

NORTH CAROLINA
COUNTY OF WAKE

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
7071 MAY 28 PM 1:45
FILE NO. 20 CVS 500147

WAKE CO., C.S.C.

PLANNED PARENTHOOD SOUTH ATLANTIC, A WOMAN'S CHOICE OF CHARLOTTE, INC., A WOMAN'S CHOICE OF GREENSBORO, INC., and A WOMAN'S CHOICE OF RALEIGH, INC., on behalf of themselves, their physicians and staff, and their patients; KATHERINE FARRIS, M.D., ANNE LOGAN BASS, F.N.P., SISTERSONG WOMEN OF COLOR REPRODUCTIVE JUSTICE COLLECTIVE, on behalf of its members; ELIZABETH DEANS, M.D., and JONAS SWARTZ, M.D., on behalf of themselves and their patients,

Plaintiffs,

v.

TIMOTHY K. MOORE, as Speaker of the North Carolina House of Representatives, in his official capacity; PHILIP E. BERGER, as President Pro Tempore of the North Carolina Senate, in his official capacity; JOSH STEIN, as Attorney General of North Carolina, in his official capacity; SATANA DEBERRY, as District Attorney ("DA") for Prosecutorial District ("PD") 16, in her official capacity; BENJAMIN R. DAVID, as DA for PD 6, in his official capacity; LORRIN FREEMAN, as DA for PD 10, in her official capacity; WILLIAM R. WEST, as DA for PD 14, in his official capacity; JAMES R. WOODALL, as DA for PD 18, in his official capacity; AVERY M. CRUMP, as DA for PD 24, in her official capacity; SPENCER B. MERRIWEATHER III, as DA for PD 26, in his official capacity; JAMES R. O'NEILL, as DA for PD 31, in his official capacity; TODD M. WILLIAMS, as DA for PD 40, in his official capacity; MANDY K. COHEN, M.D., M.P.H., as Secretary of the North

ORDER ON DEFENDANTS' MOTIONS
TO DISMISS

Carolina Department of Health and Human Services, in her official capacity; BRYANT A. MURPHY, M.D., M.B.A., as President of the North Carolina Medical Board, in his official capacity, on behalf of himself, the board, and its members; MARTHA ANN HARRELL, as Chair of the North Carolina Board of Nursing, in her official capacity, on behalf of herself, the Board, and its members,

Defendants.

THIS MATTER CAME ON TO BE HEARD before the undersigned during the March 15, 2021, Session of Superior Court, Wake County, upon Defendants' respective Motions to Dismiss made pursuant to N.C.G.S. §§ 1A-1, Rules 12(b)(1) and 12(b)(6).

The Court, in considering the pleadings, arguments and supporting briefs of the parties, supplemental affidavits and declarations of the parties, and the record established thus far, hereby rules upon the motions as follows:

Procedural History

On September 3, 2020, Plaintiffs Planned Parenthood South Atlantic ("PPSAT"); A Woman's Choice ("AWC") of Charlotte, Inc., AWC of Greensboro, Inc., AWC of Raleigh Inc. (collectively, the "AWC Clinics") on behalf of themselves, their physicians and staff, and their patients; Katherine Farris, M.D.; Anne Logan Bass, F.N.P.; SisterSong Women of Color Reproductive Justice Collective ("SisterSong") on behalf of its members; Elizabeth Deans, M.D. and Jonas Swartz, M.D. on behalf of themselves and their patients, (collectively referred to as "Plaintiffs") filed their complaint in this action, alleging five acts of the North Carolina General Assembly violate two provisions of the North Carolina Constitution.

On November 16, 2020, Defendants Speaker Timothy K. Moore And President Pro Tempore Philip E. Berger (collectively referred to as “Legislative Defendants”), each in his official capacity, filed a Motion to Dismiss, seeking to dismiss Plaintiffs’ complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Legislative Defendants’ Rule 12(b)(1) Motion seeks to dismiss Plaintiffs’ Complaint on the grounds that Plaintiffs’ Complaint presents a non-justiciable political question and that Plaintiffs lack standing. Legislative Defendants have requested that this Court reserve ruling on their Rule 12(b)(6) Motion in order for the motion to be considered by a three-judge panel.

On November 16, 2020, Defendants Attorney General Stein, in his official capacity; District Attorneys DeBerry, David, Freeman, West, Woodall, Crump, Merriweather, O’Neill, and Williams, each in his or her official capacities; the North Carolina Medical Board by and through President Murphy in his official capacity; the North Carolina Board of Nursing by and through Chair Harrell in her official capacity; and the Department of Health and Human Services by and through Secretary Cohen in her official capacity, (collectively referred to as “Attorney General Defendants”) filed a Motion to Dismiss, seeking to dismiss Plaintiffs’ Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Attorney General Defendants’ Rule 12(b)(1) Motion seeks to dismiss Plaintiffs’ Complaint on the grounds that Plaintiffs lack standing. Attorney General Defendants also seek to dismiss Plaintiffs’ Complaint due to a lack of standing through a Rule 12(b)(6) Motion.

The parties have fully briefed the matters pending before the Court, and on March 18, 2021, a remote virtual hearing was conducted via WebEx on Defendants’ respective motions, which were thereafter taken under advisement.

Standards of Review on Motions to Dismiss

1. When ruling on a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure “the court need not confine its evaluation . . . to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.” *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998) (internal quotation marks and citation omitted). But “if the trial court confines its evaluation to the pleadings, the court must accept as true the plaintiff’s allegations and construe them in the light most favorable to the plaintiff.” *Munger v. State*, 202 N.C. App. 404, 410, 689 S.E.2d 230, 235 (2010) (citations and quotations omitted).

2. On a Rule 12(b)(6) motion to dismiss, “the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.” *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 735, 659 S.E.2d 483, 486 (2008). “The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.” *Id.*

Political Question

3. Legislative Defendants argue in support of their Rule 12(b)(1) Motion that the court lacks jurisdiction over the subject matter of Plaintiffs’ action on the theory that Plaintiffs’ claims constitute non-justiciable political questions. The Court, however, concludes that the constitutional challenges asserted in Plaintiffs’ Complaint present a justiciable issue, as distinguished from a non-justiciable political question, and are therefore within the subject matter jurisdiction of the judiciary.

Standing

Guiding Legal Principles on Standing

4. The North Carolina Constitution provides that “every person, for an injury done him . . . shall have remedy by due course of law.” N.C. CONST. art. I, § 18, cl. 2. This clause should be read to guarantee standing where a legal right arising under the North Carolina Constitution has been infringed. *Comm. to Elect Forest v. Employees PAC*, 376 N.C. 558, 2021-NCSC-6, ¶ 81 (“*Elect Forest*”). The “gist of the question of standing” is whether the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Id.* at ¶ 82 (quoting *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006)).

5. An action, such as the case at bar, arising under the Declaratory Judgment Act does require a showing of direct injury. *Id.* at ¶ 61. This is because “only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue.” *Id.* at ¶ 64 (quoting *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 28, 199 S.E.2d 641 (1973)). “The ‘direct injury’ required in this context could be, but is not necessarily limited to, ‘deprivation of a constitutionally guaranteed personal right or an invasion of his property rights.’” *Id.* at ¶ 82 (quoting *State ex rel. Summerell v. Carolina-Virginia Racing Ass’n*, 239 N.C. 591, 594, 80 S.E.2d 638, 640 (1954)); see also *Piedmont Canteen Services, Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) (holding only persons “who have been injuriously affected . . . in their persons, property or constitutional rights” may challenge the constitutionality of a statute). A plaintiff may assert that it has third-party standing to sue on behalf of others. See *Guilford County ex rel.*

Thigpen v. Lender Processing Servs., 2013 NCBC 30, at *23 (N.C. Super. Ct. May 29, 2013); see *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71 (1991). A plaintiff-association may assert that it has standing to sue on behalf of its members. See *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990); *Shearon Farms Townhome Owners Ass'n v. Shearon Farms Dev., LLC*, 847 S.E.2d 229, 235 (N.C. Ct. App. 2020).

Count I of Plaintiffs' Complaint

6. Plaintiffs' first claim in the complaint is that the following five statutes are unconstitutional under Article I, Section 1 of the North Carolina Constitution: N.C.G.S. § 14-45.1(a), (g) (labeled by Plaintiffs as the "Advanced Practice Clinician 'APC' Ban"); N.C.G.S. § 90-21.82(1)(a) (labeled by Plaintiffs as the "Telemedicine Ban"); N.C.G.S. § 14-45.1(a) (labeled by Plaintiffs as the "Targeted Regulation of Abortion Providers 'TRAP' Scheme"); N.C.G.S. § 90-21.82 (1)-(2) (labeled by Plaintiffs as the "72-Hour Delay"); and N.C.G.S. § 90-21.82 (1)-(2) (labeled by Plaintiffs as the "Counseling Requirement").

7. Article I, Section 1 of the North Carolina Constitution is entitled "The equality and rights of persons," and declares: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable 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.

8. The Court concludes that Plaintiffs have standing as follows:

- a) Plaintiffs PPSAT, Farris, and the AWC Clinics all have standing to directly challenge the APC Ban, Telemedicine Ban, and the TRAP scheme on their own behalf under N.C. CONST. art. I, § 1.
- b) Plaintiff Bass has standing to challenge the Telemedicine Ban and TRAP scheme on her own behalf under N.C. CONST. art. I, § 1.

- c) Plaintiffs PPSAT, Farris, and the AWC Clinics all have third-party standing to challenge all five statutes on behalf of their patients under N.C. CONST. art. I, § 1.
- d) Plaintiff Bass has standing to challenge the Telemedicine Ban, TRAP Scheme, 72-Hour Delay, and Counseling Requirement on behalf of her patients under N.C. CONST. art. I, § 1.
- e) Plaintiffs Dean and Swartz have third-party standing to challenge the 72-Hour Delay and the Counseling Requirement on behalf of their patients under N.C. CONST. art. I, § 1.
- f) Plaintiff SisterSong has associational standing to challenge all five statutes on behalf of its members under N.C. CONST. art. I, § 1.
- g) Plaintiff Bass had not completed her training to perform aspiration abortions when this action was commenced; however, the Court has reviewed her subsequently-filed affidavit and finds, for the purposes of Defendants' Motions alleging that the court lacks jurisdiction over the subject matter of Plaintiffs' claims due to lack of standing, that she has completed her training and can now perform aspiration abortions. Therefore, the Court concludes that Plaintiff Bass does have standing to challenge the APC Ban under N.C. CONST. art. I, § 1.

Count II of Plaintiffs' Complaint

10. Plaintiffs' second claim in the complaint is that the five challenged statutes are unconstitutional under Article I, Section 19 of the North Carolina Constitution.

11. Article I, Section 19 of the North Carolina Constitution is entitled "Law of the land; equal protection of the laws," and declares: "No 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. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.” N.C. CONST. art. I, § 19.

12. The Court concludes that Plaintiffs have standing as follows:

- a) Plaintiffs PPSAT, Farris, and the AWC Clinics all have standing to challenge the APC Ban, Telemedicine Ban, and the TRAP scheme on their own behalf under N.C. CONST. art. I, § 19.
- b) Plaintiff Bass has standing to challenge the Telemedicine Ban and TRAP scheme on her own behalf under N.C. CONST. art. I, § 19.
- c) Plaintiffs PPSAT, Farris, and the AWC Clinics all have third-party standing to challenge all five statutes on behalf of their patients under N.C. CONST. art. I, § 19.
- d) Plaintiff Bass has standing to challenge the Telemedicine Ban, TRAP Scheme, 72-Hour Delay, and Counseling Requirement on behalf of her patients under N.C. CONST. art. I, § 19.
- e) Plaintiffs Dean and Swartz have third-party standing to challenge the 72-hour delay and the Counseling Requirement on behalf of their patients under N.C. CONST. art. I, § 19.
- f) Plaintiff SisterSong has associational standing to challenge all five statutes on behalf of its members under N.C. Const. art. I, § 19.
- g) As noted above, Plaintiff Bass had not completed her training to perform aspiration abortions when this action was commenced; however, the Court has reviewed her subsequently-filed affidavit and finds, for the purposes of Defendants’ Motions alleging that the court lacks jurisdiction over the subject matter of Plaintiffs’ claims due to lack of standing, that she has completed

her training and can now perform aspiration abortions. Therefore, the Court concludes that Plaintiff Bass does have standing to challenge the APC Ban under N.C. CONST. art. I, § 19.

Conclusion

14. For the reasons herein stated, the Court has jurisdiction over the subject matter of this action and Defendants' Rule 12(b)(1) Motions will be denied.

15. For the reasons herein stated, to the extent Attorney General Defendants have moved to dismiss Plaintiffs' Complaint under Rule 12(b)(6) upon an assertion that Plaintiffs' lack standing, that motion will similarly be denied.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Defendants' Motions to Dismiss under Rule 12(b)(1) are hereby DENIED.
2. Attorney General Defendants' Motion to Dismiss under Rule 12(b)(6), to the extent in which the motion is based upon the assertion that Plaintiffs lack standing, is hereby DENIED.
3. In accordance with N.C.G.S. § 1A-1, Rule 42(b)(4), this Court declines to rule on Defendants' motions to dismiss under Rule 12(b)(6) that are not based upon the assertion that Plaintiffs lack standing, and by separate order entered contemporaneously with this Order has referred such motions to be decided by a three-judge panel.

SO ORDERED, this 28th day of May, 2021.



The Honorable Rebecca W. Holt
Superior Court Judge
Tenth Judicial District