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,**

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

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; **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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv
INTRODUCTION 1
ARGUMENT 3
I. Plaintiffs lack standing. 3
A. State law controls the standing inquiry, and confirms that Plaintiffs must show a direct injury to proceed, which they cannot do. 5
B. Plaintiffs do not allege deprivation of a constitutionally guaranteed personal right. 7
C. Plaintiffs do not have third-party standing to represent hypothetical women. 9
D. Plaintiff SisterSong cannot establish associational standing. 11
II. Plaintiffs have not stated a claim upon which relief can be granted. 13
A. The North Carolina Constitution does not recognize abortion as a fundamental right. 13
B. The challenged laws satisfy rational basis review. 16
C. Plaintiffs fail to allege that the challenged laws are facially unconstitutional. 19
CONCLUSION 22

TABLE OF AUTHORITIES

Cases:

Affordable Care, Inc. v. North Carolina State Board of Dental Examiners,
153 N.C. App. 527, 571 S.E.2d 52 (2002) 20, 21

Armstrong v. North Carolina State Board of Dental Examiners,
129 N.C. App. 153. 499 S.E.2d 462 (1998) 17-18

Beaufort County Board of Education v. Beaufort County Board of Commissioners,
363 N.C. 500, 681 S.E.2d 278 (2009) 20, 21

Bunch v. Britton,
253 N.C. App. 659, 802 S.E.2d 462 (2017) 7

Byron v. Synco Properties Inc.,
258 N.C. App. 372, 813 S.E.2d 455 (2018) 7

Cheek v. City of Charlotte,
273 N.C. 293, 160 S.E.2d 18 (1968) 18

Cherry Community Organization v. City of Charlotte,
257 N.C. App. 579, 809 S.E.2d 397 (2018) 9-10

Committee to Elect Dan Forest v. Employees Political Action Committee,
2021 WL 403933 (N.C. Feb. 5, 2021) ..... *passim*

Corum v. University of North Carolina Through Board of Governors,
330 N.C. 761, 413 S.E.2d 276 (1992) 16

Davis v. New Zion Baptist Church,
258 N.C. App. 223, 811 S.E.2d 725 (2018) 3

Guilford County, ex rel. Thigpen v. Lender Processing Services, Inc.,
2013 WL 2387708 (N.C. Super. Ct. May 29, 2013) 10

Hope—A Women's Cancer Center. v. State,
203 N.C. App. 593, 693 S.E.2d 673 (2010) 17

In re Appeal of Parker,
214 N.C. 51, 197 S.E. 706 (1938) 19

June Medical Services L.L.C. v. Russo,
140 S. Ct. 2103 (2020) 11

Mazurek v. Armstrong,
520 U.S. 968 (1997) 15

M.E. v. T.J.,
2020 WL 7906672 (N.C. App. Dec. 31, 2020) 16, 21

Malloy v. Cooper,
356 N.C. 113, 565 S.E.2d 76 (2002) 7-9, 12

Rhyne v. K-Mart Corporation,
358 N.C. 160, 594 S.E.2d 1 (2004) 18

River Birch Associates v. City of Raleigh,
326 N.C. 100, 388 S.E.2d 538 (1990) 11-13

Standley v. Town of Woodfin,
362 N.C. 328, 661 S.E.2d 728 (2008) 14-16

State v. Ballance,
229 N.C. 764, 51 S.E.2d 731 (1949) 19

State v. Bryant,
359 N.C. 554, 614 S.E.2d 479 (2005) 2, 20-22

State v. Poe,
40 N.C. App. 385, 252 S.E.2d 843 (1979)..... 16

Texfi Industries, Inc. v. City of Fayetteville,
301 N.C. 1, 269 S.E.2d 142 (1980) 17

Treants Enterprise, Inc. v. Onslow County,
320 N.C. 776, 360 S.E.2d 783 (1987) 17-18

Tully v. City of Wilmington,
370 N.C. 527, 810 S.E.2d 208 (2018) 9

United States v. Stevens,
559 U.S. 460 (2010)..... 22

Other Authorities:

Black's Law Dictionary (11th Ed. 2019)..... 11

Remove Barriers/Gain Access to Abortion Act, S.B. 167 (2021) 2

INTRODUCTION

Plaintiffs seek to eliminate North Carolina's reasonable abortion regulations—which were passed by the People's representatives and mirror those in longstanding and routine operation elsewhere in myriad sovereign states—by dressing up a political disagreement as a constitutional injury. Because there is no direct injury here to any cognizable right, there is no standing.

Plaintiffs cobble together various North Carolina and federal precedents in hopes of remedying the obvious standing infirmities of their case. But resort to those federal precedents has been foreclosed by the North Carolina Supreme Court's recent, and comprehensive, treatment of standing doctrine under North Carolina law in *Committee to Elect Dan Forest v. Employees Political Action Committee*, 2021 WL 403933 (N.C. Feb. 5, 2021). In that case, the Supreme Court confirmed that for cases sounding in state law, standing must be analyzed under the North Carolina Constitution, not the United States Constitution—thwarting Plaintiffs' extensive reliance on federal cases.

Elect Forest also confirmed that a "direct injury" is required when a party "directly attack[s] the validity of a statute under the constitution," as Plaintiffs do here. *Id*. at 30. This holding dooms Plaintiffs' case because they cannot show a direct injury to their own interests, and cannot stand in for third parties or sustain associational standing under extant North Carolina law more broadly. Plaintiffs' lack of standing warrants dismissal.

In the process of attempting their end run around the legislative process, Plaintiffs give their political game away. Their Complaint, for instance,

variously labels the challenged regulations "unnecessary," ¶ 5, "unjustified" and "onerous," ¶ 12, "expensive," ¶ 13, "time-consuming," ¶ 24, and "stigmatizing," ¶ 255. In their Opposition, Plaintiffs carry on, characterizing the challenged regulations as "constrain[ing]," Opp'n. at 7, and lacking in "demonstrable health benefit[s]," *id.* at 27. This is the vocabulary of a legislative advocate, not that of a claimant properly seeking redress for a legally cognizable injury.

Coincidentally, just two days ago on March 1, a bill was filed in both chambers of the General Assembly seeking to repeal the laws Plaintiffs challenge here.[1] The proposed legislation underscores why Plaintiffs' policy grievance is not one for the courts. Medical practice regulation is the province of the legislature and, as shown by the competing point of view expressed in the new bill, the wisdom of abortion laws is a decision for accountable, elected officials. It is not something a court should divine from constitutional text.

It would be inappropriate to permit Plaintiffs a second bite at the legislative apple—in a court of law, of all places—simply because they failed to achieve their policy preferences in the first place, *and* when they are presently in the process of legislating these very issues again. After all, it is axiomatic that "[t]he role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials," which is precisely what Plaintiffs want here. *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005).

[1] Remove Barriers/Gain Access to Abortion Act, S.B. 167 (2021), available at https://www.ncleg.gov/Sessions/2021/Bills/Senate/PDF/S167v0.pdf (last accessed March 2, 2021).

But there is more. Plaintiffs have failed to state a claim upon which relief can be granted, because their substantive claims founder as well, beginning with their unsupported presumption that the North Carolina Constitution counts abortion as a fundamental right. It does not.

Plaintiffs also fail to overcome the high bar to succeed on a facial claim under North Carolina law. As even a cursory review of their Complaint reveals, many constitutional applications exist for the regulations Plaintiffs challenge.

Finally, Plaintiffs cannot show that these reasonable regulations do not pass rational basis review, especially because when dealing with the health, safety, and welfare of its citizens, North Carolina's police power is at its apogee. What's more, the challenged laws are rationally related to legitimate state interests. These fatal shortcomings mean that Plaintiffs have failed to state a claim upon which relief can be granted, and the case must be dismissed for this reason as well.

ARGUMENT

I. Plaintiffs lack standing.

Plaintiffs misunderstand North Carolina standing doctrine, essentially positing it as a more expansive adjunct to federal standing principles. They cite to *Davis v. New Zion Baptist Church*, 258 N.C. App. 223, 225, 811 S.E.2d 725, 727 (2018), for the proposition that North Carolina's "standing jurisprudence is broader than federal law," and then proceed to cherry-pick various federal standing cases to establish that because Plaintiffs would ostensibly have standing in federal court for their claims, they must have standing here under North Carolina law. *E.g.*, Pls.' Br. 5 (citing to *Planned*

Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 62 (1976), and *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007)); 8 (citing to *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 n.29 (1974), *Poe v. Ullman*, 367 U.S. 497, 502 (1961), and *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)); 11 (relying on "United States Supreme Court precedent" to establish third-party standing in North Carolina).

Plaintiffs' approach suffers from three fatal flaws. First, it ignores the fact that even as *Davis* stated this principle in general terms, it confirmed that North Carolina law still requires "a legally cognizable injury" which can be "remed[ied]" by a court. Thus, even the state cases Plaintiffs cite work to affirm the constitutionality of the challenged laws. *Davis*, 258 N.C. App. at 225, 811 S.E.2d at 727–28 (citing *Goldston v. State*, 361 N.C. 26, 34–35, 637 S.E.2d 876, 881-82 (2006)).

Second, Plaintiffs ignore their own admission that controlling law establishes that "the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine." Pls.' Br. 4 (quoting *Goldston*, 361 N.C. at 35, 637 S.E.2d at 882).

Third, and most important, Plaintiffs fail to account for the Supreme Court's recent explication of North Carolina standing doctrine in *Elect Forest*, which occupies the field and establishes once and for all that standing under North Carolina law is to be analyzed separate and apart from federal standing principles, because North Carolina is a sovereign state. The standing analysis that this Court must conduct flows from the North Carolina Constitution and

this state's interpretation of it, not the federal constitution and the federal courts' interpretation of that separate document.[2]

Under *Elect Forest*, Plaintiffs' case cannot survive, as they have no direct injury to any cognizable legal interest.

A. State law controls the standing inquiry, and confirms that Plaintiffs must show a direct injury to proceed, which they cannot do.

On February 5, 2021, the North Carolina Supreme Court in *Elect Forest* confirmed that the standing inquiry flows from the North Carolina Constitution. 2021 WL 403933, at *6.

More specifically, North Carolina standing principles do not incorporate standards stemming from the well-known federal "cases and controversies" requirement. *Id.* at 21. That is because Article III standing under the federal Constitution is different than the North Carolina Constitution's requirements. *Id*. at 26–27.

Finally, the Supreme Court reaffirmed that those parties who "directly attack[ ] the validity of a statute under the [North Carolina] constitution" must "show they [have] suffered a 'direct injury.'" *Id*. at 30. "The personal or direct injury required in this context could be, but is not necessarily limited to, deprivation of a constitutionally guaranteed personal right or an invasion of his property rights." *Id*. (cleaned up).

Elect Forest has several consequences for Plaintiffs' standing arguments. First, by repudiating federal standing requirements for state-court challenges to North Carolina statutes, *Elect Forest* deprives Plaintiffs the opportunity to

[2] This was true when Legislative Defendants filed their Motion to Dismiss, but it is undeniable in the wake of *Elect Forest*.

resort to federal abortion cases to gain standing. The North Carolina Constitution controls, and that document imposes *different* standing requirements, not those which are *more relaxed* than the federal standards, as Plaintiffs would have it.[3] Any other conclusion would contravene the Supreme Court and subject North Carolina's considered and well-established jurisprudence to the whims of random federal courts throughout the country.

In addition, by requiring a "direct injury" to establish standing, *Elect Forest* eliminates Plaintiffs' attempt to gain standing by positing speculative harms on behalf of themselves and others not even before this Court, which harms may or may not ever come to fruition.

Put simply, Plaintiffs brought this case under the North Carolina Constitution. But that choice brings with it the consequence that North Carolina standing doctrine, and it alone, applies here. It is insufficient for Plaintiffs to cite "to decades of U.S. Supreme Court precedent," Pls' Br. 5, to satisfy North Carolina's particular demands, which are the product of hundreds of years of development.

Moreover, Plaintiffs do not have standing simply because they disagree with the law or do not want to comply with it—if that were the standard, then North Carolina courts would be in permanent session, functioning as a second forum for any party losing a policy fight in the General Assembly. Plaintiffs must rather show that that they have suffered the "infringement of a legal

[3] Plaintiffs are wrong when they say that "a plaintiff in North Carolina court has standing to sue when she would have standing in federal court." Pls.' Br. 5. As *Elect Forest* shows, North Carolina law and Article III are distinct, requiring separate analyses.

right." *Id.* at 31. But they cannot do this, either on their own behalf or that of others.

B. Plaintiffs do not allege deprivation of a constitutionally guaranteed personal right.

Under North Carolina law, "[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) (emphasis added). Moreover, in the ordinary case like this one "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. These guidelines are particularly appropriate here, where at most Plaintiffs have asserted generalized grievances, and the statutes they challenge do not give them a "constitutionally protected interest" to support their claims. *Byron v. Synco Properties, Inc.*, 258 N.C. App. 372, 381, 813 S.E.2d 455, 462 (2018).

Plaintiffs have no legal right to operate free of reasonable state regulations, to a preferred business model, to a more profitable business, or to increase the number of abortions they can perform. These are not the types of "constitutionally guaranteed personal . . . or . . . property rights" contemplated by *Elect Forest* as sufficient to garner standing. 2021 WL 403933 at *30.

Plaintiffs nonetheless summarily assert that they "have suffered a direct injury," Pls.' Br. 6, relying principally on *Malloy v. Cooper*, 356 N.C. 113, 565 S.E.2d 76 (2002), as support. But the drastically different facts in *Malloy* show that Plaintiffs lack standing here, for two independent reasons.

In *Malloy*, the plaintiff challenged the constitutionality of a statute a district attorney invoked in threatening to prosecute the plaintiff for a business he had been running for over a decade. *Id*. at 116. The plaintiff in *Malloy* was found to have standing because when he filed his claim there was an unmistakable threat of "imminent or threatened prosecution" relating to a behavior in which he was already engaged and for which he had a clear property interest that would be injured if the threat was carried out. *Id*. at 118.

First, the North Carolina Supreme Court held that the case was not speculative because "the uncontroverted evidence shows that plaintiff has conducted the pigeon shoots in the same manner for [ ] an extended period of time, and with [ ] regularity and frequency." *Id*. at 116. Second, the plaintiff could "show that the statute's enforcement, if unconstitutional, w[ould] deny him his *fundamental right to conduct a lawful business or earn a livelihood*." *Id*. at 118 (emphasis added). This was because the plaintiff had alleged that he "receive[ed] fifty percent of his income from conducting the pigeon shoots," and had alleged he had "expended $500,000 in capital improvements to his land in furtherance of the pigeon shoots." *Id*. Accordingly, the Court concluded that "a substantial portion of plaintiff's livelihood" had been threatened. *Id*.

Here, Plaintiffs lack imminence of injury. That alone is enough to defeat standing. In *Malloy*, for instance, the district attorney lodged a real threat which if acted upon promised severe financial consequences for the plaintiff. *Id*. at 114. In contrast, here there is no threat of enforcement, imminent or otherwise, in large part because Plaintiffs are not engaged in the prohibited conduct. Their businesses are not already built and reliant upon it—which

means that the statutes' enforcement deprives them of nothing. Instead, Plaintiffs merely express a desire to do something additional in their practices, and speculate that they would do something additional, if the law did not bar or regulate that activity. *Malloy* does not support such a standing theory, and *Elect Forest* expressly forecloses it.

Stated differently, Plaintiffs do not assert the deprivation of a constitutionally guaranteed personal right, like the fundamental right to conduct a lawful business or earn a livelihood. Plaintiffs are not losing out on the "fruits of the[ir] labor," precisely because they have not engaged in the labor and been deprived of any recompense related to it. The future "labors" limned in their Complaint, along with any deprivations connected thereto, are merely speculative, and such imaginings will not support a claim to legal injury. *Tully v. City of Wilmington*, 370 N.C. 527, 538, 810 S.E.2d 208, 217 (2018) ("To demonstrate a property interest under the [Constitution], a party must show more than a mere expectation; he must have a legitimate claim of entitlement." (quoting *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994))).

Having failed to proffer a direct injury that is credibly threatened, Plaintiffs lack standing to bring this case in their capacities as providers.

C. Plaintiffs do not have third-party standing to represent hypothetical women.

Even before *Elect Forest* confirmed that a "direct injury" is required to lodge a constitutional challenge, North Carolina had an exceedingly high bar to grant third-party standing, especially in challenges to reasonable regulations like the one Plaintiffs attack here. *See, e.g.*, *Cherry Cmty. Org. v.*

City of Charlotte, 257 N.C. App. 579, 582, 809 S.E.2d 397, 400 (2018) ("courts 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"); *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) (third-party standing requires a plaintiff to have "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").[4]

Under that standard, Plaintiffs already lacked standing for various reasons, because they did not have standing in their own right; did not have close relationships with unknown and unidentified women; could not show such women couldn't bring their own claims; and had a conflict of interest in seeking to represent such women to boot, in that Plaintiffs were challenging laws designed to protect women from Plaintiffs themselves. *See* Leg. Defs.' Br. 7–12.

In the wake of *Elect Forest*, however, Plaintiffs' predicament is even worse, because their reliance on federal cases to circumvent North Carolina standing requirements has been foreclosed. Thus, their extensive reliance on *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), and the federal cases

[4] "Plaintiffs' attempts to distinguish *Cherry Community* and *Thigpen* are unavailing. These cases most closely represent the limited governing caselaw on third-party standing in North Carolina, and should thus guide the Court here. For the same reason, to the extent that Plaintiffs correctly assert that those cases are distinguishable and should not apply here, Plaintiffs would have no legal basis for asserting third-party standing, since they have presented no other North Carolina authorities supporting the doctrine.

it collects, is unavailing. *See* Pls' Br. 11–15. Plaintiffs must instead show that they have standing under North Caroline law, fully accounting for *Elect Forest*'s "direct injury" requirement, which they cannot do.

Indeed, a "direct injury" is one that is "immediate," which in turn means "not separated by other persons or things" and "without an intervening agency." Black's Law Dictionary (11th Ed. 2019). *Elect Forest*'s "*direct* injury" requirement by its terms precludes the Plaintiff providers any ability to stand in for unknown and unidentified patients. Any injury to those patients would be only direct to them, and not to the Plaintiff providers, defeating their claim to third-party standing under North Carolina law.[5]

D. Plaintiff SisterSong cannot establish associational standing.

In North Carolina, associational standing exists when an association's "(a) . . . 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)). Legislative Defendants have already shown that the associational standing test is not met here. *See*

[5] Plaintiffs' reliance on *June Medical* to establish third-party standing is not without problems itself, even apart from the controlling force of *Elect Forest*. In that case, a plurality of the United States Supreme Court concluded that the state of Louisiana had waived its argument against third-party standing. And Justice Thomas, in dissent, noted that "there is no controlling precedent that sets forth the blanket rule advocated for by plaintiffs here—i.e., abortionists may challenge health and safety regulations based solely on their role in the abortion process." *June Medical*, 140 S. Ct. 2103, 2143 (2020) (Thomas, J., dissenting).

Leg. Defs.' Br. at 12–15. And *Elect Forest's* "direct injury" requirement only makes that conclusion that much stronger.[6]

First, even if SisterSong had proffered one woman affected by the challenged laws (it did not), the amorphous injuries asserted by Plaintiffs—including the "psychological, financial, logistical, emotional, and dignitary harms of maintaining an unwanted pregnancy"—do not meet the "direct injury" threshold required by *Elect Forest* and exemplified by *Malloy*. Plaintiffs assert that "every SisterSong member in North Carolina capable of pregnancy faces a threatened injury," and that its members "are likely to become pregnant and seek abortion care." Pls.' Br. 16. But these are the very type of speculative, non-immediate, non-direct, contingent-based predictions which not only fail to show any injury, but explain why North Carolina law looks askance at associational standing (and third-party standing) and requires more than conclusory statements of harm (which are insufficient for standing in federal court, too). Contrary to Plaintiffs' assertions, there is nothing "distinct and palpable" about a predicted injury which may or may not happen sometime in the foreseeable or distant future. Pls.' Br. at 16–17.

Second, the challenged regulations are reasonable exercises of North Carolina's police power as to the health, safety, and welfare of its citizens, and they do not regulate SisterSong in any way. SisterSong makes no claim that it exists to impede health regulations meant to protect women of childbearing age, and it therefore has no claim to any injury in its own right.

---

[6] Plaintiffs' citations to federal cases interpreting *Hunt*, *see* Pls.' Br. 15 n.12, are inapposite in the wake of *Elect Forest*.

Therefore, because neither SisterSong itself nor any of its members has shown a direct injury, it lacks associational standing. *See River Birch*, 326 N.C. at 129, 388 S.E.2d at 555 (cleaned up) ("To have standing the complaining association or one of its members must suffer some immediate or threatened injury.").

***

Because Plaintiffs lack standing to bring claims in their own right as providers, as representative of women under third-party standing, or as associations representing their members, Plaintiffs' case must be dismissed.

II. Plaintiffs have not stated a claim upon which relief can be granted.

As noted, Leg. Defs.' Br. at 19 n.2, the 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").

A. The North Carolina Constitution does not recognize abortion as a fundamental right.

Despite their admission that "North Carolina courts have not specifically held there is a state constitutional right to abortion," Pls.' Br. 24, Plaintiffs nonetheless seek to use federal case law to convince this Court to depart from North Carolina jurisprudence to create a new right to abortion. *See id*. at 24–26 (arguing that a right to abortion should be discovered by implication from federal cases and from state cases recognizing the general right to privacy and

dignity). This Court should reject that gambit—Plaintiffs have brought this case under the North Carolina Constitution, and no court has ever declared abortion a right under the North Carolina Constitution.[7]

That is not surprising, given that North Carolina courts are loath to declare rights absent a clear and compelling warrant, which does not exist here. In fact, to determine whether a "liberty interest" is protected, North Carolina courts look at whether it is "'objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the liberty interest at issue] were sacrificed.'" *Standley v. Town of Woodfin*, 362 N.C. 328, 331–32, 661 S.E.2d 728, 730 (2008) (quoting *Glucksberg v. Washington*, 521 U.S. 702, 720–21 (1997)). This exceedingly high hurdle, coupled with the North Carolina Supreme Court's admonition that courts must "tread carefully before recognizing a fundamental liberty interest," *id.*, means that Plaintiffs' attempt to create a right to abortion based on assorted strands of federal and state case law fails.[8] None of those cases addresses whether North Carolina recognizes a

[7] In fact, the case law that even arguably touches upon the matter, albeit only tangentially, leads to the conclusion that abortion is emphatically not a right in North Carolina. *See, e.g.*, *See Rosie J. v. N.C. Dep't Human Res.*, 347 N.C. 247, 251, 491 S.E.2d 535, 537 (1997) (concluding that "indigent women who need medically necessary abortions" are not a suspect class, and declaring that "hav[ing] the State pay for an abortion is not a right protected by the North Carolina Constitution and is not a fundamental right").

[8] Plaintiffs' citation to other states, which ostensibly recognize a fundamental right to abortion, *see* Pls' Br. 31 n.25, only serves to highlight the fact that North Carolina has not found abortion to be a fundamental right under its own constitution. To the extent that other states' laws are relevant, countless laws like the ones Plaintiffs challenge here have been enacted and upheld in courts around the nation. *See* Leg. Defs.' Br. 23 n.3 (collecting statutes); *see also, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (upholding physicians-only abortion law).

right to abortion, and none wrestles with the objective test required to declare a fundamental right under North Carolina law.

Plaintiffs say that there must be a protected right to abortion in North Carolina because "North Carolina state courts do not interpret a parallel state constitutional provision to provide lesser rights than are available federally." Pls.' Br. 32 (emphasis in original). First, as already stated, there is no parallel right to abortion recognized by courts interpreting the North Carolina Constitution. Second, declaring a right by proxy, as Plaintiffs effectively suggest this Court do, would violate the strictures laid down by the Supreme Court in *Standley*. The question is not what some federal courts have said about abortion, or how other state courts have dealt with the matter, but whether the right to abortion is "objectively, deeply rooted in [North Carolina's] history and tradition and implicit in the concept of ordered liberty" in North Carolina. *Standley*, 362 N.C. at 331–32, 661 S.E.2d at 730. It is not, and that is why no court has ever held such.

And Plaintiffs' grab bag of cases do not come close to establishing abortion as a fundamental right either.

- Plaintiffs cite *M.E. v. T.J.*, No. COA18–2045, 2020 WL 7906672 (N.C. App. Dec. 31, 2020), for the proposition that the liberty interests recognized by the North Carolina Constitution "include the right to privacy and dignity." Pls. Br. 25. But the general right "to live as one chooses" which was recognized in *M.E.*, 2020 WL 7906672 at * 10), does not encompass the specific right to abortion by implication. Plaintiffs' suggestion that it does contravenes *Standley*, which requires courts assessing whether a right is fundamental to first "carefully describe the liberty interest the complainant seeks to have protected." 362 N.C. at 331, 661 S.E.2d at 730. Plaintiffs have instead intentionally resorted to nebulous

concepts of liberty and dignity in hopes this Court will divine a right where none exists. That is improper.

- Plaintiffs cite to *State v. Poe*, 40 N.C. App. 385, 252 S.E.2d 843 (1979), for the proposition that a "zone of privacy" exists, and that abortion is surely within that zone. *Poe* interpreted a claim under the United States Constitution, so it says nothing about whether North Carolina recognizes abortion as a right. And Plaintiffs' citation to *Poe* suffers the same infirmity as its citation to *M.E.*: it sidesteps the rigorous analysis required by *Standley*.

- Finally, Plaintiffs cite to *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992), to show that courts give the North Carolina "Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens," and that the North Carolina "Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum* negates Plaintiffs attempt to have this Court announce a right to abortion. Not only does it also fail the *Standley* test, but if it is true that the North Carolina Constitution is indeed more specific than the federal constitution, then it would have explicitly delineated abortion as a right. That it did not undercuts Plaintiffs' argument.

***

Because abortion is not a constitutional right in North Carolina, Plaintiffs' attempt to posit their claims as deserving of strict scrutiny fail. As a consequence, the challenged laws need only pass rational basis review. Plaintiffs have not adequately alleged that the laws do not pass that rudimentary check, which means that they have also failed to allege that the laws are facially invalid.

B. The challenged laws satisfy rational basis review.

Because the challenged laws do not touch on a special interest or implicate a fundamental right, Plaintiffs must allege that the laws do not

satisfy rational-basis review, to survive dismissal. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). This means that so long as the laws "bear some rational relationship to a conceivable governmental interest," they pass constitutional muster. *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). Plaintiffs have failed to allege such defects.

Plaintiffs instead cast reasonable regulations as constitutional deprivations. But North Carolina courts have consistently upheld the power of the state to exercise its police powers, especially when the state protects the health and welfare of its citizens, even in those cases implicating the constitutional provisions relied upon by Plaintiffs here. *See, e.g.*, *Hope—A Women's Cancer Ctr. v. State*, 203 N.C. App. 593, 603, 693 S.E.2d 673, 680 (2010) (holding that Art. I §1 permits the state to "regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose"); *Treants Enters., Inc. v. Onslow Cty.*, 320 N.C. 776, 778–79, 360 S.E.2d 783, 785 (1987) (holding that "[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," and declaring that "the state has the power to do whatever may be necessary to protect public health, safety, morals, and the general welfare"); *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 468 (1998) (holding that the power to regulate "all professions concerned with health . . . is as extensive as is necessary for the protection of the public health, safety, morals, and general welfare"). Moreover, such ordinary exercises of the police

power are presumed to be constitutional. *See Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E.2d 18, 21 (1968) (courts assume legislative regulations of professions are valid "until the contrary clearly appears"); *Rhyne*, 358 N.C. at 181, 594 S.E.2d at 15 (cleaned up) (courts may not invoke due process to "disturb . . . [a] statute" supported by rational basis).

Faced with these precedents, which predictably grant generous leeway to the legislature in exercising its legitimate police powers and impose only a rational-basis test, Plaintiffs variously argue that abortion is a fundamental right requiring strict scrutiny, that their claims implicate suspect classes, or that at the very least a heightened form of rational-basis review must be applied because the challenged laws "evidence a desire to harm them." Pls.' Br. 26–40 & n. 30. But as has already been established, abortion is not a right in North Carolina, and certainly not a fundamental one. Further, no suspect class obtains here. *See* Leg. Defs.' Br. 31–32. And finally, far from evidencing a desire to harm Plaintiffs, the challenged laws are routine measures aimed at regulating the medical profession with the intention of protecting North Carolina's citizens. *See id.* at 26, 32–33.

Plaintiffs cite *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), for the proposition that they have been prevented from pursuing their livelihoods. Pls.' Br. 38. But that would be like a surgeon arguing she is prevented from pursuing her livelihood because North Carolina requires her to use sterilized instruments and to fully disclose the surgery's complications to the patient before beginning the procedure. Nothing has prevented Plaintiffs from pursuing their livelihoods; their complaint is that they cannot pursue their

livelihoods as freely as they might like. Indeed, their Complaint reflects disagreement with the choices made by the legislative branch in the exercise of its police powers. *See* Pls.' Br. 22, 38 (characterizing the challenged laws as "unnecessary," "expensive," "time-consuming," and "arbitrary").

Ballance actually supports the challenged law, because it clearly provides "the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society." 229 N.C. at 769, 51 S.E.2d at 734. Moreover, the North Carolina Supreme Court has already foreclosed the ability of claimants like Plaintiffs to dress up their policy disagreements in legal garb to defeat legitimate exercises of the state's police power. *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938) ("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.").

Plaintiffs' complaint fails to allege that the challenged laws, for either count, lack a rational relation to a legitimate state interest. It must therefore be dismissed.

C. Plaintiffs fail to allege that the challenged laws are facially unconstitutional.

As masters of their own complaint, Plaintiffs chose not only to bring their claims solely under North Carolina law, thereby causing themselves insuperable standing problems, but they also chose to bring only facial challenges to the statutes in question, which is fatal to the complaint's survival. In North Carolina, as in many other jurisdictions, "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. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281 (1998)).

To succeed on a facial challenge, a party 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). Even if there exists "some conceivable set of circumstances" where a law might operate unconstitutionally, such an infirmity "is insufficient to render it wholly invalid." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (cleaned up). Based on these unforgiving strictures, Plaintiffs have failed to meet their heavy burden. Instead, Plaintiffs seek to change the rules of the game.

First, notwithstanding Legislative Defendants' showing of the multitude of situations in which the challenged laws can be constitutionally applied, *see* Leg. Defs.' Br. 20–23, Plaintiffs summarily declare that they have properly pleaded facial claims because strict or heightened scrutiny applies, Pl. Br. 34–35. But as explained above, neither strict nor heightened scrutiny applies, and Plaintiffs should not be permitted to smuggle in their incorrect "fundamental right to abortion" assertion to defeat North Carolina's high bar with respect to facial claims.

Second, Plaintiffs seek to evade the obstacles properly imposed by North Carolina law on facial claims—which seek to extinguish the operation of duly enacted laws—by simply restating the law in a way which does violence to the jurisprudence governing the issue, and defies logic to boot. Put simply,

Plaintiffs argue that in analyzing facial challenges, courts must look only to the group "who will be affected by the Restrictions," Pls.' Br. 41, which group Plaintiffs then self-interestedly define as those who disagree with the laws and do not want to comply with them.

As established by *Affordable Care*, *Beaufort County*, and *State v. Bryant*, North Carolina law does not allow that. The law requires that "no circumstances" exist in which the law can be constitutionally applied, not just those circumstances which pertain to the "relevant groups" represented or created by Plaintiffs. This axiom was recently reaffirmed by the Court of Appeals, which in *M.E.* stated that a facial challenge involves a "plaintiff's contention that a statute is incapable of constitutional application *in any context*," without distinguishing between those groups who see the law as a restriction and those who don't. *M.E. v. T.J.*, 2020 WL 7906672, at *6 (emphasis added). Plaintiffs' attempt to rewrite North Carolina law in order to reduce their burden to establish facial relief must therefore be rejected as a matter of law.

As a matter of logic, Plaintiffs' argument fails as well. The whole point of erecting a high barrier to facial relief is to prevent the presumptively constitutional acts of the legislature from being overturned too easily, because it is the role of the legislature and not the courts "to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests." *Bryant*, 359 N.C. at 565, 614 S.E.2d at 486 (quoting *Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986)). If plaintiffs were permitted to circumvent this barrier by simply announcing that the only

relevant group in the analysis was their own, facial relief would be the rule and not the exception, laws would become presumptively unconstitutional, and courts would be required to routinely "second-guess" the legislature.

***

Asking the Court to second-guess the legislature is what makes this case a nonjusticiable political question. Plaintiffs argue that the challenged laws are "bad" or "unwise," but that question is "not for the courts—it is a political question." *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960). The remedy for Plaintiffs' grievances about "what the public welfare requires," *id.* at 696, 114. S.E.2d at 666, and their venue for seeking "policy-based changes," *Rhyne*, 358 N.C. at 169, 594 S.E.2d at 8, lies in the General Assembly—where a bill is now pending.

CONCLUSION

For the reasons stated in their Motion to Dismiss and here in reply, Legislative Defendants respectfully request that this Court dismiss Plaintiffs' claims in their entirety.

Respectfully submitted this 3rd day of March, 2021

/s/ Nathan A. Huff
Nathan A. Huff
N.C. Bar No. 40626
Jared M. Burtner
N.C. Bar No. 51583
Phelps Dunbar LLP
4140 Parklake Avenue, Suite 100
Raleigh, North Carolina 27612
nathan.huff@phelps.com
(919) 789-5300; (919) 789-5301 (Fax)

Kevin H. Theriot (AZ Bar #030446)*
ktheriot@adflegal.org
Elissa Graves (AZ Bar #030670)*
egraves@adflegal.org
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020; (480) 444-0028 (Fax)

Denise M. Harle (GA Bar #176758)*
dharle@adflegal.org
Alliance Defending Freedom
1000 Hurricane Shoals Rd. NE
Ste D-1100
Lawrenceville, GA 30043
(770) 339-0774; (480) 444-0028 (Fax)

* *Admitted to appear pro hac vice*

Attorneys for Defendants Moore and Berger

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 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:

Jaclyn Maffetore
jmaffertore@acluofnc.org
Kristi Garunke
kgraunke@acluofnc.org
Elizabeth Barber
ebarber@acluofnc.org
ACLU of North Carolina Legal Foundation
P.O. Box 28004
Raleigh, NC 27611-8004
Attorneys for All Plaintiffs

Susan Lambiase
susan.lambiase@ppfa.org
Hana Bajramovic
hana.bajramovic@ppfa.org
Planned Parenthood Federation of America
123 William St., 9th Floor
New York, NY 10038
Attorneys for Planned Parenthood South Atlantic, Katherine Farris, M.D., and Anne Logan Bass, F.N.P.

Caroline Sacerdote
csacerdote@reprorights.org
Autumn Katz
akatz@reprorights.org
Jen Samantha D. Rasay
Center for Reproductive Rights
199 Water St., 22nd Floor
New York, NY 10038
Attorneys for A Woman's Choice of Charlotte, Inc.; A Woman's Choice of Greensboro, Inc.; and A Woman's Choice of Raleigh, Inc.

Brigitte Amiri
bamiri@aclu.org
Clara Spera
cspera@aclu.org
Alexa Kolbi-Molinas
akolbi-molinas@aclu.org
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Attorneys for Plaintiffs Dr. Elizabeth Deans, Dr. Jonas Swartz, and SisterSong Women of Color Reproductive Justice Collective

Michael T. Wood
mwood@ncdoj.gov
Kathryn H. Shields
kshields@ncdog.gov
Special Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Counsel to Defendants AG Stein, DeBerry, David, Freeman, West, Woodall, Crump, Merriweather, O'Neill, Williams, DHHS Sec. Cohen, NC Medical Board President Murphy, and NC Nursing Board Chair Harrell, all in his or her official capacities

/s/ Nathan A Huff
Nathan A. Huff
N.C. Bar No. 40626
Phelps Dunbar LLP
4140 Parklake Avenue, Suite 100
Raleigh, North Carolina 27612
nathan.huff@phelps.com
(919) 789-5300; (919) 789-5301 (Fax)