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

PLANNED PARENTHOOD SOUTH ATLANTIC, et al.,	)	
Plaintiffs,	)	
v.	)	**REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS**
TIMOTHY K. MOORE, as Speaker of the North Carolina House of Representatives, in his official capacity, et al.,	)	(Hearing Set for March 18, 2:30pm)
Defendants.	)	

NOW COME Defendants Attorney General Stein, District Attorneys DeBerry, David, Freeman, West, Woodall, Crump, Merriweather, O'Neill, and Williams, the North Carolina Medical Board by and through President Murphy ("Medical Board"), the North Carolina Board of Nursing by and through Chair Harrell ("Board of Nursing"), and the Department of Health and Human Services by and through Secretary Cohen ("DHHS"), all in his or her official capacities, by and through the undersigned Special Deputy Attorneys General, and submit this reply to *Plaintiffs' Brief in Opposition to All Defendants' Motion to Dismiss.*

Plaintiffs Fail to Demonstrate a Direct Injury

The General Assembly's enactment of a law, and its inclusion in the North Carolina Statutes Annotated, does not by itself directly injure any person. State codes often include duly-

enacted statutes that remain valid law but have rarely or never been enforced.[1] Likewise, the existence of State agencies and actors with authority to enforce laws, by itself, causes no direct injury. Standing requires more than a codified, enforceable statute that a plaintiff would like to challenge because it may affect him or her, some day. It is only where an authorized law enforcement entity clearly and credibly threatens to enforce the statute – or actually files enforcement proceedings – that a plaintiff faces such a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) (*quoted in Comm. to Elect Dan Forest v. Emps. PAC*, No. 231A18, 2021 WL 403933, at ¶ 82 (N.C. Feb. 5, 2021)); *see also Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 180 (1993) (a statute that is not enforced causes no direct injury that can support a lawsuit: "[w]e believe that deprivation of property resulting from enforcement of the statute gives these defendants standing to challenge the constitutionality of the statute"). Without that requisite "direct injury, plaintiffs lack standing, and Courts must dismiss a complaint under Rules 12(b)(1) and (6).

One month after Defendants filed their *Memorandum of Law in Support of the Motion to Dismiss*, the North Carolina Supreme Court issued its decision in *Committee to Elect Dan Forest v. EMPAC*, No. 231A18, 2021 WL 403933 (N.C. Feb. 5, 2021). There, the Supreme Court affirmed that Plaintiffs risk dismissal in the absence of an existing, direct injury in injunctive and

[1] *See, e.g., Doe v. Duling*, 782 F.2d 1202, 1204 (4th Cir. 1986) (where the last reported convictions were in 1849 and 1883, respectively, there was no credible threat of prosecution and no standing to challenge Virginia statutes prohibiting fornication and cohabitation); *Chance v. Bd. of Ed. of Harnett Cty.*, 224 F. Supp. 472, 475 (E.D.N.C. 1963) (noting that N.C. Gen. Stat. § 51-3 "represents a legislative enactment against intermarriage, which however seemingly is never enforced, as the Cherokee and the white often intermarry").

declaratory actions seeking to invalidate legislative enactments based upon alleged unconstitutionality. *Id*., 2021 WL 403933, at * 30. "We have held that, in directly attacking the validity of a statute under the constitution, a party must show they suffered a 'direct injury.'" *Id*. at * 30 (citing *State ex rel. Summrell v. Carolina-Virginia Racing Ass'n*, 239 N.C. 591, 594 (1954)). The personal "direct injury" required in this context could be established through a showing of actual "deprivation of a constitutionally guaranteed personal right or an invasion of his property rights." *Id*. (*citing Summrell*, 239 N.C. at 594; *Canteen Services v. Johnson, Comm'r of Revenue*, 256 N.C. 155, 166 (1962)). "A party who is not personally injured by a statute is not permitted to assail its validity[.]" *Yarborough v. North Carolina Park Comm'n*, 196 N.C. 284, 288 (1928). As our Supreme Court explained, the requirement of direct, personal injury in injunctive lawsuits is an extension of the "principle to recognize that, in exercise of the equitable judicial power, a party was not entitled to injunctive relief as a matter of *substantive* law unless he would be irreparably harmed." *Comm. to Elect Dan Forest*, 2021 WL 403933 at * 22 (citing *Newman v. Watkins*, 208 N.C. 675 678 (1935)) (emphasis in original).

The Supreme Court's decision in *Committee to Elect Dan Forest* favorably cited *Poe v. Ullman*, 367 U.S. 497, 505 (1961), which held that disputes about unenforced statutes are not justiciable. Our Supreme Court explained that *Poe* stands for the proposition that, under federal law, the "exercise of the judicial power require[s] adverse parties." *Id*., at * 14 (*quoting Poe*, 319 U.S. at 305). Later in in the decision, the Court explains that the same policy rationale that supported the outcome in *Poe* also undergirds the direct-injury requirement that applies in North Carolina courts. For instance, the Court explained that "as a rule of prudential self-restraint, we have held that, in order to assure the requisite '*concrete adverseness'* to address 'difficult constitutional questions,' we have required a plaintiff to allege 'direct injury' to invoke the

judicial power to pass on the constitutionality of a legislative or executive act." *Id*. at 26 (emphasis added).

Plaintiffs cannot meet their burden of proof to establish a "direct injury" under these authorities. Put simply, Plaintiffs lack standing because Defendants have not taken any recent steps to enforce the five laws addressed in the Complaint. *See* Def. Mem. at 8-13. Plaintiffs do not dispute (and cannot dispute) Defendants' showing that neither the District Attorneys, nor the Attorney General, have ever investigated or criminally charged any clinic, doctor, nurse, medical provider or organization under these laws. *See* Def. Mem. at 8-10. Nor do they dispute that both the NC Medical Board, and the NC Board of Nursing, likewise have not taken enforcement or administrative action in more than 20 years. *See id.* at 10-12. Plaintiffs have no response to rebut Defendants' showing, which squarely undermine their bare allegation of a potential direct injury.

Attempting to evade these undisputed facts, Plaintiffs purport to show a credible threat of future prosecution based upon two administrative actions taken by DHHS in 2013. *See* Opp. at 9. But Plaintiffs' argument is based on a false equivalence, and must be rejected. It is undisputed that DHHS/DHSR took administrative actions in 2013 to address violations of four specific subsections of 10A N.C. Admin. Code 14E – including .0302, .0305, .0309 and .0311. Ex. 13, ¶¶ 9-10. As accurately stated in the Declaration of Ms. Conley, none of these four subsections are cited in the Complaint. The Complaint only addresses subsections .0203 through .0207, and .0307, all of which relate to physical requirements that clinics must have (e.g., elevators that can accommodate a stretcher, patient corridors no less than 60 inches wide, room doors no less than three feet wide, specific ventilation system requirements). *See* Compl. ¶¶ 12, 199, 209. The Complaint includes no allegations and no citations pertaining to .0302, .0309 or

.0311.[2] Put simply, there is no meaningful overlap between DHHS/DHSR's citations in 2013 and the physical requirement provisions that Plaintiffs have included in the Complaint. Accordingly, because the 2013 administrative actions addressed regulations wholly different from the ones raised in this case, they have no relevance to Plaintiffs' standing.[3] Plaintiffs have not rebutted Defendants' showing that they have never pursued any legal proceeding under one of the Challenged Laws in more than 20 years.

CONCLUSION

For the reasons demonstrated in Defendants' opening memorandum and herein, the Court should dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6).

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[2] The Appendix to the Complaint makes reference to specific provisions of 10A NCAC 14E (the rules pertaining to DHHS Annual Inspections of clinics). Compl., ¶ 212. However, neither the Complaint nor the Appendix provide any alleged nexus between the majority of these requirements and the alleged constitutional rights Plaintiffs contend are being infringed. Much to the contrary, the Complaint only addresses several physical requirements, subsections .0203 through .0207, and .0307.

[3] While Rule 8(a) does not "does not require detailed fact pleading, nevertheless, we hold that it does require a certain degree of specificity. 'It is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant and the Court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery." *Manning v. Manning*, 20 N.C. App. 149, 154, 201 S.E.2d 46, 50 (1973). To the extent Plaintiffs contend the Complaint includes constitutional challenges to provisions under .0302, .0305, .0309 or .0311, despite the absence of any supporting citation in the Complaint itself, then Defendants move for a More Definite Statement pursuant to Rule 12(e).

Respectfully submitted, this the 3rd day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document is being electronically filed using the Court's electronic filing system, which will automatically send notification to all users who are registered with that system, and that additionally the document will be transmitted by electronic email to the following addresses:

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Dated this the 3rd day of March 2021.

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