STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
WAKE COUNTY	20 CVS 500147

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,	)	
Plaintiffs,	)	
v.	)	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**
TIMOTHY K. MOORE, as Speaker of the North Carolina House of Representatives, in his official capacity, et al.,	)	(Hearing Set for Week of March 15)
Defendants.	)	

NOW COME Defendants Attorney General Stein, District Attorneys DeBerry, David, Freeman, West, Woodall, Crump, Merriweather, O'Neill, and Williams, the North Carolina Medical Board by and through President Murphy ("Medical Board"), the North Carolina Board of Nursing by and through Chair Harrell ("Board of Nursing"), and the Department of Health and Human Services by and through Secretary Cohen ("DHHS"), all in his or her official capacities, by and through the undersigned Special Deputy Attorneys General, and without waiving any motions or defenses not set our herein, respectfully submit this Memorandum of Law in Support of their Motion to Dismiss pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(6).

Plaintiffs do not have any injury, nor are they threatened with any imminent future injury, because the abortion laws they seek to challenge have not been enforced in North Carolina for more than 30 years. Plaintiffs lack standing to assert facial constitutional challenges against these five state laws, and this Court lacks subject matter jurisdiction. Accordingly, as demonstrated below, the Complaint should be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

INTRODUCTION

Plaintiffs Planned Parenthood South Atlantic ("PPSAT") and A Woman's Choice ("AWC") are medical clinics in North Carolina which provide healthcare services including abortions. Plaintiffs Farris, Deans and Swartz are licensed physicians who provide medical services to patients including abortion care. Compl. ¶¶ 32-42. Plaintiff Bass is a Family Nurse Practitioner at PPSAT who provides reproductive care to patients including follow-up care to abortion patients. She alleges she is currently undergoing training necessary to perform aspiration (surgical) abortions. *Id*., ¶ 35. The clinics and medical providers purport to assert constitutional claims on behalf of themselves, their staff, and their patients. *Id*. Plaintiff SisterSong is a non-profit membership organization that advocates for "the human right to reproductive justice." *Id*., ¶ 36; *see also id.,* ¶ 37. SisterSong purports to assert claims on behalf of itself and its members. *Id*., ¶ 37.

Plaintiffs initiated this case to assert facial challenges under the North Carolina Constitution to five current provisions of North Carolina law. Plaintiffs do not assert any claims under the United States Constitution or federal law.

The Challenged Abortion Laws

The five challenged provisions are included in the "Woman's Right to Know Act" and codified in N.C. Gen. Stat. § 90-21.82 *et seq*. and § 14-45.1. The provisions are the following:

- Qualified Physicians May Perform Lawful Abortions, under Sections 14-45.1(a), (g).[1] State law provides that only qualified physicians may perform abortions. Advance Practice Clinicians ("APCs"), including nurse practitioners, certified nurse midwives and physician's assistants, are not permitted to perform aspiration abortions or medication abortions. Plaintiffs allege that APCs are permitted to perform nearly identical functions in other contexts, including miscarriage care. Compl. ¶¶ 7-8, 106-161.

- Physical Presence Requirement for Medication Abortion, under Section 90-21.82(1)(a).[2] Telemedicine is used widely in North Carolina, but Plaintiffs assert that state law prevents providers performing abortions from using telemedicine with patients. Specifically, state law requires the physician to be physically present when the first pill is administered for a medication abortion. Compl. ¶¶ 9-11, 162-71.

- DHHS Annual Inspection of Abortion Clinics, under Section 14-45.1(a).[3] Plaintiffs that are clinics allege that non-hospital-affiliated providers that provide abortions, including them, are required to have certain physical attributes they believe to be onerous and unjustified. The Complaint includes allegations about 10A NCAC 14E .0203-.0207 and .0307. Compl. ¶¶ 12, 198-209. For example, Plaintiffs challenge state law requirements that abortion clinics have 60-inch wide hallways, elevators and doorways that can accommodate stretchers, and specific HVAC standards. Compl. ¶¶ 12-14, 192-212.

- 72-Hour Waiting Period, under Section 90-21.82(1)-(2).[4] Except for medical emergencies, State law requires that patients must receive counseling and then wait at least 72 hours to receive an abortion. Plaintiffs allege state law does not require a waiting period for any medical service except abortion. Compl. ¶¶ 15-19, 213-236.

- Counseling Requirement, under Section 90-21.82(1)-(2).[5] Healthcare providers that perform abortions must give certain mandatory information to patients seeking abortions (*e.g.*, explaining that social welfare programs are available, and that a mother can seek support of the child from the father). Plaintiffs who are medical providers allege this requirement harms the doctor-patient relationship and ignores patient-centered care. Compl. ¶¶ 20-23, 237-256.

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[1] In their Complaint, Plaintiffs refer to this statutory provision as the "Advanced Practice Clinician Ban," or the "APC Ban."

[2] Plaintiffs refer to this statutory provision as the "Telemedicine Ban."

[3] Plaintiffs refer to this statutory provision as the "Targeted Regulation of Abortion Provider Scheme," or "TRAP Scheme."

[4] Plaintiffs refer to this statutory provision as the "72-Hour Mandatory Delay."

[5] Plaintiffs refer to this statutory provision as the "Biased Counseling Requirement."

In this memorandum, the five laws for which Plaintiffs raise facial constitutional challenges will be referred to collectively as the "Challenged Laws."

Defendants are the Attorney General, the District Attorneys of nine prosecutorial districts in which the clinics and medical provider Plaintiffs perform healthcare services including abortions, the President of the Medical Board, the Chair of the Nursing Board, the Secretary of DHHS, and two representatives of the General Assembly. All have been named in their official capacities only. Compl. ¶¶ 45-59. Each of these Defendants has been named based upon his, her or its statutory authority to enforce one or more provisions of the Challenged Laws, including authority to initiate criminal, civil, administrative, regulator or licensure proceedings.

LEGAL STANDARDS

Standing "is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)). It is "a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." *In re T.B.*, 200 N.C. App. 739, 742, 685 S.E.2d 529, 531–32 (2009) (alteration in original) (citations and internal quotation omitted). "Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which plaintiff bears the burden of proof …." *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51 (citations omitted).

Plaintiffs have the burden of establishing the elements of standing. *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). A plaintiff establishes standing by showing facts that, if accepted as true, would demonstrate the existence of jurisdiction. *American Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002) ("[P]laintiffs have the burden of proving that standing

exists."). Each plaintiff is required to "demonstrate standing separately for each form of relief sought." *Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d. at 52 (2002) (quoting *Friends of Earth, Inc. v. Laidlaw Env. Serv.*, 528 U.S. 167, 185 (2000)).

A defendant may properly challenge a plaintiff's standing under either Rule 12(b)(1) or Rule 12(b)(6). *Raja v. Patel*, No. 16 CVS 4472, 2017 NCBC LEXIS 25, * 11, 2017 WL 1129981, *5 (N.C. Super. Ct. March 23, 2017). "Whether challenged as a failure to state a claim ... or a challenge to [plaintiffs'] standing ... the question before the Court is the same: whether [plaintiffs] have alleged that they suffered an injury." *Id.* (quoting *Banyan Mezzanine Fund II v. Rowe*, 2016 NCBC LEXIS 38, at *26, n.57, 2016 WL 2753996 (N.C. Super. Ct. May 10, 2016)). "Mere conclusory allegations in the complaint are insufficient to support jurisdiction." *Id.* at *12 (referring to the Rule 12(b)(6) standard of review) (quoting *Burgess v. Charlottesville Sav. & Loan Ass'n*, 477 F.2d 40, 43 (4th Cir. 1973)); *see also Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 493, 751 S.E.2d 227, 233 (2013) (well-pleaded material allegations are taken as true; the court is "not, however, required to accept mere conclusory allegations, unwarranted deductions of fact, or unreasonable inferences as true").

Standing demands "'that the plaintiff[s] have been injured or threatened by injury or have a statutory right to institute an action.'" *Bruggeman v. Meditrust Co., L.L.C.*, 165 N.C. App. 790, 795, 600 S.E.2d 507, 511 (2004) (quoting *In re Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986)). "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); *see, e.g.*, N.C. R. Civ. P. 12(h)(3) ("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.").

In *Neuse River Foundation*, our Court of Appeals explained that injury sufficient to invoke the Court's jurisdiction requires a plaintiff to establish three elements:

> (1) An "injury in fact" – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
>
> (2) That the injury is fairly traceable to the challenged action of the defendant; and
>
> (3) It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Neuse River Found., 155 N.C. App. at 114, 574 S.E.2d at 52 (quoting *Lujan*, 504 U.S. at 560-61).

To be real and imminent, as opposed to hypothetical or speculative, an injury must "'proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.'" *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (citing *Lujan*, 504 U.S. at 564, n.2). Plaintiff must demonstrate that the injury in fact is "distinct and palpable—and conversely that it not be abstract or conjectural or hypothetical." *In re Ezzell*, 113 N.C. App. 388, 392, 438 S.E.2d 482, 484 (1994) (citations and internal quotation marks omitted) (dismissing claims for lack of standing because alleged injury was "conjectural or hypothetical"); *see also Arendas v. N.C. High Sch. Ath. Ass'n*, 217 N.C. App. 172, 175, 718 S.E.2d 198, 200 (2011) ("the injury in fact must be particularized and actual, not hypothetical or conjectural"); *Raja*, 16 CVS 4472, 2017 NCBC LEXIS 25, *17, 2017 WL 1129981, * 7 (future injuries must be "imminent" and "certainly impending").

It is not necessary that a party demonstrate that injury has already occurred. A showing of "immediate or threatened injury" will suffice for purposes of standing. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977)). However, the mere "possibility of future injury" is

insufficient to bring the power of a court of law to bear in a case. *Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 906 (1991). *But see Malloy v. Cooper*, 356 N.C. 113, 114, 565 S.E.2d 76, 77 (2002) (under Declaratory Judgment Act, plaintiff had standing to challenge potential, future prosecution under animal cruelty laws, and the injury was "actual and real," where the District Attorney unambiguously threatened "that if given the opportunity, he will prosecute the Plaintiff").

Under Rule 12(b)(6), the standard of review is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 334, 714 S.E.2d 770, 773 (2011) (quotation marks and citation omitted). The Court is "not, however, required to accept mere conclusory allegations, unwarranted deductions of fact, or unreasonable inferences as true." *Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 751 S.E.2d 227, 233 (2013) (citing *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 699 S.E.2d 61, 73 (2008)). Well-pleaded material allegations are taken as true, "but conclusions of law or unwarranted deductions of fact are not admitted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 447-48, 781 S.E.2d 1, 7-8 (2015).

ARGUMENT

I. Plaintiffs Lack Standing and the Court Lacks Subject Matter Jurisdiction.

No Plaintiff in this action has sufficiently alleged that they suffered an injury relating to the five Challenged Laws, nor have they sufficiently alleged they face any immediate or threatened potential injury in the future from these laws. Accordingly, Plaintiffs lack standing, the Court lacks subject matter jurisdiction, and Plaintiffs have failed to state any proper claim upon which relief may be granted. Defendants respectfully ask the Court to dismiss Plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

A. No Plaintiff has Injury Stemming from the Challenged Laws.

It is undisputed that no Plaintiff has been the subject of any criminal, civil or administrative legal proceeding, or a licensure action, or any related investigation, under the Challenged Laws. Nor have Defendants taken enforcement action under these laws against any North Carolina clinic, doctor, nurse, medical provider or organization in more than 30 years. Plaintiffs have no current injury and face no immediate or threatened injury stemming from Defendants by virtue of the Challenged Laws.

Declarations submitted by representatives of the Attorney General, the nine District Attorneys, the Board of Nursing and DHHS confirm that he, she or it has **never** pursued any legal proceeding against a medical clinic, healthcare provider or advocacy organization pursuant to authority codified in one or more of the Challenged Laws. The Declaration submitted by the Medical Board confirms that it found no record of the Medical Board sanctioning any physician or medical provider for performing an illegal abortion since 1986 – more than 30 years ago. These Declarations are submitted as Exhibits 1 through 13 and summarized below.[6]

a. Attorney General Stein has not taken action under § 90-21.88(b).

Plaintiffs named Attorney General Stein as a defendant based on his authority to seek injunctive relief under three of the provisions in question – Physical Presence Requirement for Medication Abortion, the 72-Hour Waiting Period, and the Counseling Requirement. *See* Compl., ¶ 47. N.C. Gen. Stat. § 90-21.88(b) authorizes the Attorney General to seek this civil remedy "against any person who has willfully violated this Article …," and provides that "the injunction

[6] When considering a motion to dismiss for lack of subject matter jurisdiction, a trial court is not limited to the pleadings, "'but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.'" *Burton v. Phoenix Fabricators & Erectors, Inc.*, 194 N.C. App. 779, 782, 670 S.E.2d 581, 583 (2009) (*quoting Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397, *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998)).

shall prevent the abortion provider from performing or inducing further abortions in this State in violation of this Article." *Id*.

Plaintiffs have not alleged, nor can they, that the Attorney General has ever exercised this authority under this law. Nor have they alleged that he has threatened, or is threatening, to do so. To the contrary, based on a review of records of the Department of Justice, the Attorney General has not initiated or participated in any legal action pursuant to N.C. Gen. Stat. § 90-21.88(b). *See* Ex. 1 (Decl. of Melissa A. Lovell, Agency Legal Specialist, NCDOJ), ¶ 4. Nor has the Attorney General initiated or participated in any criminal action pursuant to N.C. Gen. Stat. § 14-44 and/or § 14-45. *Id*., ¶ 5. NCDOJ's search did not find any record indicating that the Attorney General consulted with any District Attorney on these statutes. *Id*.

b. The District Attorneys have not prosecuted cases under §§ 14-44, 14-45, or 14-45.1(a).

The nine District Attorneys, in their official capacities, have statutory authority under N.C. Gen. Stat. §§ 14-44, -45 and -45.1 to prosecute alleged violations of two of the laws being challenged – that only Qualified Physicians May Perform Lawful Abortions as provided by N.C.G.S. § 14-45.1(a), and that DHHS will inspect abortion clinics annually as provided by N.C.G.S. § 14-45.1(a1). Plaintiffs allege that each District Attorney has the authority to prosecute violations of N.C.G.S. § 14-45.1(a) that occur within his or her respective prosecutorial district. Plaintiffs also allege the District Attorneys have authority to prosecute individuals who perform abortions in a facility that is not certified by DHHS as provided by N.C.G.S. § 14-45.1(a1). Compl. ¶¶ 48-56.

As shown in Exhibits 2 through 10, each of the District Attorneys has investigated all available records and information and confirms the following:

- No District Attorney Defendant has ever charged or prosecuted any physician, nurse practitioner, certified nurse midwife or physician assistant with performing an abortion in violation of N.C.G.S. §§ 14-44, -45 or -45.1.
- No District Attorney Defendant is aware of any prior case in which a physician, nurse practitioner, certified nurse midwife or physician assistant was charged with, or prosecuted for, performing an abortion in violation of N.C.G.S. §§ 14-44, -45 or -45.1. Nor has any such action been threatened.
- Local law enforcement has never made a referral to these District Attorney Defendants based upon an act that would constitute a violation of N.C.G.S. §§ 14-44, -45 or -45.1.
- Nor have any of the District Attorney Defendants asked local law enforcement to investigate any physician, nurse practitioner, certified nurse midwife or physician assistant under these statutes.

See Exs. 2-10 (Declarations of District Attorneys Avery Crump, Benjamin R. David, Satana Deberry, Lorrin Freeman, Spencer B. Merriweather, III, James R. O'Neill, William R. West, Todd M. Williams, and James R. Woodall).

c. The NC Medical Board has not taken action relating to an illegal abortion in more than 20 Years.

The President of the Medical Board has been named in his official capacity, based on the Board's statutory authority to license physicians and physician assistants in North Carolina. *See* Compl. ¶¶ 58, 59, 107, 195, 197; *see also* N.C. Gen. Stat. §§ 90-9.1, 90-9.3. In conjunction with the Board of Nursing, the Medical Board also regulates nurse practitioners. *See* N.C. Gen. Stat. §§ 90-18(c)(14), 90-18.2. The Medical Board has statutory authority to place physicians, physician assistants and nurse practitioners on probation, impose other sanctions, or suspend or

revoke their licenses for a variety of acts or conduct, including "[p]roducing or attempting to produce an abortion contrary to law." *Id.* §§ 90-14(a)(2). The Medical Board does not license or regulate medical offices or clinics, but it does investigate allegations, and when appropriate impose professional discipline, related to failures by licensees of the Medical Board to employ standards of acceptable and prevailing medical practice, including standards in regard to sanitation, maintaining equipment in proper working order, and storing, administering, and disposing of medications appropriately.

The Medical Board has submitted a Declaration of R. David Henderson, its Chief Executive Officer since November 2002. *See* Ex. 11, ¶ 2. The Declaration confirms that Medical Board staff researched the issue of whether the Medical Board has ever disciplined a physician or medical provider under N.C. Gen. Stat. § 90-14(a)(2) for performing an illegal abortion. *Id.*, ¶ 4. Based upon an electronic, archival search of minutes from the Medical Board's web site, and with the search limitations described in the Declaration, ¶ 4, the Medical Board confirms to the best of its knowledge that it did not sanction any physician, physician assistant or nurse practitioner for violating N.C. Gen. Stat. § 90-14(a)(2) between 2000 and the present date. *Id.*, ¶ 8. The Medical Board identified one case in 1986 that was prosecuted against a physician under N.C. Gen. Stat. § 90-14(a)(2). *Id.*, ¶ 6. It also found that the Medical Board prosecuted cases under N.C. Gen. Stat. § 90-14(a)(2) prior to the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). *Id.*, ¶ 5.

d. The Board of Nursing has never taken action against a nurse for performing an illegal abortion under § 90-161.37.

The Chair of the Board of Nursing is named in her official capacity. *See* Compl., ¶ 59. The Board of Nursing has statutory authority to place nurses on probation, impose other sanctions, and suspend or revoke licenses for a broad range of activities that might violate any provision of

N.C. Gen. Stat. § 90-171.37 or any rule or regulation promulgated by the Board of Nursing. *See* Compl., ¶ 59, 107, 195, 197.

The only plaintiff subject to the regulatory authority of the Board of Nursing is Plaintiff Bass, a Family Nurse Practitioner. *See* Compl. ¶ 35. The Board of Nursing does not regulate abortion clinics or physicians. Nor does it have any regulatory authority with respect to organizations or associations. Therefore, it logically follows that neither the Plaintiff clinics (PPSAT and AWC), nor the Plaintiff physicians (Farris, Deans, Swartz), nor SisterSong, have any viable claim against the Board of Nursing.

Plaintiff Bass has not alleged that the Board of Nursing has taken any adverse action against her. Compl., ¶ 35. In sworn testimony, the Board of Nursing confirms that it has never received a complaint relating to an alleged illegal abortion in connection with N.C.G.S. § 90-171.37. *See* Ex. 12 (Decl. of Crystal L. Tillman, Board of Nursing), ¶ 6. The Board of Nursing has not engaged in discussions relating to illegal abortions in connection with this statute. *Id.* Nor has the Board of Nursing initiated or pursued any disciplinary matter under N.C.G.S. § 90-171.37 relating to an alleged illegal abortion. *Id.*

e. DHHS has not taken action against an abortion clinic under § 14-45.1(a1) or the administrative code provisions challenged by Plaintiffs.

Plaintiffs named DHHS as a Defendant based upon its statutory authority to license and certify abortion clinics pursuant to N.C. Gen. Stat. § 14-45.1(a1), and its authority to investigate abortion clinics and "deny, suspend, or revoke a certificate" where a clinic does not comply with rules promulgated in 10A NCAC 14E .0101 *et seq*. *See* Compl. ¶ 57. The Complaint includes allegations with respect to the following rules applicable to abortion clinics:

.0203	In multi-story clinics, there must be at least one elevator for patient use, and it must accommodate a stretcher
.0204	The width of patient-use corridors must be no less than 60 inches wide to allow patient evacuation by stretcher
.0205	The minimum width of door to all rooms needing access for stretchers shall be 3 feet.
.0206	The physical plant must meet specified minimum requirements for air supply, exhaust and ventilation
.0207	Clinics must have certain specific, separate areas.
.0307	A licensed RN must organize and supervise the nursing staff; a RN must be on duty while patients are in the clinic

See Compl., ¶¶ 12, 198-209.

DHHS, through its Division of Health Service Regulation ("DHSR"), conducts annual inspections of clinics and ambulatory surgical centers where abortions are performed. *See* Ex. 13 (Decl. of Azzie Conley, DHHS, DHSR), ¶ 5. DHSR also has authority to take administrative action against an abortion clinic that does not comply with applicable regulations under 10A NCAC 14E .0100 *et seq*. *Id*. As explained in the Declaration of DHSR's representative, DHSR's has never taken any action against an abortion clinic pursuant to the provisions that Plaintiffs are challenging here -- 10A NCAC 14E sections .0203, .0204, .0205, .0206, .0207 or .0307. *Id*., ¶¶ 6-7. In other words, DHHS through DHSR has never exercised the regulatory authority that the Clinic Plaintiffs purport to challenge here.[7]

[7] As explained in the Declaration of Ms. Conley, and based upon her investigation, DHSR took two administrative actions in 2013 against woman's clinics in Charlotte and Durham. Ex. 13, ¶¶ 9-10. Those actions was based on findings of noncompliance with sections .0302 (person in authority), .0305 (medical records) and .0309 (laboratory services). *Id.* The Complaint does not address these subsections.

B. Because There is no Injury, Plaintiffs Lack Standing, and Cannot Establish Subject Matter Jurisdiction.

Plaintiffs have not suffered any legally cognizable injury. At most, Plaintiffs have alleged the possibility of a potential injury in the indefinite future. This does not establish an injury in fact sufficient to establish standing or invoke this court's subject matter jurisdiction. *See, e.g., Pierson,* 330 N.C. at 186, 409 S.E.2d at 906 (dismissing claim where "plaintiff had no more than an *expectancy* ... no more than the *possibility* of future injury;" "[u]ntil a party has a real and vested interest in the subject matter of a lawsuit, an action will not lie"); *Raja*, 16 CVS 4472, 2017 NCBC LEXIS 25, * 17, 2017 WL 1129981, * 7 (no standing where plaintiffs alleged only "the possibility of a future injury" and not one that was "certainly impending").

Malloy v. Cooper is instructive. There, the Supreme Court interpreted the Declaratory Judgment Act (which has not been raised here) and whether a threat of a potential, future prosecution was sufficient to confer standing and subject matter jurisdiction. *Malloy*, 356 N.C. 113, 565 S.E.2d 76 (2002). The plaintiff was an individual who owned a gun club, and since 1987 had organized pigeon shoots on his property. *Id*., 356 N.C. at 114, 565 S.E.2d at 77. In 1999, the District Attorney for Granville County "notified the Plaintiff, through counsel, that he considers the [pigeon shoots] to be in violation of N.C.G.S. § 14-360 [the "Cruelty to Animals" statute] and that **if given the opportunity, he will prosecute the Plaintiff**." *Id*., 356 NC at 114, 565 S.E.2d at 77 (emphasis added). Plaintiff filed suit to challenge the application and constitutionality of the statute, and to enjoin enforcement. The Supreme Court explained that declaratory relief is available only "if the plaintiff can demonstrate that a criminal prosecution is imminent or threatened, and that he stands to suffer the loss of either fundamental human rights or property interests if the criminal prosecution is begun and the criminal statute is enforced." *Id*., 356 NC at 117, 565 S.E.2d at 79 (quoting *State ex. Rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d

294, 303 (1984)). The Court concluded that the District Attorney's unambiguous and direct threat of a future prosecution constituted "an actual and real existing controversy between parties having adverse interests …." *Id.*, 356 NC at 116-17, 565 S.E.2d at 79-80. Plaintiff had standing, and dismissal under Rule 12(b)(1) was not appropriate. *Id.*

As demonstrated above, the five laws that Plaintiffs seek to challenge have not been applied or enforced in North Carolina. Unlike the prosecutor in *Malloy*, here the District Attorneys have never threatened to prosecute any Plaintiff under the Challenged Laws. *See* Exs. 2-10. Nor have the Attorney General, the Board of Nursing or DHHS taken action under these laws. See Exs. 1, 12, 13. The Medical Board has not taken an enforcement action under these laws in more than 30 years. *See* Ex. 11. Plaintiffs have not alleged and do not have any legally cognizable injury. The Court should dismiss the Complaint.

II. Plaintiff SisterSong has No Injury, and Lacks Associational or Organizational Standing.

The claims of Plaintiff SisterSong fail for two reasons – both of which require dismissal for lack of standing. First, none of the five Challenged Laws apply in any way to SisterSong. The Complaint alleges that SisterSong is a non-profit membership organization that advocates for "the human right to reproductive justice." *Id.*, ¶ 36; *see also id.*, ¶ 37. Because it is an advocacy organization, rather than a clinic or healthcare provider who performs abortions, the Challenged Laws do not apply to SisterSong. None of the defendants are granted legal or regulatory authority pursuant to the Challenged Laws over SisterSong. "The rationale of [the standing] rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

Second, SisterSong has failed to allege facts to satisfy the 3-part test to establish associational standing. "[A]n association has standing to bring suit on behalf of its members when:

(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.*, 326 N.C. at 130, 388 S.E.2d at 555 (quoting *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977)). SisterSong fails the first and third parts of the River Birch test.

SisterSong alleges its members are women of reproductive age who allegedly are threatened by the Challenged Laws. Comp., ¶¶ 36-37. Importantly, however, the Complaint does not sufficiently allege that the entity or one of its members has "suffer[ed] some immediate or threatened injury." *River Birch*, 326 N.C. at 129, 388 S.E.2d at 555. Nor does it allege there is a member with a "distinct and palpable injury" likely to be redressed by granting the requested relief. *In re Ezzell*, 113 N.C. App. at 392, 438 S.E.2d at 484 (dismissing claims for lack of standing because alleged injury was "conjectural or hypothetical"). It does not sufficiently allege any injury traceable to the Challenged Laws or Defendants' authority under these laws. In other words, the Complaint fails to allege facts that show that a member of SisterSong would have standing to sue in her own right (part 1 of the *River Birch* test). Nor does the Complaint sufficiently allege that neither the claims asserted nor the relief requested require the participation of a member of SisterSong as a plaintiff in this matter (part 3 of the *River Birch* test).

Nor does SisterSong sufficiently allege that it has diverted or may divert financial resources to advocate against the Challenged Laws. Organizational standing is recognized in North Carolina when there is an injury to the organization's ability to carry out its duties, which is traceable to the defendant's conduct and is redressible by the relief sought. *Indian Rock Ass'n, Inc. v. Ball*, 167 N.C. App. 648, 651, 606 S.E.2d 179, 181 (2004). There are several problems with this theory.

First, SisterSong has not alleged that any resources have in fact been diverted, nor that its ability to carry out its duties has diminished. Compl. ¶¶ 36-37. Second, as noted above, SisterSong does not allege that Defendants have taken any action against it, or even that Defendants have statutory authority to do so. Id. For both reasons, Plaintiff SisterSong lacks injury, lacks standing, and has failed to state a claim upon which relief can be granted. The Court should dismiss SisterSong pursuant to Rules 12(b)(1) and 12(b)(6**).**

III. Plaintiff Bass Does Not Have Standing To Challenge the State Statutes That Provide That Only Qualified Physicians May Perform An Aspiration Abortion.

Plaintiff Bass does not have standing to challenge N.C.G.S §§ 14-45 and 14-45.1(a), which provide that only qualified physicians may perform an aspiration abortion, because she has not completed training as a Family Nurse Practitioner to perform that procedure. To have standing to challenge these state laws, Plaintiff Bass must prove that she has suffered an injury in fact that is particularized and actual and not hypothetical or conjectural. *Coker*, 172 N.C. App. at 391, 617 S.E.2d at 310. Plaintiff Bass must also show that the challenged statutes caused her injury. *In re Ezzell*, 113 N.C. App. at 392, 438 S.E.2d at 484 (internal citation omitted). At this time, Plaintiff Bass's alleged injury – that state law prevents her from providing abortion care to her patients in that she is not allowed to perform aspiration abortions – is purely hypothetical.

According to the Complaint, Plaintiff Bass had not completed the training necessary to perform an aspiration abortion. *See* Compl. ¶ 35. Perhaps she will complete this training at some point in the future, or perhaps something will prevent her from completing this training. However, at this time, it is undisputed that Plaintiff Bass is not qualified to perform this procedure. Since she lacks the necessary training, Plaintiff Bass cannot show that she is in immediate danger of sustaining an injury should the statutes that she challenges be enforced against her.

As Plaintiff Bass is not qualified to perform an aspiration abortion, she cannot show that the statutes she challenges have caused her an injury in fact. Therefore, Plaintiff Bass does not have standing to assert a challenge to N.C.G.S. §§ 14-45 and 14-45.1(a) on behalf of herself or her patients. *See Pierson*, 330 N.C. at 186, 409 S.E.2d at 906 (holding that "[u]ntil a party has a real and vested interest in the subject matter of a lawsuit, an action will not lie"). The Court should dismiss Plaintiff Bass's claims pursuant to Rules 12(b)(1) and 12(b)(6).

CONCLUSION

For the reasons demonstrated above, and because Plaintiffs have not suffered any legally cognizable injury, the Court should dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6).

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

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CERTIFICATE OF SERVICE

I hereby certify that 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 will be transmitted by electronic email to the following addresses:

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Dated this the 6th day of January 2021.

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