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, on behalf of itself, its physicians and staff, and its patients; et al.,

Plaintiffs,

v.

TIMOTHY K. MOORE, as Speaker of the North Carolina House of Representatives, in his official capacity; et al.,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO ALL DEFENDANTS' MOTIONS TO DISMISS

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INTRODUCTION

Plaintiffs and their patients and members (collectively, "Plaintiffs") challenge five abortion restrictions ("Abortion Restrictions" or "Challenged Laws") that violate their rights to substantive due process, equal protection, and the fruits of their labor, guaranteed by Article I, Sections 1 and 19 of the North Carolina Constitution. These rights encompass Plaintiffs' fundamental liberty, privacy, and dignity interests—including patients' deeply personal reproductive decisions. The only issue before this Court is whether the Complaint is well-pleaded and states colorable legal claims that the Challenged Laws are unconstitutional. It clearly does. Over the course of 68 pages plus an Appendix, Plaintiffs present concrete facts relating to and injuries that flow from the Abortion Restrictions. Plaintiffs' Complaint alleges that Defendants have enacted and are charged with enforcing the Abortion Restrictions, which obstruct North Carolinians' right to safe, common, and critical health care; deny abortion patients the right to their bodily autonomy; discriminate against and stereotype abortion patients; undermine the clinician-patient relationship; discriminate against abortion providers; and impede health care providers' ability to pursue their livelihoods and enjoy the fruits of their labors. At the pleading stage, all these allegations present cognizable legal claims.

Defendants' motions seriously misconstrue the law.[1] Defendants cannot successfully contest Plaintiffs' standing, which is based on well-settled precedent. Defendants also improperly conflate the direct injury requirement with the ultimate merits of Plaintiffs' case, and incorrectly attempt to evade constitutional review by framing this case as a "political question."

[1] Plaintiffs combine their responses to the Motions to Dismiss submitted by Defendants Attorney General Stein et al. (the "State Defendants") and Defendants Speaker Moore and President Pro Tempore Berger (the "Legislative Defendants") in this single document.

Defendants further fail to recognize that under North Carolina law, the constitutional protections Plaintiffs pleaded are broad in scope and liberally interpreted, with federal rights operating as the constitutional floor. While the Abortion Restrictions deprive people seeking abortions in North Carolina of their fundamental rights and should thus be reviewed under strict scrutiny, Plaintiffs have adequately pleaded all violations of their constitutional rights under any standard of review. Despite Defendants' improper attempt to raise summary judgment arguments in their motions to dismiss, Plaintiffs have easily met the threshold requirements at this early stage of the proceedings, and Defendants' motions should be denied.

BACKGROUND

Plaintiffs challenge five Abortion Restrictions that unconstitutionally infringe upon Plaintiffs' and their patients' or members' substantive due process, equal protection, and fruits of their labor rights, as articulated in Plaintiffs' Complaint:

- **The Advanced Practice Clinician ("APC") Ban**, N.C. Gen. Stat. § 14-45.1(a), (g), which exempts abortions provided by licensed physicians, but not qualified APCs—who are trained clinical professionals such as Physician Assistants ("PAs"), Certified Nurse-Midwives ("CNMs"), and Nurse Practitioners ("NPs")—from North Carolina's general criminalization of abortion. *See* Compl. ¶¶ 7–8, 106–61.
- The **Telemedicine Ban**, N.C. Gen. Stat. § 90-21.82(1)(a), which unnecessarily requires the prescribing clinician to be physically present when the first of the pills necessary for a medication abortion is administered. *See* Compl. ¶¶ 9–11, 162–91.
- The **Targeted Regulation of Abortion Providers ("TRAP") Scheme**, N.C. Gen. Stat. § 14-45.1(a), which singles out non-hospital-affiliated abortion providers, such as Planned Parenthood South Atlantic ("PPSAT") and the A Woman's Choice ("AWC")

Clinics and their staff, to meet onerous requirements. *See* Compl. ¶¶ 12–14, 192–212; 10A N.C. Admin. Code 14E.0203–.0204, .0206.

- The **72-Hour Mandatory Delay**, N.C. Gen. Stat. § 90-21.82(1)–(2), which requires abortion patients to wait a minimum of 72 hours after receiving state-mandated counseling before obtaining an abortion (except in a medical emergency). *See* Compl. ¶¶ 15–19, 213–36.
- The **Biased Counseling Requirement**, N.C. Gen. Stat. § 90-21.82(1)–(2), which requires state-scripted counseling for every abortion patient, regardless of circumstance. *See* Compl. ¶¶ 20–23, 213–21, 237–56.

STANDARD OF REVIEW

Defendants move to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction under N.C. Gen. Stat. § 1A–1, Rule 12(b)(1), and for failure to state a claim under N.C. Gen. Stat. § 1A–1, Rule 12(b)(6). In deciding a motion to dismiss under Rule 12(b)(1), "the court need not confine its evaluation . . . to the face of the pleadings, but may review or accept any evidence, such as affidavits." *Smith v. Privette,* 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998) (internal quotation marks and citation omitted). "If the evaluation is confined to the pleadings, the court must accept the plaintiff's allegations as true, construing them most favorably to the plaintiff." *Id.* On a Rule 12(b)(6) motion to dismiss, "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." *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 735, 659 S.E.2d 483, 486 (2008). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Id*.

ARGUMENT

I. This Court Has Subject Matter Jurisdiction

Because Plaintiffs have standing; because their claims are ripe for review and redressable by the relief sought; and because their Complaint raises constitutional, not political, questions, this Court has subject matter jurisdiction and should deny Defendants' motions to dismiss under Rule 12(b)(1).

A. Plaintiffs Have Standing

The North Carolina Constitution confers standing upon any party that suffers harm: "all courts shall be open; [and] every person for an injury done him . . . shall have remedy by due course of law." N.C. Const. art. I, § 18.

North Carolina's "standing jurisprudence is broader than federal law." *Davis v. New Zion Baptist Church*, 258 N.C. App. 223, 225, 811 S.E.2d 725, 727 (2018); *accord Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) ("While federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine."). Notably, the North Carolina Constitution "includes no case-or-controversy requirement," and does not impose an "'injury-in-fact' requirement, as under the federal constitution."[2] *Comm. to Elect Dan Forest. v. Emps. Pol. Action Comm.*, No. 231A18, --- S.E.2d ---, 2021 WL 403933, at *26 (N.C. Feb. 5, 2021). Rather, plaintiffs "directly attacking the validity of a statute under the constitution . . . must [only] show they suffered a direct injury." *Id.* at *30 (internal quotation marks and citation omitted). Thus, at a

[2] Accordingly, Defendants' position that North Carolina law "requires" an injury in fact is misplaced. Leg. Defs.' Br. 13; *see also* State Defs.' Br. 14.

minimum, a plaintiff in North Carolina court has standing to sue when she would have standing in federal court.

Here, Plaintiffs PPSAT, the AWC Clinics, Farris, Bass, Deans, and Swartz (together, "Plaintiff Providers") have standing in their own right as well as third-party standing, and Plaintiff SisterSong has associational standing.

1. Plaintiff Providers Have Standing in Their Own Right

It is well-established that a plaintiff can demonstrate standing by alleging that enforcement is "imminent or threatened" and that the plaintiff "stands to suffer the loss of either fundamental human rights or property interests." *Malloy v. Cooper*, 356 N.C. 113, 117, 565 S.E.2d 76, 79 (2002) (quoting *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 350, 323 S.E.2d 294, 310 (1984)); *accord Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (holding that plaintiffs can demonstrate standing by alleging that they intend to engage in conduct "arguably affected with a constitutional interest" that is prohibited by the challenged law and that they fear a credible threat of enforcement). Legislative Defendants' suggestion that Plaintiff Providers must risk prosecution before they can challenge the Abortion Restrictions, Leg. Defs.' Br. 15–16, flies in the face of North Carolina law and decades of U.S. Supreme Court precedent.[3]

Contrary to Defendants' representations, State Defs.' Br. 7–8; Leg. Defs.' Br. 15–16, Plaintiff Providers have alleged "direct injury" sufficient to confer individual standing to challenge

[3] For over four decades, the U.S. Supreme Court has consistently held that abortion providers who are themselves subject to criminal penalties need not risk prosecution by violating the laws they seek to challenge in order to demonstrate standing. *See*, *e.g.*, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976) (finding physicians "clearly [had] standing" to challenge an abortion restriction because the "physician is the one against whom [the restriction] directly operate(s)" (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973))); *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("[W]e do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.").

the Abortion Restrictions. *Comm. to Elect Dan Forest*, 2021 WL 403933, at *30; *see also id.* at *31 ("When a person alleges the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution . . . the legal injury itself gives rise to standing."). As shown below, Plaintiff Providers have alleged that they suffer direct, ongoing harms due to their continued compliance with the Abortion Restrictions; that they intend to engage in the prohibited conduct but for the statutes; and that they face a credible threat of enforcement given the criminal, civil, and administrative penalties imposed by the Challenged Laws. Thus, Defendants' challenge to Plaintiff Providers' individual standing fails.

a. Plaintiff Providers Have Suffered a Direct Injury Sufficient to Confer Individual Standing

The Plaintiff Providers' ongoing compliance with the Abortion Restrictions has resulted in the violation of their "constitutionally guaranteed personal right[s]"—here, equal protection under the law and the enjoyment of the fruits of their labor. *Comm. to Elect Dan Forest,* 2021 WL 403933, at *30 (quoting *State ex rel. Summrell v. Carolina-Va. Racing Ass'n*, 239 N.C. 591, 594, 80 S.E.2d 638, 640 (1954)); *see also, e.g.*, *Stephenson v. Bartlett*, 355 N.C. 354, 377, 562 S.E.2d 377, 393 (2002) (recognizing that loss of fundamental constitutional rights, like the right to vote, is an injury under the state constitution's equal protection clause). In addition, the Plaintiff Providers could lose "property rights"—such as a medical license or clinic certification. *Comm. to Elect Dan Forest,* 2021 WL 403933, at *30 (quoting *Summrell*, 239 N.C. at 594, 80 S.E.2d at 640); *see also, e.g.*, *Craig v. Boren*, 429 U.S. 190, 194–95 (1976) (finding economic injury, and possible loss of license, a direct injury sufficient to confer standing).

As discussed *infra* Section II.C, Plaintiff Providers allege that the Abortion Restrictions violate their constitutional rights to equal protection by singling them out as abortion care providers and requiring them to abide by unjustified licensing and medical practice regulations

that are not applied to other health care professionals. Likewise, as discussed *infra* Section II.D, Plaintiff Providers allege that the Abortion Restrictions violate their constitutional rights to enjoy the fruits of their labor. The Plaintiff Providers have alleged that the APC Ban, Telemedicine Ban, and TRAP Scheme constrain their ability to conduct business in serving people who seek to access constitutionally protected health care services in North Carolina; force them to practice medicine in a way that harms patients and conflicts with their medical training and expertise; and limit the pursuit of their livelihood. This is sufficient to allege direct injury for the purpose of standing. *Comm. to Elect Dan Forest,* 2021 WL 403933, at *30–32.

b. Plaintiff Providers Intend to Engage in the Prohibited Course of Conduct but for the Abortion Restrictions

Contrary to Legislative Defendants' assertions, Leg. Defs.' Br. at 16, Plaintiff Providers have alleged clear and unambiguous intent to engage in conduct specifically prohibited by the Abortion Restrictions. But for the Abortion Restrictions, PPSAT "would expand abortion services to all its North Carolina health centers" and the AWC Clinics "would make their abortion care more accessible." Compl. ¶¶ 33, 44. The APC Ban prevents PPSAT and the AWC Clinics from hiring qualified and competent clinicians, Compl. ¶ 140; *accord* Compl. ¶¶ 141–49, and prohibits APCs from providing care that is otherwise within their scope of practice under North Carolina law, Compl. ¶¶ 7–8, 108–10; *see also* Compl. ¶¶ 141–61. Likewise, the Telemedicine Ban prohibits Plaintiff Providers from incorporating telemedicine, which would allow for more flexibility with scheduling and staffing. Compl. ¶¶ 186, 188; *see also* Compl. ¶¶ 11, 191. Finally, the TRAP Scheme requires PPSAT and the AWC Clinics to comply with requirements that are "onerous" and "expensive"—as well as unnecessary. Compl. ¶¶ 12–13, 195, 198–209.

c. Plaintiff Providers Credibly Fear Enforcement of the Abortion Restrictions

Legislative Defendants' suggestion that Plaintiff Providers must risk felony prosecution before they can assert their constitutional rights in this Court is untenable. Leg. Defs.' Br. 16; *see supra* Section I.A.1.b.[4] While the North Carolina Supreme Court has not established a clear test for what constitutes "imminent or threatened" enforcement, the U.S. Supreme Court considers several factors, including whether: (1) there is any present injury occasioned by compliance with the challenged laws, *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 n.29 (1974); (2) there have been open and notorious violations of the challenged statutes without enforcement over several decades, *Poe v. Ullman*, 367 U.S. 497, 502 (1961); and (3) the officials responsible for enforcing the statutes have formally disavowed intent to enforce the statute in a manner binding on successors, *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988).[5]

As discussed *supra* Section I.A.1.a, Plaintiff Providers assert that their equal protection and "fruits of their labor" rights have been violated as a result of their compliance with the Abortion Restrictions. And Defendants do not suggest that Plaintiff Providers have openly and

[4] Legislative Defendants' challenge to Plaintiffs' standing based on credible threat of enforcement is limited to Plaintiff Providers. Leg. Defs.' Br. 15–16. The State Defendants, however, appear to challenge credible threat of enforcement as to *all* Plaintiffs' standing. State Defs.' Br. 8–15. As discussed throughout Section I.A, all Plaintiffs—Plaintiff Providers, on behalf of their patients and in their own right, as well as Plaintiff SisterSong—have alleged injuries that implicate their constitutionally protected rights. Plaintiffs' responses herein, addressing both Defendants' arguments based on credible threat of enforcement, apply to those claims as well.

[5] Legislative Defendants cite *Bryant v. Woodall*, 363 F. Supp. 3d 611, 617 (M.D.N.C. 2019), *appeal docketed*, No. 19-685 (4th Cir. June 26, 2019), to argue that "'imaginary or speculative' fears of prosecution are insufficient to confer standing." Leg. Defs.' Br. 15. But they fail to note that in *Bryant*, while the state raised similar arguments concerning the plaintiff providers' standing to challenge North Carolina's twenty-week abortion ban, the district court rejected those arguments and found that the abortion providers faced a credible threat of enforcement. *Bryant*, 363 F. Supp. 3d at 627.

notoriously violated the Abortion Restrictions without enforcement. The remaining factor—whether Defendants have disavowed enforcement—also weighs in favor of Plaintiff Providers' standing and establishes a credible threat of enforcement.

Far from disavowing enforcement, the North Carolina Department of Health and Human Services ("NCDHHS"), under Defendant Secretary Cohen's direction, actively enforces the TRAP Scheme.[6] State Defendants' claim that NCDHHS has "never taken any action against an abortion clinic pursuant to the provisions that Plaintiffs are challenging here," State Defs.' Br. 13, is patently untrue. As State Defendants' own submissions show, NCDHHS enforced the challenged TRAP Scheme against two clinics in 2013 and *currently* conducts inspections and investigations to evaluate clinics' compliance. State Defs.' Br. Ex. 13 (Decl. of Azzie Conley) ¶¶ 5, 9–11. This alone is sufficient to confer standing. *See Babbitt*, 442 U.S. at 302 n.13 (holding that the prospect of administrative action provided substantial additional support for justiciability of plaintiffs' claim); *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (finding abortion provider physicians' standing to assert the rights of their patients is not limited to cases where they face criminal penalties).

Further, lack of historical criminal prosecution does not undermine the credible threat of enforcement; rather, it evinces Plaintiff Providers' compliance with the law. Plaintiffs' stringent compliance does not bar them from challenging the Abortion Restrictions. *Cf. Mobil Oil Corp. v. Att'y Gen. of Va.*, 940 F.2d 73, 75 (4th Cir. 1991) ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of

[6] The State Defendants concede that they are authorized to impose serious sanctions on Plaintiff Providers for violations of the Abortion Restrictions. State Defs.' Br. 4, 8–13. These include criminal and civil penalties, damages and court-ordered prohibitions on their provision of care, and licensure action. Compl. ¶¶ 7, 13, 195, 220.

the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution."). As the U.S. Supreme Court has held for decades, the "alleged danger" of a challenged statute can take the form of "self-censorship; a harm that can be realized even without an actual prosecution." *Am. Booksellers Ass'n*, 484 U.S. at 393; *accord Epperson v. Arkansas*, 393 U.S. 97, 101–02 (1968) (holding teacher had standing to challenge constitutionality of 1928 criminal law prohibiting teaching evolution despite lack of prosecution).

Finally, the State Defendants' erroneous statements that they have not enforced the Challenged Laws "in more than 30 years," State Defs.' Br. 8–15, even if true, would not mitigate the threat of enforcement of the Abortion Restrictions.[7] Unofficial and non-binding disavowals are insufficient to dispel a credible threat of enforcement. *See, e.g.*, *Va. Soc'y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 388, 390 (4th Cir. 2001). And the State Defendants' declarations are not disavowals anyway; they refer only to actions taken in response to *past* conduct. They make no mention of *future* enforcement or potential changes in their policies and practices; do not purport to bind themselves, their office, or their successors; and they certainly do not interpret the challenged Abortion Restrictions to be moribund. *See, e.g.*, *Mobil Oil Corp.*, 940 F.2d at 76 (holding that plaintiffs had standing where Attorney General did not disclaim any intention of exercising authority to enforce); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710–11 (4th Cir.

[7] State Defendants rely on *Malloy* to erroneously assert that an "unambiguous and direct threat of a future prosecution" is necessary to establish credible fear of prosecution. State Defs.' Br. 15. But *Malloy* instead refers to "imminent or threatened prosecution." *Malloy*, 356 N.C. at 117–18, 565 S.E.2d at 79. Moreover, in *Malloy*, the plaintiff had already been engaging in conduct for over a decade that the District Attorney subsequently determined was in violation of North Carolina law. *Id.* at 114–15, 565 S.E.2d at 77–78. As discussed *supra* Section I.A.1.c, Defendants do not (nor can they) assert that Plaintiffs have been openly or notoriously violating the Challenged Laws without criminal prosecution.

1999) (holding that lack of binding nonenforcement rule and record evidence that district attorneys would not prosecute in the future supports plaintiffs' standing).

* * *

Accordingly, Plaintiff Providers have standing in their own right.

2. Plaintiff Providers Have Third-Party Standing on Behalf of Their Patients

Litigants may bring actions on behalf of third parties if (1) those litigants have suffered an injury, (2) the litigants have a "close relation" to the third-party, and (3) there is a "hindrance to the third-party's ability" to assert her own rights. *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *see also Comm. to Elect Dan Forest,* 2021 WL 403933, at *30–32 (requiring merely a "direct injury" for standing, not an "injury-in-fact"). For decades, under this test, courts have long recognized that abortion and reproductive health care providers have third-party standing to assert the rights of their patients. *See June Med. Servs. L.L.C. v. Russo* ("*JMS*"), 140 S. Ct. 2103, 2118 (2020) (plurality opinion) (collecting cases).[8] There is no North Carolina caselaw to the contrary. Indeed, the limited North Carolina caselaw that does exist does not contradict federal law but rather confirms it, as discussed below. Under an unbroken line of relevant and recently reaffirmed United States Supreme Court precedent, Plaintiff Providers would have third-party standing to sue in federal court, and therefore have third-party standing under North Carolina's more permissive standards.

[8] Citations to *June Medical Services* are to the plurality opinion throughout this brief unless otherwise noted. However, Chief Justice Roberts joined the plurality's entire third-party standing holding. *Id*. at 2139 n.4 ("For the reasons the plurality explains, *ante*, at 2117–2120, I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients.").

a. Plaintiff Providers Have Suffered an Injury

Defendants[9] argue that Plaintiff Providers suffer no injury because they are not "women seeking abortion." Leg. Defs.' Br. 6. Defendants misconstrue the injury requirement, however. Here, the Plaintiff Providers are the direct object of the Challenged Laws. *See JMS*, 140 S. Ct. at 2119 (holding that because providers are "the parties who must actually [comply with challenged laws], they are far better positioned than their patients to address the burdens of compliance"); *Singleton*, 428 U.S. at 112–13 (explaining that "there is no doubt" abortion providers "suffer concrete injury" for standing purposes when abortion restrictions restrict their ability to provide care); *see also supra* Section I.A.1.a. Defendants would have this Court ignore this well-settled principle.

Defendants instead focus on an inapposite North Carolina Court of Appeals case, *Cherry Community Organization v. City of Charlotte*, 257 N.C. App. 579, 809 S.E.2d 397 (2018). Leg. Defs.' Br. 6. As an initial matter, even though the *Cherry Community* Court made passing reference to "third parties," the issue before it was whether a non-profit organization had standing in its own right to bring a claim. *See Cherry Cmty. Org.*, 257 N.C. App. at 582, 809 S.E.2d at 400. Moreover, that case was clearly cabined to claims involving a party's standing to challenge a land use decision. *Id.* at 583, 809 S.E.2d at 400 (laying out specific standard for a party "challeng[ing] a zoning ordinance"). The Abortion Restrictions, by contrast, impose requirements directly on the Plaintiff Providers—requirements that carry the threat of felony liability, civil penalties, and professional licensure sanctions. *See JMS*, 140 S. Ct. at 2118–19 ("[T]he enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties'

[9] As State Defendants do not make any arguments regarding third-party standing, all references in this section are to Legislative Defendants.

rights." (internal quotation marks and citation omitted)). Accordingly, Plaintiff Providers have established injury. *See supra* Section I.A.1.c.

b. Plaintiff Providers Have a "Close Relationship" with Patients Seeking Abortion

The U.S. Supreme Court has held that a "close relationship" exists "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Warth v. Seldin*, 422 U.S. 490, 510 (1975). That is exactly the case here: a patient's ability to access safe abortion care is directly dependent on the ability of the providers to deliver such care.[10] Plaintiff Providers are thus "uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision." *Singleton*, 428 U.S. at 117 (plurality opinion). Indeed, the Supreme Court held just last year that "well-established precedents foreclose" Defendants' claim that there is a conflict of interest between Plaintiff Providers and their patients that precludes third-party standing. *JMS*, 140 S. Ct. at 2120; *see* Leg. Defs.' Br. 9–12. As the Court explained, it is a "common feature of cases in which [it has] found third-party standing," that the restrictions at issue are "ostensibly enacted to protect the women whose rights [the plaintiffs] are asserting." *JMS*, 140 S. Ct. at 2119.

Defendants again cite inapplicable cases to try to evade decades of relevant precedent. For example, they argue that Plaintiff Providers must have "significant relationships over extensive periods of time" with their patients, but rely on a case that is specifically limited to the child

[10] That Plaintiff Bass does not yet have patients for whom she can provide abortion care in North Carolina does not make this outcome any different; indeed, the U.S. Supreme Court has held that parties challenging abortion restrictions are able to raise the rights of their future patients with whom they do not yet have a relationship. *JMS*, 140 S. Ct. at 2118 ("We have long permitted abortion providers to invoke the rights of their actual *or potential* patients in challenges to abortion-related regulations." (emphasis added)). In any event, Plaintiff Bass is currently providing medication abortion (both in-person and through telemedicine) and aspiration abortion in Virginia. *See* Ex. 1 (Aff. of Anne Logan Bass, F.N.P. ("Bass Aff.")) ¶ 4; Compl. ¶ 35.

custody context. Leg. Defs.' Br. 7 (quoting *Chavez v. Wadlington*, 261 N.C. App. 541, 545, 821 S.E.2d 289, 293 (2018), which analyzed standing only in "custody proceedings"). Similarly, Defendants rely on *Guilford County ex rel. Thigpen v. Lender Processing Services, Inc.*, No. 12 CVS 4531, 2013 WL 2387708, at *4 (N.C. Super. Ct. May 29, 2013), Leg. Defs.' Br. 7, but that unpublished decision is also inapposite. There, the plaintiff could not bring a challenge on behalf of third parties because the statute the plaintiff relied upon gave only landowners the right to sue, and the plaintiff was not a landowner. The court held that fact was "fatal to [the plaintiff's] ability to assert the rights of others under the same statute." *Thigpen*, 2013 WL 2387708 at *4. As discussed above, unlike the plaintiff in *Thigpen*, Plaintiff Providers here suffer a direct injury. Thus, Plaintiff Providers have no conflict of interest with their patients, and their relationship is close.

c. Patients Seeking Abortion Would Face a Hindrance to Asserting Their Own Rights

In the context of abortion, courts have long recognized the difficulties patients face in asserting their own rights and have held that these barriers are sufficient to confer third-party standing. Indeed, the U.S. Supreme Court has directly rejected Defendants' arguments as to hindrance and held that people seeking abortion are "chilled" from asserting their rights out of concern for their privacy and safety. *See, e.g., Singleton*, 428 U.S. at 117 (plurality opinion). The Court's concerns are well-founded due to the stigma that abortion carries as a direct result of regressive laws like the ones challenged here. Additionally, people seeking abortion are hindered by the "imminent mootness" of their claims due to the time-limited nature of pregnancy. *Id.* As the U.S. Supreme Court has noted, "there seems little loss in terms of effective advocacy from allowing [the] assertion [of the abortion right] by a physician." *Id.* at 118. Therefore, contrary to

Defendants' claim, Leg. Defs.' Br. 8, the hypothetical idea that a person seeking abortion "could" possibly bring claims in her own lawsuit does not defeat third-party standing.

* * *

Thus, consistent with nearly half a century's worth of established precedent, Plaintiff Providers have third-party standing under federal law. Because North Carolina's standing principles are more generous than the federal standard, there can be no doubt that they have standing in North Carolina as well.

3. SisterSong Has Associational Standing[11]

Under North Carolina law, "[a] nonprofit association, in its name, may institute, defend, intervene, or participate in a judicial, administrative, or other governmental proceeding or in an arbitration, mediation, or any other form of alternative dispute resolution." N.C. Gen. Stat. § 59B-8(a). North Carolina courts have adopted the federal standard for 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. v. City of Raleigh, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).[12]

No defendant argues that SisterSong fails to meet the second prong of the test—nor could they. This lawsuit is inextricably related to SisterSong's organizational mission, which involves

[11] SisterSong does not allege organizational standing, and therefore State Defendants' arguments on this score are irrelevant. *See* State Defs.' Br. 15–17.

[12] Associational standing is also referred to as "representational" standing. *See, e.g.*, *Hunt*, 432 U.S. at 345 (holding that plaintiff association had "standing to bring this action in a representational capacity"); *Warth*, 422 U.S. at 511 ("[A]n association may have standing . . . as the representative of its members.").

"addressing . . . systems . . . that limit the reproductive lives of marginalized people." Compl. ¶ 36. SisterSong likewise plainly meets the remaining two prongs of the associational standing test.

a. SisterSong Members Have Standing to Sue in Their Own Right

Federal courts applying the *Hunt* associational standing test adopted by *River Birch* have found that an "organization need only show that its members 'face[] a probability of harm in the near and definite future' to establish injury that is sufficient to confer standing to seek prospective relief." *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1336 (N.D. Ga. 2018) (quoting *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1160–61 (11th Cir. 2008)); *cf. 520 S. Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006) ("Standing depends on the probability of harm, not its temporal proximity.").

Here, SisterSong's members have standing in their own right, as its membership includes people living in North Carolina "of reproductive age," Compl. ¶ 37, who are likely to become pregnant and seek abortion care, Compl. ¶ 61 ("Nationwide, one in five pregnancies ends in abortion. Approximately one out of every four women will have had an abortion by the time she reaches 45 years old."). SisterSong's members' injuries are anything but "amorphous," Leg. Defs.' Br. 13; instead, they are directly "traceable to the Challenged Laws," State Defs.' Br. 16, because every SisterSong member in North Carolina capable of pregnancy faces a threatened injury.[13] The

[13] Legislative Defendants' reliance on *Creek Pointe Homeowner's Association, Inc. v. Happ*, 146 N.C. App. 159, 552 S.E.2d 220 (2001), is misplaced. Leg. Defs.' Br. 13–14. There, the Court of Appeals found that organizational standing was inappropriate based not on whether the members had standing in their own right—indeed the court found that the first two prongs of the *River Birch/Hunt* test were satisfied—but rather on the fact that the homeowners' association sought money damages and thus failed the third prong of the associational standing test. *Creek Pointe*, 146 N.C. App. at 167–68, 552 S.E.2d at 226. Plaintiffs do not seek money or any other individualized damages here.

injuries are indeed "distinct and palpable." State Defs.' Br. 16 (citing *In re Ezzell*, 113 N.C. App. 388, 392, 438 S.E.2d 482, 484 (1994)).[14]

Legislative Defendants' assertions that "each and every member" of SisterSong must establish standing in their own right, Leg. Defs.' Br. 13, is plainly contrary to North Carolina law. "To have standing the complaining association *or one of its members* must suffer some immediate or threatened injury." *River Birch*, 326 N.C. at 129, 388 S.E.2d at 555 (citing *Hunt*, 432 U.S. at 342) (emphasis added). As explained above, SisterSong meets this standard. Contrary to Legislative Defendants' contentions, associational standing simply "does not require a threat of immediate injury to each and every individual member of the association in order for the association to have standing." *State Emps. Ass'n of N.C., Inc. v. State*, 154 N.C. App. 207, 219, 573 S.E.2d 525, 533 (2002) (Tyson, J., concurring in part and dissenting in part), *rev'd* 357 N.C. 239, 240, 580 S.E.2d 693, 693 (2003) (per curiam) (reversing the decision of the Court of Appeals "for the reasons stated in the dissenting opinion").

b. There Is No Need for SisterSong's Individual Members to Participate in the Lawsuit

Plaintiffs also satisfy the third prong required for associational standing. Plaintiffs seek declaratory and injunctive relief, the type of relief especially appropriate for associational standing. *Creek Pointe*, 146 N.C. App. at 165–66, 552 S.E.2d at 225 (citing *Hunt*, 432 U.S. at 343 (noting that "in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought" has been "a declaration, injunction, or some other form of prospective relief")). When a case seeks this type of relief, there is no need for "consideration of the [members'] individual circumstances." *Id.* Thus, contrary to Legislative Defendants' protestations,

[14] *In re Ezzell* is not an associational standing case and is therefore inapposite.

Plaintiffs do not need to allege "specific and individualized facts," Leg. Defs.' Br. 14, about each SisterSong member.

Legislative Defendants argue that individual SisterSong members must participate in this suit "to establish the alleged particular burden on their rights and the imminent or actual nature of any 'threat.'" *Id.* This argument is unavailing. First, as explained *supra* Section I.A.3.a, SisterSong members have standing in their own right and have demonstrated injury. Second, Legislative Defendants conflate standing requirements with the substance of Plaintiffs' allegations. There is no need for "[i]ndividual-specific allegations," Leg. Defs.' Br. 14, to establish associational standing because the very purpose of associational standing is to allow an organization to stand as a "representative of injured members of the organization." *Creek Pointe*, 146 N.C. App. at 165, 552 S.E.2d at 225. There would be little point to invoking associational standing if plaintiffs had to plead highly specific facts for each individual member of the organization.[15]

* * *

The Complaint demonstrates that SisterSong satisfies the requirements for associational standing, and this Court should deny Defendants' motion to dismiss SisterSong.

B. Plaintiffs' Claims Are Redressable by the Relief Sought

Legislative Defendants' redressability arguments must also be rejected. First, they improperly conflate the direct injury requirement with the ultimate merits of Plaintiffs' claims, recycling Legislative Defendants' argument that Plaintiffs have not asserted an "injury in fact." Leg. Defs.' Br. 16. But any dispute over the merits of Plaintiffs' claims is premature and should

[15] Similarly, in the context of third-party standing, which courts routinely grant in abortion cases, *see supra*, individual patients are not required to participate. In that context, courts do not adjudicate the merits of every possible patient—indeed, doing so would be "awkward." *JMS*, 140 S. Ct. at 2119 (quoting *Craig*, 429 U.S. at 197). The same principle holds true here.

be rejected at this stage. *Teague v. Bayer AG*, 195 N.C. App. 18, 28, 671 S.E.2d 550, 557 (2009) ("What is at issue [for the purposes of standing] is Plaintiff's right of access to the courts, not the merits of his allegations.").

Next, Legislative Defendants argue that Plaintiffs' right to abortion claims are not redressable because Plaintiffs "have not described any actual injury to any particular woman's right." Leg. Defs.' Br. 18. The U.S. Supreme Court has never required such allegations under the federal standard. *JMS*, 140 S. Ct. at 2114–16; *see also Whole Woman's Health v. Hellerstedt* ("*WWH*"), 136 S. Ct. 2292, 2301–03 (2016). Nor do Defendants offer any support for the extraordinary proposition that Plaintiffs must plead harms specific to "any particular woman." Leg. Defs.' Br. 18. Plaintiffs' allegations—which detail the myriad ways the Abortion Restrictions each delay and restrict access to abortion care—are more than sufficient here. *See infra* Section II.B.

Finally, Legislative Defendants assert that Plaintiffs' "fruits of their labor" claims are not redressable because they are based on an "alleged lack of an expanded market" and "acquiring more business." Leg. Defs.' Br. 17. These arguments are wholly misplaced. Plaintiffs assert their fundamental constitutional right to "conduct a lawful business or to earn a livelihood." *Treants Enters., Inc. v. Onslow Cnty.*, 83 N.C. App. 345, 371, 350 S.E.2d 365, 354 (1986); *see also Tully v. City of Wilmington*, 370 N.C. 527, 534, 810 S.E.2d 208, 214 (2018). The Complaint contains detailed allegations of how the APC Ban, Telemedicine Ban, and TRAP Scheme interfere with the Plaintiff Providers' right to conduct business and enjoy the "fruits of their labor." Compl. ¶¶ 141–61, 186–92, 193, 198–99, 202–10; *see also infra* Section II.D. Moreover, it is not "unknowable" "whether plaintiffs will choose to set up various new abortion services." Leg. Defs.' Br. 17. The Complaint contains detailed allegations about what services Plaintiff Providers would offer but for the Abortion Restrictions. Compl. ¶¶ 33–35, 44, 133–35, 148–49, 157, 184, 187–88, 210; *see also*

supra Section I.A.1.b; *infra* Section II.D. Adopting Legislative Defendants' logic would seemingly render the "fruits of their labor" right meaningless if Plaintiff Providers had to demonstrate predicted market success to assert their constitutional right.

The relief Plaintiff Providers seek does not, as Legislative Defendants suggest, depend "on the unfettered choices made by independent actors." Leg. Defs.' Br. 17 (quoting *Hamm v. Blue Cross & Blue Shield of N.C.*, No. 05 CVS 5606, 2010 WL 5557501 (N.C. Super. Ct. Aug. 27, 2010)).[16] Rather, the threat of State Defendants' enforcement of the Challenged Laws imposes Plaintiffs' ongoing harms. *See supra* Section I.A.1.c. A decision favorable to Plaintiffs would prevent State Defendants from imposing such harms. *Cf. Hamm*, 2010 WL 5557501, at *5 (holding claims were redressable where decision would estop defendants from breaching its alleged contracts).

Plaintiffs have adequately pleaded that they are directly injured by the Abortion Restrictions and that declaratory and injunctive relief would redress these harms.[17]

C. Plaintiffs' Claims Are Ripe for Review

Legislative Defendants' argument that Plaintiffs' claims are not ripe for review is indistinguishable from their standing arguments because it is once again premised on the incorrect

[16] Likewise, the existence of what Legislative Defendants refer to as "external market conditions" does not shield the Abortion Restrictions from constitutional review. Leg. Defs.' Br. 29–30. The shortage of physician abortion providers, coupled with harassment and stigma, exacerbate the Abortion Restrictions' real-world harms, buttressing the need for review.

[17] Legislative Defendants' reliance on *Marriott* is misplaced. There, plaintiffs sought relief that would effectively reinforce the alleged injury. *Marriott v. Chatham Cnty.*, 187 N.C. App. 491, 495, 654 S.E.2d 13, 17 (2007) (holding that, where injury was the county's failure to establish minimum criteria for determining when an environmental impact statement is necessary, striking down the portion of the ordinance requiring such criteria would not redress plaintiffs' alleged injury). In contrast, there is no question that the relief Plaintiffs seek here would redress their injuries.

assertion that Plaintiffs have failed to allege injury. As discussed in detail *supra* Section I.A, Plaintiffs have standing—and thus Legislative Defendants' ripeness argument fails.

Plaintiffs' claims are also ripe because Plaintiffs are currently experiencing ongoing constitutional harm. The Complaint alleges that the Abortion Restrictions today place unnecessary, expensive, and time-consuming obligations on patients and providers that force patients to delay or forego abortion care; require pregnant people to travel significant distances to access care; increase the risks to patients' lives and health; force patients to suffer the psychological, financial, logistical, emotional, and dignitary harms of maintaining an unwanted pregnancy, including increased risks of intimate partner violence and other forms of abuse; and increase the risk that some people will use unsafe means to attempt to end their pregnancies. *See* Compl. ¶¶ 82–97, 141–61, 180–91, 213–56. These harms are disproportionately experienced by North Carolinians who are people of color, living in poverty, and/or are experiencing intimate partner violence. *See* Compl. ¶¶ 82–97. In particular, forced pregnancy and childbirth will have a disproportionate impact on Black North Carolinians. *See* Compl. ¶¶ 95, 100–102.

As these harms are continuing and ongoing, Plaintiffs' claims are ripe for review.

D. Plaintiffs Raise Constitutional, Not Political, Questions

Plaintiffs do not simply assert that the Abortion Restrictions are "bad" or "unwise." Leg. Defs.' Br. 4. Rather, Plaintiffs assert that the Restrictions violate fundamental guarantees enshrined in the Declaration of Rights of the North Carolina Constitution. That such constitutional questions "are within the subject matter jurisdiction of the judiciary is just as well established and fundamental to the operation of our government as the doctrine of separation of powers." *News & Observer Publ'n Co. v. Easley,* 182 N.C. App. 14, 19, 641 S.E.2d 698, 702 (2007). Legislative Defendants' argument that the Complaint presents a nonjusticiable political question is thus without merit.

The political question doctrine, which precludes the judiciary from interfering "with an issue committed to the sole discretion of the General Assembly," *Cooper v. Berger,* 370 N.C. 392, 409, 809 S.E.2d 98, 108 (2018), is inapplicable to the case at hand. The General Assembly's policy-making authority "is necessarily constrained by the limits placed upon that authority by other constitutional provisions," *id.* at 410, 809 S.E.2d at 109, including the provisions within the Declaration of Rights under which Plaintiffs bring this action. It has never been within the sole discretion of the General Assembly to determine whether its enacted policies infringe upon the fundamental rights guaranteed by North Carolina's Constitution; instead, that duty is reserved to the courts. *See, e.g.*, *Leandro v. State*, 346 N.C. 336, 342–55, 488 S.E.2d 249, 252–59 (1997) (rejecting defendants' justiciability argument challenging a constitutional guarantee to adequate education in North Carolina as without merit, concluding that "[w]hen a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits"); *Corum v. Univ. of N.C. ex rel. Bd. of Governors,* 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("It is the state judiciary that has the responsibility to protect the state constitutional rights of its citizens; this obligation to protect the fundamental rights of individuals is as old as the State.").

Legislative Defendants' reliance on *State v. Warren*, 252 N.C. 690, 114 S.E.2d 660 (1960), is misplaced. Leg. Defs.' Br. 4. *Warren* did not address the issue of justiciability, but instead supported the propriety of judicial review when a plaintiff alleges that a statutory scheme regulating a profession violates her constitutional rights. 252 N.C. at 696, 114 S.E.2d at 666 ("The mere expediency of legislation is a matter for the Legislature *when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts*." (emphasis added)). The North Carolina Supreme Court in *Warren* did not consider itself powerless in the face of the

General Assembly's judgment and policymaking authority, but rather fulfilled its obligations of constitutional interpretation and judicial review to uphold the law in question.

Plaintiffs recognize the General Assembly's authority to enact policy regulating abortion care "when it is acting entirely within constitutional limitations." *Id*. at 252 N.C. at 696, 114 S.E.2d at 666. Thus, the question at the heart of this case is whether the Abortion Restrictions constitute acts of the General Assembly "entirely within constitutional limitations," or are instead repugnant to Plaintiffs' fundamental rights. And as detailed *infra* Sections II.B–C, Plaintiffs have amply alleged that the Abortion Restrictions fail to withstand constitutional scrutiny. This is not a political question—it is a question of constitutional interpretation that the judicial branch is not only able, but obligated, to adjudicate. *See, e.g.*, *Cooper*, 370 N.C. at 412, 809 S.E.2d at 110; *Leandro*, 346 N.C. at 344, 488 S.E.2d at 254.

II. Plaintiffs Adequately State Claims upon Which Relief Can Be Granted[18]

Defendants[19] argue that the Complaint should be dismissed because Plaintiffs have failed to state a claim under Rule N.C. R. Civ. P. 12(b)(6). Leg. Defs.' Br. 19–34. For the reasons stated below, Plaintiffs have adequately pleaded that the Abortion Restrictions violate their substantive due process, equal protection, and fruits of their labor rights,[20] and sufficiently asserted their facial

[18] Legislative Defendants ask this Court to reserve ruling on their 12(b)(6) motion so that it may be decided by a three-judge panel. Leg. Defs.' Br. 19 n.2. Plaintiffs are ready and willing to have these motions to dismiss decided now in their entirety.

[19] As only Legislative Defendants make arguments that Plaintiffs fail to state a claim upon which relief can be granted under Rule 12(b)(6), all references to "Defendants" in this section are to Legislative Defendants.

[20] Defendants suggest that Plaintiffs' claims are "nonjusticiable" because the Complaint spends "only two pages making the alleged constitutional claims." Leg. Defs.' Br. 4. But the purpose of a complaint is to state enough facts to satisfy the substantive elements of at least some legally recognized claim—not to make legal arguments. *See*, *e.g.*, *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (noting that "conclusions of

challenge to the Abortion Restrictions. Defendants not only miscast Plaintiffs' allegations and assert incorrect standards, but also attempt to litigate the substance of Plaintiffs' legal claims in this 12(b)(6) motion. As there are no pleading defects in Plaintiffs' Complaint, Defendants' 12(b)(6) argument must fail.

A. Abortion Is a Fundamental Right Under the North Carolina Constitution

While North Carolina courts have not specifically held there is a state constitutional right to abortion, the North Carolina Constitution protects the fundamental liberty interests of privacy and dignity, from which the right to abortion is derived.

Article I of the North Carolina Constitution, the Declaration of Rights, protects North Carolinians' fundamental due process rights. Section 1 of Article I safeguards North Carolinians' rights to equality and to life and liberty, among other things. The Law of the Land Clause in Section 19 of Article I provides procedural and substantive due process protections. *See, e.g., Tully*, 370 N.C. at 538, 810 S.E.2d at 216–17. Section 19 also recognizes equal protection of the laws. *See Sanders v. State Pers. Comm'n*, 197 N.C. App. 314, 324–25, 677 S.E.2d 182, 189 (2009).

The North Carolina Supreme Court has recognized that the "fundamental guaranties" provided by the Declaration of Rights are "broad in scope." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949); *see also id.* (explaining that Sections 1 and 19 "are intended to secure to each person subject to the jurisdiction of the State extensive individual rights"); *M.E. v. T.J.*, No. COA18–2045, 2020 WL 7906672, at *9 (N.C. App. Dec. 31, 2020) ("These fundamental guaranties [contained in Article I, Sections 1 and 19] . . . are intended to secure to each person

law [in a complaint] are not admitted" (quoted in State Defs.' Br. 7)). Plaintiffs have clearly met that standard.

subject to the jurisdiction of the State extensive individual rights, including that of personal liberty.").

And while these provisions are similar to the federal constitutional guarantees of "due process" and "equal protection," and the North Carolina Supreme Court looks to interpretations of the federal Constitution as highly persuasive,[21] the North Carolina Supreme Court has held that the "[North Carolina] Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum*, 330 N.C. at 783, 413 S.E.2d at 290. Further, the state judiciary's responsibility to protect those rights requires "giv[ing] our 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 in regard to both person and property."[22] *Id.*

Sections 1 and 19's liberty interests include the right to privacy and dignity. *See M.E.*, 2020 WL 7906672, at *10 ("As our Supreme Court has recognized, the 'liberty' protected by our constitution includes the right to live as one chooses, within the law, unmolested by unnecessary State intrusion into one's privacy, or attacks upon one's dignity." (citing *Tully*, 370 N.C. at 534, 810 S.E.2d at 214)); *see also Jackson v. Bumgardner*, 318 N.C. 172, 187, 347 S.E.2d 743, 752 (1986) (Martin, J., concurring in part and dissenting in part) ("The Constitution of North Carolina likewise protects the right of privacy." (citing *State v. Poe,* 40 N.C. App. 385, 252 S.E.2d 843, *appeal dismissed,* 298 N.C. 303, 259 S.E.2d 304 (1979))). In *Poe,* the court recognized "a zone of privacy protected by several constitutional guarantees" that encompasses a married couple's right

[21] Grant E. Buckner, *North Carolina's Declaration of Rights: Fertile Ground in a Federal Climate*, 36 N.C. Cent. L. Rev. 145, 154 (2014).

[22] Chief Justice Newby has affirmed the "list of enumerated rights . . . are only 'among' the protected rights." John Orth & Paul Martin Newby, *The North Carolina State Constitution* 47 (2nd ed. 2013).

to plan their family and determine whether and when to have a child. 40 N.C. App. at 388, 252 S.E.2d at 844.

This precedent is more than sufficient to support Plaintiffs' claim at the pleading stage that the fundamental liberty interests of privacy and dignity protected by the North Carolina Constitution also encompass the right to abortion. *See, e.g.*, Compl. ¶¶ 1–5, 160, 190, 258–60, 263–65; *see also infra* Section II.B.

B. Plaintiffs Adequately Pleaded Their Substantive Due Process Claims Under the North Carolina Constitution

Plaintiffs have adequately stated a claim that the Challenged Laws violate their right to abortion under the North Carolina Constitution and that the Laws cannot withstand any level of scrutiny.

1. Plaintiffs Adequately Pleaded the Abortion Restrictions Fail Strict Scrutiny

When the State's action implicates a fundamental right, this Court must apply a strict scrutiny analysis. *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 535–36, 571 S.E.2d 52, 59 (2002). While this issue need not be decided on a motion to dismiss, Plaintiffs have properly alleged that the Abortion Restrictions should thus be reviewed under strict scrutiny.

Under the strict scrutiny standard, the state must demonstrate that the Challenged Laws are narrowly tailored to further a compelling state interest. *Libertarian Party of N.C. v. State*, 200 N.C. App. 323, 332, 688 S.E.2d 700, 707 (2009); *M.E.*, 2020 WL 7906672, at *10. Plaintiffs have adequately pleaded both that the Abortion Restrictions do not meet a compelling state interest and that those restrictions are not connected, let alone narrowly tailored, to furthering those interests. Accordingly, Defendants' motion to dismiss should be denied.

a. Plaintiffs Adequately Pleaded the APC Ban Is Not Narrowly Tailored to Further a Compelling State Interest

As Plaintiffs explained in detail in their Complaint, the APC Ban unnecessarily restricts who may provide abortion care, without any medical justification or demonstrable health benefit to those restrictions. Compl. ¶¶ 7, 108–11, 132–33, 136–40. The APC Ban prohibits highly qualified and trained clinicians from providing safe medication and early aspiration abortion care through the appropriate collaborative practice and supervisory arrangements with physicians, even though they have or can obtain the training to perform identical or nearly-identical procedures. Compl. ¶¶ 106–130. Leading medical authorities have concluded that laws prohibiting qualified APCs from providing abortion services lack medical justification and that they are a barrier to accessing safe abortion. Compl. ¶¶ 136–38.

The APC Ban, rather than serving a legitimate (let alone compelling) governmental interest, demonstrably *harms* public health, because it unjustifiably limits the pool of available abortion providers in North Carolina and the locations around the state where abortions can be provided, thus significantly restricting access to abortion care, which in turn jeopardizes patient health and safety and imposes financial and logistical burdens on clinics and patients. *See* Compl. ¶¶ 141–161.

Even if there were some benefit to limiting APCs' scope of practice, and there is not, Plaintiffs adequately pleaded that the APC Ban is not narrowly tailored to achieve any such interest. Plaintiffs have pleaded that the APC Ban is both over- and underinclusive, because it indiscriminately bans *all* APCs from providing abortion care when they are able to provide equally complex procedures, and because abortion is the *only* context in which APCs are statutorily prevented from providing care that is otherwise within their scope of practice. Compl. ¶ 108. A statute "cannot survive even minimum scrutiny" when it is "grossly underinclusive in that it does

not include all who are similarly situated." *Walters v. Blair,* 120 N.C. App. 398, 400–01, 462 S.E.2d 232, 234 (1995) (defining minimum scrutiny in equal protection context); *see also*, *e.g.*, *IMDb.com, Inc., v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020) (in the free speech context, "a statute is not narrowly tailored if it is either underinclusive or overinclusive").

b. Plaintiffs Adequately Pleaded the Telemedicine Ban Is Not Narrowly Tailored to Further a Compelling State Interest

Plaintiffs have adequately pleaded that there is extensive evidence of telemedicine's safety and its important role in facilitating access to health care—particularly for rural and medically underserved populations—as even NCDHHS and the North Carolina Medical Board have affirmed. *See* Compl. ¶¶ 9, 162–169, 176. Nonetheless, North Carolina has categorically banned telemedicine exclusively in the context of abortion care, Compl. ¶ 170, unnecessarily requiring the prescribing clinician (who, due to the APC Ban, must be a physician) to be physically present when the first pill used in a medication abortion is "administered"—i.e., to watch the patient swallow it. Compl. ¶ 171; N.C. Gen. Stat. § 90-21.82(1)(a).

Plaintiffs have pleaded there is no medical basis for this requirement; medication abortion via telemedicine is just as safe and effective as when the provider is in the same health center as the patient. *See* Compl. ¶¶ 10–11, 172–73, 175–78. Indeed, Plaintiffs have alleged the law does not improve but instead detracts from public health, as it unjustifiably restricts access to abortion, pushing some patients past the point at which they can even access medication abortion. Compl. ¶¶ 180–83. Plaintiffs have alleged that but for the Telemedicine Ban, PPSAT and the AWC Clinics could expand medication abortion through telemedicine, reducing delays and travel burdens for patients, reducing costs due to transportation, lodging, and childcare, as well as time away from work or school. Compl. ¶¶ 184–87. Thus, the Telemedicine Ban, rather than serving a legitimate (let alone compelling) governmental interest, demonstrably harms public health.

Even if there were a public health benefit to requiring a physician's physical presence, which Plaintiffs have pleaded there is not, the Telemedicine Ban is not narrowly tailored to any such benefit. As Plaintiffs pleaded, the Ban is overinclusive, as it indiscriminately prohibits *all* clinicians from providing and all patients from receiving medication abortion through telemedicine, when they are able to provide and receive similar medications through telemedicine. Compl. ¶¶ 10–11, 170–71. It is also underinclusive because it bans telemedicine *only* in the context of medication abortion, but no other comparable procedure. Compl. ¶¶ 10–11, 170, 264, 266.

c. Plaintiffs Adequately Pleaded the TRAP Scheme Is Not Narrowly Tailored to Further a Compelling State Interest

Plaintiffs have set forth detailed allegations that the TRAP Scheme is without medical basis and that without it, patients would have greater access to abortion. Compl. ¶¶ 192–212. Specifically, Plaintiffs have pleaded that abortion care is safely provided on an outpatient basis, with extremely low complication rates, Compl. ¶ 194, and the doctors, nurses, and medical professionals who provide or assist in the provision of abortion care are already subject to North Carolina's generally applicable professional licensure, health, and tort laws and regulations, Compl. ¶ 195. Plaintiffs have additionally pleaded that in North Carolina, non-abortion procedures performed in an office-based setting (i.e., one that is not an ambulatory surgical center or other specialized facility) include procedures that are more invasive than abortion and that have higher complication rates than abortion. Compl. ¶ 196. Thus, the TRAP Scheme serves no legitimate (let alone compelling) governmental interest.[23]

[23] In striking down a Texas state law that imposed similarly medically unnecessary restrictions on facilities that provide abortions, the United States Supreme Court observed that "abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals" and yet are not subject to similar facility requirements. *WWH*, 136 S. Ct. at 2315; *see also, e.g., Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908, 912 (7th Cir. 2015) ("[C]omplications from an abortion are both rare and rarely dangerous.").

Nor is the TRAP Scheme narrowly tailored to any purported interest. Plaintiffs have adequately pleaded that the TRAP Scheme is both over- and underinclusive, as it indiscriminately applies to *all* North Carolina non-hospital-affiliated abortion providers and their patients, and because it applies *only* to non-hospital-affiliated abortion providers and no other providers of office-based medicine.[24] Compl. ¶¶ 192, 196–98, 264, 266.

d. Plaintiffs Adequately Pleaded the 72-Hour Mandatory Delay and Biased Counseling Requirement Are Not Narrowly Tailored to Further a Compelling State Interest

Finally, Plaintiffs have adequately pleaded that the 72-Hour Mandatory Delay and Biased Counseling Requirement endanger the health of abortion patients without any medical benefit, Compl. ¶¶ 213, 217–19, 221, and thus do not serve a legitimate (let alone compelling) governmental interest, but rather demonstrably harm public health. As Plaintiffs pleaded in their Complaint, the Biased Counseling Requirement is unnecessary, because Plaintiffs are already subject to state Informed Consent Laws, which, unlike the Biased Counseling Requirement, allow physicians to use their professional judgment in determining what information is relevant to each patient. Compl. ¶ 20–23, 221, 237–56; *see* N.C. Gen. Stat. § 90-21.13. Moreover, Plaintiffs have pleaded that the 72-Hour Mandatory Delay—one of the most extreme "waiting periods" in the country, which is often much longer in practice—increases the risk and cost of the abortion

[24] State Defendants misunderstand Plaintiffs' challenge to the TRAP Scheme. Plaintiffs do not challenge only some of the TRAP Scheme requirements. State Defs.' Br. 3, 13. Rather, Plaintiffs challenge the TRAP Scheme as a whole and explain, by way of example, how particular medically unnecessary regulations are contrary to the realities of abortion care services in the state. Compl. ¶¶ 192–212. Plaintiffs set forth the multitude of TRAP Scheme requirements in full in an Appendix attached to the Complaint. It includes 10A N.C. Admin. Code 14E.0302, .0305, and .0309, which State Defendants erroneously assert Plaintiffs do not address and therefore do not challenge. State Defs.' Br. 13 n.7; Compl. at A-9–A-10, A-12–A-14, A-18–A-19.

procedure, but does not increase patients' decisional certainty and can indeed be detrimental to patients' mental health. Compl. ¶¶ 15–19, 94, 222–36.

Nor are the laws at issue narrowly tailored to any purported interest. Plaintiffs have adequately pleaded that the 72-Hour Mandatory Delay and Biased Counseling Requirement are both over- and underinclusive, as they indiscriminately apply to *all* North Carolina abortion providers and patients, except in a medical emergency, and they also apply *only* to abortion providers and patients and no other providers or patients.

* * *

Plaintiffs' pleadings sufficiently state their substantive due process claims under strict scrutiny.[25]

[25] Other states, recognizing that their own constitutions' fundamental right to privacy, personal autonomy, or due process includes the right to pre-viability abortion, have reviewed laws affecting those rights under strict scrutiny. *See, e.g., State v. Planned Parenthood of Great Nw.,* 436 P.3d 984 (Alaska 2019) (applying strict scrutiny to restrictions on state's Medicaid funding of abortion, relying on prior state holding that abortion rights are fundamental); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 650, 665–71, 440 P.3d 461, 486, 494–98 (2019) (applying strict scrutiny to state constitutional natural rights that includes decision about whether to continue a pregnancy); *Planned Parenthood of Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 237–38 (Iowa 2018) (applying scrutiny to state constitutional right to abortion); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 27, 31 (Minn. 1995) (state fundamental right to privacy broader than federal and includes right to pre-viability abortion requiring strict scrutiny); *In re T.W.*, 551 So. 2d 1186, 1192, 1195 (Fla. 1989) (state right to privacy broader than federal and includes right to abortion demanding state interest to be compelling and statute to be least intrusive means to achieving that interest); *Armstrong v. State*, 296 Mont. 361, 374, 989 P.2d 364, 373–74 (1999) (state right to privacy is fundamental and includes right to pre-viability abortion requiring strict scrutiny); *Comm. to Def. Reprod. Rts. v. Myers*, 29 Cal. 3d 252, 274–76, 625 P.2d 779, 793 (1981) (state fundamental right to privacy includes right to abortion for which law must serve compelling state interest and be narrowly tailored); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W. 3d 1, 16 (Tenn. 2000), superseded by constitutional amendment (state constitution protects right to abortion as fundamental requiring strict scrutiny); *cf. Hope Clinic for Women, Ltd. v. Flores*, 372 Ill. Dec. 255, 275–77, 991 N.E.2d 745, 765–67 (2013) (state due process clause protects right to abortion); *Right to Choose v. Byrne*, 91 N.J. 287, 305, 450 A.2d 925, 934 (1982) (state substantive due process right includes right to abortion); *Moe v. Sec'y of Admin. & Fin*., 382 Mass. 629, 649, 417 N.E.2d 387, 399 (1981) (state due process clause contains implied fundamental right to privacy, including whether or not to beget or bear a child).

2. Plaintiffs Adequately Pleaded the Abortion Restrictions Fail the Undue Burden Test

While this Court need not decide what level of scrutiny is applicable to Plaintiffs' claims on a motion to dismiss, Plaintiffs have not only pleaded a claim under strict scrutiny, but the motion should fail because there can be no doubt that they have pleaded a valid claim under the undue burden standard. North Carolina state courts do not interpret a parallel state constitutional provision to provide *lesser* rights than are available federally. *Toomer v. Garrett*, 155 N.C. App. 462, 472, 574 S.E.2d 76, 85 (2002); *see also Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998). "For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998). Defendants wholly ignore this legal landscape.[26]

Thus, nearly fifty years of federal precedent holding that abortion is a fundamental right that merits substantive due process protection must serve as a constitutional floor for this Court's analysis. *See Roe v. Wade,* 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *WWH,* 136 S. Ct. 2292; *JMS,* 140 S. Ct. 2103. Under this precedent, an abortion restriction violates due process if it imposes an undue burden on access to abortion. *Casey*, 505

[26] In wrongly arguing that this Court should apply rational basis review to all of Plaintiffs' claims, Leg. Defs.' Br. 24–25, 32, Defendants conflate Plaintiffs' substantive due process privacy and dignity claims with their fruits of labor and livelihood claims. As explained herein, *see* Sections II.B and II.D, these two sets of claims undergo far different analyses, with only fruits of labor claims undergoing a rational basis review. Defendants' reliance on *Warren,* 252 N.C. at 694, and *Treants Enters.*, 320 N.C. at 778–779, as to treatment of fruits of labor and livelihood claims, *see* Leg. Defs.' Br. 24–25, is misplaced as to Plaintiffs' rights of privacy and dignity claims.

U.S. at 877 (plurality opinion); *see also Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014) (recognizing abortion regulations examined under undue burden standard). Thus, Defendants' repeated assertion that only rational basis review should apply is without basis. *See WWH*, 136 S. Ct. at 2309 (holding that applying rational-basis review to abortion restrictions is inconsistent with *Casey* and incorrectly "equate[s] the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue").

Here, Plaintiffs have adequately pleaded that the APC Ban, Telemedicine Ban, and TRAP Scheme unjustifiably reduce the number of abortion providers throughout North Carolina, which in turn delays and restricts abortion access throughout the State; the 72-Hour Delay increases both the risks and the expenses related to the abortion procedure, preventing some patients from accessing their preferred abortion method and others from obtaining an abortion altogether; and the Biased Counseling Requirement undermines the core principles of informed consent by requiring the same state-scripted counseling for every abortion patient, regardless of circumstance. *See supra* Section II.B.1.a–d; *see also* Compl. ¶¶ 8, 148, 158–59, 181–84, 210, 221, 231–33, 239–40. Plaintiffs have pleaded that the Abortion Restrictions impose an undue burden on patients seeking abortion.[27] *See supra* Section II.B.2.

[27] Indeed, other courts have permitted challenges to provisions similar to those challenged here. *See, e.g., Weems v. State by & through Fox,* 395 Mont. 350, 359, 440 P.3d 4, 10 (2019) (upholding preliminary injunction on APC Ban based on state constitutional right to privacy); *Planned Parenthood Great of Nw. & Hawaiian Islands v. Wasden,* 406 F. Supp. 3d 922, 928 (D. Idaho 2019) (denying a motion to dismiss a federal due process and equal protection challenge to Idaho APC ban); *Adams & Boyle, P.C. v. Slatery*, No. 3:15-cv-00705, 2020 WL 6063778 (M.D. Tenn. Oct. 14, 2020) (striking down 48-hour mandatory delay), *appeal docketed*, No. 20-6267 (6th Cir. Nov. 6, 2020); *June Med. Servs. L.L.C. v. Gee*, 280 F. Supp. 3d 849 (2017) (plaintiffs sufficiently alleging constitutional challenge to 72-hour mandatory delay law).

C. Plaintiffs Adequately Pleaded Their Equal Protection Claims Under the North Carolina Constitution

Like the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the equal protection provision in Article I, Section 19 of the North Carolina Constitution "requires that all persons similarly situated be treated alike," and "operates as a restraint on certain activities of the State that either create classifications of persons or interfere with a legally recognized right." *Blankenship v. Bartlett,* 363 N.C. 518, 521, 681 S.E.2d 759, 762 (2009) (internal quotation marks omitted).[28]

1. North Carolina Courts Review Equal Protection Challenges Under Three Tiers of Scrutiny

"When a statute or ordinance is challenged on equal protection grounds, the first determination for the court is what standard of review to apply in determining constitutionality." *Transylvania Cnty. v. Moody*, 151 N.C. App. 389, 397, 565 S.E.2d 720, 726 (2002). Strict scrutiny applies when a law "infringes on the ability of some persons to exercise a fundamental right." *Dep't of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). Such a law "may be justified only by a compelling state interest, and must be narrowly drawn to express only the legitimate interests at stake." *Libertarian Party*, 200 N.C. App. at 332, 688 S.E.2d at 707 (internal quotation marks omitted). When a law discriminates on the basis of certain suspect classifications, such as sex or gender, it must withstand intermediate scrutiny, *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207, which means it must serve "an important or substantial government interest," there must

[28] As with substantive due process, North Carolina courts find federal courts' construction of the Equal Protection Clause in the Fourteenth Amendment "highly persuasive" in analyzing parallel rights in the North Carolina Constitution. *Bacon v. Lee*, 353 N.C. 696, 721, 549 S.E.2d 840, 856–57 (2001); *see also Blankenship,* 363 N.C. at 522, 681 S.E.2d at 762. However, the federal courts' interpretation is a floor, not a ceiling: North Carolinians may not be "accorded . . . lesser rights than they are guaranteed by the parallel federal provision." *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988); *see also supra* Section II.B.2.

be "a direct relationship between the [law] and the interest," and the law must be "no more restrictive than necessary to achieve that interest," *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012). To all other laws, courts apply rational basis scrutiny, which requires that the law have "a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare." *Ballance*, 229 N.C. at 769, 51 S.E.2d at 735. However, if a law exhibits "a desire to harm a politically unpopular group," courts apply "a more searching form of rational basis review." *M.E.,* 2020 WL 7906672, at *24 n.11 (quoting *Lawrence v. Texas*, 539 U.S. 558, 580 (2003)).

2. Plaintiffs Adequately Pleaded Their Equal Protection Claims Under Any Standard of Review

While this court need not decide the appropriate level of scrutiny on a motion to dismiss, as explained in detail above, *see supra* Sections II.A–B, the fundamental liberty interests of privacy and dignity protected by the North Carolina Constitution also encompass the right to abortion. Because Plaintiffs have pleaded that each of the Abortion Restrictions implicate this fundamental right, they have pleaded that their equal protection claims based on this right should be reviewed under strict scrutiny. *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207. However, their claims could also be understood to be pleaded under intermediate scrutiny because the Restrictions discriminate both

against the right to abortion, and against women, a suspect class. Compl. ¶ 265; *M.E.*, 2020 WL 7906672, at *10.[29] But Plaintiffs' claims too may move forward under even rational basis review.[30]

First, the APC Ban treats abortion patients and providers differently from "persons in similar circumstances," *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660–61, 178 S.E.2d 382, 385–86 (1971), because it prevents patients from receiving abortion care from APCs when they are able to receive the very same services from APCs in the context of miscarriage management. *See supra* Section II.B.1.a; Compl. ¶¶ 108–11, 264, 266. Likewise, Plaintiffs have pleaded that the Telemedicine Ban treats abortion patients and providers differently from other patients and providers by unnecessarily requiring the prescribing clinician to be physically present when the first of the pills necessary for a medication abortion is administered, thus singling out and preventing abortion providers and patients from utilizing telemedicine. *See supra* Section II.B.1.b; Compl. ¶¶ 170–72, 264, 266. The TRAP Scheme also singles out abortion providers and patients, subjecting abortion providers to a complex web of medically unnecessary regulations that no other providers of office-based medical care must meet. *See supra* Section II.B.1.c; Compl. ¶¶ 192–212,

[29] Though transgender and non-binary people also seek abortion care, Plaintiffs have pleaded that the Abortion Restrictions have a disproportionate impact on women, and the 72-Hour Mandatory Delay in particular is based on impermissible stereotyping of women's decision-making capabilities. Compl. ¶ 265. *Rosie J. v. North Carolina Department of Human Resources*, 347 N.C. 247, 251, 491 S.E.2d 535, 537 (1997), on which Defendants rely, Leg. Defs.' Br. 31, is plainly inapplicable, as that case concerned whether "indigent women," not women, were a suspect class.

[30] If the Court were to find that neither strict nor intermediate scrutiny applies to Plaintiffs' claims, it should find that Plaintiffs adequately pleaded that their claims should be analyzed under a heightened form of rational basis review. As explained in this section, there is simply no plausible policy reason for the differential treatment each of the Abortion Restrictions imposes on abortion patients and providers, and thus the Restrictions evidence a desire to harm them—a politically unpopular group. *M.E.,* 2020 WL 7906672, at *24 n.11; *see Whole Woman's Health v. Hellerstedt*, 231 F. Supp. 3d 218, 229 (W.D. Tex. 2017) (fact that certain Texas regulations applied to abortion but not miscarriage or ectopic pregnancy was "evidence [the State's] stated interest is a pretext for its true purpose, restricting abortions"). Plaintiffs' equal protection claims are thus entitled at the very least to a "more searching form" of rational basis review.

264, 266; Compl. at A-1–A-23. The 72-Hour Mandatory Delay requires abortion patients to wait a minimum of 72 hours after receiving state-mandated counseling before they can obtain an abortion—but it does not impose such a waiting period on patients seeking any other procedure.[31] *See supra* Section II.B.1.d; Compl. ¶¶ 222, 227, 264. Finally, the Biased Counseling Requirement, which requires the same state-scripted counseling for every abortion patient, regardless of circumstance, singles out abortion patients to receive (and abortion care providers to provide) additional disclosures that have no parallel for other patients or medical practices in North Carolina. *See supra* Section II.B.1.d; Compl. ¶¶ 237–39, 248–54, 264.

As explained in detail above, Plaintiffs have adequately pleaded that none of the Abortion Restrictions has any rational relationship to any purported legitimate state interest—let alone any direct relationship to a substantial interest, or narrowly drawn relationship to a compelling interest. *See supra* Section II.B.1.a (explaining that the APC Ban is not rationally related to any "legitimate (let alone compelling) governmental interest"); Section II.B.1.b (same for Telemedicine Ban); Section II.B.1.c (same for TRAP Scheme); Section II.B.1.d (same for 72-Hour Delay and Biased Counseling Requirement). Thus, Plaintiffs have adequately pleaded an equal protection claim under Article I, Section 19 of the North Carolina Constitution.[32]

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[31] Defendants allege that North Carolina imposes "waiting periods" in other contexts. Leg. Defs.' Br. 33. But three of the four laws that Defendants cite are cancellation or revocation periods and thus inapposite. *See* N.C. Gen. Stat. §§ 48-3-608(a), 66-121, 93A-45. The fourth law they cite, which requires that spouses live separately for a year before seeking divorce, is likewise inapposite because it does not force patients to delay medical procedures—particularly where, as here, delay increases both the cost and risk of the procedure.

[32] And indeed, numerous state and federal courts have enjoined government action targeting abortion providers and patients for dissimilar treatment on the grounds that such action violates their equal protection rights. *See, e.g., Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 762 A.2d 620 (2000) (holding that state statute conditioning minor's right to obtain abortion on parental notification violated state constitution's equal protection provision); *Planned Parenthood of Kan. & Mid-Mo., Inc., v. Lyskowski*, No. 2:15-CV-04273-NKL, 2016 WL 2745873 (W.D. Mo. May 11, 2016) (holding that state agency violated Equal Protection Clause of federal

D. Plaintiff Providers Sufficiently Pleaded the APC Ban, Telemedicine Ban, and TRAP Scheme Violate Their Rights to the Fruits of their Labor and to Pursue Their Livelihoods

Plaintiff providers also separately assert claims based on the "fruits of one's labor" and the right to pursue one's own livelihood provisions set forth in Article I, Section 1 and Section 19. The right to "the enjoyment of the fruits of their own labor," "embraces the right of the individual . . . to live and work where he will, to earn his livelihood by any lawful calling, and to pursue any legitimate business, trade, or vocation . . . [with] dignity, integrity and liberty of the individual." *Tully*, 370 N.C. at 534, 810 S.E.2d at 214. As such, the North Carolina Supreme Court recognizes that its "duty to protect fundamental rights includes preventing arbitrary government actions that interfere with the right to the fruits of one's own labor." *King v. Town of Chapel Hill,* 367 N.C. 400, 408, 758 S.E.2d 364, 371 (2014) (holding fee schedule unconstitutional). Moreover, a statute that "prevents any person from engaging in any legitimate business, occupation, or trade cannot be sustained as a valid exercise of the police power unless the promotion or protection of the public health, morals, order, or safety, or the general welfare makes it reasonably necessary." *Ballance*, 229 N.C. at 770, 51 S.E.2d at 735.

In analyzing the constitutionality of such a law, the courts will look to whether it is rationally related to a legitimate government interest. *Affordable Care, Inc.*, 153 N.C. App. at 536–37, 571 S.E.2d at 59–60.

Plaintiffs have adequately pleaded that the APC Ban, Telemedicine Ban, and TRAP Scheme constrain their ability to conduct business in serving people who seek to access

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Constitution by treating abortion facility more harshly than others in ambulatory-surgical-center licensing process); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r Ind. State Dep't Health*, 64 F. Supp. 3d 1235, 1257 (S.D. Ind. 2014) (holding that requirement that abortion clinics, but not physician's offices, meet physical plant requirements violated Equal Protection Clause of federal Constitution).

constitutionally-protected abortion care in North Carolina; force Plaintiffs to practice medicine in a way that conflicts with their medical training and expertise and harms patients; and limit their pursuit of their livelihood. For example, the APC Ban prevents Plaintiff Bass from performing medication and aspiration abortions and pursuing her livelihood, despite her training and expertise in these areas. Compl. ¶¶ 7–8, 35, 132–33, 161; Bass Aff. ¶¶ 4–6. The APC Ban also hinders PPSAT's and AWC Clinics' ability to make staffing and hiring decisions. Compl. ¶¶ 7–8, 33, 40–44, 131–35, 148 157, 161. The Telemedicine Ban restricts Plaintiff Providers' ability to conduct their business and enjoy the fruits of their own labor by inhibiting their practice of medicine and limiting the number of patients they can serve as well as the locations where they can perform medication abortions. Compl. ¶¶ 9–11, 32–35, 40–44, 180–84, 189, 191. The TRAP Scheme arbitrarily limits where the Plaintiff Providers can provide abortion care; constrains scheduling of RN staff as well as physicians, who have to split their time between multiple locations; and prevents Plaintiffs PPSAT and AWC Clinics from expanding the number of staff who can provide abortion services in order to better serve their patients' needs. Compl. ¶¶ 12–14, 33, 40–44, 189, 192–212; Compl. at A-1–A-23.

Plaintiffs have also adequately asserted that the APC Ban, Telemedicine Ban, and TRAP Scheme are not rationally related to public health, safety, or the general welfare.[33] As explained in detail above, Plaintiffs have adequately pleaded that the APC Ban, Telemedicine Ban, and TRAP Scheme do not serve but in fact detract from public health and welfare, *see supra* Section II.B.1.a

[33] Defendants improperly rely on *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938), for the proposition that a court should not substitute its judgment for the legislature's when it comes to health, safety, or welfare. Even under rational basis review, courts must always "measure the balance struck by the legislature against the minimum standards of the constitution." *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005) (quoting *Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986)); *see Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280–81 (2009) (same).

(APC Ban); Section II.B.1.b (Telemedicine Ban); Section II.B.1.c (TRAP Scheme), and thus serve no purpose but to deprive Plaintiffs of their constitutional rights, meaning that they are not rationally related to a legitimate purpose. Compl. ¶¶ 27, 261, 266. Therefore, at this preliminary stage, Plaintiff Providers' claims to the fruits of their labor and to pursue their livelihoods should be allowed to proceed.

E. Plaintiffs Adequately Pleaded the Abortion Restrictions Are Facially Unconstitutional

Defendants suggest that Plaintiffs' Complaint does not adequately state a claim for facial relief, Leg. Defs.' Br. 19–23, but this confuses a question of remedy with a question of adequate pleading. *See State v. Grady*, 372 N.C. 509, 546, 831 S.E.2d 542, 569 (2019) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010))). Defendants' arguments on this score should be rejected.[34]

In any event, Plaintiffs have adequately pleaded facial claims. Defendants' argument—that Plaintiffs must plead that the Abortion Restrictions are incapable of any valid application—cannot be reconciled with the approach North Carolina courts take in applying strict or other heightened scrutiny to facial claims. For example, as discussed above, a law fails strict scrutiny if it is not substantially tailored to a compelling government interest regardless of whether it might have some conceivable application that would not violate someone's rights. *See Rowe*, 353 N.C. at 675, 549

[34] The question of whether Plaintiffs have adequately pleaded a facial constitutional challenge, which they have, is relevant to whether the case should be heard by a three-judge panel. *See* N.C. Gen. Stat. § 1-267.1.

S.E.2d at 207. Indeed, although Defendants cite several cases stating a general rule that facial challenges require allegations "that there are no circumstances under which the statute might be constitutional," Leg. Defs.' Br. 20, none of these cases involves heightened scrutiny.

Defendants suggest that the Abortion Restrictions are not subject to facial challenge because they may have constitutional applications, but Defendants do not focus on the relevant groups, i.e., those who will be affected by the Restrictions. When North Carolina courts assess whether a law is facially unconstitutional, they consider only the applications of the statute that actually affect conduct. *Grady*, 372 N.C. at 549, 831 S.E.2d at 571 ("[T]he constitutional 'applications' that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute." (quoting *City of L.A. v. Patel*, 576 U.S. 409, 418 (2015))); *see also Casey*, 505 U.S. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."); *Planned Parenthood of Heartland,* 915 N.W.2d at 232 (measuring the constitutionality of law restricting abortion based on "its impact on those whose conduct it affects" (quoting *Casey*, 505 U.S. at 894). For example, in *Affordable Care, Inc. v. North Carolina State Board of Dental Examiners*, which Defendants cite, the court held that a rule that failed to provide a time frame for review of dental practices' management contracts was not facially unconstitutional, since some contracts might be reviewed in a timely fashion. 153 N.C. App. at 540, 571 S.E.2d at 61. The court thus focused on a group for whom the law was relevant—dental practices whose contracts were reviewed by the Board of Dental Examiners—and concluded that the rule could be applied constitutionally to some of that group's members.

Defendants, by contrast, focus solely on groups "for whom the law is irrelevant." *Casey*, 505 U.S. at 894. First, Defendants argue that the APC Ban applies constitutionally to all *physicians*

wishing to perform abortions and their patients. Leg. Defs.' Br. 20–21. The proper focus of inquiry, however, is on the APCs who are prevented by the ban from providing abortions and the patients who would receive abortion care from APCs but for the ban. Plaintiffs have adequately pleaded that the APC Ban is unconstitutional as to these groups because it violates their substantive due process and equal protection rights. *See supra* Sections II.B.1.a, II.C.2.

Defendants also oddly suggest that the Telemedicine Ban is constitutional because physicians are able to provide in-person abortions to patients, Leg. Defs.' Br. 21, but this circular reasoning fails. Plaintiffs' compliance with the Telemedicine Ban is irrelevant to the fact that it prevents all abortion providers from providing, and all patients from receiving, medication abortions via telemedicine—despite the fact that telemedicine is not categorically banned in any other context in North Carolina—thus violating Plaintiffs' substantive due process and equal protection rights. *See supra* Sections II.B.1.b, II.C.2.

Similarly, the relevant constitutional group for the TRAP Scheme is the abortion providers whose ability to provide abortion care is limited—or outright prevented—by the TRAP Scheme and their patients; not, as Defendants contend, Leg. Defs.' Br. 21, those providers who *are* able to provide care and their patients. Likewise, the relevant group for the 72-Hour Mandatory Delay and the Biased Counseling Requirement are the patients who are delayed, prevented, or otherwise burdened in accessing abortion care and their providers, and the patients for whom the information provided is harmful or irrelevant and their providers. Plaintiffs have adequately pleaded that the TRAP Scheme, 72-Hour Mandatory Delay, and Biased Counseling Requirement violate the substantive due process and equal protection rights of all members of the relevant groups. *See supra* Sections II.B.1.c–d, II.C.2.

But even assuming that the relevant constitutional group for the TRAP Scheme, 72-Hour Mandatory Delay, and Biased Counseling Requirement is all abortion providers and all their patients, which it is not, Plaintiffs have adequately pleaded that the restrictions violate the equal protection rights of all members of those groups. The TRAP Scheme impermissibly singles out abortion providers by subjecting them to onerous and medically unjustified requirements that no other providers of office-based medical care must meet, and it impermissibly singles out abortion patients by forcing them to travel to far-away facilities with unnecessary physical requirements. *See supra* Sections II.B.1.c, II.C.2. The 72-Hour Mandatory Delay also violates the equal protection rights of all patients seeking abortion and all abortion providers, as state law imposes no such waiting period on any other medical procedure. *See supra* Sections II.B.1.d, II.C.2. And the Biased Counseling Requirement violates the equal protection rights of all patients seeking abortion and all abortion providers, as the law singles out abortion for additional requirements that have no parallel in North Carolina law or medical practice: it requires the same state-scripted counseling for every abortion patient, regardless of circumstance, even though state law already requires health care professionals to obtain informed consent prior to undergoing a medical procedure. *See supra* Sections II.B.1.d, II.C.2.

Plaintiffs have thus adequately pleaded facts to support facial relief, and Defendants' argument to the contrary must be rejected.

CONCLUSION

For all of the above reasons, Defendants' Motions to Dismiss should be denied.

Dated: February 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This 17th day of February, 2021.

/s/ Jaclyn A. Maffetore
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