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, vs. 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 Secretary of the North Carolina Medical Boad; 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.	)	Case No.: 1:16-cv-01368-UA-LPA

MEMORANDUM IN SUPPORT OF MOTION OF THE HON. PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Come now, the Hon. Phil Berger, President Pro Tempore of the North Carolina Senate, and Tim Moore, Speaker of the North Carolina House of Representatives, by and through their counsel, and pursuant to Rule 7.5(b) of the Local Rules of the Middle District

of North Carolina, hereby files this brief in support of motion for leave to file an *amicus curiae* brief in support of Defendants to respectfully oppose Plaintiffs' Motion for Summary Judgment, filed herein on December 14, 2016 (Docket No. 13).

The Movants are constitutional officers of the State of North Carolina, pursuant to Art. II, §§ 14 and 15 of the Constitution of the State of North Carolina. In June 2015, both houses of the General Assembly voted by large margins - the House by 71-43 and the Senate by 31-15 - to amend N.C. GEN. STAT. § 14-45.1, which governs permitted abortions within the State. That section had permitted abortion within the State up to 20 weeks of pregnancy if done by a licensed physician in a hospital or clinic certified by the Department of Health and Human Services as a suitable facility. N.C. GEN. STAT. § 14–45.1(a). Abortion after 20 weeks was governed by Sec. 14-45.1(b), which permitted abortions after that gestation "if there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman." The 2015 amendment incorporated the definition of "medical emergency" found in N.C. GEN. STAT. § 90-21.81(5):

> Medical emergency.--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.

This definition is substantially identical to the definition for medical emergency exceptions approved as constitutional by the Supreme Court in *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992).

The 2015 amendments also added confidential informational and reporting requirements for abortions after the sixteenth week of gestation, S.L. 2015-62 amending N.C. GEN. STAT. § 14-45.1(b1) and (c), and increased the period for considering the informed consent information required by the State from twenty-four hours to seventy-two hours. S.L. 2015-62, Sec. 7.(b), amending N.C. GEN. STAT. § 90-21.82. Plaintiffs do not challenge these amendments. The informational provisions addressed a growing concern of the General Assembly that data regarding abortions, and particularly late-term abortions, was not available or was underreported by practitioners. The revision to the "medical emergency" definition took effect on October 1, 2015, while the informational requirements and consent period amendments took effect on January 1, 2016. S.L. 2015-62, § 7.(d).

In spite of the fact that the statute was amended in June 2015 and the challenged portion became effective in January 2016, Plaintiffs waited to file the Complaint in this case until nearly a year later, on November 30, 2016. (Docket No. 1) Now, through this Motion filed December 14, 2016 (Docket No. 13) before Defendants even had a chance to file their Answer (Docket No. 20, filed January 13, 2017), Plaintiffs urge that no factual record is required in this case, and that they are entitled to judgment as a matter of law. The

Court's proposed *Amici* respectfully disagree. They would urge that, as set out more fully in the submitted *amicus* brief, the Supreme Court has not treated viability as a black-and-white line of demarcation which prohibits regulation of abortion before that point, and the State in fact has a compelling and constitutionally valid interest in protecting unborn children through all nine months of pregnancy. *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458, 461 (1983) (O'Connor, J., dissenting). *See also Casey*, *supra*, 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"); *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) ("the government has a legitimate and substantial interest in preserving and promoting fetal life"). Plaintiffs erroneously claim that the State's limitation on abortion after twenty weeks' gestation – at a time when abortion is *more dangerous* to the mother than childbirth and unborn infants feel horrific pain on being torn apart in abortion – violates the Fourteenth Amendment right of their patients to access the procedure without being "unduly burdened." Plaintiffs misconstrue existing Supreme Court law, which allows the States to reasonably license and regulate the practice of medicine while permitting abortion under necessary and appropriate circumstances. It is "inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion." *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 877).

In order to protect these compelling and valid constitutional interests of the State of North Carolina, its citizens and children yet unborn, the General Assembly enacted the challenged provisions. The Court's proposed *Amici* desire to speak to the reasons why this legislation was passed from the point of view of the members of the General Assembly, and thereby to assist the Court in determining and evaluating the State's interests in passing this legislation. Based on the above, Movant submits this proposed *amicus curiae* brief in support of State District Attorneys Jim Woodall and Roger Echols and Eleanor E. Greene, M.D., M.P.H., Secretary of the North Carolina Medical Board, and Rick Brajer, Secretary of the North Carolina Department of Health and Human Services.

Date: January 27, 2017

Respectfully submitted,

/s/ Robert D. Potter, Jr.
Robert D. Potter, Jr. NC Bar No. 17553
Attorney at Law
2820 Selwyn Ave., #840
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

Kevin Theriot* AZ Bar No. 030446
Lead Counsel
Steven H. Aden* DC Bar No. 46777
Kenneth Connelly* AZ Bar No. 025420
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax
ktheriot@ADFlegal.org
saden@ADFlegal.org
kconnelly@ADFlegal.org

*Appearing pursuant to Local Rule 83.1(d);
appearances to be filed

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Robert D. Potter, Jr.
Robert D. Potter, Jr.

Attorney for *Amicus Curiae*