STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20 CVS 500147

PLANNED PARENTHOOD SOUTH ATLANTIC, A WOMAN'S CHOICE OF CHARLOTTE, INC., A WOMAN'S CHOICE OF GREENSBORO, INC., and **A WOMAN'S CHOICE OF RALEIGH, INC.,** on behalf of themselves, their physicians and staff, and their patients; **KATHERINE FARRIS. M.D., ANNE LOGAN BASS, F.N.P., SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, on behalf of its members**; **ELIZABETH DEANS, M.D.,** and **JONAS SWARTZ. M.D.,** on behalf of themselves and their patients,

Plaintiffs,

v.

TIMOTHY K. MOORE, as Speaker of the North Carolina House of Representatives, in his official capacity; **PHILIP E. BERGER,** as President Pro Tempore of the North Carolina Senate, in his official capacity; **JOSH STEIN,** as Attorney General of North Carolina, in his official capacity; **SATANA DEBERRY,** as District Attorney ("DA") for Prosecutorial District ("PD") 16, in her official capacity; **BENJAMIN R. DAVID,** as DA for PD 6, in his official capacity; **LORRIN FREEMAN,** as DA for PD 10, in her official capacity; **WILLIAM R. WEST,** as DA for PD 14, in his official capacity; **JAMES R. WOODALL,** as DA for PD 18, in his official capacity; **AVERY M. CRUMP,** as DA for PD 24, in her official capacity; **SPENCER B. MERRIWEATHER III,** as DA for PD 26, in his official capacity; **JAMES R. O'NEILL,** as DA for PD 31, in his official capacity; **TODD M. WILLIAMS,** as DA for PD 40, in his official capacity; **MANDY K. COHEN,** M.D., M.P.H., as Secretary of the North Carolina Department of Health and Human Services, in her official capacity; **BRYANT A. MURPHY, M.D., M.B.A**., as President of the North Carolina Medical Board, in his official capacity, on behalf of himself, the board, and its members;

BRIEF OF DEFENDANTS SPEAKER TIMOTHY K. MOORE AND PRESIDENT PRO TEMPORE PHILIP E. BERGER IN SUPPORT OF MOTION TO DISMISS UNDER N.C. R. CIV. P. 12(b)(1) AND 12(b)(6)

MARTHA ANN HARRELL, as Chair of the North Carolina Board of Nursing, in her official capacity, on behalf of herself, the Board, and its members,

Defendants.

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INTRODUCTION

Plaintiffs ask this Court to override the judgment of the legislative branch in matters of health, welfare, and safety — areas in which the legislative body has maximum discretion to enact sound policy. Plaintiffs seek to strike down five commonsense laws that have been on the books for several years and that mirror laws in states around the nation. In doing so, they present a nonjusticiable political question, hoping that this Court will step into a legislative role and adjudicate rights that don't exist. Separation of powers precludes such relief.

The Complaint is also nonjusticiable because Plaintiffs lack standing. Standing "is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *Byron v. Synco Properties, Inc.*, 258 N.C. App. 372, 375, 813 S.E.2d 455, 458 (2018), review denied, 371 N.C. 450, 817 S.E.2d 199 (2018). The plaintiff abortion providers and aspiring abortion provider purport to raise individual women's rights, without establishing any basis for an exception to the general bar on third-party standing. Worse yet, those plaintiffs — Planned Parenthood of the South Atlantic (PPSAT), the A Woman's Choice (AWC) clinics, Farris, Deans, Swartz, and Bass — have an inherent conflict of interest with the women whose rights they purport to raise. Because the health-and-safety regulations at issue protect women *from* these practitioners, the abortion provider plaintiffs can never fully or adequately advocate for those women. And the remaining plaintiff, SisterSong, lacks organizational standing because it has not alleged facts showing that its members would have standing to sue in their own

right, or that the claims could be litigated without the individual members' participation.

Plaintiffs also fail to state a claim on which relief can be granted in arguing that numerous, validly enacted North Carolina statutes are all facially invalid. North Carolina courts "seldom uphold facial challenges," precisely "because it is the role of the legislature, rather than th[e] Court," to weigh and balance considerations in forming public policy. *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2015). North Carolina courts "require the party making the facial challenge to meet the high bar of showing that there are *no* circumstances under which the statute might be constitutional." *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015) (emphasis added). Invoking hypothetical circumstances unsupported by specific facts, Plaintiffs don't come close to alleging that there are no conceivable circumstances in which these commonsense laws can be constitutionally applied.

What's more, even taking all allegations in the Complaint as true, Plaintiffs fail to identify any protected legal right that is implicated by the challenged laws, let alone demonstrate that the statutes have no rational relation to a legitimate governmental health-and-safety purpose. The statutes at issue are subject to rational basis review, yet the Complaint does not state any basis to conclude that the General Assembly could not have permissibly determined that these laws were reasonable.

Because this Court lacks subject-matter jurisdiction and Plaintiffs fail to state a claim upon which relief can be granted, Defendants Speaker of the North

Carolina House of Representatives, Timothy K. Moore, and President Pro Tempore of the North Carolina Senate, Philip E. Berger ("Legislative Defendants"), submit this motion to dismiss under North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6).

ARGUMENT

I. The Complaint should be dismissed for lack of subject-matter jurisdiction.

Plaintiffs' Complaint presents a non-justiciability political question and Plaintiffs lack standing to bring. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. R. Civ. P. 12(h)(3). Accordingly, this Court should dismiss for lack of subject matter jurisdiction.

A. The Complaint presents a nonjusticiable political question asking the Court to second-guess legislation and adjudicate nonexistent rights.

"It is well established that the . . . courts will not adjudicate political questions." *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (cleaned up). "The political question doctrine controls, essentially, when a question becomes not justiciable because of the separation of powers provided by the Constitution." *Id.* (cleaned up). Because the political question doctrine "excludes [certain controversies] from judicial review," where it applies it strips the Court of subject-matter jurisdiction over the cause of action in question. *Cooper v. Berger*, 370 N.C. 392, 407–08, 809 S.E.2d 98, 107 (2018) (cleaned up).

The "dominant considerations" for "whether a question falls within the political question category [are] the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Id.* (cleaned up). As to the question of "whether an act is good or bad law, wise or unwise, [that] is a question for the Legislature and not for the courts — it is a political question." *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960).

Plaintiffs present this Court with arguments that the challenged laws are "bad" or "unwise," but that question is "not for the courts – it is a political question." *Warren*, 252 N.C. at 696, 114 S.E.2d at 666; *see, e.g.*, Compl. ¶ 97 (alleging that the regulations "threaten patient health and well-being"), ¶ 261 (challenging the regulations as "unjustified" and "onerous"). Perhaps the most telling feature of Plaintiffs' nonjusticiable Complaint is that it contains 46 pages of allegations about policy judgments, Compl. ¶¶ 60–256, and only two pages making the alleged constitutional claims, *id.* at ¶¶ 257–67. Based on these policy arguments about "what the public welfare requires," *Warren*, 252 N.C. at 696, 114. S.E.2d at 666, Plaintiffs ask this Court to make impermissible "policy-based changes," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004), by permanently enjoining health-and-safety regulations. But this Court "lack[s] [the] satisfactory criteria for a judicial determination" based on weighing policy considerations." *Cooper*, 370 N.C. at 407–08, 809 S.E.2d at 107. Plaintiffs should not be allowed to litigate the issues they lost on the floor of the General Assembly.

B. Plaintiffs have not and cannot establish standing to bring these claims.

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Marriott v. Chatham Cty.*, 187 N.C. App. 491, 492, 654 S.E.2d 13, 16 (2007). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005).

"The burden is on the plaintiff to demonstrate that the requirement of standing is satisfied." *Credigy Receivables, Inc. v. Whittington*, 202 N.C. App. 646, 655–56, 689 S.E.2d. 889, 895 (2010). To meet this burden, Plaintiffs are "required to allege that [they] [1] suffered an injury [2] as a result of the enactment of the [challenged laws]." *Cooper*, 370 N.C. at 412, 809 S.E.2d at 110. They must establish a personal "legal interest," *Goldston v. State*, 361 N.C. 26, 31, 637 S.E.2d 876, 880 (2006), that is "injuriously affected," *id.* at 35, 637 S.E.2d at 882. As shown below, Plaintiffs fail to meet their burden.

Moreover, "[a] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *State v. Brown*, 67 N.C. App. 223, 235, 313 S.E.2d 183, 192 (1984) (citing *Murphy v. Hunt*, 455 U.S. 478 (1982)). Plaintiffs' argument that the laws might be unconstitutionally applied to hypothetical women is not enough to support standing.

1. Practicing and aspiring abortion providers do not have third-party standing to assert unknown women's rights.

In both claims, Plaintiffs attempt to raise the abortion rights of unidentified women to challenge laws that protects those same women's safety. Compl. ¶¶ 259–60 (Count I, based on "[t]he ability to make fundamental decisions about reproductive autonomy" and on behalf of "North Carolinians . . . seeking abortions"); ¶¶ 264–65 (Count II, on behalf of "North Carolinians who have abortions"). But Plaintiffs cannot "represent" women in this way. The alleged injury to the "right to abortion" is not an injury in fact to any of the Plaintiffs. Not a single plaintiff alleges that his, her, or its right to obtain an abortion is violated. That is because none of the plaintiffs are women seeking abortion. *See McGowan v. Maryland*, 366 U.S. 420, 429, 81 S. Ct. 1101, 1103 (1961) (because plaintiffs "do not allege any infringement of their own religious freedoms," they will have standing only if they may raise the constitutional claims of third parties).

In North Carolina, "[c]ourts appropriately have set a high bar for third parties to establish standing to bring actions relating to the exercise of police powers between the State and its citizens." *Cherry Cmty. Org. v. City of Charlotte*, 257 N.C. App. 579, 582, 809 S.E.2d 397, 400, disc. rev. denied, 371 N.C. 114, 812 S.E.2d 850 (2018). "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *accord Warth v. Seldin*, 422 U.S. 490, 500–01 (1975) (expressing a "reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties").

The bar is extraordinarily high. Indeed. North Carolina courts have never permitted third-party standing in the absence of a close, established relationship between litigant and third party, and a showing that the proper litigant cannot assert her own interests. *See Guilford Cty., ex rel. Thigpen v. Lender Processing Servs., Inc.*, No. 12-CVS-4531, 2013 NCBC 30, 2013 WL 2387708, at *4 (N.C. Super. Ct. May 29, 2013) ("To assert third-party standing, a plaintiff first must demonstrate that it has standing in its own right and it then must also show that it has a sufficiently 'close' relationship with the third party whose rights it seeks to assert and that there exists some hindrance to that third party's ability to pursue their own rights") (citations omitted). But Plaintiff abortionists do not allege a close relationship with unspecified women seeking abortion, nor do they allege that women are unable to assert their own rights.[1]

a. Abortion providers do not have a close relationship with unknown, unidentified women.

The very rare cases where third-party standing has been established have "involved significant relationships over extensive periods of time" between the plaintiff and the third party whose rights they are asserting. *Chavez v. Wadlington*, 261 N.C. App. 541, 545, 821 S.E.2d 289, 293 (2018), aff'd, 832 S.E.2d 692 (N.C. 2019) ("the relationship between the third party and the child is the relevant consideration for the standing determination in custody disputes") (cleaned up). No such relationship exists when the litigant and third party are arms-length strangers or when their interests diverge, as when a doctor seeks to invalidate a

[1] The analysis for standing in federal court.

rule that helps keep her patients safe. And certainly no close relationship exists when, as in the case of the plaintiff nurse practitioners here, the litigant only *aspires* to have a close relationship with unknown third parties.

Allowing plaintiff abortion providers to raise women's abortion interests would turn principles of third-party standing on their head. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879 (cleaned up). A conflicted litigant is not a fitting proponent for the third party's interest. Such a litigant is an advocate who will distort the case and sacrifice the right-holder's interests.

b. Abortion providers have not shown that women couldn't bring their own claims.

Plaintiffs have not shown that women seeking abortions couldn't assert their own rights. Mothers seeking to abort their prenatal children in procedures (i) performed by non-physicians, (ii) immediately, (iii) without information about the unborn child's gestational age and development or the availability of medical- and social-assistance benefits, and (iv) without visiting a doctor's office or clinic, or in a clinic without certain facility-safety requirements, are fully capable of bringing their own lawsuits against these laws. Potential plaintiffs with legitimate privacy concerns could use pseudonyms or file documents under seal. Concerns about mootness could be addressed by well-recognized exceptions or seeking emergency

relief, if necessary. And no systemic practical challenges are apparent. It is demeaning to women that Plaintiffs believe women cannot represent themselves and their own interests.

c. Conflict of interest independently precludes exceptions to the bar on third-party standing.

Because third-party standing allows a third-party to speak in place of a litigant, is impossible when there is an inherent conflict between the litigant's and the third party's interests. The U.S. Supreme Court established this in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 15 (2004). The plaintiff there was a father raising his daughter's asserted constitutional interest in objecting to hearing others recite the words "under God" in the Pledge of Allegiance at public school. *Id.* at 5. According to her mother, the daughter had "no objection either to reciting or hearing" the pledge. *Id.* at 9. The Court held that the father could not raise the daughter's rights. *Id.* at 15. The father's "standing derives entirely from his relationship with his daughter." *Id.* But "[i]n marked contrast to our case law on [third-party standing]," the Court said, "the interests of this parent [the litigant] and this child [the third party] are not parallel and, indeed, are potentially in conflict." *Id. Elk Grove* reaffirmed that there can be no third-party standing when the litigant's and third party's interests conflict.

Here, there is an unavoidable conflict of interest, where the regulations at issue protect women *from* abortion providers' negligence or conflicting profit motives. The Physicians-only Provision ensures that people performing abortions are "qualified physician[s] licensed to practice medicine in North Carolina in a

hospital or clinic certified by the Department of Health and Human Services to be a suitable facility for the performance of abortions." N.C. Gen. Stat. § 14-45.1(a). A "qualified physician" is (i) a physician who possesses, or is eligible to possess, board certification in obstetrics or gynecology, [or] (ii) a physician who possesses sufficient training based on established medical standards in safe abortion care, abortion complications, and miscarriage management." *Id.* § 14-45.1(g). The statute is expressly designed to prevent *un*qualified and *un*licensed practitioners from performing this serious procedure. It also explicitly protects women from undergoing abortions at the hands of individuals who are not sufficiently trained or in facilities that are not unsuitable for the procedure.

The In-person Appointments Provision likewise protects patients from less-than-thorough health care practices. For years, North Carolina has required that physicians performing surgical or chemical abortions by "physically present" and "in the same room" with the patient. N.C. Gen. Stat. § 90-21.82(1)a. This requirement ensures that the Physicians-only Provision is meaningful — i.e., that the licensed, trained, qualified physician is actually there for the abortion. Although requiring a doctor's presence at an abortion might take more effort and cut into plaintiff abortion providers' profit margins, it an eminently reasonable measure to ensure that health care is administered with attention and due caution. Plaintiff abortion providers might not benefit from the law, but patients surely do. Again, the conflict of interest is apparent.

The same goes for the Facility Safety Requirements. The regulations for ambulatory surgical centers ensure patients' safety. These requirements cover sanitation, 10A NCAC 14E .0202, certification and licensing, *e.g.*, N.C. Gen. Stat. § 14045.1(a), and measures to assure adequate medical staffing and staff training, *e.g.*, 10A NCAC 14E .0310(b), (d), and facility layout, *e.g.*, 10A NCAC 14E .0203, 14E .0204. For example, the Facility Safety Requirements subject abortion-performing facilities to the same sanitation rules governing hospitals, nursing homes, and other regulated institutions. 10A NCAC 14E .0202. For a facility where patients are undergoing medical screenings and invasive procedures, disinfecting and sanitizing are reasonable means to protect patients from infection. This is, of course, why the same requirements apply to hospitals, nursing homes, and other facilities. The Facility Safety Requirements also ensure that hallways, doorways, and elevators can accommodate stretchers. 10A NCAC 14E .0203, 14E .0204, 14E .0205. Though everyone hopes that emergencies are rare, they are a known risk in medical procedures, including abortion. In case of an emergency, these provisions safeguard patients by facilitating their quick transport.

Plaintiff abortion providers, on the other hand, do not like the expense or inconvenience of meeting these patient-protecting requirements. *See* Compl. ¶ 201 (PPSAT complaining that the Facility Safety Requirements would require "renovation" of three of its centers), ¶ 208 (complaining that the Facility Safety Requirements "complicate the process of moving to a new location"), ¶ 209 (complaining that the Facility Safety Requirements regarding nursing staff might

sometimes mean they cannot move as many abortion patients quickly through the system). Plaintiff abortion providers will incur costs to meet the various patient-safety requirements *because Plaintiffs' clients receive a benefit*. Their interests are irreconcilably at odds.

The conflict is equally apparent in the Informed-consent Period, during which a woman might decide to continue her pregnancy and keep her baby after taking a couple nights to consider the weighty decision and the information provided in the Informed-consent Information Process. This brief time is an invaluable benefit to any woman who ends up as a happy mother instead of hastily making an irreversible decision ending the life of her child. But the same decision is a loss to the plaintiff abortion providers, which lose out on business income and a client. On each of the challenged laws, plaintiff abortion providers do not have "a personal stake in the outcome of the controversy" in the sense that standing requires. *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879. This inherent conflict with the third parties' "personal stake," instead of "sharpen[ing] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," skews the presentation of arguments in a way that undermines the very point of standing. *Id.*

2. An abortion advocacy group does not have organizational standing to sue for individual women's rights.

Neither does SisterSong have standing to bring claims on behalf of its members, which it claims "include[] people of reproductive age whose fundamental constitutional rights and bodily autonomy, along with their health and safety, are

threatened by the Abortion Restrictions." Compl. ¶ 37. Organizational standing is limited in North Carolina. SisterSong must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (quoting *Hunt v. Wash. State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977)). SisterSong fails on at least two of these requirements — and has not even alleged that it satisfies any of them.

First, SisterSong's members would not have standing to sue in their own right because their speculative interest does not amount to an injury. North Carolina law requires "injury in fact" for standing. *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993). But SisterSong has not explained what the specific legal "threat" is to this generic group of "people of reproductive age." Dislike of a law is not injury in fact. And the alleged amorphous "injuries" of "psychological, financial, logistical, emotional, and dignitary harms of maintaining an unwanted pregnancy," Compl. ¶ 25, are not enough to "establish a non-speculative, imminent injury-in-fact for purposes of Article III standing," *Beck v. McDonald*, 848 F.3d 262, 267 (4th Cir. 2017) (affirming district court's dismissal of case for lack of standing where plaintiffs alleged speculative future harm). More is required, such as an actual controversy over existing property rights of each and every member. *See Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 167–68, 552 S.E.2d 220,

226–27 (2001) (association of homeowners did not have standing on behalf of individual landowners, without their participation, to challenge restrictive covenants that applied to all deeds in the subdivision).

Second, organizational standing is improper because the claims SisterSong asserts would require the participation of individual members in order to establish the alleged particular burden on their rights and the imminent or actual nature of any "threat." For example, this Court would need to consider, for standing purposes, questions like: Are the individuals pregnant, attempting to get pregnant, or planning an imminent abortion? Individual-specific allegations are required. Further, are their rights unduly impaired, and specifically how do each of these laws actually impede them from obtaining an abortion? For instance, do these individuals lack transportation (and if so, how do they otherwise get from place to place?), or are they completely unable to take off work (and have no days off?), or do they have no available child care? How far do they live or work from the nearest abortion provider?

Plaintiffs' allegations depend on specific and individualized facts about geography, work schedules, access to health care, and financial conditions. Their statewide data about women in general is untethered to any injury, imminent or otherwise. The allegations about women who get "no paid time off or sick leave," or who "must also arrange and pay for childcare while they travel," Compl. ¶ 82, or who will experience an increase in abuse or domestic violence, *id.* at ¶ 25, are not specific to any real person or supported by well-pled facts. The allegation that the

challenged laws "prevent some from obtaining abortions altogether," *id.* at ¶ 88, is not supported by any facts at all, nor is the claim that the laws "forc[e] some patients to continue a pregnancy after they have already decided to terminate," *id.* at ¶ 25. The Complaint identifies no individuals that plan to "use unsafe means to attempt to end their pregnancies" as a result of the laws. *See id.* at ¶ 95. These sweeping allegations are purely speculative and theoretical in a vacuum, and cannot be vetted without the participation of whichever individual SisterSong members actually face such circumstances. An advocacy organization alone cannot provide these necessary facts and testimony to the Court.

3. Plaintiffs do not have standing in their own right.

There is no "automatic right of standing to challenge an abortion regulation and 'imaginary or speculative' fears of prosecution are insufficient to confer standing." *Bryant v. Woodall*, 363 F. Supp. 3d 611, 614 (M.D.N.C. 2019) (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). And "[a] party has no standing to enjoin the enforcement of a statute or ordinance absent a showing that his rights have been impinged or are imminently threatened by the statute." *Bunch v. Britton*, 253 N.C. App. 659, 671, 802 S.E.2d 462, 472 (2017).

The Complaint alleges no "realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297–98 (1979) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). Although plaintiff physicians claim that the statutes "expose[] them to potential licensing penalties, including revocation of their medical license" and "civil damages, as well as a court-ordered prohibition on their ability to provide abortion

care in North Carolina," Compl. ¶ 220, they never allege that they intend to violate any of the statutes, let alone that prosecution is likely or imminent. Moreover, "[i]t is well established that ordinarily an injunction will not lie to restrain the enforcement of a statute, since the constitutionality, defects, or application of the statute may be tested in a prosecution for the violation of the statute." *Bunch*, 253 N.C. App. at 671, 802 S.E.2d at 472. Thus, physician plaintiffs have not shown show a "realistic danger" of enforcement. *Babbitt*, 442 U.S. at 298.

At best, Plaintiffs assert generalized grievances. Their claims must be dismissed for lack of standing "[b]ecause Plaintiffs do not have a constitutionally protected interest in the [subject of the statutes], and because their . . . constitutional challenges assert only generalized grievances." *Byron*, 258 N.C. App. at 381, 813 S.E.2d 455 at 462 (holding that trial court properly dismissed plaintiffs' claims).

C. Plaintiffs' claims are not redressable by the relief sought.

To establish standing in North Carolina courts, plaintiffs must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Teague v. Bayer AG*, 195 N.C. App. 18, 22, 671 S.E.2d 550, 554 (2009). When, as discussed above, Plaintiffs have no injury in fact, then Plaintiffs also cannot establish redressability. The remedy Plaintiffs seek here — striking down duly enacted health-and-safety laws — would not "redress" any alleged injury but instead would give them unjustified relief. *See Marriott*, 187 N.C. App. at 495, 654 S.E.2d at 17 ("The remedies plaintiffs seek are unavailable and inappropriate,

and their claims do not satisfy the third element of standing, which is the redressability of their injury by a favorable decision.").

As to abortion providers wanting to "enjoy the fruits of their labor," the plaintiffs' alleged lack of an expanded market is not a constitutional injury. And striking down these health-and-welfare protections would not guarantee plaintiff abortion providers more "business," anyway. *See, e.g.*, Compl. ¶ 209 (PPSAT claiming it could perform more abortions if not subject to the Facility Safety Requirements, but not considering any other factors in the hypothetical or supporting its claim with factual allegations). "For an injury to be redressable, a favorable decision must not depend 'on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Hamm v. Blue Cross & Blue Shield of N. C.*, No. 05 CVS 5606, 2010 NCBC 14, 2010 WL 5557501, at *5 (N.C. Super. Ct. Aug. 27, 2010) (quoting *Wangberger v. Janus Capital Grp. (In re Mut. Funds Inv. Litig.)*, 529 F.3d 207, 217 (4th Cir. 2008)). Even if this Court enjoined these laws, whether the practicing and aspiring abortion providers expanded their market and acquired more business depends on many independent, external choices. Whether plaintiffs will choose to set up various new abortion services, and whether unknown women across the state choose to use them — all *because of* an injunction — is unpredictable and unknowable.

As to the "abortion rights" substantive due process claim, since plaintiffs have not described any actual injury to any particular woman's right, there is no way that striking down these laws redresses the unspecified injury.

D. Dismissal of the Complaint is independently required because the claims are not ripe.

A claim also must be dismissed under Rule 12(b)(1) when the issues at play are not yet ripe for review. "[H]ypothetical circumstances" suggesting that an event might occur in the future "do not constitute a justiciable case or controversy." *Prop. Rights Advocacy Grp. v. Town of Long Beach*, 173 N.C. App. 180, 183, 617 S.E.2d 715, 718 (2005), aff'd, 360 N.C. 474, 628 S.E.2d 768 (2006). Instead, for a controversy to be ripe there must be "practical certainty" that an event will occur. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 590, 347 S.E.2d 25, 32 (1986). But here there is no allegation that any woman is presently facing hardship based on these laws, much less that hardship would violate her constitutional rights.

The lack of ripeness is especially problematic in a constitutional challenge attacking a duly enacted law. The requirement that courts may only review ripe cases or controversies "applies with special force to prevent the premature litigation of constitutional issues." *Granville Cty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 625, 407 S.E.2d 785, 791 (1991).

II. The Complaint should be dismissed for failure to state a claim.[2]

A court must dismiss a complaint under Rule 12(b)(6) when the plaintiffs "[f]ail[ ] . . . to state a claim upon which relief can be granted." N.C. R. Civ. P. 12(b)(6). Dismissal under 12(b)(6) is appropriate "if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990); *accord Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546 (2018). When considering a motion to dismiss under Rule 12(b)(6), this Court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (cleaned up). Because Plaintiffs' Complaint on its face suffers from a fatal absence of both facts and law to support the claims, it fails. *See Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

A. Plaintiffs fail to make the allegations required for a facial challenge.

In North Carolina courts, "a facial challenge to a law is 'the most difficult challenge to mount successfully.' " *Affordable Care, Inc. v. N.C. St. Bd. of Dental Exam'rs*, 153 N.C. App. 527, 539, 571 S.E.2d 52, 60 (2002) (quoting *State v.*

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[2] Legislative Defendants believe that this Court should reserve ruling on their Rule 12(b)(6) motion in order for the 12(b)(6) motion to be considered by a three-judge panel appointed pursuant to N.C. Gen. Stat. § 1-267.1(b2). *See* N.C. R. Civ. P. 42(b)(4) (providing a case must be resolved by a three-judge panel when "a determination as to the facial validity of an act of the General Assembly must be made").

Thompson, 349 N.C. 483, 491, 508 S.E.2d 277, 281 (1998)). North Carolina courts "seldom uphold facial challenges because it is the role of the legislature, rather than th[e] Court, to balance disparate interests and find a workable compromise among them." *Town of Boone*, 369 N.C. at 130, 794 S.E.2d at 714.

A facial challenge to a statute must allege "that there are *no* circumstances under which the statute might be constitutional." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (emphasis added); *accord, e.g.*, *Affordable Care*, 153 N.C. App. at 539, 571 S.E.2d at 61 (affirming dismissal of plaintiffs' facial challenge and noting that "[u]nder this facial challenge, we cannot agree that there is no set of circumstances under which the Rule would be valid"). Any lesser showing must fail. "The fact that a statute might operate unconstitutionally under some conceivable set of circumstances" — which is, at best, what Plaintiffs have alleged — "is insufficient to render it wholly invalid." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (cleaned up).

Each of Plaintiffs' claims fails because there are many circumstances in which each the challenged laws are constitutionally applied, as to Count I ("fruits of their own labor"), Count II ("law of the land"), or both. The conceivable constitutional applications are obvious from the face of the Complaint, requiring dismissal.

The Physicians-only Provision is constitutionally applied to all licensed physicians wishing to perform abortions, including plaintiff physicians (Drs. Farris, Deans, and Swartz), who allege that they readily perform abortions in compliance

with this law. *Cf. In re Guess*, 327 N.C. 46, 54, 393 S.E.2d 833, 838 (1990) (statute regulating the medical profession through licensing board is "a valid exercise of the police power for the public health and general welfare"). It is also constitutionally applied to, for example, the 25,000 or so women who had abortions in North Carolina last year alone, at the hands of licensed physicians. *See* Compl., ¶ 98 & n. 44 (23,018 abortions in North Carolina in 2018).

The In-person Appointments Provision is constitutionally applied to, for example, all plaintiff physicians and all AWC plaintiffs, each of whom alleges that they currently perform abortions using in-person dispensation of chemical abortion pills. It is also constitutionally applied to the thousands of women undergoing chemical abortions with a doctor physically present each year in North Carolina. *See* Compl. ¶ 99 & n. 45 (10,108 chemical abortions performed in North Carolina in 2018).

Similarly, the Facility Safety Requirements are constitutionally applied, according to the allegations in the Complaint, to six out of nine PPSAT clinics and *all* AWC plaintiffs, which currently operate in compliance with these safety provisions. *See* Compl. ¶¶ 12–13. These regulations are also constitutional as applied to the tens of thousands of women across North Carolina who have undergone abortions at clinics that are in compliance.

The statute providing supportive information and resources, N.C. Gen. Stat. § 90-21.82(1)–(2), is readily applied as a constitutional part of informed consent for women who want or need information on social welfare programs, medical

assistance benefits, and child support as they consider their options for terminating or continuing the pregnancy. *See Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 882 (1992) (requiring that a pregnant woman be informed of the availability of information relating to the consequences to the fetus of abortion or childbirth does not interfere with constitutional right of privacy) (plurality op.). This may include, as here, "risks and alternatives to the procedure . . . that a reasonable patient would consider material to the decision" *Id.* at 902. And it includes such information "even when those consequences have no direct relation to her health." *Id.* at 882.

Plaintiffs would strike down this statute which, they fail to mention, provides a pregnant mother with the gestational age of her unborn child, N.C. Gen. Stat. § 90-21.82(1)(c), and the opportunity to see and hear a sonogram of her unborn child, N.C. Gen. Stat. § 90-21.82(1)(e) — truthful and relevant information that is fundamentally part of valid informed consent to abortion, *see Stuart v. Camnitz*, 774 F.3d 238, 252, 253 (4th Cir. 2014) (provisions for disclosing gestational age and offering sonogram under North Carolina informed-consent law "closely resemble" the statutes upheld in *Casey*).

Finally, the Informed-consent Period would be constitutionally applied to the overwhelming majority of women who are capable of arranging their schedules to attend doctor's appointments, as well as women who are not immediately certain about their decision upon receiving substantial, significant information about the procedure. Indeed, the U.S. Supreme Court has upheld as constitutional brief

informed-consent periods, and a majority of states require them,[3] as reasonable measures to safeguard public health and welfare.

1. Plaintiffs fail to state a claim for relief on Count I because the laws satisfy rational-basis review.

Plaintiffs allege in Count I that the challenged statutes violate Article I, Section 1 of the North Carolina Constitution, which guarantees "the equality of all persons" and recognizes that "all persons" possess "certain inalienable rights," such as "liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." To state a claim under that provision, Plaintiffs must allege — with sufficient facts and without bare conclusory statements — (i) that the laws restrict a protected interest under the North Carolina Constitution, or (ii) that the laws do not satisfy rational-basis review. *Rhyne*, 358 N.C. at 180, 594 S.E.2d at 15. Plaintiffs adequately allege neither.

Rational-basis review is appropriate here, where the challenged laws do not touch on a special interest protected under the state constitution. *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 135, 478 S.E.2d 501, 505 (1996). Courts have never interpreted the North Carolina Constitution to guarantee a right to abortion.

[3] *See* Ala. Code § 26-23a-4; Ariz. Rev. Stat. § 36-2153; Ark. Code § 20-16-903; Ga. Code § 31-9A-3; Idaho Code § 18-609(4); Ind. Code § 16-34-2-1.1(a); Kan. Rev. Stat. § 65-6709(a); Ky. Rev. Stat § 311.725(1)(a); La. Rev. Stat. § 40:1299.35.6(B)(3); Mich. Comp. Laws § 333.17015(3); Minn. Stat. § 145.4242(a)(1); Miss. Code § 41-41-33; Mo. Stat. § 188.027; Neb. Rev. Stat. § 28-327(1); N.C. Gen. Stat. § 90-21.82; N.D. Code § 14-02.1-03; Ohio Rev. Code § 2317.56(B); Okla. Stat. § 1-738.2(B); 18 Pa. Cons. Stat. § 3205(a)(1); S.C. Code § 44-41-330(C); S.D. Codified Laws § 34-23A.10.1; Tenn. Code § 39-15-202(d)(1); Tex. Health & Safety Code § 171.012(a)(4); Utah Code § 76-7-305(2)(a); Va. Code § 18.2-76(B); W. Va. Code § 16-2I-2(b); Wis. Code § 253.10(3)(c).

Regardless, none of the challenged laws strike at a woman's abortion decision itself but rather provide reasonable guidelines for how a medical procedure is performed. For this reason, and setting aside the deficiencies in standing, plaintiff SisterSong cannot state a claim on Count I because women of reproductive age do not have a right to unregulated abortion on demand.

Likewise, plaintiff abortion providers do not have a protected right to make abortion "more accessible." Compl. ¶ 44. To the contrary, as the Court of Appeals has explained in a case dealing with the regulation of medical facilities, "[t]hese constitutional protections [contained in Art. I §1] have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Hope—A Women's Cancer Ctr. v. State*, 203 N.C. App. 593, 603, 693 S.E.2d 673, 680 (2010). Stated differently, the "fruits of their own labor" provision does not guarantee citizens may engage in any unregulated form of occupational activities that they wish. It simply assures that the state will not deprive citizens of property rights by interfering with "the *enjoyment* of the fruits of their own labor." N.C. Const. art. I §1 (emphasis supplied).

"A single standard determines whether the [regulation] passes constitutional muster imposed by both section 1 and the 'law of the land' clause of section 19: the [regulation] must be rationally related to a substantial government purpose." *Treants Enters., Inc. v. Onslow Cty.*, 320 N.C. 776, 778–79, 360 S.E.2d 783, 785 (1987). The challenged laws pass this lenient test because the purpose of the

statutes is squarely within the scope of the state's police power, as clear under precedent. "[T]here is no right to practice medicine which is not subordinate to the police power of the states." *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 159, 499 S.E.2d 462, 468 (1998) (quoting *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926)). "The state's discretion in that [dental] field extends naturally to the regulation of all professions concerned with health. This power is as extensive as is necessary for the protection of the public health, safety, morals, and general welfare." *Armstrong*, 129 N.C. App. at 160, 499 S.E.2d at 468 (cleaned up). Indeed, "the state has the power to do whatever may be necessary to protect public health, safety, morals, and the general welfare." *Treants Enters.*, 320 N.C. at 778, 360 S.E.2d at 785.

Plaintiffs have not alleged, as would be required to state a claim for relief, that the laws challenged are not rationally related to public health, safety, and general welfare. And they could not. Laws requiring that physicians be licensed and physically present when performing abortions is "reasonably designed to accomplish this [public health] purpose." *Warren*, 252 N.C. at 694, 114 S.E.2d at 664. Same, too, for the requirements ensuring that non-hospital abortion facilities meet basic physical standards to facilitate quick patient transport in case of emergency. And, of course, traditional informed-consent requirements relating to medical procedures are hardly irrational; they have a long history and are "firmly entrenched in American tort law." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

The legislature, not Plaintiffs, gets to decide whether regulations are "unnecessary." "When the most that can be said against [an ordinance] is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere." *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938). In those instances, "the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare." *Id.*

The General Assembly could permissibly conclude that the challenged regulations are in fact reasonable. State legislatures around the nation have done just that. The statutes Plaintiffs call "not medically justified" have been determined to be good public policy in dozens of states. For example, 39 states ensure that only licensed physicians perform abortions,[4] and 19 states require that chemical abortions be dispensed in person.[5] The reasonableness of these laws is apparent, and a much higher showing is required for Plaintiffs to state a claim upon which relief can be granted.

a. The legislature receives even greater rational-basis deference in technical and medical occupations.

Although interpreted broadly, "[t]he basic constitutional principle of personal liberty and freedom embrac[ing] the right of the individual to be free to enjoy the

[4] Guttmacher Institute, *An Overview of Abortion Laws* (Dec. 9, 2020), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

[5] Guttmacher Institute, *Medication Abortion* (Dec. 1, 2020), https://www.guttmacher.org/state-policy/explore/medication-abortion.

faculties with which he has been endowed by his Creator, to live and work where he will, to earn his livelihood by any lawful calling, and to pursue any legitimate business, trade or vocation," is still a rational basis test. *Warren*, 252 N.C. at 693, 114 S.E.2d at 663. "[T]he constitutional provision guarantees to an individual only the right to pursue *ordinary* and *simple* occupations free from government regulation." *Teleflex Info. Sys., Inc. v. Arnold*, 132 N.C. App. 689, 692, 513 S.E.2d 85, 87 (1999) (emphasis added). Plaintiff practicing and aspiring abortion providers are not being deprived of fruit of their labor. They are instead asking to do new types and variations of labor to make more fruit — and not in simple or ordinary occupations.

North Carolina courts have dismissed "fruits of their own labor" claims aimed at striking down reasonable regulations, especially in technical professions tied to public health and safety. For example, in *Sanders v. State Personnel Commission*, 197 N.C. App. 314, 677 S.E.2d 182 (2009), the Court of Appeals affirmed the dismissal of equal protection and fruit-of-their-labor challenges to provisions limiting the status and benefits of certain state workers. The Court of Appeals explained why dismissal was required: "The regulations at issue here do not exhibit a situation in which the legislature is interfering with an 'ordinary and simple occupation,' nor is the employment scheme intended to be 'free from governmental regulation.'" *Id.* at 326–27, 677 S.E.2d at 191 (cleaned up). Here, as in *Sanders*, "nothing in the governmental action at issue has arbitrarily or irrationally limited plaintiffs' rights to earn a livelihood. Plaintiffs have not been barred from earning a

living, denied pay for their employment, or deprived of bargained-for benefits." *Id.* at 327, 677 S.E.2d at 191.

Such regulations are presumed constitutional. "When . . . the legislative body undertakes to regulate a business, trade, or profession, courts assume it acted within its powers until the contrary clearly appears." *Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968). "As long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute." *Rhyne*, 358 N.C. at 181, 594 S.E.2d at 15 (cleaned up).

Although North Carolina courts have struck down severe occupational restrictions in lay professions like photography and real estate, North Carolina law has never protected the fundamentally health- and safety-related profession of medicine from reasonable regulation. When striking down a regulation of photographers as unreasonably restrictive, the North Carolina Supreme Court contrasted regulations of the artistic profession with permissible regulation of professions like medicine: "Undoubtedly, the State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949).

Unlike the restriction on photographers, which forbade working as a photographer unless the state approved one's "competency, ability and integrity"

through the "require[d] proof as to the technical qualifications, business record and moral character," here, "[w]here the practice of a profession or calling requires special knowledge or skill and intimately affects the public health, morals, order, or safety, or the general welfare, the legislature may prescribe reasonable qualifications for persons desiring to pursue such profession or calling, and require them to demonstrate their possession of such qualifications by an examination on the subjects with which such profession or calling has to deal as a condition precedent to the right to follow such profession or calling." *Id.* at 766, 770, 51 S.E.2d at 732, 735 (collecting cases).

To be sure, "[a]n exertion of the police power inevitably results in a limitation of personal liberty, and legislation in this field 'is justified only on the theory that the social interest is paramount.' " *Id.* at 769, 51 S.E.2d at 734–35. "If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm." *Id.* at 769–70, 51 S.E.2d at 735.

b. The "fruit" Plaintiffs claim to be missing is a product of external, independent market choices, not a result of the statutes.

In any event, the "restrictions" Plaintiffs complain of are largely and admittedly of their own making, or are external market conditions — not a result of the challenged laws:

- A "nationwide shortage of abortion-providing physicians," Compl. ¶ 141 — none of the challenged laws limit the number of abortion-providing physicians that can practice in North Carolina or the number of locations and number of hours they can provide abortions.
- "[S]kyrocketing levels of student-loan debt," *id.* ¶ 142 — Plaintiffs offer zero tie between the cost of student loans and the challenged North Carolina safety laws.
- Allegations that "harassment and stigma" prevent physicians from choosing to perform abortions, *id.* — Plaintiffs offer no such factually-supported allegation and no allegation that anything in North Carolina's health laws causes the alleged "harassment and stigma."
- Plaintiff PPSAT chooses to employ only "two staff physicians" statewide. *Id.* ¶ 144.
- Claim that safety regulations "in some cases outright prevent[] the provision of abortion services," but immediately admit this is because three PPSAT facilities choose not to operate in buildings that meet the medical-safety standards. *Id.* ¶ 12.

In sum, Plaintiffs want this Court to strike down the laws so they can have "a much larger pool of providers," *id.* ¶ 148, when it is Plaintiffs' own business decisions contributing to the current business model. The solution is not a facial

challenge to longstanding commonsense state laws, nor is it the state's responsibility to cater to Plaintiffs' market frustrations.

2. Because the laws pass rational basis review on the allegations, Plaintiffs also have not stated a claim for relief on Count II.

Plaintiffs' second claim for relief likewise fails because Plaintiffs have not alleged facts showing that the challenged laws are not rationally related to health, safety, and general welfare. The standard for Plaintiffs' "law of the land" claim is the same as for their "fruits of their labor" claim: the regulation "must be rationally related to a substantial government purpose." *Treants Enters.*, 320 N.C. at 778–79, 360 S.E.2d at 785. As shown above, the regulations bear some rational relation to health and safety, and Plaintiffs have failed to meet their threshold burden to adequately allege otherwise.

The only exception to rational basis review for such a claim is if Plaintiffs alleged a suspect class or fundamental right. *Rhyne*, 358 N.C. at 180, 594 S.E.2d at 15. They have not. Neither abortionists nor aspiring abortionists are a suspect class. Nor are women of reproductive age a suspect class. The Complaint does not allege that any suspect classes are at issue, aside from a single reference to the laws having a "disproportionate[] impact [on] women and/or are based on and perpetuate outdated and impermissible sex and gender stereotypes." Compl. ¶ 265. But the North Carolina Supreme Court has already held that "indigent women who need medically necessary abortions" are not a suspect class. *See Rosie J. v. N. C. Dep't Human Res.*, 347 N.C. 247, 251, 491 S.E.2d 535, 537 (1997) (applying rational

basis). And as explained above, North Carolina courts have never recognized a fundamental right to abortion in the State Constitution.

"[T]he rational basis test is the lowest tier of review, requiring a connection between the statute and 'a conceivable,' . . . or 'any,' legitimate governmental interest." *Rhyne*, 358 N.C. at 181, 594 S.E.2d at 16 (citations omitted). The court is to merely decide whether "distinctions which are drawn by a challenged statute . . . bear some rational relationship to a conceivable legitimate governmental interest." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980).

As with Count I, Count II fails to allege, with even minimal factual support, that there is no rational relationship between the challenged laws and a valid public health purpose. The rational relationship is plain. For example, on the Facility Safety Requirements there is a "plausible policy reason," if not several, for ensuring that ambulatory surgical centers performing life-ending surgeries and administering life-ending drugs meet building codes consistent with other medical facilities hosting serious procedures — i.e., the same reasons hospitals and other ambulatory surgical centers must meet those standards. Plaintiffs' attempted distinctions are meritless. Abortion carries a different risk and is different in kind than the "intrauterine device ('IUD') insertions, Pap tests, and cervical cancer screenings" Plaintiffs use as comparators. Compl. ¶ 12. None of those minor procedures involve, among other things, ending a human life through poisoning or dismemberment. Regardless, just because the General Assembly could, but has not

chosen to regulate these procedures or plastic surgery in the exact same way, *see* Compl. ¶ 196, does not mean its regulation of abortion is irrational.

Similarly, the licensing requirements for medical facilities that Plaintiffs complain of, including recordkeeping and facilities-operations requirements, *id.* at ¶13, are quintessential functions of the state regulatory role in protecting the health, welfare, and safety of its citizens. Plaintiffs offer no basis to conclude that regulating medical facilities in this way is irrational and untethered to any legitimate governmental objective.

As to the 72-hour informed-consent provision, a brief informed-consent period is reasonable for momentous, permanent life decisions. North Carolina law, as a matter of good public policy, provides for similar waiting periods in other, and less serious, contexts. *E.g.* N.C. Gen. Stat. § 50-6 (one-year waiting period for divorce); *cf.* N.C. Gen. Stat. § 48-3-608(a) (7-day revocation period for giving up child for adoption); N.C. Gen. Stat. § 93A-45 (5-day cancellation period for purchasing a timeshare); N.C. Gen. Stat. § 66-121 (72-hour right to cancel contract with gyms and health clubs).

Moreover, information in the informed-consent statute is rationally related to the legitimate governmental objectives of (i) ensuring women undergo serious medical procedures only if fully informed of risks and alternatives, and (ii) protecting "potential" life. *See Casey*, 505 U.S. at 846 ("the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." Informing women of the

gestational age of their unborn child, offering a description of baby's development, and providing information on public assistance for the alternative choice of continuing pregnancy all advance these legitimate objectives.

CONCLUSION

The General Assembly enacted — in some instances, years ago — regulations in matters of public health and welfare, providing reasonable protections for women undergoing abortions and ensuring that the medical profession is appropriately regulated. Plaintiffs' facial constitutional attack on these health and safety statutes fails on every possible level: justiciability, standing, ripeness, and on the merits. For each and every one of these reasons, Plaintiffs' claims must be dismissed.

Respectfully submitted this the 6th day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 2021, the foregoing document is being electronically filed using the Court's electronic filing system, which will automatically send notification to all users who are registered with that system, and that additionally the document is being served by electronic mail and U.S. Mail to the following addresses:

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