

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ASSOCIATES IN OBSTETRICS &	:	CIVIL ACTION
GYNECOLOGY, on behalf of itself and	:	
its patients et al.,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
UPPER MERION TOWNSHIP et al.,	:	
Defendants.	:	NO. 03-2313

**MEMORANDUM**

**Baylson, J.**

**October 29, 2004**

Defendants have moved for summary judgment on all claims brought by Plaintiffs, Associates in Obstetrics & Gynecology (“Associates”), a medical practice providing abortion services, and its physician-owner Dr. Steven C. Brigham, who allege, pursuant to 42 U.S.C. § 1983, violation of rights guaranteed under the United States Constitution and pendent state claims. Defendants are Upper Merion Township (“Township”), its Board of Supervisors, the Zoning Hearing Board,<sup>1</sup> five individuals who serve as Supervisors, the Township Manager and the Zoning Officer, sued in both their individual and official capacities. After considerable briefing, oral argument was held on October 25, 2004. Defendants’ Motion will be granted in part and denied in part.

The factual background in this case is set forth in two prior opinions, the first ruling on Defendants’ 12(b)(6) Motion to Dismiss the Complaint, reported at 270 F. Supp. 2d 633 (E.D.

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<sup>1</sup>The individual members of the Zoning Hearing Board were dismissed as parties as a result of their Rule 12(b)(6) Motion, with prejudice. Associates in Obstetrics & Gynecology v. Upper Merion Township, 270 F. Supp. 2d 633, 664 (E.D. Pa. 2003)(“Associates”).

Pa. 2003), and the second, denying Plaintiffs' Motion for a Preliminary Injunction, Memorandum and Order, Dec. 19, 2003 (not reported). Briefly stated, Plaintiffs were providing abortion services in the King of Prussia area. Defendants asserted that the Upper Merion Zoning Code required that an operation such as Plaintiffs' was appropriately classified as a "clinic," which required that it be situated on a lot of at least three acres, whereas Plaintiffs were operating in an office building situated on a lot of fewer than three acres. The Township initiated a cease and desist order, accompanied by other enforcement actions, which led to four separate legal proceedings in Pennsylvania state courts, including the issuance of a preliminary injunction against Plaintiffs. These actions were resolved in favor of the Township<sup>2</sup> in the state court system, including affirmations by appellate courts and denial of review by the Pennsylvania Supreme Court.

The Court will consider the Plaintiffs' claims separately.

**I. Count I - Denial of Federal Constitutional Rights**

**A. Equal Protection Claim**

Count I claims denial of federal constitutional rights, specifically denial of equal protection and denial of substantive due process. As to the equal protection claims, the Court finds from the evidence presented at the preliminary injunction hearing itself as well as in the filings of the parties, that a genuine issue of material fact exists as to the intent and motive behind the actions taken by Defendants, whether these actions were arbitrary as to Plaintiffs based on their provision of abortion services, whether the classification of Plaintiffs' business as

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<sup>2</sup>There is still pending a criminal complaint issued against Associates, which was stayed pending the resolution of the other civil cases.

a clinic and the other enforcement actions were taken because of anti-abortion animus, whether the treatment of Plaintiffs by Defendants was discriminatory compared to other allegedly similar businesses, or reflected an intent to prevent Plaintiffs from operating their business of providing abortions, and thus constituted selective enforcement of the Township's zoning laws.

As the Court stated in reaching this conclusion at the oral argument, there is indeed considerable testimony on the record that no such anti-abortion intent by the individual or governmental Defendants existed, and that the state court proceedings and decisions demonstrate that the Township's zoning laws were lawfully applied. Nonetheless, as the Court has already held, the state court proceedings did not consider the Plaintiffs' claim of selective enforcement, and there exists sufficient evidence regarding discriminatory intent and allegedly inconsistent treatment of various businesses under the Township's zoning code such that a jury could conclude that the Defendants did engage in discriminatory and/or selective enforcement, and therefore Plaintiffs are entitled to a trial on their claim of denial of equal protection.

#### **B. Relevance of State Court Proceedings**

The Court has continually asked the parties for legal authority as to the impact of the state court rulings on this case, believing that the Court must allow the jury to know, and indeed instruct the jury, that the state courts consistently, albeit in different contexts, concluded that the actions of the Township officials did not violate state law in any respect. As will be noted below, the Court finds that these holdings are entitled to significant weight in relation to some of the other pending claims and on the issue of qualified immunity.

The Full Faith and Credit Act, 28 U.S.C. § 1738, requires a federal court to give "the same preclusive effect to a state-court judgment as another court of that State would give." Nat'l

R.R. Passenger Corp. v. Pennsylvania Pub. Util. Comm'n, 342 F.3d 242, 254 (3d Cir. 2003)(quoting Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 523 (1986)). The question, then, is what preclusive effect a Pennsylvania court would be required to give the state court decisions in Associates.

Under Pennsylvania law, re-litigation of issues of law or fact is precluded in a subsequent action when the following four factors are demonstrated:

(1) the issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the prior case and had a full and fair opportunity to litigate the issue; and (4) the determination in the prior proceeding was essential to the final judgment.

Cantarella v. Dep't of Corrections, 835 A.2d 870, 875 (Pa. Commw. Ct. 2003)(citation omitted).

The Third Circuit recently addressed this question in the land-use context in a non-precedential opinion where the plaintiffs complained that the district court erroneously failed to give preclusive effect to findings in a state court decision. Lindquist v. Buckingham Township, 106 Fed. Appx. 768, 776 (3d Cir. July 19, 2004). The court outlined the relevant standard for preclusion:

[T]he District Court was required to give the state court's findings preclusive effect if a Pennsylvania court would have been required to give them preclusive effect.

Turning to Pennsylvania law, we note that Pennsylvania has adopted the requirements of the Restatement (Second) of Judgments, regarding when a prior determination of a legal issue is conclusive in a subsequent action. In Pennsylvania, the doctrine of issue preclusion applies if: (1) the issue decided in the prior case is identical to the one presented in the subsequent action; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the

subsequent case; (4) the party or person in privity with a party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

Id. (citations omitted).

This standard requires this Court to accept that Associates was properly deemed a “clinic” subject to the 3-acre rule and thus was not allowed to operate as it was, at least under state law.<sup>3</sup> The Pennsylvania courts have decided that this determination was not legal error, there was a final judgment on the merits, the parties are identical, Associates had a fair opportunity to litigate the issue in the state court proceedings, and this determination was essential to the state court judgments. The state court decisions do not have preclusive effect as to Plaintiffs’ equal protection claims, however, as Plaintiffs did not have an opportunity to litigate these claims in the state proceedings.

### **C. Substantive Due Process Claims and Standards**

Although Plaintiffs have advised the Court that they will no longer pursue their substantive due process claims, Defendants assert that the substantive due process standard should apply to the equal protection claims.

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<sup>3</sup>In many other land-use cases, the plaintiffs proceeded directly to federal court, so there were no state court judgments regarding the zoning officials’ actions. Eichenlaub v. Township of Indiana, 385 F.3d 274 (3d Cir. Sept 21, 2004); Corneal v. Jackson Township, 94 Fed. Appx. 76 (3d Cir. April 13, 2004)(not precedential); Fred’s Modern Contracting, Inc. v. Horsham Township, 2004 WL 620060 (E.D. Pa. Mar. 29, 2004). In other cases, the plaintiffs had prevailed in the state courts prior to the federal litigation. Levin v. Upper Makefield Township, 90 Fed. Appx. 653 (3d Cir. March 8, 2004)(not precedential); United Artists v. Township of Warrington, 316 F.3d 392, 401 (3d Cir. 2003); Siegmund v. Fedor, 2004 WL 1490430 \*2 (M.D. Pa. June 29, 2004); Blain v. Township of Radnor, 2004 WL 1151727 (E.D. Pa. May 21, 2004). We have not encountered a case such as Associates where the plaintiffs litigated unsuccessfully in the state courts.

In the context of land use, the Third Circuit has held that a substantive due process violation occurs only when the infringement of the protected property interest is so arbitrary as to shock the conscience. United Artists Theatre Circuit, Inc. v. Township of Warrington, Pa., 316 F.3d 392, 401 (3d Cir. 2003)(applying the more stringent conscience-shocking test instead of the ‘improper motives’ test previously applied). The Third Circuit has recently described this conscience-shocking standard thus:

[W]hether a zoning official’s actions or inactions violate due process is determined by utilizing a “shocks the conscience” test. [United Artists, 316 F.3d at 399]. That test, of course, is not precise, see County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998), and it also “varies depending on the factual context,” United Artists, 316 F.3d at 400. What is clear is that this test is designed to avoid converting federal courts into super zoning tribunals. What “shocks the conscience” is “only the most egregious official conduct.” Id. (quoting Lewis, 523 U.S. at 846).

Eichenlaub v. Township of Indiana, 385 F.3d 274, 285 (3d Cir. Sept 21, 2004).

In Eichenlaub, the Third Circuit distinguished “the kinds of gross misconduct that have shocked the judicial conscience,” citing this Court’s prior opinion in Associates, 270 F. Supp. 2d 633, where the zoning controversy involves “allegations of hostility to constitutionally-protected activity on the premises.” Id. The court described this case as “a case that implicates more than just disagreement about conventional zoning or planning rules.” Id.

The Defendants suggest that the stringent “shocks the conscience” standard should apply to the equal protection claim, noting that, when remanding the equal protection claim to the district court in Eichenlaub because it had not been considered previously, the Third Circuit stated that “we do not view an equal protection claim as a device to dilute the stringent requirements needed to show a substantive due process violation” and that it “may be very

unlikely that a claim that fails the substantive due process test will survive under an equal protection approach.” Eichenlaub, 385 F.3d at 287. What the Defendants fail to note, however, is that in Eichenlaub, unlike Associates, the plaintiffs did not “assert that any differences in treatment stem from racial or other invidious forms of discrimination, or from an effort to burden fundamental rights.” Id. at 286.

Pending further developments at trial, the standard for evaluating whether any selective enforcement found by the jury constitutes an equal protection violation will thus be that set forth in the Memorandum and Order of Dec. 19, 2003, pp. 14-15, whether:

(1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the persons.

Homan v. City of Reading, 15 F. Supp. 2d 696, 702 (E.D. Pa. 1998)(citation omitted); Desi’s Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 425 (3d Cir. 2003); United States v. Torquato, 602 F.2d 564, 570 (3d Cir. 1979).

#### **D. The “Most Precise Claim” Doctrine**

Another guiding legal principle that is relevant to the interplay between equal protection and substantive due process stems from a series of Supreme Court decisions starting with Graham v. Connor, 490 U.S. 386, 395 (1989), also a § 1983 action, which held that claims of excessive force should be analyzed under the Fourth Amendment and its reasonableness standard rather than under a substantive due process approach. This “most precise claim” principle was carried forward in County of Sacramento v. Lewis, 523 U.S. 833 (1998), in which the “shocks

the conscience” theory arose, and which held that in a civil rights claim for violation of the Fourth Amendment, if a constitutional claim is covered by a specific constitutional provision, it “must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.” *Id.* at 843 (citing U.S. v. Lanier, 520 U.S. 259, 272 n.7 (1997)); see also City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 200-01 (2003)(J. Scalia, concurring)(noting in a land use case that it is “absurd to think that all ‘arbitrary and capricious’ government action violates substantive due process,” particularly when other constitutional provisions, such as the equal protection clause, are available to provide a remedy). These cases provide another reason to apply the traditional equal protection standard rather than the “shocks the conscience” substantive due process standard to Plaintiffs’ claim of denial of equal protection.

Although the Third Circuit has not squarely endorsed this doctrine in a case involving fundamental rights such as those at issue here, it has indicated reluctance to use substantive due process theory when other constitutional claims are extant. See, generally, Khodara Environmental, Inc. v. Beckman, 237 F.3d 186, 197-98 (3d Cir. 2001).

## **II. Count II - Rights of Privacy and Association**

In Count II, Plaintiffs allege that Defendants’ actions have imposed an undue burden on women seeking abortions in Upper Merion Township, and have violated their patients’ privacy and association rights. (Pls’ Third Amended Complaint, ¶¶ 125-127). Paragraph 125 incorporates the prior averments of Count I. Paragraphs 126 and 127 describe only injury to the patients, for which, Plaintiffs admitted at oral argument, they seek only injunctive relief. (Transcript of Oral Argument, p. 28, 10/25/04). Plaintiffs’ Memorandum in Opposition to

Defendants' Motion, pp. 27-34, discusses only the claims of patients.<sup>4</sup> The Court has previously ruled that Plaintiffs have third party standing to seek vindication of their patients' constitutional rights. (Memorandum and Order Denying Plaintiffs' Motion for Preliminary Injunction, p. 7-10, 12/19/03).

As to Plaintiffs' claims of an "undue burden," Plaintiffs agree that it should be considered as part of Plaintiffs' claim of selective enforcement. (Transcript of Oral Argument, p. 36, 10/25/04).

The Supreme Court has squarely held that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992)(emphasis added); Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127, 142 (3d Cir. 2000)(quoting Casey, 505 U.S. at 878). The "undue burden" cases, however, generally apply only to governmental regulation on abortion providers as to the actual provision of abortion services. The Township has no objection to Plaintiffs providing abortion services on a lot of three acres or more. (Transcript of Oral Argument, p. 26, 10/25/04). This court has previously noted, however, that "[t]hough Casey's language applied the undue burden standard to statutes and regulations that restrict access to abortion, several courts have applied the same test to executive action and

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<sup>4</sup>As Plaintiffs' counsel at oral argument:

MR. SURKIN: – we're asserting a right of association with respect to our ability to associate with our patients, to enable them to exercise their constitutional rights to receive advice regarding abortions and to get abortions.

(Transcript of Oral Argument, p. 29, 10/25/04).

executive interpretation of statutes and regulations,” and therefore that “Plaintiffs’ allegations that Defendants acted with the purpose of creating a substantial obstacle to abortion supports a claim of impermissible undue burden on the right to an abortion.” Associates, 270 F. Supp. 2d at 654-55 (emphasis added).

As discussed in relation to Count I, Plaintiffs have provided evidence sufficient to create a triable issue of fact as to whether Defendants’ actions were motivated by a purpose to restrict women’s access to abortion. Defendants’ motion for summary judgment on Count II is therefore denied in regards to Plaintiffs’ allegations that Defendants’ actions were motivated by a purpose to create a substantial obstacle to their patients’ right to an abortion, which Plaintiffs pursue under an equal protection theory in relation to Defendants’ alleged selective enforcement. (Transcript of Oral Argument, p. 35, l. 22- p. 36, l. 11, 10/25/04).

Plaintiffs also argue that, regardless of the Defendants’ motivation, the effect of the closing of Associates has been to create a “substantial obstacle” to abortion by causing their patients to forego or to delay obtaining an abortion and to incur increased costs in seeking abortion services. (Pls’ Memorandum in Opposition to Defendants’ Motion for Summary Judgment, pp. 28-33). Plaintiffs have submitted evidence that allegedly demonstrates the increased costs and travel time their patients face in obtaining abortion services from other abortion providers in the area.<sup>5</sup> They also cite to Dr. Henshaw’s testimony at the Preliminary Injunction Hearing regarding the effect of such additional costs and distances on women’s choice

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<sup>5</sup>Plaintiffs have submitted, inter alia, copies of the “abortion services” sections of the Norristown/King of Prussia and Philadelphia yellow pages, and of the King of Prussia facility’s fee schedule (Plaintiffs’ Exhibit Q); printouts from www.mapquest.com estimating driving times from Plaintiffs’ to other abortion providers in the Philadelphia area (Plaintiffs’ Exhibit DDD); selections of relevant testimony from the preliminary injunction hearing (Plaintiffs’ Exhibit B).

to delay or to forego an abortion. (Plaintiffs' Exhibit B, PI Hearing Transcript, October 1, 2003, pp. 143-53).

However, in view of the state court rulings, there is no undue burden under the zoning laws, except as to the claims of selective enforcement. Even assuming that the evidence before the Court demonstrates the increases in costs and inconvenience that Plaintiffs allege, and viewing this evidence in the light most favorable to Plaintiffs, this evidence does not create a triable issue of material fact as to whether the closing of Associates had the effect of creating a "substantial obstacle" to abortion. The Supreme Court has rejected the notion that the sort of increased costs of abortion services and inconveniences of increased travel time alleged by Associates can constitute a "substantial obstacle" to abortion and thus an "undue burden" on patients' constitutional rights. Casey, 505 U.S. at 874.

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.

Id. Following Casey, the Eighth Circuit has noted that "there is little question that enforcement of the [state statute regulating the development of institutional health services] is not unconstitutional if it merely has the incidental effect of making it more difficult or more expensive to procure an abortion and does not otherwise impose an undue burden on one's ability to obtain an abortion." Planned Parenthood of Greater Iowa, Inc. v. Atchison, 126 F.3d 1042, 1049 (8th Cir. 1997)(citing Casey, 505 U.S. at 874). This is not to say that a case could not arise in which the increases in cost and inconvenience created by the closing of an abortion provider

would be so significant as to create a “substantial obstacle” to abortion in such a way that would constitute an “undue burden.” But the facts here relate to enforcement of a zoning code, and in view of the state court rulings, the only “undue burden” has been created by the alleged selective enforcement. Thus, Plaintiffs may offer evidence of “purpose” in support of their equal protection claim, but the Court will not receive evidence, or allow damages or grant injunctive relief, in regards to Plaintiffs’ allegations that the closing of Associates had the effect of creating a “substantial obstacle” to abortion.

### **III. Count IV - Procedural Due Process Claims**

At oral argument, Plaintiffs supported their procedural due process claims by contending the evidentiary rulings in the state courts prevented them from introducing certain evidence and making certain claims. The Court disagrees and concludes that it would be error to allow these claims to proceed in this Court along with a selective enforcement claim. This Court cannot sit in review of evidentiary rulings in state courts, particularly where there has been finality in the state court proceedings, and having a trial to decide the propriety of such rulings would intrude on settled federalism principles.

The Third Circuit has determined that “[i]n Pennsylvania the procedure for challenging zoning ordinances substantially conforms with the general due process guidelines enunciated by the Supreme Court,” Rogin v. Bensalem Township, 616 F.2d 680, 695 (3d Cir. 1980). The procedural due process violations that Associates alleges involve the failure to allow evidence regarding their selective enforcement claim, not the determination that Associates was a “clinic.” As other courts in this circuit have recently held in similar situations, the statutory scheme for the appeal of zoning enforcement actions provided Associates with the requisite process for the

presentation of a full and complete defense as to whether the determination that Associates was a “clinic” comported with state law, and Plaintiffs will have trial in this Court on their selective enforcement claims. Thus, Defendants are entitled to a judgment in their favor on the procedural due process claims. *See, e.g., Highway Materials, Inc. v. Whitmarsh Township*, 2004 WL 2220974 \*9 (E.D. Pa. Oct. 4, 2004); *Fred’s Modern Contracting v. Horsham Township*, 2004 WL 620060 (E.D. Pa. March 29, 2004); *Siegmund v. Fedor*, 2004 WL 1490430 \*1 (M.D. Pa. June 29, 2004). As the Third Circuit stated in *Bello v. Walker*, “[i]t is the law of this Circuit that a state provides adequate due process when it provides reasonable remedies to rectify a legal error by a local administrative body. Pennsylvania clearly provides such remedies.” 840 F.2d 1124, 1128 (3d Cir. 1988)(quotation and citation omitted). Here, the Pennsylvania state courts made reasonable remedies available to Associates but upheld the determination that Associates was properly deemed a “clinic” under state law.

#### **IV. Count III - Conspiracy and § 1985 Claims**

Plaintiffs added allegations in their Third Amended Complaint, see ¶¶ 25-26 and 122B, that one or more of the individual Defendants conspired with anti-abortion activists to achieve the goals alleged in the Complaint. At oral argument, Plaintiffs acknowledged that they had no evidence to support these allegations, and that a conspiracy cannot rest on government officials conspiring with the governmental entity. Plaintiffs only suggestion of evidence on a theory of conspiracy rests on the conduct of Defendant Rooney, a Township Supervisor who has strong personal beliefs against abortion.<sup>6</sup> Plaintiffs suggest that to the extent Rooney acted in his

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<sup>6</sup>Defendants cite *Laverdure v. County of Montgomery*, 324 F.3d 123 (3d Cir. 2003) for the proposition that Rooney’s statements, as an individual commissioner, cannot be binding on

individual capacity, he could have formed a conspiracy with the other Defendants and/or the Township. (Pls' Memorandum in Opposition to Defendants' Motion for Summary Judgment, pp. 50-54). Finding no authority to allow a conspiracy claim based on Mr. Rooney's personal beliefs, as opposed to his actions as a Township Supervisor, the Court will grant summary judgment on the Plaintiffs' conspiracy claims.

**V. Count XII - § 1983 Municipal Liability Under Monell**

The Court finds sufficient evidence of deliberate indifference, policy, custom, pattern and/or practice of actions and/or inaction by the Township itself under the same evidence deemed sufficient to require a trial under the selective enforcement theory. See Monell v. N.Y. Dept. Social Services, 436 U.S. 658 (1978). Therefore, Defendants' Motion to Dismiss the Township (which includes the Zoning Board) will be denied. Thus, Plaintiffs may pursue their claim for damages against the Township.

**VI. State Law Claims**

In view of the decisions of the state courts that the Defendants acted properly with regard to state law, the Court concludes that it must, as a matter of comity, as well as for a lack of evidence, grant Defendants Motion for Summary Judgment as to the state law claims.

**VII. Qualified Immunity**

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the Township as a defendant because he was only one member of the Board of Supervisors, which can only speak through a majority vote of the Commissioners or other officially authorized statements. However, Plaintiffs do not contend that all Defendants are bound by Rooney's statements, but to the contrary, that Rooney's statements were expressing his personal views, and the Court can find a conspiracy between those personal views and the actions of the Supervisors, but Plaintiffs cite no case supporting such a conceptually difficult theory.

Defendants seek dismissal as to all the individual defendants sued in their personal capacity under the doctrine of qualified immunity. See Associates, 270 F. Supp. 2d at 661. Plaintiffs have alleged the deprivation of a constitutional right, which was clearly established at the time of the alleged violations. However, it is equally clear from the evidence, viewed in the light most favorable to Plaintiffs, that a reasonable Township manager, zoning officer and supervisor, in the position of the individual defendants, would have reason to believe that their actions were not violating the Plaintiffs' civil rights. Such a reasonable Township official may have made a reasonable mistake. See Carswell v. Borough of Homestead, 381 F.3d 235 (3d Cir. 2004)(approving qualified immunity in context of excessive force by police officer). Although different from the work of a police officer, enforcement of zoning codes calls for considerable exercise of discretion, subject to levels of review within a municipality, and then in the courts. Further, Plaintiffs' evidence of selective enforcement in this case spans a lengthy period of many years, during which different persons held some of the positions of the present Defendants. The Zoning Officer was brand new to the job. The Township Manager was a long-term official, but he did not concentrate on zoning matters. The supervisors were part-time. The findings of the state courts are relevant here, and because the state courts have upheld the enforcement actions of the Township, the Township officials who have acted in this case could not, at the same time the state courts have upheld the validity of their actions, be found to have knowingly violated any constitutional rights of the Plaintiffs. The Court cannot split the Defendants' actions into "lawful state law" acts and "unlawful selective enforcement" acts or allow a jury to find damages by making such distinctions.

The Plaintiffs take the position that if the Court grants qualified immunity to the

individual Defendants in their personal capacity, they should nonetheless remain Defendants in their official capacities. The Court rejects this suggestion as unnecessary for plaintiffs and unduly burdensome on these Defendants. Under Hafer v. Melo, 502 U.S. 21, 25 (1991), there is complete symmetry between a governmental entity as a defendant and the officers who hold positions in that governmental entity in their official capacities. A.M. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 580 (3d Cir. 2004)(“A suit against a governmental official in his or her official capacity is treated as a suit against the governmental entity itself.”). Thus, Plaintiffs suffer no prejudice from having their suit proceed against the governmental entity alone, rather than against the individual Defendants in their official capacity. The individual Defendants will therefore be dismissed as parties in both their individual capacities under qualified immunity and in their official capacities as redundant to the Township itself continuing as a defendant.

### **VIII. Conclusion**

Based on the rulings above and Plaintiffs’ decision not to pursue their claim of substantive due process, the trial will proceed on Plaintiffs’ claims against Upper Merion Township, as the sole Defendant, for compensatory damages for claims of denial of equal protection, and for claims of equitable relief for Plaintiffs’ patients for violations of privacy and association rights (limited to evidence of Defendants’ “purpose” related to selective enforcement).

An appropriate Order follows.



3. The case will be listed in the Court's trial pool for November 17, 2004, as a back-up, and counsel shall consult with the deputy clerk as to the precise date when the trial is likely to start.

4. Any Motions in Limine shall be filed by November 9, 2004 and responses shall be due on November 16, 2004.

5. The parties shall exchange proposed voir dire questions, and statements concerning the parallel state court proceedings (in a format to be read to the jury); Plaintiffs and Defendants shall exchange drafts and confer promptly, and shall file a stipulated statement, and voir dire questions, or separate proposed questions and statements, by November 16, 2004.

6. Points for Charge are due on the first day of trial.

7. Plaintiffs' Pretrial Memorandum is due on November 5, 2004.

8. Defendants' Pretrial Memorandum is due on November 12, 2004.

BY THE COURT:

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Michael M. Baylson, U.S.D.J.