STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 20 CVS 500147

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WAKE CO., C.S.C.
BY

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.

LEGISLATIVE DEFENDANTS' MEMORANDUM IN SUPPORT OF 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Plaintiffs ask this Court to eliminate five commonsense abortion regulations that have been on the books for years. The challenged laws ensure that women have access to qualified medical providers and safe facilities, receive critical counseling, and have the deliberation time they need before making a life-altering decision. Enjoining these laws would override the judgment of the General Assembly on matters of health, welfare, and safety, where it has maximum discretion to enact sound policy.

Plaintiffs allege that the reasonable health and safety regulations they challenge here are facially invalid because the North Carolina Constitution contains a previously unrecognized fundamental right to abortion. But nothing in the North Carolina Constitution's text, structure, history, or the caselaw interpreting it even hints that abortion is or ever was a fundamental right under state law.

Plaintiffs' case was already meritless under state law before the United States Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2279, 2283 (2022), but now they lack even the federal backstop they relied on to prop up their unavailing state claims because *Dobbs* overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). *Dobbs* clarifies that "the authority to regulate abortion [belongs] to the people and their elected representatives." In fact, under the federal constitution, states may even "prohibit[]" abortion altogether. 142 S. Ct. at 2284. In light of *Dobbs*, Plaintiffs can no longer claim a fundamental constitutional right to abortion. No such right exists under the United States Constitution or the North Carolina Constitution. The entire premise of Plaintiffs' Complaint—that the abortion regulations at issue invade a fundamental constitutional right and are subject to a strict scrutiny standard of review—has thus been rendered invalid and incorrect by *Dobbs*.

Plaintiffs fail to overcome the exceedingly high bar to succeed on their facial claims. North Carolina courts "seldom uphold facial challenges," precisely "because it is the role of the legislature, rather than th[e] Court," to weigh and balance considerations in forming public policy. *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2015). Plaintiffs must show "that there are no circumstances under which the statute[s] might be constitutional," *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015), but they make no such allegation. Instead their complaint demonstrates that the challenged laws can be applied constitutionally by repeatedly conceding examples when the statutes are lawfully applied.

Plaintiffs also fail to show that the challenged regulations do not pass muster under the rational-basis test. Rational-basis review gives the most leeway to uphold such a law under both state and federal precedent. Defendants Speaker of the North Carolina House of Representatives, Timothy K. Moore, and President Pro Tempore of the North Carolina Senate, Philip E. Berger ("Legislative Defendants"), request that this Court enter judgment on the pleadings and dismiss this entire case under North Carolina Rules of Civil Procedure 12(c).[1]

[1] In doing so, the Court will dismiss the entire case against all parties because Plaintiffs cannot continue without the President Pro Tem and Speaker. They are necessary parties pursuant to Civil Procedure Rule 19(d): "The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, must be joined as defendants in any civil action challenging the validity of a North Carolina statute or provision of the North Carolina Constitution under State or federal law."

FACTUAL AND PROCEDURAL BACKGROUND

Procedural History

Plaintiffs challenge the following North Carolina health and safety regulations:

- The Physicians-only Provision, N.C. GEN. STAT. § 14-45.1(a), (g) (effective Jan. 1, 2016), which provides that only qualified physicians may perform abortions.

- The In-person Appointments Provision, N.C. GEN. STAT. § 90-21.82(1)(a) (effective Oct. 1, 2015), which ensures that a physician is physically present when the "first drug or chemical" of a medication abortion is "administered to the patient."

- The Facility Safety Requirements, N.C. GEN. STAT. § 14-45.1(a), which provides that abortion facilities must have facility attributes and design features that ensure patient safety, just like many other health centers do.

- The Supportive Information and Resources Counseling Provision, N.C. GEN. STAT. § 90-21.82(1)–(2), which ensures women receive information on social welfare programs, medical assistance benefits, and child support as they consider their options for terminating or continuing their pregnancies.

- The Informed-consent Period, N.C. GEN. STAT. § 90-21.82(1)–(2), which gives women minimal deliberation time before making a life-altering decision by requiring that abortionists wait 72 hours after providing informed-consent information before performing an abortion.

Legislative Defendants and the Attorney General both filed separate motions to dismiss under N.C. R. Civ. P. 12(b)(1) and 12(b)(6).[2] In May 2021, the Superior Court denied Legislative Defendants' and the Attorney General's motions to dismiss on standing grounds. The court then referred Legislative Defendants' remaining 12(b)(6) motion to dismiss to a three-judge panel, in accordance with N.C. Gen. Stat.

[2] The Attorney General moved to dismiss under both rules on standing grounds alone, while Legislative Defendants moved under Rule 12(b)(1) to dismiss on standing, and under Rule 12(b)(6) for failure to state a claim on which relief could be granted.

§ 1A-1, Rule 42(b)(4). The Attorney General soon after answered Plaintiffs' Complaint. Legislative Defendants ultimately withdrew without prejudice their Rule 12(b)(6) motion to dismiss in April 2022, and then answered Plaintiffs' Complaint in May 2022.

Pertinent Case Developments since Plaintiffs filed their Complaint

After Plaintiffs filed their Complaint in September 2020 but before the *Dobbs* decision in June 2022, many federal courts across the country continued to routinely uphold reasonable abortion regulations like the ones Plaintiffs challenge here. For instance, the Seventh Circuit refused to enjoin Indiana's physicians-only, in-person counseling, and hospital/surgical center requirement abortion laws. *Whole Women's Health All. v. Rokita*, 13 F.4th 595 (7th Cir. 2021). And the Sixth Circuit held that Tennessee's 48-hour waiting period and provision of information requirements survived rational basis scrutiny. *Bristol Reg'l Women's Ctr., P.C. v. Slatery*, 7 F.4th 478 (6th Cir. 2021). It also upheld Ohio's law preventing doctors from knowingly aborting a child because of a Down syndrome diagnosis. *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 516 (6th Cir. 2021). And the en banc Fifth Circuit upheld Texas's ban on live dismemberment abortions. *Whole Woman's Health v. Paxton*, 10 F.4th 430, 437 (5th Cir. 2021).

These decisions were rendered before *Dobbs* overruled both *Roe* and *Casey* and returned abortion policy to the states. Even before *Dobbs*, many courts sustained modest abortion regulations aimed at preserving health and general welfare, and patient safety.

The United States Supreme Court's decision in *Dobbs* removed any doubt that states have the authority to limit abortion in a way that promotes life and ensures health and safety. *Dobbs* overruled *Roe* and *Casey*, held there is no federal constitutional right to abortion, and declared that "the authority to regulate abortion must be returned to the people and their elected representatives." 142 S. Ct. at 2279.

Dobbs also confirmed that "[u]ntil the latter part of the 20th century, such a right was entirely unknown in American law"—indeed, "[n]o state constitutional provision" and "no federal or state court" had recognized a right to abortion "until shortly before *Roe*." *Id.* at 2242, 2248. On the other hand, "abortion had long been a crime in every single State." *Id.* at 2248. Put another way, *Dobbs* held that there is no fundamental right to abortion under the United States Constitution.

Dobbs foreclosed any argument that a state constitution contains a fundamental right to abortion when it is not set forth in unambiguous language of the constitution or "objectively, deeply rooted in . . . history and tradition." *Id.* at 2247 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)). Neither exists in North Carolina. Plaintiffs cannot show that a fundamental right to abortion exists now, or has ever existed, under North Carolina law or its constitution.

At the same time, the Supreme Court in *Dobbs* established that a "law regulating abortion, like other health and welfare laws, is entitled to a strong presumption of validity" and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id.* at 2284 (cleaned up). Finally, *Dobbs* stated that the legitimate state interests in regulating abortion are expansive and include, among other interests, "respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety, . . .[and] the preservation of the integrity of the medical profession." *Id.* (cleaned up). The North Carolina laws at issue directly advance these legitimate state interests.

Dobbs had an immediate effect on North Carolina's abortion laws. Less than two months after the *Dobbs* decision, a federal district court in *Bryant v. Woodall*, No. 1:16CV1368, 2022 WL 3465380 (M.D.N.C. Aug. 17, 2022), lifted injunctions it had previously "entered under the authority of *Roe* and *Casey*" on three North Carolina abortion laws. These regulations included a law that prohibited abortions after 20

weeks that was the subject of the injunction. They also required the inspection of abortion facilities by the state Department of Health and Human Services, and required abortion facilities to comply with certain recordkeeping and personnel qualification parameters. *Id.* at *2 (citing N.C. GEN. STAT. ANN. § 14-45.1).

The court held that because *Dobbs* commands that "there is . . . no constitutional right to a pre-viability abortion," its injunction was "no longer lawful." *Id.* And if plaintiff abortion providers were "providing services in accordance with the terms of the injunction," they would be "acting contrary to North Carolina law." *Id.* Acknowledging that *Dobbs* permits states to regulate and even prohibit abortion altogether, the court ruled that the challenged statutes "are constitutional acts by the State of North Carolina." *Id.* at *1. *Bryant* thus illustrates that North Carolina is free to regulate for health and safety in the abortion context.

Many other post-*Dobbs* cases reinforce sustaining North Carolina's modest health and safety abortion regulations.

- In a case brought by one of the plaintiffs here, the Eleventh Circuit lifted an injunction on a law prohibiting abortions after detection of a fetal heartbeat. *SisterSong Women of Color Reprod. Just. Collective v. Governor of Ga.*, 40 F.4th 1320, 1324-26 (11th Cir. 2022). The law also instituted informed-consent provisions ensuring that women are told "the medical risks" of the abortion procedure and "the probable gestational age and presence of a detectable human heartbeat" at least 24 hours before the abortion. GA. CODE ANN. § 31-9A-3(1)(A-B) (West 2020). The court noted that the Georgia legislature found that the state had an interest in "providing full legal recognition to an unborn child," which the court concluded provided a rational basis justifying the law under *Dobbs*. *SisterSong*, 40 F.4th at 1326 (cleaned up). More generally, the Eleventh Circuit noted that after *Dobbs*, courts must "treat parties in cases concerning abortion the same as parties in any other context," and are not to employ the "distorted legal standards" of *Roe* and *Casey* anymore. *Id.* at 1328.

- The Seventh Circuit lifted an injunction on Indiana laws requiring that abortions be performed only in hospitals or outpatient surgical centers, requiring informed-consent disclosures relating to fetal pain and medical risks of the procedure, and prohibiting telemedicine chemical abortion. *Whole Woman's Health All. v. Rokita*, 2022 WL 2663208, at *1 (7th Cir. July 11, 2022)

- The Eighth Circuit lifted an injunction on a South Dakota informed-consent law requiring counseling with a physician and at a pregnancy resource center

before an abortion. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).[3]

Collectively, this persuasive authority, along with the text of the North Carolina Constitution and caselaw interpreting it, shows that Plaintiffs' claims, which were meritless before *Dobbs* overruled *Roe* and *Casey*, are completely defunct post-*Dobbs*.

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[3] Numerous other federal and state courts sustained modest abortion regulations or lifted previous injunctions in the wake of *Dobbs*, even for state laws prohibiting abortion altogether. *See, e.g., Whole Woman's Health v. Young*, 37 F.4th 1098, 1099-1100 (5th Cir. 2022) (citations omitted) (lifting injunction on a **Texas** law that "regulat[ed] the disposal of embryonic and fetal tissue remains" and required abortion facilities to dispose of these remains in certain ways: "*Dobbs* holds that '[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion'"); *EMW Women's Surgical Ctr., P.S.C. v. Cameron*, No. 2022-SC-0326-I, 2022 WL 3641196, at *1 (Ky. Aug. 18, 2022) (upholding a decision lifting an injunction on **Kentucky's** Human Life Protection Act and Heartbeat Bill, which "effectively outlaw abortion in the Commonwealth except in limited instances when necessary to preserve the life of a pregnant woman"); *State v. Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d 863 (Fla. Dist. Ct. App. 2022) (refusing to grant an injunction on a **Florida** law prohibiting abortions after 15-weeks); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2022 WL 2314402, at *1 (M.D. Ala. June 24, 2022)(lifting an injunction on an **Alabama** law that prohibited all abortions); *Planned Parenthood Sw. Ohio Region v. Yost*, No. 1:19-CV-00118, 2022 WL 2292336 (S.D. Ohio June 24, 2022) (lifting an injunction on an **Ohio** law prohibiting dismemberment abortions); *Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969, 2022 WL 2570275, at *1 (6th Cir. June 28, 2022) (lifting injunction on a **Tennessee** law prohibiting abortion after detecting fetal heartbeat); *Jackson Women's Health Org. v. Dobbs*, No. 25CH1:22-cv-00739 (Chancery Ct. Hinds Cnty., Miss. First Jud. Dist. July 5, 2022) (refusing to grant an injunction on **Mississippi** laws prohibiting abortion in general and after 6 weeks); *Planned Parenthood Great Nw., Haw., Alaska, Ind., & Ky., Inc. v. Cameron*, No. 3:22-CV-198-RGJ, 2022 WL 2763712, at *2 (W.D. Ky. July 14, 2022) (lifting injunction on **Kentucky** law prohibiting abortion after 15 weeks); *Planned Parenthood Great Nw. v. State*, No. 49615, 2022 WL 3335696, *6 (Idaho Aug. 12, 2022) (refusing to grant an injunction on **Idaho** law prohibiting abortion and noting that petitioners could not show "a *substantial* likelihood of success on the merits or a 'clear right' to the ultimate relief requested . . . in the post-*Dobbs* landscape").

ARGUMENT

A motion for judgment on the pleadings under Rule 12(c) should be granted where the moving party "show[s] that no material issue of fact exists and that he is entitled to judgment as a matter of law." *Tully v. City of Wilmington*, 370 N.C. 527, 532, 810 S.E.2d 208, 213 (2018) (cleaned up); *Erickson v. Starling*, 235 N.C. 643, 655, 71 S.E.2d 384, 393 (1952). The purpose of Rule 12(c) "is to dispose of baseless claims . . . when the formal pleadings reveal their lack of merit." *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 70, 852 S.E.2d 146, 151 (2020) (cleaned up). Rule 12(c) motions are filed any time "[a]fter the pleadings are closed but within such time as not to delay the trial," N.C. GEN. STAT. § 1A–1, Rule 12(c) (West 2022), and are proper "when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). While a court must take as true "all well pleaded factual allegations in the nonmoving party's pleadings," *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 2022-NCSC-93, ¶ 17 n. 2, 876 S.E.2d 476, 485 (2022) (cleaned up), it is not required to accept "conclusions of law, legally impossible facts, and matters not admissible in evidence. . .." *Ragsdale*, 209 S.E.2d at 499.

No material factual disputes exist. Plaintiffs have filed only facial claims against the regulations. Thus, dismissal pursuant to 12(c) is appropriate here. Because Plaintiffs' claims lack any legal merit and the challenged regulations comfortably pass rational-basis review, judgment on the pleadings in favor of Legislative Defendants is warranted. The Court should, respectfully, dismiss the entire case based on Plaintiffs' failures to state a claim.

I. Plaintiffs failed to make the allegations required for a facial challenge under North Carolina law.

"[A] facial challenge to a law is 'the most difficult challenge to mount successfully.'" *Affordable Care, Inc. v. N.C. St. Bd. of Dental Exam'rs*, 153 N.C. App. 527, 539, 571 S.E.2d 52, 60 (2002) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281 (1998)). North Carolina courts "seldom uphold facial challenges because it is the role of the legislature, rather than th[e] Court, to balance disparate interests and find a workable compromise among them." *Town of Boone*, 369 N.C. at 130, 794 S.E.2d at 714. An Act of the General Assembly can only be overturned upon a showing beyond a reasonable doubt that the General Assembly has "plainly and clearly" exceeded its authority. *Hart*, 368 N.C. at 141, 774 S.E.2d at 294. "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 892 (1961).[4]

"In a facial challenge, the presumption is that the law is constitutional and a court may not strike it down if it may be upheld on any reasonable ground." *Affordable Care*, 153 N.C. App. at 539, 571 S.E.2d at 61. To state a claim, Plaintiffs must allege "that there are *no* circumstances under which the statute *might* be constitutional." *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (emphasis added); *Affordable Care*, 153 N.C. App. at 539, 571 S.E.2d at 61 (affirming dismissal of plaintiffs' facial challenge

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[4] *See also State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998), *abrogated by State v. Kelliher*, 381 N.C. 558, 873 S.E.2d 366 (2022) ("A well recognized rule in this State is that, where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality."); *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118, 574 S.E.2d 48, 54 (2002), *abrogated on other grounds by Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 853 S.E.2d 698 (2021) (declaring that "[i]t is not the role of the judicial branch of government to pre-empt the legislative branch's policy considerations").

and noting that "[u]nder this facial challenge, we cannot agree that there is no set of circumstances under which the Rule would be valid"). Any lesser showing fails. The "fact that a statute might operate unconstitutionally under some conceivable set of circumstances" — which is, at best, what Plaintiffs have alleged here — "is insufficient to render it wholly invalid." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485-486 (2005) (cleaned up).

A. Plaintiffs' allegations concede the challenged statutes do not unconstitutionally apply to everyone, every time.

Each of Plaintiffs' claims fails because they have not alleged the challenged laws are unconstitutional in all circumstances. On the contrary, the Complaint frequently concedes that the challenged statutes do not apply in an unconstitutional way to everyone, every time. For example, the Physicians-Only law allegedly harms only nurse practitioners, certified nurse midwives, and physician assistants who independently practice outside of a physician's physical presence. Compl. ¶¶ 114, 124, 129. And Plaintiffs say "some" or "certain" women may be harmed by the In-person Appointments requirement, indicating others will not be. Compl. ¶¶ 88, 177. Indeed, some women must go to the facility in person to have lab work drawn or an ultrasound. The Facility-Safety Requirements only affect three of Planned Parenthood's nine facilities, and those could comply if renovated. Compl. ¶¶ 201, 207. Plaintiffs do not allege this renovation is impossible. And the waiting period allegedly "can" or "may" cause the harm Plaintiffs claim. There is no allegation it harms every pregnant woman every time. Compl. ¶¶ 229, 230, 232.

B. The challenged laws are constitutionally applied in many circumstances.

Additionally, the Physicians-only Provision is constitutionally applied to all licensed physicians wishing to perform abortions, including Plaintiff physicians (Drs.

Farris, Deans, and Swartz) who do not allege they are harmed by this law, but instead readily perform abortions in compliance with it. Compl. ¶¶ 34, 38, 39; *cf. In re Guess*, 327 N.C. 46, 54, 393 S.E.2d 833, 838 (1990) (statute regulating the medical profession through licensing board is "a valid exercise of the police power for the public health and general welfare"). It is also constitutionally applied as to the tens of thousands of women who have abortions in North Carolina at the hands of licensed physicians.[5] *See* Compl., ¶ 98 & n. 44 (23,018 abortions in North Carolina in 2018).

The In-person Appointments Provision is constitutionally applied to all plaintiff physicians and PPSAT. All allege that they currently perform abortions using in-person dispensation of chemical abortion drugs. ¶¶ 32, 40-43. It is also constitutionally applied as to the thousands of women undergoing chemical abortions with a doctor physically present each year in North Carolina. *See* Compl. ¶¶ 99 & n. 45; 154 (the vast majority of abortions performed in North Carolina in 2018 occurred in the first trimester when chemical abortion is permitted).

Similarly, the Facility Safety Requirements are constitutionally applied, according to the allegations in the Complaint, to six out of nine PPSAT clinics, which currently operate in compliance with these safety provisions. *See* Compl. ¶¶ 12–13. These regulations are also constitutional as applied to the tens of thousands of women across North Carolina who have undergone abortions at these six safety-compliant clinics.

The statute providing supportive information and resources, N.C. GEN. STAT. § 90-21.82(1)–(2), is a constitutional part of informed consent for women who want or need information on social welfare programs, medical assistance benefits, and child support as they consider their options for terminating or continuing the pregnancy.

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[5] Indeed, no North Carolina women seeking abortions are challenging the Physician-only Law, the In-person Appointments Provision, the Facility-Safety Requirements, the Supportive Information and Resources Counseling Provision, or the Informed-consent Period.

See Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 882 (1992) (upholding requirement to inform women seeking abortion of the availability of information about the consequences to the fetus of abortion or childbirth) (plurality op.). This may include, as here, "risks and alternatives to the procedure . . . that a reasonable patient would consider material to the decision" *Id.* at 902. And it includes that information "even when those consequences have no direct relation to her health." *Id.* at 882.

In their Complaint, Plaintiffs fail to mention that the statute provides a pregnant mother with the gestational age of her unborn child, N.C. GEN. STAT. § 90-21.82(1)(c), and the chance to see and hear a sonogram of her unborn child, N.C. Gen. Stat. § 90-21.82(1)(e). This is true and relevant information that is part of court-validated informed consent to abortion. *See Stuart v. Camnitz*, 774 F.3d 238, 252, 253 (4th Cir. 2014) (provisions for disclosing gestational age and offering sonogram under North Carolina informed-consent law "closely resemble" the statutes upheld in *Casey*). No question exists that this previously court-approved regulation remains constitutional still, in the aftermath of *Dobbs*.

Finally, the Informed-consent Period is constitutionally applied to, at a minimum, all abortion-seeking women who arrange their schedules to attend doctor's appointments. And it is constitutional as applied to any woman who is not immediately certain about her decision upon receiving substantial, significant information about the abortion procedure. Indeed, even before *Dobbs*, the U.S. Supreme Court upheld as constitutional brief informed-consent periods, *Casey*, 505 U.S. at 885. Accordingly a majority of states require them as reasonable measures to safeguard public health and welfare.[6]

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[6] *See* ALA. CODE § 26-23a-4 (1975); ARIZ. REV. STAT. § 36-2153 (2021); ARK. CODE ANN. § 20-16-903 (West 2015); GA. CODE ANN. § 31-9A-3 (West 2020); IDAHO CODE ANN. § 18-609(4) (West 2021); IND. CODE ANN. § 16-34-2-1.1(a) (West 2022); KAN. STAT. ANN. § 65-6709(a) (West 2022); KY. REV. STAT. ANN. § 311.725(1)(a) (West 2019); LA. STAT. ANN. § 1061.17(B) (2022); MICH. COMP. LAWS ANN. § 333.17015(3) (West

Plaintiffs fail—by their own words and allegations—to show that no circumstances exist in which each of the laws they challenge can be constitutionally applied. Their Complaint therefore fails as a matter of law, and the Court should, respectfully, dismiss the entire case.

II. Count I fails because the challenged laws do not implicate a fundamental right and satisfy rational-basis review.

Plaintiffs allege in Count I that the challenged statutes violate Article I, Section 1 of the North Carolina Constitution, which guarantees "the equality of all persons" and recognizes that "all persons" possess "certain inalienable rights," such as "liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Count I cannot survive, as a matter of law, because the challenged laws do not implicate a protected interest under the North Carolina Constitution, and the challenged laws comfortably satisfy rational-basis review. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004).

A. Abortion is not a protected interest under the North Carolina Constitution.

Courts have never interpreted the North Carolina Constitution to guarantee a right to abortion, and for good reason. The case law that arguably touches upon the matter, even if only tangentially, shows abortion is emphatically not a right in North Carolina. *See Rosie J. v. N.C. Dep't Hum. Res.*, 347 N.C. 247, 251, 491 S.E.2d 535, 537

2013); MINN. STAT. ANN. § 145.4242(a)(1) (West 2022); MISS. CODE ANN. § 41-41-33 (West 2022); MO. ANN. STAT. § 188.027 (West 2019); NEB. REV. STAT. ANN. § 28-327(1) (West 2022); N.C. GEN. STAT. ANN. § 90-21.82 (2015); N.D. CENT. CODE ANN. § 14-02.1-03 (West 2021); OHIO REV. CODE ANN. § 2317.56(B) (West 2021); OKLA. STAT. ANN. tit. 63, § 1-738.2(B) (West 2022); 18 PA. CONS. STAT. § 3205(a)(1) (2022); S.C. CODE ANN. § 44-41-330(C) (2021); S.D. CODIFIED LAWS § 34-23A.10.1 (2022); TENN. CODE ANN. § 39-15-202(d)(1) (West 2019); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2021); UTAH CODE ANN. § 76-7-305(2)(a) (West 2022); VA. CODE ANN. § 18.2-76(B) (West 2020); W. VA. CODE ANN. § 16-2I-2(b) (West 2021); WIS. STAT. ANN. § 253.10(3)(c) (West 2016).

(1997) ("To have the State pay for an abortion is not a right protected by the North Carolina Constitution and is not a fundamental right.").

That is because North Carolina courts "tread carefully before recognizing a fundamental liberty interest." *Standley v. Town of Woodfin*, 362 N.C. 328, 32, 661 S.E.2d 728, 730 (2008). To determine whether the North Carolina Constitution protects a "liberty interest," courts look at whether the asserted right is "'objectively, deeply rooted in [North Carolina's] history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the liberty interest at issue] were sacrificed.'" *Id.*, 362 N.C. at 331–32, 661 S.E.2d at 730 (quoting *Glucksberg*, 521 U.S. at 720–21). There is no history or tradition containing even the slightest hint that abortion is a fundamental right in this state. In fact, "North Carolina criminalizes the procurement or administration of abortion as a felony, and has done so for the past 140 years." *Bryant v. Woodall*, 1 F.4th 280, 284 (4th Cir. 2021). *Standley*'s exceedingly high hurdle defeats Plaintiffs' attempt to fabricate a new right here. *Dobbs* deprives Plaintiffs from any refuge they might have sought under federal law, as it permits states to prohibit abortion altogether without regard to the United States Constitution.

Plaintiff abortion providers also have no protected right to make abortion "more accessible." Compl. ¶ 44. To the contrary, as the Court of Appeals has explained in a case about regulating medical facilities, "[t]hese constitutional protections [contained in Art. I §1] have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Hope—A Women's Cancer Ctr. v. State*, 203 N.C. App. 593, 603, 693 S.E.2d 673, 680 (2010)(citation omitted).

Put another way, the "fruits of their own labor" provision Plaintiffs rely on does not guarantee that citizens may engage in any unregulated form of occupational

activities that they wish. It simply ensures that the state will not deprive citizens of property rights by interfering with "the *enjoyment* of the fruits of their own labor" obtained or created within the bounds of the law. N.C. Const. art. I §1 (emphasis added). For instance, the State could allow growing and selling poppy plants for flowers, but prohibit growing poppy plants for processing and selling heroin. And the State can regulate and control a convenience store's sale of cigarettes to adults, but completely preclude the sale to minors.

In any event, none of the challenged laws prohibit a woman's abortion decision itself. Instead, they merely provide reasonable safety guidelines for performing medical treatment. The challenged laws "come before the court with a presumption of validity" and need only pass rational-basis review. *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 135, 478 S.E.2d 501, 505 (1996) (cleaned up).

B. The regulations challenged by Plaintiffs under Count I comfortably pass rational-basis review.

A regulation passes rational-basis review under Article I, Section 1 if it is "rationally related to a legitimate governmental interest, and in so assessing, we must presume the Rule's validity." *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C. App. 527, 537, 571 S.E.2d 52, 60 (2002). The challenged laws survive this most deferential judicial inquiry because their purpose is squarely within the state's police power, which is at its apogee when addressing public health and the general welfare. *Id.* at 153 N.C. App. at 538, 571 S.E.2d at 60 (protecting the public's "health, safety, and welfare" is a "legitimate government purpose"). More specifically, "there is no right to practice medicine which is not subordinate to the police power of the states." *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 159, 499 S.E.2d 462, 468 n. 5 (1998) (quoting *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926)). The state's discretion "extends naturally to the regulation of all professions concerned with health" and its power "is as extensive

as is necessary for the protection of the public health, safety, morals, and general welfare." *Id.* at 129 N.C. App. at 160, 499 S.E.2d at 468 (cleaned up).

Laws requiring physician licensure and physical presence when providing abortions are "reasonably designed to accomplish this [public health] purpose." *State v. Warren*, 252 N.C. 690, 694, 114 S.E.2d 660, 664 (1960). Same, too, for the requirements ensuring that non-hospital abortion facilities meet basic physical standards to safely facilitate quick patient transport in case of emergency. Also, traditional informed-consent requirements relating to medical procedures are hardly irrational; they have a long history and are "firmly entrenched in American tort law." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

What Plaintiffs have alleged is that the laws are "unnecessary," Compl. ¶¶ 5, 12-13, 24, 27, 33, 88, 150, 160, 189-90, 204, 211, 228, 264, but that is not enough to render their pleading legally meritorious. The legislature, not Plaintiffs—or even, respectfully, the courts—decides whether regulations are necessary or not. "When the most that can be said against [an ordinance] is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere." *In re Appeal of Parker*, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938). In such instances, "the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare." *Id.*

As to the challenged regulations, the General Assembly has permissibly concluded that each is reasonable, just like dozens of other state legislatures around the nation. For example, 32 states ensure that only licensed physicians may perform

abortions,[7] and 18 states require dispensing chemical abortions in person.[8] Since *Dobbs*, many courts have upheld laws like the ones Plaintiffs challenge here. *See infra* at n. 3. The reasonableness of these laws is well settled. Plaintiffs cannot insert themselves as a superlegislature to supplant their discretionary decisions for those of the General Assembly. The Court should reject Plaintiffs' invitation to substitute their decisions for the laws duly passed and enacted by the General Assembly.

1. The legislature receives even greater deference in technical and medical occupations.

Article I, section I, which requires only rational basis scrutiny, *Warren*, 252 N.C. at 693, 114 S.E.2d at 663, "guarantees to an individual only the right to pursue *ordinary* and *simple* occupations free from government regulation," *Teleflex Info. Sys., Inc. v. Arnold*, 132 N.C. App. 689, 692, 513 S.E.2d 85, 87 (1999) (emphasis added). Plaintiffs do not allege that medical practice is an ordinary or simple occupation.

North Carolina courts have dismissed "fruits of their own labor" claims aimed at striking down reasonable regulations, especially in technical professions tied to public health and safety. For example, in *Sanders v. State Pers. Commission*, 197 N.C. App. 314, 677 S.E.2d 182 (2009), the Court of Appeals affirmed the dismissal of equal protection and fruit-of-their-labor challenges to provisions limiting the status and benefits of certain state workers. The Court of Appeals explained that dismissal was required because the regulations did "not exhibit a situation in which the legislature is interfering with an 'ordinary and simple occupation,' nor is the employment scheme intended to be 'free from governmental regulation.'" *Id.* at 326–27, 677 S.E.2d at 191 (cleaned up). *See also Hope—A Women's Cancer Center, P.A.*,

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[7] Guttmacher Institute, *An Overview of Abortion Laws* (Nov. 23, 2022), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

[8] Guttmacher Institute, *Medication Abortion* (Nov. 23, 2022), https://www.guttmacher.org/state-policy/explore/medication-abortion.

203 N.C. App. at 602-03, 693 S.E.2d at 680-81 (rejecting a fruits of their labor challenge to a requirement that new medical facilities obtain a certificate of need before opening). Here, as in *Sanders*, "nothing in the governmental action at issue has arbitrarily or irrationally limited plaintiffs' rights to earn a livelihood. Plaintiffs have not been barred from earning a living, denied pay for their employment, or deprived of bargained-for benefits." *Id.* at 327, 677 S.E.2d at 191. Quite the opposite—the General Assembly has merely ensured health and safety by passing reasonable regulations in a highly technical field.

Although North Carolina courts have struck down occupational restrictions in lay professions like photography and real estate, those cases did not involve the health and safety-related medical professions. North Carolina has never excepted the medical profession from reasonable regulation. In fact, when striking down a regulation of photographers as unreasonably restrictive, the North Carolina Supreme Court made sure to contrast regulations of the artistic profession with permissible regulations of professions like medicine: "Undoubtedly, the State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949).

The restriction on photographers in *Ballance* was unconstitutional because it forbade working as a photographer unless the state approved one's "competency, ability and integrity" through the "require[d] proof as to the technical qualifications, business record and moral character." *Id.* at 766, 770, 51 S.E.2d at 732, 735. The court distinguished regulation of the medical field

> [w]here the practice of a profession or calling requires special knowledge or skill and intimately affects the public health, morals, order, or safety, or the general welfare, [so] the legislature may prescribe reasonable

> qualifications for persons desiring to pursue such profession or calling, and require them to demonstrate their possession of such qualifications by an examination on the subjects with which such profession or calling has to deal as a condition precedent to the right to follow such profession or calling.

Id. (collecting cases).

To be sure, "[a]n exertion of the police power inevitably results in a limitation of personal liberty," but when as here the laws "have a rational, real, or substantial relation to [] public health, morals, order, []safety, [and] general welfare," they should be sustained. *Id.* at 769–70, 51 S.E.2d at 735. When the General Assembly tells medical providers how they should safely provide medical treatment and in what safe setting or facility, its laws need only be rationally related to public health, morals, order, or safety, or the general welfare. The mere fact that Plaintiffs would make different choices on these safety regulations if they were convened as a valid legislature does not permit them to substitute their choices for those of the actual General Assembly.

2. Plaintiffs' "fruit" is missing, if at all, due to their independent market choices, not a result of the laws they challenge.

In any event, the "restrictions" Plaintiffs complain of are largely and admittedly of their own making or from external market conditions. The following allegations are not a result of the challenged laws and would exist without regard to these laws. So they have no bearing on any of Plaintiffs' claims against these Defendants:

- A "nationwide shortage of abortion-providing physicians," Compl. ¶ 141 — none of the challenged laws limit the number of abortion-providing physicians that can practice in North Carolina or the number of locations and number of hours they can provide abortions.
- "[S]kyrocketing levels of student-loan debt," *id.* ¶ 142 — Plaintiffs offer zero tie between the cost of student loans and the challenged North Carolina safety laws.

- "Harassment and stigma" prevent physicians from choosing to perform abortions, *id.* — Plaintiffs do not allege that anything in North Carolina's health laws causes the alleged "harassment and stigma."

- PPSAT chooses to employ only "two staff physicians" statewide. *Id.* ¶ 144. Nothing in the challenged laws precludes Plaintiffs from hiring more physicians to comply with these health and safety regulations.

- Safety regulations "in some cases outright prevent[] the provision of abortion services," but Plaintiffs concede this is because three PPSAT facilities choose not to operate in buildings that meet the medical-safety standards required by law. *Id.* ¶ 12.

In sum, Plaintiffs want this Court to strike down the laws so they can have "a much larger pool of providers," *id.* ¶ 148, but Plaintiffs' own business decisions create their business model and determine the challenged laws' effects on that model. Plaintiffs may find it easier to provide abortions if they could hire registered nurses or physical therapists or anyone with a GED to perform them. Plaintiffs' desire to make it much easier for them to provide abortions for a price does not bootstrap a constitutional claim against safety regulations dealing with medical procedures. Plaintiffs' solution lies with hiring more doctors and opening more safety compliant facilities, not a facial attack on longstanding, commonsense state laws. As much as Plaintiffs seem to crave it, the General Assembly need not craft laws to cater to Plaintiffs' business plan or to alleviate whatever their market frustrations and the public's perceptions of them are. Respectfully, this Court should not, and truly cannot within the bounds of binding precedent, nullify reasonable regulations advancing health and safety simply because Plaintiffs view them as inconvenient or unnecessary.

III. Count II fails because the challenged laws do not involve a suspect class or implicate a fundamental right, and they satisfy rational-basis review.

Plaintiffs' second claim for relief—based on the "law of the land" clause of Article I, Section 19 of the North Carolina Constitution—fails for much the same reasons as their first claim. The standard is the same: the regulation "must be rationally related to a legitimate governmental interest." *Affordable Care, Inc.*, 153 N.C. App. at 537, 571 S.E.2d at 60. As shown above, the regulations bear a rational relation to health and safety. Thus, Plaintiffs' claims lack legal merit and judgment on the pleadings is warranted to dismiss the entire claim against all Defendants.

A. The challenged laws do not implicate a fundamental right or suspect class.

The only exception to rational-basis review for this claim is if the challenged laws implicate a fundamental right or a suspect class. *Rhyne*, 358 N.C. at 180, 594 S.E.2d at 15. Neither applies here. There is no fundamental constitutional right to abortion because there is no North Carolina history and tradition of recognizing one. In fact, it has criminalized it for more than a century. *See supra* at Section II. Nor are Plaintiffs a suspect class. Neither abortionists nor aspiring abortionists, or the businesses that employ them, are a suspect class. Nor are women of reproductive age, whether poor, minor, or otherwise, a suspect class. *Harris v. McRae*, 448 U.S. 297, 322-23 (1980).

The Complaint does not allege any suspect classes exist for the claims, aside from a single line claiming, without tethering to anything concrete, that the laws have a "disproportionate[] impact [on] women and/or are based on and perpetuate outdated and impermissible sex and gender stereotypes." Compl. ¶ 265. By contrast, the North Carolina Supreme Court has actually already held that "indigent women who need medically necessary abortions" are not a suspect class. *See Rosie J.*, 347

N.C. at 251, 491 S.E.2d at 537. So, Plaintiffs' unfounded, directly controverted, ipse dixit, one-liner that women, who are not even Plaintiffs—just unknown, unnamed women—are a suspect class cannot be taken at face value. The Court should apply rational-basis review to Plaintiffs' Count II.

B. The challenged laws survive rational basis scrutiny.

"[T]he rational basis test is the lowest tier of review, requiring a connection between the statute and 'a conceivable,' . . . or 'any,' legitimate governmental interest." *Rhyne*, 358 N.C. at 181, 594 S.E.2d at 16 (citations omitted). The court is to merely decide whether "distinctions which are drawn by a challenged statute . . . bear some rational relationship to a conceivable legitimate governmental interest." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). As the U.S. Supreme Court recently clarified, states certainly have a legitimate interest in protecting maternal health and prenatal life at every stage of development. *Dobbs*, 142 S. Ct. at 2284.

The Facility Safety Requirements ensure ambulatory surgical centers performing life-threatening and ending surgeries and administering life-threatening and ending drugs meet building codes consistent with other medical facilities hosting serious procedures. Plaintiffs' attempted distinctions are meritless. Abortion carries a different risk and is different in kind than the "intrauterine device ('IUD') insertions, Pap tests, and cervical cancer screenings" Plaintiffs offer as comparable medical treatments. Compl. ¶ 12. None of those minor medical treatments or lab screenings or tests involve, among other things, ending a prenatal life through poisoning or dismemberment. Regardless, just because the General Assembly could choose, but chose not, to regulate these procedures or plastic surgery in exactly the same way, *see* Compl. ¶ 196, does not mean its regulating abortion is irrational. *Liebes v. Guilford Cnty. Dept. of Pub. Health*, 213 N.C. App. 426, 724 S.E.2d 70, 77 (2011)

("The legislature may select one phase of one field and apply a remedy there, neglecting the others." (cleaned up)).

Similarly, the licensing requirements for medical facilities that Plaintiffs complain of, including recordkeeping and facilities-operations requirements, Compl. at ¶ 13, are quintessential functions of the state regulatory role in protecting the health, welfare, and safety of its citizens. Plaintiffs cannot offer any basis to conclude that regulating medical facilities in this way is irrational and untethered to any legitimate governmental objective.

As to the 72-hour informed-consent provision, a brief informed-consent period is reasonable for momentous, permanent life decisions. North Carolina law, as a matter of good public policy, provides for similar waiting periods in other, less serious contexts. E.g., N.C. GEN. STAT. § 50-6 (2022) (one-year waiting period for divorce); cf. N.C. GEN. STAT. § 48-3-608(a) (effective Oct. 1, 2012) (7-day revocation period for giving up child for adoption); N.C. GEN. STAT. § 93A-45 (effective Oct. 6, 2021) (5-day cancellation period for purchasing a timeshare); N.C. GEN. STAT. § 66-121 (2022) (72-hour right to cancel contract with gyms and health clubs). Moreover, information in the informed-consent statute is rationally related to the legitimate governmental objectives of (i) ensuring women undergo serious medical procedures only if fully informed of risks and alternatives, and (ii) protecting fetal life. *See Casey*, 505 U.S. at 846 ("the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child"). Informing women of the gestational age of their unborn child, offering a description of baby's development, and providing information on public assistance for the alternative of continuing pregnancy all advance these legitimate objectives.

CONCLUSION

Plaintiffs' facial claims fail as a matter of law because, as the Complaint concedes, the challenged laws can be applied constitutionally in some circumstances. In fact, the challenged laws are applied constitutionally in all circumstances. There is no right to abortion in the North Carolina Constitution's text, structure, history, or caselaw interpreting it. The challenged laws therefore do not implicate fundamental rights, and they easily pass the applicable rational-basis scrutiny by advancing legitimate state interests in protecting maternal health and preserving prenatal life. The Court should, respectfully, grant the motion for judgment on the pleadings and dismiss the case against all Defendants.

Respectfully submitted, this the 14th day of December, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing LEGISLATIVE DEFENDANTS' MEMORANDUM IN SUPPORT OF 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS by email addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 14th day of December, 2022.

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