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' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PARTIAL PRELIMINARY INJUNCTION

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The Supreme Court's recent ruling in *Dobbs v. Jackson Women's Health Organization*[1] upended fifty years of federal abortion jurisprudence and stripped away a federal constitutional right that had been recognized for nearly half a century. In response, many states have put into place bans, or severe restrictions, on abortion.[2] In North Carolina, abortion is legal up to 20 weeks of pregnancy. But *Dobbs* is significantly impacting North Carolinians' access to abortion. Since *Dobbs* was decided, a continuing influx of out-of-state patients who are unable to access abortion in their home states have turned to North Carolina for the care they need. This, in turn, has exacerbated the long wait times experienced by North Carolinians seeking abortion—forcing them to remain pregnant against their will for longer periods, potentially pushing them past the gestational age limit for a medication abortion, and more. Before *Dobbs*, abortion access was already limited—now, practically speaking, it is much more so.

Plaintiffs, including Planned Parenthood South Atlantic ("PPSAT"), Katherine Farris, M.D., and Anne Logan Bass, F.N.P., on behalf of their staff and their patients, and Plaintiff SisterSong on behalf of its members, have challenged a number of restrictions on abortion providers that limit access to abortion in North Carolina. This motion for a partial preliminary injunction, however, focuses on a single restriction—the prohibition against Advanced Practice Clinicians ("APCs") providing medication abortion. Plaintiffs bring this motion so that APCs may provide medication abortion, which is within their scope of practice, to alleviate the increased burden on abortion access caused by the *Dobbs* ruling during the pendency of this case. Thus,

[1] 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2236 (2022).

[2] As of the filing of this Memorandum, 23 states have either banned abortion outright or effectively banned abortion by restricting abortion at such an early stage of pregnancy that many people do not even know they are pregnant by the deadline to obtain an abortion. *See* Guttmacher Inst., *State Bans on Abortion Throughout Pregnancy* (Oct. 2022), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions.

pursuant to N.C. R. Civ. P. 65 and N.C. Gen. Stat. § 1-485, Plaintiffs seek a partial preliminary injunction of N.C. Gen. Stat. §§ 14-45.1(a) and (g)'s prohibition on APCs providing medication abortion.

Medication abortion is a simple process where a patient uses a combination of medications—mifepristone and misoprostol—in pill form within a specified time period. The Federal Drug Administration's ("FDA") approved label for mifepristone is for use within the first 10 weeks of a pregnancy, and subsequent research has shown that a regimen of mifepristone and misoprostol is safe and effective through 77 days (or 11 weeks, zero days).[3] In North Carolina, qualified health care professionals, such as physician assistants, nurse practitioners, and certified nurse midwives (referred to collectively as Advanced Practice Clinicians or APCs), are legally authorized to provide these medications for miscarriage management,[4] but are legally prohibited from providing the very same medications for abortion. There is no medical or safety reason to prohibit APCs from providing the medications for medication abortion. Permitting APCs to provide these medications for abortion—which they already do for their patients in other contexts and which is within their scope of practice—would immediately increase access to abortion for North Carolinians and help alleviate the exacerbated post-*Dobb*s burdens on their access to reproductive health care.

[3] Expert Declaration of Daniel Grossman, M.D. ("Grossman Decl.") ¶¶ 25–28.
[4] Declaration of Anne Logan Bass, F.N.P. ("Bass Decl.") ¶ 18; Declaration of Katherine Farris, M.D. ("Farris Decl.") ¶ 20; *see also* Grossman Decl. ¶¶ 31, 65, 67-68.

I. INTRODUCTION

A. Procedural History

In the Complaint, Plaintiffs seek a declaration that five laws restricting abortion access violate the North Carolina Constitution and a permanent injunction against those laws.[5] At issue in the present motion is only one aspect of one of those laws: N.C. Gen. Stat. §§ 14-45.1(a) and (g), which prohibit APCs from providing abortion, including medication abortion. In the Complaint, Plaintiffs refer to this prohibition generally as the "APC Ban." However, in this motion, Plaintiffs use "APC Ban" to refer only to the aspect of the APC Ban that prohibits APCs from providing medication abortion.[6]

On November 16, 2020, Defendants filed Motions to Dismiss pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(6). On May 28, 2021, the Honorable Rebecca Holt denied all Defendants' Motions to Dismiss under Rule 12(b)(1), denied State Defendants'[7] Motion to Dismiss under Rule 12(b)(6) to the extent that the Motion was based on an assertion that Plaintiffs lack standing, and declined to rule on Legislative Defendants'[8] Motion to Dismiss to the extent it was not based on

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[5] Specifically, Plaintiffs challenge the following abortion restrictions (1) the APC Ban (N.C. Gen. Stat. §§ 14-45.1(a) and (g)), (2) the Telemedicine Ban (N.C. Gen. Stat. § 90-21.82(1)(a)), (3) the Targeted Regulation of Abortion Providers ("TRAP") Scheme (N.C. Gen. Stat. § 14-45.1(a)), (4) the 72-Hour Mandatory Delay (N.C. Gen. Stat. § 90-21.82(1)-(2)), and (5) the Biased Counseling Requirement (N.C. Gen. Stat. § 90-21.82(1)-(2)). Compl. ¶ 6.

[6] While Plaintiffs seek a preliminary injunction only as to this aspect of the APC Ban, due to the immediate threat of irreparable harm posed by this restriction, the Complaint challenges the APC Ban in its entirety, including banning APCs from providing aspiration abortion. *See* Compl. ¶¶ 106-61. Plaintiffs therefore reserve the right to later pursue their claim that all aspects of the APC Ban violate the North Carolina Constitution.

[7] "State Defendants" refers to Defendants Attorney General Josh Stein; nine separate District Attorneys; the Secretary of the Department of Health and Human Services; the President of the North Carolina Medical Board; and the Chair of the North Carolina Board of Nursing, all sued in their official capacities.

[8] "Legislative Defendants" refers to Defendants Timothy K. Moore as Speaker of the North Carolina House of Representatives, and Philip E. Berger, as President Pro Tempore of the North Carolina Senate, in their official capacities.

an assertion that Plaintiffs lacked standing. By separate order on May 28, 2021, Judge Holt referred Plaintiffs' facial challenges and the remaining Motion to Dismiss to a three-judge panel. On November 19, 2021, the Chief Justice of the Supreme Court of North Carolina assigned this action to the current three-judge panel. While oral argument on the outstanding portion of Legislative Defendants' Motion to Dismiss under Rule 12(b)(6) was scheduled for April 28, 2022, Legislative Defendants withdrew their Motion on April 19, 2022. Defendants answered the Complaint on May 18, 2022. Discovery has commenced and is ongoing. Trial is scheduled for September 11, 2023.[9]

B. Factual Background

1. *Dobbs* Has Exacerbated Existing Limitations on Abortion Access in North Carolina.

On June 24, 2022, the U.S. Supreme Court issued its ruling in *Dobbs*, overturning *Roe v. Wade* and *Planned Parenthood v. Casey.*[10] Since this ruling, PPSAT has seen an influx of out-of-state patients seeking abortion in the State, putting an increased demand on its health centers and health care providers, and increasing wait times for North Carolinians seeking abortion. Between July 1 and September 30, 2022, more than one-third of PPSAT's abortion patients in North Carolina came from out of state—1,317 total, compared to just 322 patients between July 1 and September 30, 2021.[11] PPSAT has taken steps to increase the number of available abortion appointments and the days on which it offers abortion services.[12] But even with its increased capacity, PPSAT's wait times for medication abortion appointments, which were already high in 2020 (the year Plaintiffs filed their Complaint), have failed to improve and in fact have worsened

[9] Pretrial Sched. Order (Oct. 11, 2022).
[10] 213 L. Ed. 2d 545, 142 S. Ct. 2228, 2236 (2022).
[11] Farris Decl. ¶ 56 & n.4.
[12] *Id.* ¶¶ 59-62.

in some parts of the state.[13] For example, in Asheville, wait times for medication abortion appointments have increased from 12 days in July, August, and September 2021 to between 14 and 21 days since July 1, 2022.[14] These increased wait times have persisted despite the fact that PPSAT expanded services from one day a week at the time the Complaint was filed, to two days a week in July 2022, and three days a week in September 2022.[15] In short, PPSAT has been unable to adequately meet the demand and has not stemmed the increase in abortion wait times, which were already long and causing hardship to North Carolinians.

2. Medication Abortions Are Safe and Simple to Provide.

The medications for abortion are simple to provide and proven to be safer than some commonly used over-the-counter and prescription medications, such as penicillin, Tylenol, and Viagra.[16] A "medication abortion" consists of a patient taking two drugs, mifepristone and misoprostol, within the first 11 weeks, or 77 days, of pregnancy, as measured from the first day of the patient's last menstrual period.[17] Mifepristone temporarily blocks the hormone progesterone, which is necessary to maintain pregnancy.[18] In North Carolina, mifepristone is provided at a health care provider's office.[19] Misoprostol, which is typically taken some time later, away from a medical office,[20] causes the uterus to contract and expel its contents (as the uterus does during a miscarriage).[21] Medication abortion is highly effective, and only rarely requires follow-up care.[22]

[13] *Id.* ¶¶ 61-65, n.6.
[14] *Id.* ¶ 62.
[15] *Id.* ¶¶ 62, 64.
[16] Grossman Decl. ¶ 47.
[17] *Id.* ¶¶ 25-28.
[18] *Id.* ¶ 25.
[19] Farris Decl. ¶ 29.
[20] Bass Decl. ¶ 11.
[21] Grossman Decl. ¶ 25.
[22] *Id*. ¶¶ 21, 39–45.

Similar to patients seeking a medication abortion, mifepristone and misoprostol are also used to treat patients who have retained tissue following a miscarriage.[23] APCs at PPSAT treat patients for miscarriage management with mifepristone and misoprostol.[24]

While in the first 11 weeks of pregnancy most patients have a choice between medication abortion and aspiration abortion (a procedure that uses suction to empty the uterus),[25] most patients seeking an abortion prefer medication.[26] Since 2011, the percentage of abortions in North Carolina that were by medication has steadily increased, with 59.1% of abortions in 2020 being medication abortions.[27]

3. Advanced Practice Clinicians Are Highly Trained Medical Professionals Qualified to Provide Medication for Medication Abortion.

APCs—a category that in North Carolina includes nurse practitioners, certified nurse midwives, and physician assistants—are prohibited under the APC Ban from providing medication for medication abortion, despite their qualifications[28] and despite being lawfully permitted to provide the same medication used in medication abortions for miscarriage management. To obtain an APC license, a clinician must meet rigorous educational, certification, and continuing education requirements.[29] Under North Carolina law, upon licensure, nurse practitioners and certified nurse midwives are authorized to independently "prescrib[e], administer[], and dispense[] therapeutic

[23] Grossman Decl. ¶ 31.
[24] Bass Decl. ¶ 18; Farris Decl. ¶ 20.
[25] Grossman Decl. ¶¶ 29, 32; Farris Decl. ¶ 10.
[26] Grossman Decl. ¶ 32.
[27] N.C. Dep't of Health & Human Servs., State Ctr. for Health Stats, *NC Resident Abortions: Characteristics of Women Receiving Abortions North Carolina Residents, 2011-2020*, (2020) https://schs.dph.ncdhhs.gov/data/vital/pregnancies/2020/abortioncharacteristics.pdf.
[28] Grossman Decl. ¶¶ 10, 58-63, 74, 76; Expert Declaration of Joanne Spetz, Ph.D. ("Spetz Decl.") ¶¶ 17-19, 25-30, 85-87.
[29] Grossman Decl. ¶ 56 & n.59; Spetz Decl. ¶¶ 8; 17-23, 25, 30; 85-87.

measures, tests, procedures, and drugs."[30] Licensed physician assistants can perform similar functions, provided they practice in collaboration with a physician; their scope of practice is outlined in, and determined by, an agreement with a collaborating physician.[31] APCs in every state, including North Carolina, can legally prescribe controlled substances (including drugs with a high potential for abuse and severe psychiatric or physical dependence, like opioids and amphetamines).[32]

APCs provide a broad scope of services, including patient care,[33] that carries significantly higher risks than providing medication for medication abortion. For instance, APCs regularly prescribe medications that are comparable to or higher risk than those used for medication abortion, including gender-affirming hormone prescriptions, menopause hormone replacements, pre-exposure HIV prophylaxis, and for treatment of pelvic infections and complicated sexually transmitted infections.[34] They also perform a variety of other office-based reproductive health procedures comparable to or of greater clinical complexity and risk than medication abortion, such as endometrial and vulvar biopsies and colposcopies, as well as the insertion and removal of

[30] As to nurse practitioners: 21 N.C. Admin. Code 36.0801 *et seq.* (approval and practice parameters); 21 N.C. Admin. Code 36.0810 (collaborative practice agreement standards); 21 N.C. Admin. Code 32M.0101, (definitions); N.C. Gen. Stat. § 90-18.2. (prescriptive authority). As to certified nurse midwives: N.C. Gen. Stat. §§ 90-178.2 (definitions), 90-178.3 (prescriptive authority). *See also* Spetz Decl. ¶ 20.

[31] N.C. Admin. Code 32S.0212 (prescriptive authority); N.C. Med. Bd., *Resources & Information, Physician Assistant*, https://www.ncmedboard.org/resources-information/faqs/physician_assistant (last visited Oct. 14, 2020). *See also* Spetz Decl. ¶ 90. A physician need not be physically present while care is provided. 21 N.C. Admin. Code 32S.0213(b).

[32] Spetz Decl. ¶¶ 9, 37-38, 88; Farris Decl. ¶ 18; N.C. Gen. Stat. § 90.18.2 (Nurse Practitioners); 21 N.C. Admin. Code 32S.0212 (Physician Assistants); N.C. Gen. Stat. § 90-178.3(b) (Certified Nurse Midwives).

[33] Spetz Decl. ¶¶ 12, 15.

[34] Farris Decl. ¶ 19; Bass Decl. ¶ 19.

intrauterine contraception devices ("IUDs"), which can involve administering paracervical blocks or using forceps under ultrasound guidance to grasp an IUD that has become partially embedded in the uterine lining or is otherwise inaccessible.[35] In fact, APCs often *train* other clinicians, *including physicians*, in care that is of comparable or higher-risk than abortion.[36] APCs also already regularly and independently provide all elements of patient care before and after a medication abortion, including diagnosing and dating an intrauterine pregnancy, screening for contraindications, providing options counseling, providing follow-up care to ensure that the abortion was complete, and assessing and managing post-abortion complications.[37] Numerous other states allow APCs to provide abortion, including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington, as well as the District of Columbia.[38]

[35] Bass Decl. ¶¶ 7, 19; Farris Decl. ¶ 21; Grossman Decl. ¶¶ 64(a)–(e) (explaining that endometrial biopsies involve "inserting a sterile tube through a patient's cervix into the uterus to suction and remove tissue from the uterine lining"; colposcopies involve "using instruments to magnify the cervix, identifying signs of cervical cancer, performing biopsies, and managing bleeding with the use of hemostatic agents"; and IUD insertion and removal sometimes requires ultrasound guidance and forceps).

[36] Bass Decl. ¶ 8, 10; Farris Decl. ¶ 15.

[37] Bass Decl. ¶¶ 19, 21-23; Farris Decl. ¶ 28. *See also* Spetz Decl. ¶ 73.

[38] Grossman Decl., ¶ 62 n.69; Spetz Decl. ¶ 41. Additionally, the Alaska Superior Court recently granted a preliminary injunction permitting APCs to provide medication abortion despite a statute prohibiting it. *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Alaska*, No. 3AN-19-11710CL slip op. (Alaska Sup. Ct. Nov. 2, 2021), https://www.plannedparenthood.org/uploads/filer_public/27/0f/270f79ef-3e9f-43c1-83fe-654a3ceac878/3an-19-11710ci.pdf.

APCs are essential health care providers in North Carolina.[39] PPSAT employs or contracts with eighteen APCs across its nine locations in North Carolina,[40] all of whom specialize in reproductive health care and would be qualified to prescribe medication abortion if legally permitted.[41] They regularly prescribe medications and perform procedures that are comparable to or higher risk than medication abortion.[42] Plaintiff Bass is a Family Nurse Practitioner who is trained and qualified to provide medication abortion and would do so in North Carolina if the APC Ban were enjoined. Indeed, she currently provides both medication and aspiration abortion at PPSAT health centers in Virginia. Similarly, four other PPSAT APCs are already trained and provide medication abortion in Virginia, and one other provides aspiration abortion there.[43]

There is no medical justification for prohibiting APCs from prescribing medication for abortion while allowing them (1) to prescribe the same medication for miscarriage management; and (2) to provide other care that is comparable or greater in risk and complexity. Medical experts agree. When the FDA updated the labeling of mifepristone in 2016, it removed the language specifying that the prescriber needed to be a physician; as such, any qualified clinician may provide medication abortion.[44] Likewise, the American College of Obstetricians and Gynecologists, the nation's leading organization of women's health care providers, opposes APC Bans based on studies "show[ing] no difference in outcomes in first-trimester medical and aspiration abortion by

[39] Spetz Decl. ¶ 91; *See* Adam J. Zolotor et al., *Primary Care Clinicians in Low Access Counties*, 83 N.C. Med. J. 163, 163, 168 (2022).
[40] Bass Decl. ¶¶ 9, 49; Compl. ¶ 146.
[41] Bass Decl. ¶ 49.
[42] Bass Decl. ¶ 19; Farris Decl. ¶ 19; Spetz Decl. ¶¶ 89-90; Grossman Decl. ¶¶ 64(a)–(e), 65–67.
[43] Bass Decl. ¶¶ 12-14.
[44] Grossman Decl. ¶ 61.

provider type and indicat[ing] that trained APCs can provide abortion services safely."[45] Similarly, the National Academies of Sciences, Engineering, and Medicine ("National Academies")[46] has concluded that APCs "can provide medication and aspiration abortions safely and effectively.[47] The American Public Health Association and the World Health Organization agree.[48]

4. A Partial Preliminary Injunction Would Expand Abortion Access for North Carolinians.

Plaintiffs' requested relief would allow APCs to provide medication abortion, at all of PPSAT's North Carolina health centers that currently provide abortion through a physician, on all days that they are open, thereby removing medically unnecessary and arbitrary barriers to abortion while dramatically expanding abortion access to North Carolinians seeking abortion.[49] This would allow more North Carolinian patients to access medication abortion, would reduce the time patients must carry a pregnancy against their will, and may prevent delays past 11 weeks into their pregnancies, after which a patient must undergo a safe but more invasive procedural abortion.[50]

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[45] Grossman Decl. ¶ 60; Am. Coll. of Obstetricians & Gynecologists, Comm. on Health Care for Underserved Women, Op. No. 612: *Abortion Training and Education* (Nov. 2014, reaff'd 2019), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Abortion-Training-and-Education. *See also* Spetz Decl. ¶ 70 (describing similar studies).

[46] The National Academies is a body composed of highly esteemed experts that was first established by Congress in 1863 to provide independent, objective expert analysis and advice to the nation to inform public policy. Grossman Decl. ¶ 40.

[47] Grossman Decl. ¶ 60; Nat'l Acads. of Scis., Eng'g & Med., *The Safety and Quality of Abortion Care in the United States*, at 14 (2018) ("National Academies Report").

[48] Grossman Decl. ¶ 60; Am. Pub. Health Ass'n, Policy No. 20112: *Provision of Abortion Care by Advanced Practice Nurses and Physician Assistants* (Nov. 1, 2011), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/16/00/provision-of-abortion-care-by-advanced-practice-nurses-and-physician-assistants; World Health Org., *Safe Abortion: Technical and Policy Guidance for Health Systems*, 65 (2d ed. 2012).

[49] Farris Decl. ¶ 37.

[50] Grossman Decl. ¶¶ 23, 29 (describing different types of procedural abortions).

This is particularly harmful for patients who would have strongly preferred to avoid a procedural abortion, for example because they have been raped or assaulted in the past or have suffered other physical trauma.[51]

For those patients who are delayed past the window for a medication abortion, their options become even less accessible, because procedural abortion is available on an even more limited basis.[52] Because of the difficulty of accessing care in North Carolina, some patients have no choice but to end their pregnancies later; some must travel at greater cost to do so; some must rely on other methods of abortion that, while safe, are riskier and more expensive; and some might have to carry to term against their will or attempt to self-induce without medical supervision.[53] All of these harms are entirely avoidable and completely unnecessary.

II. LEGAL STANDARD FOR GRANTING A PRELIMINARY INJUNCTION

A trial court may issue a preliminary injunction if (1) the movant is able to: "show *likelihood* of success on the merits of his case," (2) the movant "is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a [movant's] rights during the course of litigation[,]" and (3) a "careful balancing of the equities" supports injunctive relief. *See A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400-01, 302 S.E.2d 754, 759 (1983) (citations omitted, emphasis in original) (reversing denial of preliminary injunction). When a preliminary injunction is sought to protect fundamental constitutional rights, an injunction is warranted "[i]n light of the great public interest in the subject matter of these cases, the importance of the issues to the constitutional jurisprudence of this State,

[51] Bass Decl. ¶ 45.
[52] Farris Decl. ¶ 48; Bass Decl. ¶ 46.
[53] Grossman Decl. ¶¶ 81-88; 99-101; Farris Decl. ¶¶ 47-51; Bass Decl. ¶¶ 46-48, 50.

and the need for urgency in reaching a final resolution on the merits at the earliest possible opportunity[.]" *Harper v. Hall*, 379 N.C. 656, 658, 865 S.E.2d 301, 302 (2021).

In determining whether to issue a preliminary injunction, the trial court "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Town of Pinebluff v. Marts*, 195 N.C. App. 659, 664, 673 S.E.2d 740, 744 (2009); *see also Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975) (affirming grant of injunction where "ampl[e]" evidence of harm to plaintiffs outweighed any harm to defendants, for which there was little to no evidence in support).

III. ARGUMENT

A. Abortion Is a Fundamental Right Protected by the North Carolina Constitution.

The North Carolina Constitution provides "fundamental guarantees" in its Declaration of Rights that are "broad in scope." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949). Courts must "give our Constitution a liberal interpretation" to "safeguard the liberty and security of . . . both person and property." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). The framers of the North Carolina Constitution "loved liberty and loathed tyranny." *Ballance*, 229 N.C. at 768, 51 S.E.2d at 734. They "were convinced that government itself must be compelled to respect the inherent rights of the individual if freedom is to be preserved and oppression is to be prevented." *Id.* "In consequence, they inserted in the basic law a declaration of rights designed chiefly to protect the individual from the State." *Id.*

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. 761 at 783, 413 S.E.2d 276 at 290. The U.S. Constitution provides a floor, with "the state Constitution guarantee[ing] 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);[54] *see also Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (applying additional scrutiny to Section 19 equal protection claim). Indeed, the preeminent history of North Carolina's Constitution co-authored by Chief Justice Newby affirmed that the "list of enumerated rights [in the State Constitution] . . . are only 'among' the protected rights."[55]

The broad guarantees of the State Constitution encompass a right to abortion—which is necessary to ensure a right not to be forced to give birth. This fundamental right can be found in the State Constitution's protections of privacy and dignity, procedural and substantive due process, equal protection, and the right to life and liberty. Its existence is supported by North Carolina precedent interpreting these provisions, as well as rulings from courts in other states interpreting similar constitutional provisions to encompass the right to abortion.

Article I, Section 1 declares, "[A]ll persons . . . are endowed by their Creator with certain unalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const., art. I, § 1. Article I, Section 19's law of the land clause states that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const., art. I, § 19. The phrase "'law of the land' is synonymous with 'due process of law.'" *Tully v. City of Wilmington*, 370 N.C. 527, 538, 810 S.E.2d 208, 216-17 (2018). Both provisions expressly recognize a liberty interest, and the North Carolina Supreme

[54] Thus, the U.S. Supreme Court's ruling in *Dobbs*, which held that there is no federal constitutional right to abortion, in no way prevents this Court from conducting an independent analysis of the scope of its State Constitution.

[55] John V. Orth & Paul M. Newby, *The North Carolina State Constitution*, 47 (2nd ed. 2013); *see also* N.C. Const., art. I, § 36 ("The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people.").

Court has recognized the rights provided by Sections 1 and 19 as fundamental. *See Ballance*, 229 N.C. at 769, 51 S.E.2d at 734 (calling the "individual rights, including that of personal liberty," provided for in the Declaration of Rights "fundamental guaranties").

Broadly interpreting the scope of these "fundamental guarantees," North Carolina courts have recognized a right to liberty, privacy, and dignity, including 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." *M.E. v. T.J.*, 275 N.C. App. 528, 546, 854 S.E.2d 74, 93 (2020) (citing *Tully*, 370 N.C. at 534, 810 S.E.2d at 214) (applying strict scrutiny to find that law making domestic orders of protection available to heterosexual couples, but not same-sex couples, violated due process and equal protection under State Constitution).

While North Carolina courts have not addressed whether the right to abortion is within the scope of the "fundamental guarantees" of Sections 1 and 19, other state supreme courts have interpreted similar constitutional provisions, and North Carolina courts can look to those decisions when interpreting the North Carolina constitution. *See State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d. 79, 84 (1982) (examining "[n]umerous decisions from sister states" before concluding that a statute violated article I, section 6 of the North Carolina Constitution). State supreme courts have interpreted provisions similar to those provided for in the North Carolina Constitution to include a fundamental right to privacy encompassing a right to abortion. *See Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609, 626, 762 A.2d 620, 629 (N.J. 2000) (N.J. Const. Art. 1, § 1, which provides that "[a]ll persons . . . have certain natural and unalienable rights," incorporates a right to privacy including the right to choose to have an abortion); *Right to Choose v. Byrne*, 91 N.J. 287, 303, 450 A.2d 925, 933 (1982) (same); *Moe v. Sec'y of Admin. & Fin.*, 382, Mass. 629, 645-649 417 N.E.2d 387, 397-99 (Mass. 1981) (finding right to privacy

arising from state constitution's due process provision); *Planned Parenthood of Mich. v. Att'y Gen.,* No. 22-000044, 2022 WL 7076177, at *7-9 (Mich. Ct. Cl. Sept. 7, 2022) (right to bodily integrity is separate from right to privacy and includes right to abortion); *Doe v. Maher*, 40 Conn. Supp. 394, 422, 515 A.2d 134, 148 (Ct. Super. Ct. 1986) (deriving right to privacy encompassing right to abortion in part from "'natural rights,' . . . deeply rooted in the core of liberty"); *Women of State of Minn. v. Gomez*, 542 N.W.2d 17, 26-27 & n.10 (Minn. 1995) (finding right to privacy, in part based on "law of the land" provision previously interpreted to encompass "right to be free from intrusive medical treatment," also encompassed right to abortion as a "right of procreation without state interference").[56]

The Kansas Supreme Court's decision in *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019), is instructive. Like the North Carolina Constitution, the Kansas Constitution is interpreted broadly, including because it uses the expansive term "inalienable natural rights." *Id.* at 470-73. In *Hodes*, the court found that a provision of the Kansas Constitution similar to Article I, Section 1 (providing that "[a]ll men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness") creates the "right of personal autonomy," including the right of "a woman to make her own decisions regarding her body, health, family formation, and family life—decisions that can include whether to continue a pregnancy." *Id.* at 471-72.

[56] Other states have found the right to abortion arising from express constitutional privacy rights. *E.g.*, *Armstrong v. State*, 1999 MT 261 ¶ 66, 296 Mont. 361, 376, 989 P.2d 364, 375 (Mont. 1999); *Valley Hosp. Ass'n v. Mat-Su Coal. for Choice*, 948 P.2d 963, 969 (Alaska 1997); *Comm. to Defend Reprod. Rts. v. Myers*, 29 Cal.3d 252, 283, 625 P.2d 779, 798 (Cal. 1981) ("By virtue of the explicit protection afforded an individual's inalienable right of privacy by article I, section 1 of the California Constitution, however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state rich or poor is guaranteed the constitutional right to make that decision as an individual, uncoerced by governmental intrusion.").

The right to privacy and dignity recognized in the North Carolina Constitution encompasses a right to abortion because whether or not to carry and give birth to a child is a private medical decision that should not be dictated by the government. It is oppressive for pregnant patients to be forced to carry a pregnancy to term and have their bodies used for that purpose against their will. The right to life and liberty also encompass a right to abortion because abortion is necessary to maintain the life and liberty of pregnant patients who desire not to be forced to give birth, and because the ability of a person to control their own body is necessary for full and equal participation in society.

B. Plaintiffs Are Likely to Succeed on the Merits Because the APC Ban Violates the North Carolina Constitution under Any Standard of Review.

Likelihood of success on the merits means a "reasonable likelihood." *A.E.P. Indus.*, 308 N.C. at 401-402, 302 S.E.2d. at 759-60. Plaintiffs are likely to succeed in establishing that the APC Ban is unconstitutional under Article I, Sections 1 and 19 of the North Carolina Constitution. The Ban (a) fails rational basis review, because it is not rationally related to any legitimate government purpose; (b) fails strict scrutiny, because it abridges a fundamental right without being narrowly tailored to a compelling government interest; and (c) fails intermediate scrutiny, because it discriminates on the basis of sex without serving an important government interest. The APC Ban also unconstitutionally deprives Plaintiffs PPSAT and Anne Logan Bass, F.N.P. of their right to enjoy the fruits of their labor.

The Court need only agree with *one* of these constitutional arguments to issue a preliminary injunction. Further, while the APC Ban decidedly fails strict scrutiny—which is required because it interferes with a fundamental right—it also fails any legal test, including rational basis review, because there is no medical justification for this restriction on lawful reproductive care.

1. <u>The APC Ban Violates the North Carolina Constitution's Equal Protection Clause</u>.

North Carolina's Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws." N.C. Const., art. I, § 19. It "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). The APC Ban violates the Equal Protection Clause for two reasons: (1) it treats patients who seek to terminate their pregnancies differently from patients who seek to carry their pregnancies to term (and either give birth or miscarry) and (2) it discriminates on the basis of sex. *See S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660–61, 178 S.E.2d 382, 385–86 (1971).

First, the APC Ban treats patients seeking an abortion differently from pregnant patients seeking other care by subjecting the former to medically unnecessary, onerous regulations and blocking them from receiving care from APCs. *See State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001) ("[A] woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person."); *see also Planned Parenthood Ass'n, Inc. v. Dep't of Hum. Res. of State of Or.*, 63 Or. App. 41, 59, 663 P.2d 1247, 1259 (Or. Ct. App. 1983), *aff'd*, 297 Or. 562, 687 P.2d 785 (Or. 1984) ("[T]he medical assistance program provides funding for all medically necessary services relating to pregnancy and childbirth (within funding limitations), including those necessary to overcome complications attendant on childbirth, so long as they do not involve termination of the pregnancy; therefore, the rule denies benefits for pregnancy-related medically necessary services that involve abortion solely on that ground."). The APC Ban also

treats patients seeking an abortion through mifepristone and misoprostol differently than patients seeking *the same medications* for miscarriage management, cervical ripening for IUD insertion or removal, or to treat an incomplete abortion.[57] *See Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky. v. Alaska*, No. 3AN-19-11710CL slip op. (Alaska Sup. Ct. Nov. 2, 2021), https://www.plannedparenthood.org/uploads/filer_public/27/0f/270f79ef-3e9f-43c1-83fe-654a3ceac878/3an-19-11710ci.pdf (granting preliminary injunction as to Alaska's prohibition on APCs performing medication abortions, reasoning that the law "dictates a patient's access to care based on their decision to obtain an abortion; it prevents patients seeking abortions from receiving care—a combination of mifepristone and misoprostol—that APCs can and do provide to patients experiencing miscarriage."). In addition, the APC Ban treats similarly situated APCs differently—those who desire to provide abortion care are treated differently than those that do not offer abortion care—even though both groups of APCs prescribe *the same medication*.

Second, the APC Ban discriminates on the basis of sex because it disproportionately impacts women and because it relies on outdated stereotypes of women as mothers. Abortion patients are overwhelmingly women.[58] The APC Ban subjects them to medically unnecessary restrictions that men undergoing similarly uncomplicated, and even more complicated, procedures are not required to undergo. It assumes that women need greater protection than men—paternalistic notions unsupported by medical evidence. In relying on physical differences between

[57] Farris Decl. ¶¶ 20, 32-33.

[58] The APC Ban applies "during the first 20 weeks of a woman's pregnancy." N.C. Gen. Stat. Ann. § 14-45.1(a). The APC Ban also stereotypes anyone who may become pregnant as a woman. To be clear, people of many gender identities, including non-binary and transmasculine people and transgender men, may become pregnant and may seek to terminate their pregnancies. *Cf. Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (discussing sex stereotyping in the context of discrimination against transgender student).

those who may become pregnant—women, as the APC Ban says—and those who cannot (presumably men), the law codifies sex-based stereotypes "that reflect[] old notions and archaic and overbroad generalizations about the roles and relative abilities of men and women." *Heckler v. Mathews*, 465 U.S. 728, 745 (1984) (internal quotations omitted); *see also Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (citing stereotypes that a woman is, and should remain, "the center of home and family life," and that "a proper discharge of [a woman's] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man") (internal citations omitted) (alterations in original); *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."); *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001) ("[G]ender classifications that appear to rest on nothing more than conventional notions about the proper station in society for males and females have been declared invalid time and again by the Supreme Court.").

Typically, when analyzing whether a statute violates the Equal Protection Clause, a court must determine what standard of review to apply in determining constitutionality: strict scrutiny, intermediate scrutiny, or rational basis review. *M.E.*, 275 N.C. App. at 589, 854 S.E.2d at 119. The appropriate standard here is strict scrutiny because the APC Ban burdens the fundamental right to abortion. *See id.* at 558, 101. Intermediate scrutiny is appropriate to the extent the APC Ban discriminates on the basis of sex. And even if the Court applies rational basis review, the APC Ban cannot survive. In short, the APC Bans fails *every* level of review.

a. *The APC Ban Fails Rational Basis Review Because It Serves No Legitimate Purpose*.

To grant Plaintiffs' Motion for a Partial Preliminary Injunction, the Court need not apply the applicable heightened standard of review—the APC Ban fails even under the test most likely to result in upholding a statute: rational basis review. To survive rational basis review, a law must have "a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare." *Ballance*, 229 N.C. at 769-70, 51 S.E.2d at 735.

Here, there is no rational justification for the APC Ban. First, there is no reasonable argument that medication abortion is safer or more effective when provided by a physician rather than an APC.[59] APCs already provide the exact same medications to their patients in other circumstances, negating any argument that a physician's training is required for the safety of patients taking these drugs.[60] Medication abortion is not even a "procedure." In fact, the reality of how these medications are provided—in most cases by simply handing a patient the medication—makes the distinction between who provides the medication nonsensical. Indeed, patients usually take the second medication away from any health care provider. Thus, in the rare event that a patient has a complication from medication abortion, this occurs after the patient has left the clinic. The patient can then follow up with a health care provider as needed and, in the vast majority of cases, during a routine out-patient appointment.[61]

[59] *Armstrong*, 1999 MT 261, ¶ 66, 989 P.2d 364, 380, 387 (Mont. 1999) ("There is simply no evidence in the record of this case that laws requiring pre-viability abortions be performed only by a physician to the exclusion of a trained, experienced and medically competent physician assistant-certified, working under the supervision of a licensed physician, are necessary to protect the life, health or safety of women in this State.").
[60] Bass Decl. ¶ 18; Farris Decl. ¶ 20; Grossman Decl. ¶ 65.
[61] Bass Decl. ¶¶ 23-28; Farris Decl. ¶ 28.

Similarly, there is no rational basis to treat those who seek medication abortion differently from those who seek to carry their pregnancies to term. Pregnancy and childbirth pose greater risks for a patient than abortion[62]—particularly medication abortion, which is provided in the first 11 weeks of pregnancy and for which complications are rare and are treated by APCs.[63] Despite this, for example, certified nurse midwives can provide pregnancy care and deliver babies.[64] Furthermore, APCs provide pregnant patients who miscarry the same medications as patients who seek to terminate their pregnancies by medication abortion, yet APCs cannot provide those same medications to patients seeking medication abortion by virtue of the APC Ban.[65]

Second, rather than making patients safer, the APC Ban affirmatively harms them. The APC Ban limits the pool of available abortion providers in North Carolina and the times during which different health centers around the state are able to provide abortion, thus significantly restricting patients' access to abortion care. This limited access causes delays in patient care, which in turn jeopardizes patient health and safety and imposes financial and logistical burdens on patients and health centers.[66] *See supra* Section III.C.1. Therefore, without evidence that these restrictions provide some counterbalancing improved safety—of which there is none—the APC Ban harms residents by making abortions riskier and more burdensome.

Third, even if there was some justification for differentiating between physicians and APCs for providing medication abortion, which there is not, the APC Ban is still wholly unjustified. A version of this law was first enacted in 1967,[67] before the FDA updated the labeling for

[62] Grossman Decl. ¶¶ 13, 22, 48, 51-52.
[63] Grossman Decl. ¶¶ 70; Bass Decl. ¶¶ 23-24; Farris Decl. ¶ 28.
[64] Spetz Decl. ¶¶ 13, 81, 89.
[65] Grossman Decl. ¶¶ 31, 65, 69; Bass Decl. ¶ 18; Farris Decl. ¶¶ 20, 23.
[66] Grossman Decl. ¶¶ 53-54, 74-88.
[67] S.L. 367, 1967 Gen. Assemb., 1967 Sess. (N.C. 1967).

mifepristone and removed language specifying that the prescriber needed to be a physician.[68] Any possible concern that may have existed in 1967 cannot be used to justify prohibiting qualified APCs from providing medication abortion today.

Fourth, even if it were to be alleged that having APCs provide the medications for a medication abortion carries some distant risk justifying legal restrictions—which is thoroughly unsupported by the research[69]—the APC Ban is both over and underinclusive. 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). The APC Ban indiscriminately bans *all* APCs from providing medication abortion regardless of their training or ability to safely provide such care. The APC Ban bars APCs from providing medication abortion when they are able to provide equally or even more complex care, such as endometrial biopsies.[70] On the other hand, abortion is the *only* context in which APCs are statutorily prevented from providing care that is otherwise within their scope of practice.[71]

Other state court cases striking down similar restrictions on APCs performing abortions underscore that there is no legitimate purpose for the APC Ban. For example, an Alaska court granted a preliminary injunction against that state's APC ban based on weeks-long delays due to limited availability of medication abortion appointments rendering some patients ineligible for medication abortion. *Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky.*, No. 3AN-19-

[68] Grossman Decl. ¶¶ 26, 61 (noting that the FDA first approved mifepristone for sale in the United States in 2000, and updated the label for the brand drug Mifeprix in 2016, based on additional research).
[69] Grossman Decl. ¶¶ 57-61, n.61-62; *see also supra* Section I.B.3.
[70] Grossman Decl. ¶ 64(a)-(e); Farris Decl. ¶ 21; Spetz Decl. ¶ 48.
[71] Bass Decl. ¶ 18; Farris Decl. ¶¶ 18-22.

11710CL slip op. at 8. The Montana Supreme Court has twice struck down similar laws. In *Armstrong v. State*, that court considered a physician-only law passed by the Montana Legislature despite the fact that one physician assistant had been performing abortions for over a decade with the approval of the Board of Medical Examiners. 1999 MT 261, ¶ 64; 296 Mont. at 385–86, 989 P.2d at 381. While barring the physician assistant from performing abortions, the legislature made "no attempt to prohibit her from performing other riskier medical procedures such as uncomplicated deliveries of babies, inserting IUDs, and prescribing and administering most drugs." *Id.* The court noted that the physician assistant's provision of abortion did not endanger public health, and that the legislature's purported justification of the APC ban in the name of "'protecting women's health' served as little more than a rhetorical guise . . . and that this legislation was not justified by any constitutionally legitimate interest of the State, compelling or otherwise." *Id.* The court wrote:

> Simply put, except in the face of a medically-acknowledged, bona fide health risk, clearly and convincingly demonstrated, the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so. To this end, it also logically and necessarily follows that legal standards for medical practice and procedure cannot be based on political ideology, but, rather, must be grounded in the methods and procedures of science and in the collective professional judgment, knowledge and experience of the medical community acting through the state's medical examining and licensing authorities.

Id., 1999 MT 261, ¶ 62, 296 Mont. at 385, 989 P.2d at 380–81. Despite the Montana Supreme Court's ruling in *Armstrong*, the Montana legislature later enacted a law restricting the provision of abortions to physicians and physician assistants, excluding certified nurse midwives, and nurse practitioners. In *Weems v. State*, 2019 MT 98, 395 Mont. 350, 440 P.3d 4 (Mont. 2019), the Montana Supreme Court affirmed a preliminary injunction allowing certified nurse midwives and nurse practitioners to perform abortions.

In earlier briefing submitted by the Legislative Defendants in support of their withdrawn Motion to Dismiss, they essentially conceded that there is no rational basis for the APC Ban. In that Motion, the Legislative Defendants argued simply that the State can exercise its police power—not for any particular purpose, but just because Legislative Defendants say the State can—and make a conclusory reference to "public health." Br. at 23-29; Reply at 16-19. By this logic, the State could ban red shirts, based on the made-up conclusion that red shirts are bad for public health, because the Legislature decides it prefers the Tarheels over the Wolfpack, or simply because the State says so. This cannot be—the State must offer a reasonable justification for its laws. Thus, taken together, there is no "rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare" that justifies the APC Ban.[72]

b. *The APC Ban, Which Infringes on a Fundamental Right, Also Fails Strict Scrutiny*.

While the APC Ban fails even under rational basis review, strict scrutiny should apply, requiring a finding that the APC Ban violates the North Carolina Constitution. "The equal protection clause in section 19 of our Declaration of Rights requires that if a government classification impermissibly interferes with the exercise of a fundamental right strict scrutiny must be given [to] the classification." *Harper v. Hall*, 2022-NCSC-17, ¶ 144, 380 N.C. 317, 377, 868 S.E.2d 499, 543, *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022). "Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Id.* at ¶ 181, 393, 553.

The broad guarantees of the State Constitution protect the fundamental right to abortion. *See supra* Section III.A. The ability to choose whether and when to carry a pregnancy and give

[72] *Cf. Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1139-40 (Alaska 2016) (state assertions of a general interest in protecting minors via abortion restriction "requires context").

birth is necessary for people who can become pregnant to be able to control their lives in the same way that those who cannot become pregnant can control their lives. Here, for the same reasons the APC Ban fails rational basis review, it is not narrowly tailored to satisfy a compelling state interest. *See supra* Section III.B.1.a.

c. *The APC Ban, Which Discriminates Based on Sex, Also Fails Intermediate Scrutiny*.

The APC Ban also fails if the court applies intermediate scrutiny based on the Equal Protection Clause's proscription against sex discrimination. When a law discriminates on the basis of certain suspect classifications—in this case, sex or gender—it must withstand intermediate scrutiny, which means it must serve "an important or substantial government interest," there must 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). As discussed above, the APC Ban discriminates between men and women by subjecting abortion, a form of care disproportionately sought by women, to restrictions that do not apply to forms of care disproportionately sought by men. Furthermore, it relies on antiquated and impermissible sex-based stereotypes of women (and all who can become pregnant) as mothers. *See supra* Section III.B.1. For the same reasons there is no rational basis for the APC Ban, there is no substantial government interest that supports it. The APC Ban thus fails intermediate scrutiny.

2. <u>The APC Ban Violates Substantive Due Process Protections of the North Carolina Constitution</u>.

"The fundamental guaranties of the due process requirements of the law of the land under the State Constitution are very broad in scope and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty." *M.E.*, 275 N.C. App. at 543, 854 S.E.2d at 91-92 (citing N.C. Const., art. 1, § 19). Because the APC Ban

implicates a fundamental right, this Court must apply a strict scrutiny analysis. *Libertarian Party of N.C. v. State*, 200 N.C. App. 323, 332, 688 S.E.2d 700, 707 (2009), *aff'd as modified*, 365 N.C. 41, 707 S.E.2d 199 (2011). Under the strict scrutiny standard, the State must demonstrate that the challenged law is narrowly tailored to further a compelling state interest. *Id.*, 200 N.C. App. at 333, 688 S.E. 2d at 708. As explained above in Section III.B.1.a, the APC Ban is not even rationally related to any governmental interest and therefore, is certainly not narrowly tailored to further a compelling state interest. The APC Ban thus violates the State's substantive due process protections under strict scrutiny.

3. The APC Ban Violates Plaintiff Providers' Rights to the Fruits of Their Labor and to Pursue Their Livelihoods.

Plaintiffs PPSAT and Anne Logan Bass, F.N.P. 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, Sections 1 and 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 has recognized that the judiciary's "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). "The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the *paramount public interest* for reasons of health, safety, morals, or public welfare." *Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957) (emphasis added).

In analyzing the constitutionality of such a law, the courts look to whether it is rationally related to a legitimate government interest. *See Tully*, 370 N.C. at 534-35, 810 S.E.2d at 214-15. The APC Ban constrains PPSAT's and Anne Logan Bass's ability to conduct business serving patients who seek to access abortion care in North Carolina; forces them to practice medicine in a way that conflicts with their medical training and expertise and harms patients; and limits their pursuit of their livelihood. For example, the APC Ban prevents Plaintiff Bass from performing medication abortion and pursuing her livelihood, despite her training and expertise in these areas.[73] As explained above, the APC Ban is not rationally related to a legitimate state interest, making it unconstitutional. *See supra* Section III.B.1.a.

C. Plaintiffs and Their Patients Are Likely to Suffer Irreparable Harm Absent a Preliminary Injunction.

Harm that results from denial of the right of reproductive choice "is as irreparable as any that can be imagined: not only does it flow from the deprivation of constitutional rights, but it also creates a situation which is irreversible and not compensable." *Pilgrim Med. Grp. v. N.J. State Bd. of Med. Exam'rs*, 613 F. Supp. 837, 848–49 (D.N.J. 1985) (issuing preliminary injunction against requirement that abortions be performed in hospitals). Harm from infringement of a constitutional right is adequate to justify a preliminary injunction. *See, e.g.*, *Holmes v. Moore*, 270 N.C. App. 7, 35, 840 S.E.2d 244, 266 (2020) (granting injunction to prevent harm stemming from violation of constitutional right to equal participation in elections, where there could be "no redress" after the fact). Thus, if the Court finds that the State Constitution protects a fundamental right to abortion, that harm alone is sufficient to justify a preliminary injunction of the APC Ban.

Additionally, Plaintiffs' patients and their members will continue to suffer irreparable harm if the APC Ban is not preliminarily enjoined. Access to medication abortion is important for the

[73] Bass Decl. ¶¶ 3-8, 12, 19-23.

overall health of North Carolinians who may become pregnant. The decision to become or remain pregnant is one of the most personal and consequential choices a person will make in their lifetime, with lifelong emotional, practical, and physical repercussions.[74] About one in four women in this country has an abortion by the age of 45.[75] Women of all ages, races, incomes, marital status, and religious faiths can and do seek abortions.[76] However, the APC Ban severely limits access to this critical health care at a time where the need within our State has sharply increased, placing pregnant North Carolinians at risk.

1. The APC Ban Exacerbates the Health Care Provider Shortage and Increases Delay for Obtaining Abortion Care.

The United States has a physician shortage due to a myriad of factors, none of which are within Plaintiffs' control,[77] and North Carolina is no exception. The number of physicians in the State is low.[78] The State has far more licensed APCs than licensed physicians.[79] Preventing APCs from providing certain types of care severely limits the availability of that type of care. As an example, abortion appointments are not available at the six PPSAT health centers that provide abortion every day the health centers are open, because physicians are not available to staff them. Allowing APCs to provide medication abortions would allow for a much larger pool of providers, and PPSAT could perform significantly more abortion procedures on more days of the month.[80]

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[74] Grossman Decl. ¶¶ 48-50, 52, 97-98, 100.
[75] Grossman Decl. ¶ 19.
[76] Grossman Decl. ¶¶ 19-20; N.C. Dep't of Health & Human Servs., State Ctr. for Health Stats, *NC Resident Abortions: Characteristics of Women Receiving Abortions North Carolina Residents, 2011-2020* (2020), https://schs.dph.ncdhhs.gov/data/vital/pregnancies/2020/abortioncharacteristics.pdf.
[77] Ass'n of Am. Med. Colls., *The Complexities of Physician Supply and Demand: Projections from 2019-2034*, 5 (June 2021), https://www.aamc.org/media/54681/download?attachment.
[78] Farris Decl. ¶¶ 39-41; Spetz Decl. ¶ 91; Zolotor et al., *supra* note 39.
[79] Spetz Decl. ¶ 91.
[80] Farris Decl. ¶ 37; Bass Decl. ¶¶ 49-50

For example, in Asheville, abortion is currently provided three days a week, but if in addition to physicians, APCs were able to provide medication abortion other days that the health center is open, abortions could be provided an additional two days a week; in Chapel Hill, abortion is currently provided four days per week, but if in addition to physicians, APCs were able to provide medication abortion other days that the health center is open, abortions could be provided an additional day per week; in Charlotte, abortion is currently provided three days per week, but if in addition to physicians, APCs were able to provide medication abortion other days that the health center is open, abortions could be provided an additional two days per week; in Fayetteville, abortion is currently provided three days per week, but if in addition to physicians, APCs were able to provide medication abortion other days that the health center is open, abortions could be provided an additional two days per week; in Wilmington, abortion is currently provided one day a week with additional appointments as physician staffing has allowed, but if in addition to physicians, APCs were able to provide medication abortion other days that the health center is open, abortions could be provided an additional three days per week; in Winston-Salem, abortion is currently provided two days per week, but if in addition to physicians, APCs were able to provide medication abortion other days that the health center is open, abortions could be provided an additional three days per week.[81] This limited staffing increases wait times for patients, forcing them to remain pregnant for longer against their will and potentially pushing them passed the gestational age limit for medication abortion. Thus, the APC Ban severely limits abortion access for North Carolina patients seeking abortion.[82]

[81] Farris Decl. ¶ 38.

[82] *Id.* ¶¶ 39-41 (explaining that these difficulties are compounded by the cost of hiring and particular difficulty of recruiting physicians who are willing to face the stigma and harassment that comes with providing abortion care); *id*. ¶¶ 54, 61-62.

2. Delays in Abortion Access Have Been Exacerbated Since Dobbs was Decided.

PPSAT has seen a dramatic increase in the number of abortions it provides in North Carolina since the *Dobbs* ruling, as Chart 1 below demonstrates.[83]

CHART 1

Month	Abortions in 2021	Abortions in 2022
July	933	1,399
August	818	1,244
September	771	1,298

The percentage of out-of-state abortion patients increased dramatically as well, as Chart 2 shows.[84]

CHART 2

Month	% Out of State Abortion Patients					
	All Health Centers		Asheville		Charlotte	
	2021	2022	2021	2022	2021	2022
June	14%	15%	23%	36%	28%	21%
July	15%	39%	30%	66%	20%	58%
August	12%	40%	37%	74%	14%	52%
September	11%	27%	31%	66%	11%	27%

The proportion of out-of-state patients has not been equal across all of the PPSAT North Carolina health centers; Asheville and Charlotte have seen a particularly high percentage of out-of-state abortions. In July 2022, 66% of abortion patients at the Asheville health center came from out of state (more than double the 30% in July 2021), in August 2022, that number increased to 74% (twice the 37% in August 2021), and in September 2022 it was 66% (compared to 31% in September 2021). Since *Dobbs*, the proportion of out-of-state patients at the Charlotte health center was also very high: 52% in August 2022 (compared to just 14% in August 2021) and 58%

[83] *Id.* ¶ 55.
[84] *Id.* ¶¶ 56-57.

in July 2022 (compared to just 20% in July 2021); that number declined to 27% in September 2022, but that percentage is still much higher than in September 2021 when it was just 11%.[85] *See* Chart 2.

This influx of out-of-state patients has led to a corresponding increase in the time that patients have to wait between when they schedule and when they actually have their abortion appointments. PPSAT uses the "third next available" appointment industry standard. This means the average length of time in days between the day a patient makes a request for an appointment and the third available appointment for an abortion.[86] This increase in wait times is despite the efforts PPSAT has made to increase capacity in anticipation that the Supreme Court might overturn *Roe v. Wade*.[87]

PPSAT's Asheville and Winston-Salem health center patients, including its North Carolina patients, have experienced a dramatic increase in wait times due to the influx of out-of-state patients despite this increase in capacity, as shown in Chart 3 below.[88]

CHART 3

Asheville Medication Abortion Appointment Wait Times (Monthly Averages)			
Month	**2020**	**2021**	**2022**
July	19	12	18
August	12	12	21
September	7	12	14

PPSAT has not been able to offer additional abortion appointments at its Winston-Salem health center due to limited space, such that wait times there have also increased a great deal, as shown in Chart 4, below.[89]

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[85] *Id*.
[86] *Id*. ¶ 58; Inst. for Healthcare Improvement, *Third Next Available Appointment* (2022), http://www.ihi.org/resources/Pages/Measures/ThirdNextAvailableAppointment.aspx.
[87] Farris Decl. ¶¶ 59-60, 62, 64.
[88] *Id*. ¶¶ 61-62.
[89] *Id*. ¶ 63.

CHART 4

Winston-Salem Medication Abortion Appointment Wait Times (Monthly Averages)			
Month	**2020**	**2021**	**2022**
July	2	9	15
August	1	10	21
September	N/A	8	15

Despite the fact that PPSAT expanded abortion services in Charlotte, Fayetteville, and Wilmington, its wait times in those locations remain similar to those experienced when Plaintiffs filed the Complaint in this case in September 2020.[90] PPSAT could significantly better meet the needs of these patients if their APCs, who are on-site all week, could provide patients with the abortion care they are seeking.[91] And their APCs are more than qualified to do so.[92]

3. Delayed Access Harms Patients Who Seek Abortion.

In severely limiting the availability of medication abortion, the APC Ban compounds obstacles for patients who are already struggling to access care. Many patients travel long distances, taking off work and arranging child care, to get an abortion.[93] People with low incomes often face transportation limitations, such as lacking or sharing a car or having a low-functioning car, that make it particularly hard for them to travel long distances.[94] These hardships, combined with the APC Ban's further limitations on the availability of care, mean that some abortion patients may have to wait as much as three weeks before they can access an abortion.[95] Such delays can push a pregnant patient past the 11-week gestational age limit for medication abortion.[96] Public

[90] *Id*. ¶ 65.
[91] Bass Decl. ¶¶ 17, 49; Farris Decl. ¶ 38.
[92] Bass Decl. ¶¶ 3-6, 8, 9, 12, 17-19; Farris Decl. ¶¶ 17-21.
[93] Bass Decl. ¶¶ 42-44; Farris Decl. ¶¶ 48-49; Grossman Decl. ¶¶ 81, 85-86.
[94] Grossman Decl. ¶ 87; Bass Decl. ¶ 43.
[95] Farris Decl. ¶ 62; Grossman Decl. ¶ 84.
[96] Bass Decl. ¶¶ 44-45; Farris Decl. ¶ 54.

health experts have recognized this as a significant problem.[97] For some patients, medication abortion is the safest option and, for those who have experienced rape or other assault, is often less emotionally taxing; if delayed past 11 weeks, they no longer have that option.[98] Although abortion care is far safer than pregnancy and childbirth, its risks increase with gestational age.[99] And because, even though exceedingly safe, abortion is a more complex, more expensive procedure with increased gestational age, these delays also increase costs.[100]

The harms stemming from delay in access are disproportionally shouldered by low-income patients. Many of Plaintiffs' patients live in low-income households and work low-wage jobs with limited time off, usually without pay.[101] There is no reason—other than the APC Ban—why these patients could not receive care sooner from one of PPSAT's highly skilled APCs, thus avoiding the increased cost and risk of delay.

4. The APC Ban May Cause Patients' Psychological and Emotional Harm.

For those pregnant as a result of rape, being forced to carry an unwanted pregnancy for even one day is traumatic.[102] Those patients may prefer medication abortion over aspiration abortion to avoid being re-traumatized by the insertion of medical instruments into their cervix.[103]

Many patients need to keep their decision to obtain an abortion confidential to avoid coercion or retaliation from family, friends, or others.[104] By limiting the days on which patients

[97] Grossman Decl. ¶¶ 53, 82, 88.
[98] Bass Decl. ¶¶ 44-45 (noting that Planned Parenthood "regularly" sees patients delayed past the window for medication abortion). In addition to some patients having medical conditions that make medication abortion a safer option, many strongly prefer this option. *Id*.; Grossman Decl. ¶ 82; Bass Decl. ¶ 45; Farris Decl. ¶ 11.
[99] Grossman Decl. ¶ 53.
[100] Grossman Decl. ¶¶ 53, 77; Farris Decl. ¶ 54.
[101] Bass Decl. ¶ 39; Farris Decl. ¶ 51; Grossman Decl. ¶ 96.
[102] Grossman Decl. ¶ 37; Bass Decl. ¶ 36; Farris Decl. ¶ 50.
[103] Grossman Decl. ¶ 36; Bass Decl. ¶ 45.
[104] Grossman Decl. ¶¶ 86, 93, 95; Bass Decl. ¶¶ 35, 41.

can access care, delaying patients, and forcing them to travel farther, the APC Ban jeopardizes this confidentiality. The longer a pregnancy continues, the more likely physical changes become visible. In addition, the farther a patient must travel, the more likely it is that others will notice that they were absent from work or home for an extended period of time. This exposes these patients to a range of harms and potentially deprives them of access to abortion altogether.[105]

Loss of confidentiality is particularly harmful for abortion patients who suffer intimate partner violence.[106] Nearly 20% of women experience violence during pregnancy, with pregnant adolescents and those with unintended pregnancies at an increased risk.[107] Many abusive partners coerce their victims into becoming and staying pregnant as a means of control.[108] They often monitor their victims to prevent them from accessing abortion services.[109] Women deprived of access to abortion, and their children, are less likely to escape abusive situations.[110]

5. Patients Who Are Forced to Carry Their Pregnancies Later May Be Forced To Give Birth Against Their Will and May Suffer Serious Adverse Outcomes.

While the APC Ban may force many patients to delay their abortion, causing them harm, for some patients, such a delay may mean they cannot get an abortion at all. Patients forced to carry unwanted pregnancies to term face a range of serious adverse outcomes.[111] They are exposed to increased risks of death and major complications from childbirth.[112] Compared to willing pregnant people, patients who are forced to give birth, and their newborns, are also at risk of

[105] Grossman Decl. ¶¶ 37, 86, 95; Bass Decl. ¶ 35.
[106] Grossman Decl. ¶ 95; Bass Decl. ¶¶ 35, 41.
[107] Nat'l Coal. Against Domestic Violence, *Domestic Violence and Pregnancy Fact Sheet* (2016), https://vawnet.org/sites/default/files/assets/files/2016-09/DVPregnancy.pdf.
[108] Grossman Decl. ¶ 95; Bass Decl. ¶ 35.
[109] Grossman Decl. ¶ 95; Bass Decl. ¶ 35.
[110] Grossman Decl. ¶¶ 50, 94.
[111] *Id*.
[112] *Id*. ¶¶ 48-49, 52.

delayed use of prenatal care, lower breastfeeding rates, and poor maternal and neonatal outcomes.[113] They are significantly less likely to be able to bring themselves and their families out of poverty.[114] Those who are victims of intimate partner violence will, in many cases, face increased difficulty escaping that relationship because of long-term parental ties to that partner.[115]

The risks of being forced to carry an unwanted pregnancy to term do not fall equally across North Carolinians—they are worse for those struggling with poverty and those in rural areas.[116] Risks also fall disproportionately on Native American and Black women, who suffer significantly higher rates of maternal mortality and morbidity.[117] The APC Ban, combined with the increased demand placed upon PPSAT health centers since the *Dobbs* decision, has further exacerbated these adverse outcomes by directly contributing to the delay in access to abortion.

D. The Balance of Equities Strongly Favors a Preliminary Injunction.

Plaintiffs, their patients, and their members will suffer irreparable harm as described above if a preliminary injunction is not issued. On the other side of the scale, Defendants will not be harmed if the APC Ban is preliminarily enjoined. As set forth more fully in Sections III.C.1 above, the APC Ban does not further the health of North Carolinians; to the contrary, there is a clear medical consensus that APCs can safely provide medication abortion, and that doing so furthers the public health.[118] Providing medication abortion is within their scope of practice and they could and would provide medication abortion but for the APC Ban that singles out abortion care for no

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[113] *Id*. ¶¶ 50, 100.
[114] *Id*. ¶ 50.
[115] *Id*. ¶¶ 20, 94. Rates of intimate partner violence are especially high in North Carolina. *See* Nat'l Coal. Against Domestic Violence, *Domestic Violence in North Carolina* (2021), https://assets.speakcdn.com/assets/2497/north_carolina-2021101912193466.pdf.
[116] Grossman Decl. ¶¶ 22, 50, 101.
[117] *Id*. ¶¶ 22, 52, 101.
[118] *See supra* Section II; Grossman Decl. ¶¶ 54-63, 80.

medical reason. Leading national authorities agree on the need to eliminate scope of practice restrictions that prevent APCs from practicing to their full capacity, including unjustified restrictions on the types of care APCs may provide.[119] Further, Defendants have no legitimate interest in maintaining this law and cannot point to any harm they will suffer from an injunction. Therefore, the balance of harms tips in favor of granting an injunction. For all these reasons, Plaintiffs meet the balance of harms test, and this Court should grant a preliminary injunction.

E. Under the Circumstances of This Case, No Security Should Be Required.

Plaintiffs respectfully request that, in view of the circumstances of this case, no security, or only nominal security, should be required. Pursuant to Rule 65(c), security is only required insofar as it is necessary—if at all—to cover "such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." N.C. Gen. Stat. §1A-1, 65. The court granting a preliminary injunction "has power…to dispense with any security requirement whatsoever" in some circumstances, and North Carolina courts routinely look to federal decisions for guidance on security requirements. *Keith v. Day*, 60 N.C. App. 559, 561-62, 299 S.E.2d 296, 297-98 (1983). The circumstances in which no security (or nominal security) is required include, as is the case here, actions brought to enjoin the enforcement of allegedly unconstitutional laws or policies. *See United Food & Com. Workers Loc. 99 v. Brewer*, 817 F. Supp. 2d 1118, 1128 (D. Ariz. 2011) (finding "no reasonable likelihood" that state would be "harmed by being enjoined from enforcing" statute restricting collection of payroll deductions from union); *Am. Fed'n of Teachers-W. Va., AFL-CIO v. Kanawha Cnty. Bd. Of Educ*., 592 F. Supp. 2d 883, 906 (S.D. W. Va. 2009) (requiring nominal security where respondents would "not suffer any hardship or prejudice" from enjoining allegedly unconstitutional drug policy). Since

[119] Spetz Decl. ¶¶ 53-65.

Defendants in this case will similarly suffer no harm or loss by being enjoined from enforcing the APC Ban, no security is required.

IV. CONCLUSION

The APC Ban subjects North Carolina patients seeking abortion care to unnecessary delay in accessing abortion. This delay has no medical or rational purpose. Patients are suffering harm as a result of this unconstitutional law, and that harm has been exacerbated since *Dobb*s. Plaintiffs have made the required showing of need for an order preliminarily enjoining the enforcement, operation, and execution of the APC Ban with respect to patients seeking medication abortion. Therefore, Plaintiffs respectfully request that this Court enter the attached proposed order granting their Motion for a Partial Preliminary Injunction.

This 17th day of October 2022.

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This 17th day of October 2022.

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