IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AMY BRYANT, M.D., M.S.C.R.; BEVERLY GRAY, M.D., ELIZABETH DEANS, M.D., on behalf of themselves and their patients seeking abortions; and PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its staff, and its patients seeking abortions, Plaintiffs, v. Jim Woodall, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B; Roger Echols, in his official capacity as DA for PD 14; Eleanor E. Greene, M.D., M.P.H, in her official capacity as President of the North Carolina Medical Board; Rick Brajer, in his official capacity as Secretary of the North Carolina Department of Health and Human Services; and their employees, agents, and successors, Defendants.	)	CIVIL ACTION Case No. 1:16-CV-01368

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

For more than forty years, the United States Supreme Court has repeatedly held that, prior to viability, states lack the power to ban abortion. The Court has described this principle as the central tenet of its abortion jurisprudence, which protects each woman's right to decide whether to carry a pregnancy to term. In contravention of this clear Supreme Court precedent, North Carolina prohibits all abortions after the twentieth week of pregnancy as measured from the first day of the woman's last menstrual period ("lmp"), several weeks prior to viability, with only an extremely limited medical emergency exception. N.C. Gen. Stat. §§ 14-44, 14-45, 14-45.1 ("the 20-week ban"). The Supreme Court's decisions in *Whole Woman's Health v. Hellerstedt*, *Planned Parenthood v. Casey*, and *Roe v. Wade* guarantee that it is for a woman, and not the State, to make the ultimate decision whether or not to continue a previability pregnancy. Under this unbroken line of binding Supreme Court precedent, the 20-week ban is unconstitutional and should be permanently blocked by this Court.

QUESTION PRESENTED

1. Is North Carolina's ban on abortion after the twentieth week of pregnancy lmp, several weeks prior to viability, invalid under forty years of unbroken Supreme Court precedent holding that a ban on abortion prior to viability is unconstitutional?

STATEMENT OF FACTS

North Carolina law makes it a felony for a doctor to provide an abortion to a woman after the twentieth week of pregnancy, except in extremely limited circumstances.

Because viability does not occur until several weeks after 20 weeks lmp, the 20-week ban is an unconstitutional previability abortion ban.

I. The Challenged Provisions

North Carolina imposes a general criminal ban on abortion. N.C. Gen. Stat. §§ 14-44, 14-45. There are two exceptions to this general prohibition. The first authorizes a physician to perform an abortion during the first 20 weeks of a woman's pregnancy. *Id.* § 14-45.1(a). The second exception authorizes a physician to perform an abortion after the twentieth week of a woman's pregnancy if there is a "medical emergency." *Id.* § 14-45.1(b). Construed together, North Carolina's N.C. Gen. Stat. §§ 14-44, 14-45, and provisions of 14-45.1 ban abortion in North Carolina after the twentieth week of pregnancy. The only exception to the 20-week ban is for women facing a "medical emergency," which is narrowly defined as:

> A condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions. For purposes of this definition, no condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

Id. § 90-21.81(5).

Accordingly, under current law, no North Carolina woman may obtain a previability abortion after the twentieth week of pregnancy, unless she is experiencing a medical emergency as defined by the statute.

The current version of the 20-week ban has been in effect since January 1, 2016. Prior to 2016, the 20-week ban operated as a ban on abortions after the twentieth week of pregnancy, with a health exception that allowed a physician to perform an abortion after the twentieth week "if there is substantial risk that the continuance of the pregnancy would threaten the life or gravely impair the health of the woman." *Id.* § 14-45.1(b) (amended 2015).

The previous version of the 20-week ban prevented Plaintiffs from providing previability abortions to their patients. But the 2016 amendment made the ban even more extreme by limiting the exceptions, thereby making it illegal for Plaintiffs to perform some previability abortions after the twentieth week that were authorized under the preexisting health exception.

II. Plaintiffs

Plaintiffs are three North Carolina board-certified obstetrician-gynecologists who practice at the University of North Carolina and Duke University, and Planned Parenthood South Atlantic, a nonprofit corporation headquartered in Raleigh, North Carolina. Plaintiffs offer a range of reproductive healthcare to their patients, including abortion services. *See* Exhibit 1 to Plaintiffs' Motion for Summary Judgment, Declaration of Amy Bryant, M.D., M.S.C.R. ("Bryant Decl.") ¶¶ 2, 4, 7–8; Exhibit 2 to Plaintiffs' Motion for Summary Judgment, Declaration of Jennifer Black ("Black Decl.") ¶¶ 1, 5, 6; Exhibit 3 to Plaintiffs' Motion for Summary Judgment, Declaration of Beverly Allen Gray, M.D. ("Gray Decl.") ¶¶ 1–2, 6. But for the 20-week ban, Plaintiffs would provide previability

abortions after the twentieth week of pregnancy to their patients. Bryant Decl. ¶ 14; Black Decl. ¶ 7; Gray Decl. ¶ 7.

III. The 20-Week Ban is a Previability Abortion Ban

This case turns on a single, indisputable material fact: North Carolina's ban on abortion after the twentieth week of pregnancy is a ban on previability abortion. Pregnancy is measured from the first day of a woman's last menstrual period, also referred to as "lmp." Bryant Decl. ¶ 15; Gray Decl. ¶ 7. Viability, the point at which a fetus has a reasonable chance for sustained life outside the womb, occurs at approximately 24 weeks lmp and can occur later because viability varies from pregnancy to pregnancy. Bryant Decl. ¶¶ 15, 17; Gray Decl. ¶ 8. The determination of viability is an individualized medical determination that must be made by physicians based on the health of the woman and the fetus. Bryant Decl. ¶ 15; Gray Decl. ¶ 8. Some fetuses are never viable, due to the health of the fetus, including those suffering from fatal fetal anomalies such as undeveloped kidneys or lungs, severe brain anomalies, or severe cardiac anomalies. Bryant Decl. ¶ 17; Gray Decl. ¶ 8.

The 20-week ban prohibits abortions after the twentieth week of pregnancy. It therefore prohibits abortion at a point in pregnancy when no fetus is viable. Bryant Decl. ¶ 16; Gray Decl. ¶ 9. For these reasons, the 20-week ban is a previability abortion ban.

ARGUMENT

I. Legal Standard

Summary judgment is proper where "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Design Res., Inc. v. Leather*

Indus. of Am., 789 F.3d 495, 500 (4th Cir. 2015) (citing Fed. R. Civ. P. 56(a)); *Plett v. United States*, 185 F.3d 216, 223 (4th Cir. 1999). "And the question of whether a given set of facts entitles a party to judgment is a question of law." *Plett*, 185 F.3d at 223. "[I]t is ultimately the nonmovant's burden to persuade [courts] that there is indeed a dispute of material fact. It must provide more than a scintilla of evidence—and not merely conclusory allegations or speculation—upon which a jury could properly find in its favor." *Design Res., Inc.*, 789 F.3d at 500 (quoting *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 370 (4th Cir. 2014) (citation omitted)).

II. Binding Supreme Court Precedent Establishes that the State of North Carolina May Not Ban Abortions Prior to Viability

The U.S. Supreme Court has repeatedly and unequivocally held that, under the Due Process Clause of the Fourteenth Amendment, a state many not ban abortion prior to viability. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992).[1] Recognizing "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty," *id.* at 869, the Supreme Court first announced this straightforward rule in *Roe v. Wade*, 410 U.S. 113, 163–64 (1973), and subsequently reaffirmed it without alteration in *Casey*, 505 U.S. at 871. Indeed, *Roe*'s essential holding, reaffirmed in *Casey*, is the "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from

[1] *See Colautti v. Franklin*, 439 U.S. 379, 388 (1979) ("Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support.").

the State." *Id.* at 846. As the Court explained, "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Id.*; *see also id.* at 860 (reaffirming that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

Under *Casey*, a state simply cannot ban abortion prior to viability, regardless of what exceptions it provides. *See id.* at 879 ("Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."). As *Casey* explained, the Supreme Court's decision rests on the fundamental right of a woman to determine the course of her pregnancy before viability, grounded in a woman's right to the decisional autonomy to shape her own place in society regardless of the State's vision of a woman's role. *Id.* at 852.

The Supreme Court has repeatedly reaffirmed this legal principle, including in its most recent decision, *Whole Woman's Health*. In that case, the Court relied on *Casey* in reaffirming that a provision of law is constitutionally invalid if it bans abortion "before the fetus attains viability." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (citing *Casey*, 505 U.S. at 878); *see also Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) ("assum[ing]" the principle that, "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 878-79)); *Stenberg v. Carhart*, 530 U.S. 914, 920-21 (2000) (declining to

"revisit" the legal principles reaffirmed in *Casey* that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)).

Given this unwavering line of Supreme Court precedent, every federal appellate court or state high court faced with a law prohibiting abortions before viability, with or without exceptions, has ruled that it violates the Fourteenth Amendment; further, the Supreme Court has affirmed or denied *certiorari* in each one of those cases it has been asked to review. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 773 (8th Cir. 2015) (striking down ban on previability abortions at 6 weeks with exceptions), *cert. denied*, 136 S. Ct. 981 (2016); *Edwards v. Beck*, 786 F.3d 1113, 1117 (8th Cir. 2015) (striking down ban on previability abortions at 12 weeks with exceptions), *cert. denied*, 136 S. Ct. 895 (2016); *Isaacson v. Horne*, 716 F.3d 1213, 1217, 1231 (9th Cir. 2013) (striking down ban on previability abortions at 20 weeks with exceptions), *cert. denied*, 134 S. Ct. 905 (2014); *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (striking down ban on "the most common procedure" used to perform abortions after 13 weeks), *aff'd*, 530 U.S. 914, 922 (2000); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117−18 (10th Cir. 1996) (striking down ban on previability abortions at 22 weeks with exceptions), *cert. denied*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down ban on all abortions with exceptions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368−69 (9th Cir. 1992) (same), *cert. denied*, 506 U.S. 1011 (1992); *cf. DesJarlais v. State*,

Office of Lieutenant Governor, 300 P.3d 900, 904–05 (Alaska 2013) (invalidating proposed previability ban on all abortions with exception for "necessity"), *reh'g denied*; *In re Initiative Petition No. 395, State Question No. 761*, 286 P.3d 637, 637−38 (Okla. 2012) (invalidating proposed definition of a fertilized egg as a "person" under due process clause), *cert. denied*, 133 S. Ct. 528 (2012); *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 287 (Wyo. 1994) (ruling proposed ban on abortions would be unconstitutional); *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1, 7 (Okla. 1992) (striking down proposed abortion ban with exceptions), *cert. denied*, 506 U.S. 1071 (1993).

Indeed, in *Isaacson*, the Ninth Circuit addressed a virtually identical 20-week ban, holding that because it deprived women of the ultimate decision to terminate their pregnancies prior to viability, it was unconstitutional "under a long line of invariant Supreme Court precedents." 716 F.3d at 1217. Recognizing the indisputable fact that no fetus is viable at 20 weeks gestational age, the Court held that Arizona's ban on abortion from 20 weeks "necessarily prohibits pre-viability abortions," *id*. at 1225, and is therefore unconstitutional. *Id*. at 1231. For these reasons, the court struck down the law as applied to previability abortions. *Id*. at 1230.

Under this clear precedent, this Court should strike down the 20-week ban as unconstitutional. There can be no dispute over the critical fact in this case: North Carolina's ban on abortion after the twentieth week of pregnancy prohibits previability abortions. *See Isaacson*, 716 F.3d at 1225. The ban cannot stand under *Casey* and *Roe*,

regardless of any exceptions. *See, e.g.*, *Casey*, 505 U.S. at 846, 870–71, 879. With the 20-week ban, North Carolina has prohibited access to abortion at a time before viability. *See Isaacson* 716 F.3d at 1229. Under binding Supreme Court authority, it simply cannot restrict abortion access in this way, regardless of its reasons for doing so. *See Casey*, 505 U.S at 860.

Given that the 20-week ban prohibits abortion at a point in pregnancy before viability, as the Supreme Court has consistently used that term, the 20-week ban violates the Fourteenth Amendment rights of Plaintiffs' patients. Where, as here, (1) the loss of constitutional freedoms unquestionably constitutes irreparable injury, (2) monetary damages are inadequate to compensate for the loss of constitutional freedoms, (3) the State of North Carolina is in no way harmed by the issuance of an injunction that prevents the State from enforcing an unconstitutional restriction, and (4) upholding constitutional rights serves the public interest, permanent injunctive relief is warranted. *See Elrod v. Burns*, 427 U.S. 347, 373–74 (1976) (plurality opinion); *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011) (upholding permanent injunction where First Amendment rights were violated). For these reasons, Supreme Court precedent requires that this Court declare statutes criminalizing abortion, N.C. Gen. Stat. §§ 14-44, 14-45, and 14-45.1(a)–(b), unconstitutional as applied to previability abortions and permanently enjoin their enforcement as applied to previability abortion. Accordingly, summary judgment is warranted.

CONCLUSION

The 20-week ban must be struck down under controlling Supreme Court precedent, which precludes a ban on abortion prior to viability. For the reasons stated above, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for summary judgment, declare the 20-week ban unconstitutional, and enter an order permanently enjoining its application to previability abortions.

RESPECTFULLY SUBMITTED this 14th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2016, I electronically filed the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have appeared in the case. Counsel for all Defendants, Faison Hicks, was served via email.

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