are not entitled to even the slightest amount of discovery from them on the issue whether the plaintiffs have standing to challenge the statutes at issue in this case. (Plaintiffs' Brief at 8-10) Citing their affidavits filed in support of their Motion for Summary Judgment, the plaintiffs assert that "some of their patients need abortion services after twenty weeks of pregnancy, that they have turned patients away as a result of the [statutes at issue in this case], and but for the [statutes at issue in this case], they would provide [abortion] services to their patients." (Plaintiffs' Brief at 8) But these bare, unsupported assertions by the plaintiffs do not end the question whether the plaintiffs have standing to challenge the statutes at issue in this case. The defendants are entitled to *test* these unsupported assertions through discovery. *E.g., Natural Resources Def. Council v. Pena,* 147 F.3d 1012, 1024 (D.C. Cir. 1998) (Litigants may take discovery of facts going to standing where such discovery appears to have likely utility) (and cases cited therein); *American Humanist Association v. Greenville County School District,* 652 Fed. Appx. 224, 230 (4th Cir. 2016) ("On remand, the court should conduct jurisdictional discovery to determine whether AHA currently maintains standing to pursue this claim, …."). The defendants' proposed standing discovery, as specifically identified to the Court in the defendants' discovery Motion at pages 10-11, ¶ 30, would test the accuracy of the plaintiffs' assertions about standing. Contrary to the plaintiffs'

assertion, most of the information sought by the defendants in this proposed discovery is *not* available from the North Carolina Department of Health and Human Services. Most of it is exclusively available from the plaintiffs themselves. Without this discovery, this Court will not even know whether it has subject matter jurisdiction to adjudicate this dispute. Accordingly, this standing discovery is not only appropriate, but vital.

Conclusion

At the time the defendants filed their discovery Motion, this case was less than two months old. It is now less than three months old. The plaintiffs themselves waited fully 18 months before even challenging the post-twenty-week provisions of the statutes at issue in this case by filing this lawsuit. The defendants' proposal for limited, expedited discovery and a concurrent, brief period during which the defendants can complete their informal fact-gathering process does not threaten to materially delay the normal progress of this lawsuit. Indeed, even at the conclusion of the defendants' proposed limited, expedited discovery, this case will still be on a fast track towards conclusion. As demonstrated in their discovery Motion, the defendants need the discovery they have requested in order to be able to fairly prepare to respond to the plaintiffs' Motion for Summary Judgment and therefore again request that the Court grant their Motion.

WHEREFORE, the defendants respectfully pray that this Court grant their discovery Motion and that it grant them such other and further relief as it may deem just and proper.

Respectfully submitted and electronically filed this 23rd day of February 2017.

Signature of counsel appears on the following page

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CERTIFICATE OF SERVICE

This is to certify that, on the 23rd day of February 2017, I electronically filed the foregoing Motion with the Clerk of Court of the United States District Court for the Middle District of North Carolina using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have appeared in this case.

/s/ *I. Faison Hicks*
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