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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

NICOLE BLACKMON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 23-1196-IV(I)
	)	
STATE OF TENNESSEE, *et al.*,	)	Judge Donaghy
	)	Chancellor Culbreath
Defendants.	)	Chancellor Moskal

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS

This matter came before the assigned three-judge panel on Defendants' *Motion to Dismiss the First Amended Complaint*.[1] Plaintiffs filed a response in opposition, and Defendants filed a reply. Participating in the hearing were Attorneys Linda Goldstein and Mark Hearron, representing Plaintiffs, and Assistant Solicitor General Whitney Hermandorfer, representing Defendants. Based on the motion, response, reply, the amended complaint, and arguments of counsel, the Court GRANTS, in part, and DENIES, in part, Defendants' *Motion to Dismiss* for the reasons discussed below.

I. BACKGROUND AND STATEMENT OF CASE

This case involves Plaintiffs' constitutional challenges to the medical necessity exception to the criminal abortion statute passed by the Tennessee General Assembly, which was signed into law on April 28, 2023, and became effective immediately. 2023 Tenn. Pub. Acts ch. 313, §§ 1-3 (codified at Tenn. Code Ann. § 39-15-213(c)) (the "Medical Necessity Exception"). Tennessee's criminal abortion statute had become effective during the prior year, on August 25, 2022, and made it a crime punishable as a Class C felony for any person to perform or attempt to perform an abortion. Tenn. Code Ann. § 39-15-213(b). As originally enacted, the statute excluded from the

[1] The Court also heard Plaintiffs' *Motion for Temporary Injunction* on April 4, 2024, and is entering a separate order on that motion.

definition of abortion the "removal of a dead fetus." The 2023 amendment revised the definition of abortion to also exclude the termination of an "ectopic or molar pregnancy." *Id.* § 39-15-213(a)(1). The 2023 amendment also created the Medical Necessity Exception, which provides, in pertinent part:

> (c)(1) Notwithstanding subsection (b), a person who performs or attempts to perform an abortion does not commit the offense of criminal abortion if the abortion is performed or attempted by a licensed physician in a licensed hospital or ambulatory surgical treatment center and the following conditions are met:
>
> (A) The physician determined, using reasonable medical judgment, based upon the facts known to the physician at the time, that the abortion was necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman; and
>
> (B) The physician performs or attempts to perform the abortion in the manner which, using reasonable medical judgment, based upon the facts known to the physician at the time, provides the best opportunity for the unborn child to survive, unless using reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk of death to the pregnant woman or substantial and irreversible impairment of a major bodily function.

Id. § 39-15-313(c)(1).

Plaintiffs Nicole Blackmon, Allyson Phillips, Kaitlyn Dulong, K. Monica Kelly, Kathryn Archer, Rebecca Milner, and Rachel Fulton (the "Plaintiff Patients") were pregnant and sought medical care for their pregnancies and related health conditions. Plaintiff Patients allege that each of them wanted to be pregnant and none of them sought an elective abortion. However, each developed serious and potentially life-threatening medical conditions and/or fatal fetal diagnoses. Plaintiff Patients further allege they were denied or delayed in receiving medically necessary abortion care due to the uncertainty within the medical community regarding the scope and application of the Medical Necessity Exception. Each Plaintiff Patient suffered a tragic loss of her pregnancy, and several of them also suffered serious and life-threatening complications and

injuries due to the delay or denial of medically necessary health care. Six of the seven Plaintiff Patients allege they are again pregnant or want to become pregnant but fear they will not be able to obtain medically necessary abortion care in Tennessee if and when needed, placing their lives and health at risk.

Plaintiffs Heather Maune, M.D. and Laura Andreson, D.O., (the "Plaintiff Physicians") are obstetricians/gynecologists who practice medicine in Nashville and Franklin, Tennessee, respectively. They treat pregnant patients with a wide variety of obstetrical and other health complications that develop during pregnancies, including life- or health-threatening medical conditions. Before the criminal abortion ban went into effect, Drs. Maune and Andreson offered essential abortion care to their patients. Now, they allege they are limited in their ability to provide such care and can only offer information about out-of-state options due to the uncertainty within the Tennessee medical community as to the scope and application of the Medical Necessity Exception. Both physicians sue on their own behalf and on behalf of their patients.

Defendants are the State of Tennessee, Tennessee Attorney General Jonathan Skrmetti, the Tennessee Board of Medical Examiners ("TBME") and its officers and members, who are sued in their official capacity, and the Tennessee Board of Osteopathic Examination ("TBOE") and its officers and members, who are sued in their official capacity.

Plaintiffs challenge the constitutionality of the Medical Necessity Exception as violating the Plaintiff Patients' right to life and right to equal protection under the Tennessee Constitution, Art. I, § 8 and Art. XI, § 8. Plaintiffs further challenge the Medical Necessity Exception as unconstitutionally vague in violation of the Plaintiff Physicians' right to due process under Tennessee Constitution, Art. I, § 8. Plaintiffs request prospective declaratory and injunctive relief against the enforcement of the criminal abortion statute and Medical Necessity Exception as applied to physicians treating pregnant patients with "critical or emergent physical medical

conditions" for whom medically necessary abortion care would prevent or alleviate a risk of death or serious risk to their patients' health.

II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants move to dismiss Plaintiffs' first amended complaint for lack of subject matter jurisdiction, pursuant to Tenn. R. Civ. P. 12.02(1), under two justiciability doctrines: Defendants' sovereign immunity and Plaintiffs' lack of standing. "[S]ubject matter jurisdiction involves a court's power to adjudicate a particular type of controversy." *Dishmon v. Shelby St. Cmty. Coll.*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1999) (citing *Meighan v. U.S. Sprint Comms., Co.*, 924 S.W.2d 632, 639 (Tenn. 1996)). "Statutes or constitutional provisions confer and define a court's subject matter jurisdiction, and parties to litigation cannot confer or expand subject matter jurisdiction by consent or waiver." *New v. Dumitrache*, 604 S.W.3d 1, 14-15 (Tenn. 2020) (citing *Tennessean v. Metro. Gov't of Nashville*, 48 S.W.3d 857, 863 (Tenn. 2016)). Subject matter jurisdiction depends upon the nature of the cause of action and the relief sought. *Id.* Judgments entered by courts lacking subject matter jurisdiction are void; thus, whether a court has subject matter jurisdiction is a "threshold inquiry" to be decided at the earliest instance. *In re Est. of Trigg*, 368 S.W.3d 483, 489 (Tenn. 2012). If subject matter jurisdiction is lacking, the dismissal is without prejudice. *Dishmon*, 15 S.W.3d at 480.

A. Defendants' Sovereign Immunity

Under the doctrine of sovereign immunity, the State cannot be sued unless the suit is expressly authorized. *See Mullins v. State*, 320 S.W.3d 273, 278 (Tenn. 2010) ("It has long been well-established that the State of Tennessee, as a sovereign, is immune from lawsuits except as it consents to be sued."). Tennessee Constitution, Art. I, § 17 provides: "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." By statute, Tenn. Code Ann. § 20-13-102 provides, in pertinent part: "No court in the state shall have

any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property . . . ." Here, Plaintiffs sue Defendants for prospective declaratory judgment and injunctive relief, not damages. Therefore, Plaintiffs may proceed if they show that the relief they seek is "explicitly authorized by statute." *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 849 (Tenn. 2008); *see also Whitworth v. City of Memphis*, No. W2021-01304-COA-R3-CV, 2023 WL 2747075, at *10 (Tenn. Ct. App. Apr. 3, 2023) (noting it is the plaintiff's burden to identify authorization).

The scope of review in resolving this issue requires the Court at the outset to determine whether Defendants are bringing a "facial" or "factual" challenge to the Court's subject matter jurisdiction. If the challenge is facial, the analysis "resembles the method for deciding motions to dismiss for failure to state a claim upon which relief can be granted." *Staats v. McKinnon*, 206 S.W.3d 532, 542 (Tenn. Ct. App. 2006). Under the standard for motions to dismiss for failure to state a claim, the Court "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Webb v. Nashville Area Habitat for Humanity, Inc.,* 346 S.W.3d 422, 426 (Tenn. 2011) (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007)). In contrast, a factual challenge requires consideration of evidence outside the pleadings, such as a defendant's "fil[ing] affidavits or other competent evidentiary materials challenging the plaintiff's jurisdictional allegations." *Staats*, 206 S.W.3d at 543.

None of the parties has submitted any materials outside the pleadings regarding "the facts serving as the basis for jurisdiction." *Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 446 (Tenn. 2012) (quoting *Schutte v. Johnson*, 337 S.W.3d 767, 770 (Tenn. Ct. App. 2010)); *cf. Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 161

(Tenn. 2017) (remanding for consideration of "the other materials the parties submitted in support of and opposition to the motion [to dismiss]"). Therefore, the Court finds Defendants are bringing a facial challenge to the Court's subject matter jurisdiction and limits its analysis to those facts alleged in the Complaint.

Claims Against the State and State Boards. Defendants first argue that neither the three-judge panel statute under Tenn. Code Ann. §§ 20-18-101, *et seq.*, nor the Declaratory Judgment Act under Tenn. Code Ann. §§ 29-14-101, *et seq*., pursuant to which Plaintiffs bring their claims, waives sovereign immunity as to the State and the State Boards. *See id.*, § 20-18-103(a) (three-judge panel statute "does not waive the defense of sovereign immunity where the defense applies"); *Colonial Pipeline,* 263 S.W.3d at 853 (holding the Declaratory Judgment Act does not contain an express waiver of sovereign immunity). In the absence of an express waiver, Defendants seek dismissal of the State and the State Boards on sovereign immunity grounds.

In response, Plaintiffs do not contend that the three-judge panel statute waives sovereign immunity, but they turn to Tenn. Code Ann. § 1-3-121 as supplying an express waiver of the State's sovereign immunity. Enacted in 2018, section 1-3-121 provides:

> Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

The Tennessee Supreme Court in *Recipient of Final Expunction Order in McNairy Cnty. Circuit Court Case No. 3279 v. Rausch*, held that the "General Assembly clearly and unmistakably waived sovereign immunity by enacting Tennessee Code Annotated section 1-3-121." 645 S.W.3d 160, 168 (Tenn. 2022). As the Court explained, the General Assembly "used distinct language in section 1-3-121 to adopt a unique, claim-specific and remedy-specific waiver of sovereign immunity." *Id.* The Court explicitly determined that the plain meaning of section 1-3-121

> expressly recognizes the existence of causes of action 'regarding the legality or constitutionality of a governmental action' that seek declaratory or injunctive relief. Causes of action 'regarding the legality or constitutionality of government action' must of necessity be brought against governmental entities, and no statutory text excludes the State from the broad term "governmental entities.

Id.; *see also Parents' Choice Tenn. v. Golden*, No. M2022-01719-COA-R3-CV, 2024 WL 1670663, at *18 (Tenn. Ct. App. Apr. 18, 2024) (discussing the applicability of § 1-3-121).

In response, Defendants make two arguments as to why section 1-3-121 does not apply. First, they claim Plaintiffs are not "affected person[s]" as required by the statute. Second, they claim there has been no "governmental action" in this case, which they submit requires a discrete action to have been taken against a particular plaintiff.[2]

Defendants' arguments on sovereign immunity mirror their arguments on standing, discussed *infra*. Indeed, Defendants' sovereign immunity and standing arguments largely overlap. The Tennessee Court of Appeals has noted that when plaintiffs bring claims under "a statute [that] creates a cause of action and designates who may bring an action," the two concepts can get "conflate[d]." *See In re Est. of Wilson*, 680 S.W.3d 220, 230 (Tenn. Ct. App. 2023) (quoting *Bowers v. Est. of Mounger*, 542 S.W.3d 470, 480 (Tenn. Ct. App. 2017)). This appears to be because "[w]hen a statute creates a cause of action and designates who may bring an action," such as the Declaratory Judgment Act does here, "the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite." *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004).

Based upon the facts alleged in the Amended Complaint, the Court finds Plaintiffs have sufficiently alleged they are "affected person[s]" under section 1-3-121, and there has been adverse

[2] Defendants also mention in passing that Plaintiffs did not rely on § 1-3-121 in their amended complaint. However, Defendants responded in depth to Plaintiffs' argument on this issue, both in their reply brief and at oral argument. Moreover, since subject matter jurisdiction is a threshold inquiry, courts are permitted to consider a basis for establishing subject matter jurisdiction "at any time." *Johnson v. Hopkins*, 432 S.W.3d 840, 844 (Tenn. 2013).

"governmental action" in this case. With the exception of Plaintiff Blackmon, who underwent a tubal ligation to avoid the risk of again being denied emergency abortion care, all Plaintiff Patients allege that they fear the inability to obtain medically necessary abortion care in Tennessee in the future.

Defendants argue that five of the Plaintiff Patients are not currently pregnant, and their fear about future, uncertain pregnancies with the potential of critical or emergent physical conditions or fatal fetal diagnoses and the need for medically necessary abortions are too conjectural and speculative to support their challenge to the abortion statute. Yet taking Plaintiff Patient's allegations as true, their claims are not nearly as hypothetical as Defendants suggest. Plaintiffs Phillips, Milner, and Fulton want more children but fear becoming pregnant again in Tennessee after having been denied emergency abortion care and having to travel out-of-state to receive necessary care. Plaintiff Dulong was pregnant when the original Complaint was filed and previously had experienced a medical emergency requiring an abortion that was delayed to the point where, absent the emergency health care she eventually received, "she would have been dead in another day or two from a septic infection." Plaintiffs Kelly and Archer currently are pregnant again after previously requiring emergency abortions, and both are fearful of their inability to get medically necessary abortion care in Tennessee if needed. Both Plaintiff Physicians allege that they no longer provide abortion care that they regularly provided to their patients before the enactment of the criminal abortion statute. They further allege that they fear doing so because it is unclear whether the abortion care they believe is medically necessary will nevertheless subject them to criminal prosecution and penalties.

Each of these allegations are sufficient to show that there is presently "some real interest . . . in dispute" regarding the criminal abortion statute's impact on Plaintiffs' constitutional rights. *Colonial Pipeline*, 263 S.W.3d at 838. It follows that Plaintiffs are "affected" persons under

section 1-3-121 for purposes of the prospective relief they seek. None of these claims would be asserted but for the enactment of the criminal abortion statute and the Medical Necessity Exception. Plaintiff Physicians have stopped providing necessary abortion care out of fear caused by the passage of the criminal abortion statute and the Medical Necessity Exception and its enforcement subjecting them to Class C felonies and imprisonment of up to fifteen years. Therefore, there is sufficient "governmental action" for purposes of section 1-3-121, under which sovereign immunity is waived. *Cf. Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 4, 18 (Tenn. 2000), *superseded on other grounds by* Tenn. Const. Art. I, § 36 (allowing a challenge to a previous version of the criminal abortion statute).

Claims Against the Attorney General and the State Board Members. Defendants next acknowledge that the Tennessee Supreme Court held in *Colonial Pipeline* that while the Declaratory Judgment Act itself does not expressly waive sovereign immunity, the doctrine "does not bar declaratory judgment or injunctive relief against state officers to prevent the enforcement of an unconstitutional statute, so long as the plaintiff does not seek monetary damages." 263 S.W.3d at 852-53. Here, none of the Plaintiffs seek monetary damages. Defendants argue, however, that neither the Attorney General nor the Board members have enforcement authority for the criminal abortion statute and, therefore, neither of the Plaintiff Physicians has alleged a "realistic possibility" of enforcement of an allegedly unconstitutional law against their interests by the Attorney General or Board members. Defendants claim Plaintiff Physicians' lawsuit against them is therefore excluded where there is no identified prior threat or credible future threat of enforcement.

Plaintiffs in turn argue the Court's holding in *Colonial Pipeline* regarding enforcement action of state officers, which they refer to as the *ultra vires* exception, applies to the actions of the Attorney General and Board members. They contend that under this exception sovereign

immunity does not attach to enforcement of an unconstitutional statute by the state officers. *See, e.g.*, *Stockton v. Morris & Pierce*, 110 S.W.2d 480, 482-83 (Tenn. 1937). Plaintiffs further contend the Attorney General actually has a duty to enforce violations of the statutes governing the TBOE, *see* Tenn. Code Ann. § 63-9-110, as well as a duty to defend the constitutionality of statutes, *id.* § 8-6-109(b)(9). Plaintiffs further allege that because a violation of the criminal abortion statute is a Class C felony, both the TBME and TBOE have mandatory duties to initiate disciplinary proceedings against any physician who violates the disciplinary statutes, which specifically include being convicted of a felony. *Id.* §§ 63-6-214(b), 63-9-111(b).

This argument again overlaps with Defendants' standing arguments. And because the concepts of subject matter jurisdiction and standing are "interwoven," *Osborn*, 127 S.W.3d at 740, the distinction of what is required to waive sovereign immunity and what is required for standing may be one without a difference. In fact, the federal courts consider these arguments to be one and the same. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015) (holding under federal law that "at the point that a threatened injury becomes sufficiently imminent and particularized to confer Article III standing, that threat of enforcement also becomes sufficient to satisfy [waiver of sovereign immunity]").

Under the civil statutes governing licensure of health professionals, the Board Members, through the TBME and TBOE, are in fact required to "investigate any supposed violation" of licensees, including violations of "the laws governing abortion," and are then obligated to discipline any offender. *See* Tenn. Code Ann. §§ 63-6-213(a), -214(b)(6) (TBME); §§ 63-9-110(a) -111(b)(6) (TBOE). Further, with respect to the TBOE, the Attorney General is statutorily required to "prosecute violations of this chapter." *Id.* § 63-9-110(c). Therefore, as to the TBME Board Members relative to Plaintiff Maune and the Attorney General relative to Plaintiff Andreson, the threat of enforcement is not speculative; it is statutorily required if either Plaintiff violates the

criminal abortion statute. Thus, the Court finds sovereign immunity is waived under these circumstances pursuant to section 1-3-121.

The remaining sovereign immunity argument is raised by the Attorney General relative to Plaintiff Maune. Unlike the disciplinary statutes governing the TBOE, those governing the TBME place the duty to prosecute licensees on local district attorneys general. *See id.* § 63-6-213(b). Plaintiffs argue that, in their cases, the Attorney General would still be involved in their prosecutions since, as alleged in their amended complaint, the current district attorneys general in the districts where Plaintiff Physicians practice have disavowed an intent to prosecute under the criminal abortion statute. Plaintiff Physicians, however, point out that the Attorney General has the authority to request appointment of a district attorney general *pro tem* in such cases. *See* Tenn. Code Ann. § 8-7-106(a)(2) (allowing the Attorney General to petition the Tennessee Supreme Court when "a district attorney general peremptorily and categorically refuses to prosecute all instances of a criminal offense without regard to facts or circumstances"). Once the Attorney General makes such a request, the Supreme Court then reviews the request and appoints a general *pro tem* without further input from the Attorney General. *Id.* Plaintiffs further point to several public statements by the Attorney General, including one where he indicated he would seek appointment of a district attorney general *pro tem* if "there's a situation where a prosecution would be merited" in Davidson or Williamson Counties.[3]

Defendants reply that because the Attorney General can only petition for appointment of a district attorney general *pro tem*, his connection to an actual prosecution is too attenuated to show he actually has enforcement authority for the criminal abortion statute. But under a facial challenge

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[3] Although not referenced in the amended complaint, Plaintiffs contend the Court can take judicial notice of these comments because they represent "the undisputed positions of a public official," citing to *State ex rel. Harman v. Trinity Indus., Inc.*, No. M2022-00167-COA-R3-CV, 2023 WL 3959887, at *17-19 & nn.29, 30 (Tenn. Ct. App. June 13, 2023). Defendants do not dispute that the comments are subject to judicial notice, even using the same comments to support their arguments.

at the motion to dismiss stage, the Court takes the Plaintiff's allegations as true. *Staats*, 206 S.W.3d at 542. Here, Plaintiffs allege their respective district attorneys general have stated their intent not to enforce the criminal abortion statute, and the Attorney General has stated his intent to exercise his authority to seek appointment of a district attorney general *pro tem* if the situation calls for it. These allegations are sufficient to show a realistic possibility of enforcement at least in part on behalf of the Attorney General to initiate enforcement and a finding of waiver of sovereign immunity under *Colonial Pipeline*.

The Court concludes Plaintiffs have sufficiently alleged facts such that sovereign immunity is waived for all Defendants under either Tenn. Code Ann. § 1-3-121 or *Colonial Pipeline*, and Defendants' *Motion to Dismiss* on sovereign immunity grounds should be denied.

B. Plaintiffs' Standing

Defendants next argue that Plaintiffs lack standing to sue. "Courts use the [justiciability] doctrine of standing to determine whether a litigant is entitled to pursue judicial relief as to a particular issue or cause of action." *City of Memphis v. Hargett*, 414 S.W.3d 88, 97 (Tenn. 2013) (citing *ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006); *Kneirim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976)). Standing is a threshold issue. *See Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020) ("The question of standing is one that ordinarily precedes a consideration of the merits of a claim.") (citing *City of Memphis*, 414 S.W.3d at 96)). Tennessee recognizes two categories of standing that govern who may bring a civil cause of action: non-constitutional standing and constitutional standing. Non-constitutional standing focuses on considerations of judicial restraint, such as whether a complaint raises generalized questions more properly addressed by another branch of the government, and questions of statutory interpretation, such as whether a statute designates who may bring a cause of action or creates a limited zone of interests. Constitutional standing, the issue raised in this case, is one of the "irreducible . . .

minimum" requirements that a party must meet in order to present a justiciable controversy. *City of Memphis*, 414 S.W.3d at 98.

Constitutional standing requires a plaintiff to establish three elements: (1) a distinct and palpable injury—that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; (2) a causal connection between the alleged injury and the challenged conduct; and (3) that the injury must be capable of being redressed by a favorable decision of the court. *Fisher*, 604 S.W.3d at 396. "The primary focus of a standing inquiry is on the party, not on the merits of the claims. Thus, a party's standing does not depend on the likelihood of success of its claim on the merits." *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001).

Plaintiffs bring their claims under the Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101, *et seq.* As noted above, under the Declaratory Judgment Act, "the issue of standing is interwoven with that of subject matter jurisdiction and becomes a jurisdictional prerequisite." *Osborn*, 127 S.W.3d at 740. Therefore, the Court similarly considers whether a facial or factual challenge has been brought in the motion to dismiss. Defendants raise a facial challenge to standing because they do not rely on any facts outside the pleadings. Applying the Rule 12.02(6) standard, the Court must "construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Webb*, 346 S.W.3d at 426; *Staats*, 206 S.W.3d at 542.

<u>Plaintiff Patients' Standing</u>. Defendants argue that Plaintiff Patients lack standing because they seek only prospective relief and do not allege a "distinct and palpable injury." But, even if a present injury is not alleged, all that is required under the Declaratory Judgment Act is that "a bona fide disagreement must exist" between the parties; "that is, some real interest must be in dispute." *Colonial Pipeline*, 263 S.W.3d at 838 (citing *Goetz v. Smith*, 278 S.W. 417, 418 (Tenn. 1925)). In

declaratory judgment cases seeking prospective relief, courts "should operate as preventive clinics as well as hospitals for the injured." *Id.* at 836-37 (quoting Henry R. Gibson, *Gibson's Suits in Chancery*, § 545 (6th ed.1982)).

Applying these standards to Plaintiff Patients' claims, the Court finds they have raised an actual case or controversy, or bona fide disagreement, regarding violations of their state constitutional rights and, thus, have standing to pursue those claims. As discussed above regarding sovereign immunity, Plaintiff Patients allege fear of their inability to obtain medically necessary abortion care in Tennessee.[4] One has foregone the ability to become pregnant again specifically because of this fear. Further, all of them allege that their decisions about having and raising children have been directly impacted by the criminal abortion statute.

Plaintiff Patients, with the exception of Plaintiff Blackmon, also satisfy the remaining two elements of standing. On the element of causation between the alleged injuries and Defendants' conduct, Defendants repeat their sovereign immunity arguments on behalf of the State and Attorney General. The causation requirement is "not onerous," as it simply requires a party to allege that their injury is "fairly traceable" to the conduct of the given defendant. *City of Memphis*, 414 S.W.3d at 98 (quoting *Darnell*, 195 S.W.3d at 620). Here, Plaintiff Patients allege that their injuries stem from doctors refusing to provide medically necessary abortion care out of their fear and the uncertainty around enforcement of the criminal abortion statute—fear that is directly tied to the potential criminal prosecution of these doctors. As discussed above, Plaintiffs have already sufficiently alleged that the Attorney General is statutorily charged with prosecuting doctors regulated by the TBOE, and he has expressed his intent to request appointment of district attorneys

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[4] The fact that Plaintiff Dulong has since given birth does not deprive her of standing because "standing is determined as of the date of the filing of the complaint." *LaFollette Med. Ctr. v. City of LaFollette*, 115 S.W.3d 500, 504 (Tenn. Ct. App. 2003).

general *pro tem* be appointed to prosecute doctors regulated by the TBME in cases where the local district attorneys have stated they will not.

Defendants also contend that they cannot be responsible for "doctors over-complying" with the statute, as that is the independent action of a third party. While it is true that a third party's independent conduct does not automatically trace an injury back to a defendant, causation "'need not be proximate,' and 'the fact that an injury is indirect does not destroy standing as a matter of course.'" *Rutan-Ram v. Tenn. Dep't of Child.'s Servs.*, No. M2022-00998-COA-R3-CV, 2023 WL 5441029, at *12 (Tenn. Ct. App. Aug. 24, 2023) (quoting *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 713 (6th Cir. 2015)). Instead, "'the allegation that a defendant's conduct was a motivating factor in the third party's injurious actions' is sufficient to establish traceability." *Id.* (quoting *Parsons*, 801 F.3d at 713).

Plaintiff Patients allege that their fears about accessing and receiving emergency abortion care and personal decisions to not become pregnant again, despite desiring to do so, are because doctors across the State are unsure of what procedures are allowed and when they may be performed. The doctors, in turn, are uncertain about what is permitted under the Medical Necessity Exception and fearful of being subject to criminal prosecution, conviction of, and penalties imposed for Class C felonies. Defendants' conduct, by enacting the criminal abortion statute and Medical Necessity Exception and the stated intent to prosecute cases when warranted, are "'motivating factor[s] in the third party's injurious actions'. . . sufficient to establish traceability." *Id.* Therefore, Plaintiff Patients have met their burden of showing that their injuries are "fairly traceable" to Defendants.

The element of redressability is also met. A plaintiff meets this element if they can show their injury is "capable of being redressed by a favorable decision of the court." *Fisher*, 604 S.W.3d at 396. When a party alleges injury based on the enforcement of an unconstitutional

statute, entry of a declaratory order can provide redressability if it would provide the plaintiffs "with the benefits which they had been denied." *Rutan-Ram*, 2023 WL 5441029, at *16; *see also Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, No. M2022-01786-COA-R3-CV, 2024 WL 107017, at *13 (Tenn. Ct. App. Jan. 10, 2024). The relief Plaintiff Patients seek would do just that—at least with respect to a declaration that the criminal abortion statute is unconstitutional. Plaintiff Patients satisfy the redressability element and have standing.

Plaintiff Physicians' Standing. Defendants argue that the Plaintiff Physicians lack standing because (i) their claims on behalf of their patients about future pregnancies lack standing for the reasons argued above, and (ii) the claims alleged on their own behalf lack standing based on their fear or uncertainty as to future enforcement of the criminal abortion statute and Medical Necessity Exception against them. Defendants rely on the allegations of the amended complaint that the two enforcement officials over Dr. Maune and Dr. Andreson, the Davidson County and Williamson County District Attorneys, have "disclaimed" any intention of enforcing the abortion statute. Defendants further argue that the amended complaint contains no allegations regarding any of the Defendants' intent to enforce the challenged statute against them through a criminal prosecution or disciplinary proceeding. And, Defendants argue that Plaintiffs cannot satisfy the element of redressability with respect to any of them because they have not undertaken any imminent enforcement against them.

Plaintiff Physicians are potentially subject to prosecution under the criminal abortion statute. When courts consider a "pre-enforcement" challenge to the constitutionality of a criminal statute, "a plaintiff may satisfy the injury element by (1) alleging 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute' and (2) showing the existence of 'a credible threat of prosecution thereunder.'" *Frogge v. Joseph*, No. M2020-01422-COA-R3-CV, 2022 WL 2197509, at *11 (Tenn. Ct. App. June 20, 2022) (quoting

Tennesseans for Sensible Election Laws v. Slatery, No. M2020-01292-COA-R3-CV, 2021 WL 4621249, at *3 (Tenn. Ct. App. Oct. 7, 2021)). Defendants do not dispute that Plaintiff Physicians meet the first prong of this test; instead, they argue that there has been no credible threat of prosecution.

Taking the allegations in the amended complaint as true, Defendants' arguments fail for the same reasons their sovereign immunity arguments fail. Plaintiff Physicians have alleged that they fear prosecution because, even though their local district attorneys may have disavowed enforcement of the criminal abortion statute, the Attorney General has stated his intent to request appointment of district attorneys general *pro tem*, at least in some cases. This is a step beyond a "refusal to disavow enforcement of the statute"—it is an express statement of the Attorney General's intent to override the local district attorney's stated position. Moreover, Plaintiff Physicians remain subject to mandatory disciplinary actions from the Board Defendants if they are prosecuted and convicted, and at least Plaintiff Andreson is subject to the TBOE statute under which the Attorney General "shall" prosecute violations of "the laws governing abortion." *See* Tenn. Code Ann. §§ 63-6-214, 63-9-110. These allegations are sufficient to show that Plaintiff Physicians face a "credible threat of prosecution" if accused of operating outside the bounds of the Medical Necessity Exception, and they have alleged a sufficient injury in fact at the motion to dismiss stage. *Frogge*, 2022 WL 2197509, at *11.

The remaining elements of standing are also met. Plaintiff Physicians' fear of prosecution is caused by the prosecutorial and disciplinary authority vested in the Attorney General and Board Members. And, like Plaintiff Patients, the declaratory relief they seek would redress that fear by declaring the parties' rights under the Medical Necessity Exception regarding conditions that come within that Exception. The Court therefore finds Plaintiff Physicians have established their standing.

For the foregoing reasons, Defendants' *Motion to Dismiss* for lack of standing should be granted, in part, only to Plaintiff Blackmon, as discussed above, but denied, in part, as to all other Plaintiff Patients and Plaintiff Physicians.

III. MOTION TO DISMISS FOR FAILURE TO STATE CLAIMS FOR RELIEF

Defendants also seek dismissal of the entire amended complaint for failure to state claims for relief. A Rule 12.02(6) motion to dismiss for failure to state a claim for relief tests the legal sufficiency of a complaint and not the strength of the allegations. *Webb*, 346 S.W.3d at 426. A party filing a Rule 12.02(6) motion "admits the truth of all the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Id.* Generally, a trial court may only consider the complaint itself when deciding a Rule 12.02(6) motion, with all exhibits attached to the complaint considered as part of the pleading. *See* Tenn. R. Civ. P. 10.03; *Pagliara v. Moses*, 605 S.W.3d 619, 625 (Tenn. Ct. App. 2020). A trial court construes the complaint liberally under the notice pleading standards of Rule 8, presumes all factual allegations to be true, and draws all reasonable inferences therefrom in the plaintiff's favor. *Webb*, 346 S.W.3d at 426. Courts may disregard "assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Id.* at 427 (citing *Riggs v. Burson*, 941 S.W.2d 44, 47-48 (Tenn. 1997)). A trial court can dismiss a complaint for failure to state a claim only when "the plaintiff can establish no facts supporting the claim that would warrant relief." *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999).

A. General Legal Principles

In determining a statute's constitutionality, courts must "uphold the constitutionality of a statute wherever possible." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). Courts "begin with the presumption that an act of the General Assembly is constitutional" and "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *State v. Pickett*,

211 S.W.3d 696, 700 (Tenn. 2007) (first quoting *Gallaher v. Elam*, 104 S.W.3d 455, 569 (Tenn. 2003), and then quoting *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002)). "This presumption places a heavy burden on the person challenging the statute." *Waters*, 291 S.W.3d at 917 (Koch, J., concurring in part and dissenting in part) (citing *Gallaher*, 104 S.W.3d at 459-60; *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001); *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979)). However, this presumption "does not authorize the court to give to an act an interpretation merely to bring it within the constitutional limitation." *Exum v. Griffis Newbern Co.*, 230 S.W. 601, 603 (Tenn. 1921).

Issues of statutory construction present questions of law. *Bryant v. Genco Stamping & Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn. 2000). It is the court's duty in construing a statute to ascertain and give effect to the intention and purposes of the legislature. *Lipscomb v. Doe*, 32 S.W.3d 840, 844 (Tenn. 2000). Legislative intent is determined based on "the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language." *Id.* (internal quotation omitted). Where the statute is unambiguous, courts are to apply its plain meaning. *Id.*; *Carson Creek Vacation Resorts, Inc. v. Tenn. Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993). Where the statute is ambiguous, courts look to the entire statutory scheme and elsewhere to ascertain the legislative intent and purpose. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). "The statute must be construed in its entirety, and it should be assumed that the legislature used each word purposely and that those words convey some intent and have a meaning and purpose." *Id.* The background, purpose, and circumstances of the words used are to be considered, without taking a word or few words from their context and determining their meaning in isolation. *Id.*

B. Violation of Plaintiff Patients' Constitutional Right to Life (Count II)

Plaintiff Patients' first claim is that the criminal abortion statute violates their right to life under Tennessee Constitution Article I, § 8, insofar as it "bars the provision of abortion to pregnant people to treat critical or emergent physical medical conditions that pose a risk to pregnant people's lives or health." Article I, § 8 provides that no person may be "deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land." This right to due process prevents "deprivations of fundamental rights like the right to marry, have children, make child rearing decisions, determine child custody, and maintain bodily integrity." *Lynch v. City of Jellico*, 205 S.W.3d 384, 391-92 (Tenn. 2006). If governmental action violates substantive due process rights, courts will uphold the action only if it is "narrowly tailored to serve a compelling state interest." *Estate of Alley v. State*, 648 S.W.3d 201, 225 (Tenn. Crim. App. 2021). In all other cases not involving fundamental rights, Article I, § 8 still requires that governmental action bear "'a reasonable relation to a proper legislative purpose.'" *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 409 (Tenn. 2013) (quoting *Gallaher*, 104 S.W.3d at 463).

Many of the parties' arguments on this issue revolve around the scope of the Medical Necessity Exception. Defendants acknowledge as much, noting in their reply brief that "[m]uch of the parties' disagreement" is based on a dispute over "what constitutes 'life-or-health preserving abortion care' the Constitution must protect." Defendants argue that the statute as written provides sufficient exceptions to protect the life and health of a pregnant mother, and Plaintiffs seek a declaration that the statute as written covers additional emergent medical conditions. Moreover, Defendants argue, abortion was disclaimed as a fundamental right in Tennessee by the 2014 adoption of Article I, § 36 to the Tennessee Constitution, which provides that "[n]othing in this Constitution secures or protects a right to abortion."

The merits of Defendants' arguments, however, are beyond the scope of what a court is to determine on a motion to dismiss for failure to state a claim for relief. A trial court can dismiss a cause of action for failure to state a claim only when "the plaintiff can establish no set of facts that would warrant relief" under Article I, § 8. *Sundquist*, 2 S.W.3d at 922 (internal citation omitted). Defendants argue that the criminal abortion statute is constitutional because it allows for "plain application to serious health risks." But the facts alleged in the amended complaint are that the statute fails to do so in practice. Each Plaintiff Patient alleges that her medical situation *should* have been covered under the Medical Necessity Exception, but the statute's vagueness coupled with her doctors' fear of prosecution prevented them from receiving medically necessary abortion care. The denial of medically necessary care, in turn, put at risk the life and health of both the Plaintiff Patients and their unborn children. For example, Plaintiff Dulong alleges that the delay she suffered in receiving medically necessary abortion care put her life at risk where "she would have been dead in another day or two." Plaintiff Patients allege a myriad of other conditions requiring emergency abortion care that Tennessee doctors could not provide without "fear that a disciplinary board, prosecutor or jury second guessing their medical judgment will revoke their medical license or send them to prison." For these reasons, Plaintiff Patients have adequately alleged that the criminal abortion statute violates their constitutional right to life under Article I, § 8. Defendants' *Motion to Dismiss* on this claim should be denied**.**

C. Violation of Plaintiff Patients' Equal Protection Rights (Count III)

Plaintiff Patients also assert that the criminal abortion statute violates the Equal Protection Clause of the Tennessee Constitution, Article XI, § 8. The equal protection clause provides that the legislature shall have no power "to pass any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions other than such as may be, by the same law extended to any member of the community." Stated another way, equal protection principles

require that "persons who are similarly situated be treated alike." *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, 428 S.W.3d 800, 822 (Tenn. Ct. App. 2013). Once a court finds that two groups are similarly situated, it applies a level of review commensurate with the status of the different groups. The highest level of review, or strict scrutiny, only applies when "the classification interferes with the exercise of a 'fundamental right' or operates to the peculiar disadvantage of a 'suspect class.'" *Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994) (quoting *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973)). The middle level of review, or heightened scrutiny, applies to "legislative classifications involving a quasi-suspect class, such as gender or illegitimacy." *Gallaher*, 104 S.W.3d at 461. All other classifications are subject to a rational basis review. *See id.*

The parties agree that rational basis review applies to the equal protection claims in this case. The thrust of Plaintiff Patients' argument is that the criminal abortion statute treats pregnant women differently than other women by restricting their ability to receive emergency medical care. As a preliminary matter, the Court addresses the issue whether pregnant women are "similarly situated" to non-pregnant women, as "the equal protection clause has no application" otherwise. *Posey v. City of Memphis*, 164 S.W.3d 575, 579 (Tenn. Ct. App. 2004) (citing *Osborn*, 127 S.W.3d at 741). "'Similarly situated' is a term of art—a comparator [person] must be similar in 'all relevant respects.'" *Paterek v. Vill. of Armada, Michigan*, 801 F.3d 630, 650 (6th Cir. 2015) (quoting *United States v. Green*, 654 F.3d 637, 651 (6th Cir. 2011)).[5] "In determining whether individuals are similarly situated, a court should not demand exact correlation, but should instead

[5] The Tennessee Supreme Court has held that "Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution and the Fourteenth Amendment to the Constitution of the United States confer essentially the same protection upon the individuals subject to those provisions." *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) (citing *Marion Cnty. Tenn. River Transp. Co. v. Stokes*, 117 S.W.2d 740, 741 (Tenn. 1938); *Motlow v. State*, 145 S.W. 177, 180 (Tenn. 1912)).

seek relevant similarity." *Stimmel v. Sessions*, 879 F.3d 198, 212 (6th Cir. 2018) (quoting *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 987 (6th Cir. 2012)).

At the federal level, courts have long recognized that pregnant women may bring equal protection challenges to statutes regulating abortion. For example, the United States Supreme Court allowed equal protection claims to proceed challenging the expenditure of Medicaid benefits for childbirth services while denying them for abortions. *See Maher v. Roe*, 432 U.S. 464, 468 n.4 (1977); *see also Harris v. McRae*, 448 U.S. 297, 315 (1980). Defendants cite to the Tennessee Court of Appeals's decision in *Planned Parenthood of Middle Tenn. v. Sundquist*, No. 01A01-9601-CV-00052, 1998 WL 467110, at *27 (Tenn. Ct. App. Aug. 12, 1998), *aff'd in part, rev'd in part*, 38 S.W.3d 1 (Tenn. 2000), where that appellate court noted that "[p]regnant women are distinctly different from other women seeking reproductive or any other type of healthcare," suggesting they are not "similarly situated." But this *dictum* provides a thin reed for Defendants to stand upon, where the statement that pregnant women are different from non-pregnant women was immediately preceded by that court's statement that "pregnancy, as a medical condition, provides a natural, appropriate basis for classifying women with regard to the provision of medical services." *Id.* The court then continued with its equal protection analysis. *See id.* at *53.

Plaintiff Patients, as pregnant women, allege that they are similarly situated as non-pregnant women because they seek the same care—emergency medical care. However, because of the criminal abortion statutes, Plaintiff Patients' access to emergency care is restricted in a manner not applicable to non-pregnant persons seeking emergency care. These allegations are sufficient to show that Plaintiff Patients are "similarly situated" for purposes of an equal protection challenge and, at the motion to dismiss stage, are adequate to state a claim for relief. Defendants assert multiple reasons for upholding the statute under rational basis review, but these arguments

are addressed to the merits of the claim and not to the Rule 12.02(6) motion. Defendants' *Motion to Dismiss* the Plaintiff Patients equal protection claim should be denied.

D. Violation of Plaintiff Physicians' Constitutional Due Process Rights on Grounds Medical Necessity Exception is Void for Vagueness (Count IV)

Plaintiff Physicians raise a due process challenge to the criminal abortion statute: namely, that the Medical Necessity Exception is unconstitutionally vague. The Tennessee Supreme Court has held that a statute "is void for vagueness if its prohibitions are not clearly defined." *State v. Crank*, 468 S.W.3d 15, 22 (Tenn. 2015) (quoting *State v. Pickett*, 211 S.W.3d 696, 704 (Tenn. 2007)). When a criminal statute is challenged for vagueness, courts are to determine if the statute "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Due process does not, however, "demand that criminal statutes 'meet the unattainable standard of absolute precision.'" *State v. Allison*, 618 S.W.3d 24, 45 (Tenn. 2021) (quoting *Crank*, 468 S.W.3d at 23). Statutes that are "'applicable in a wide variety of situations, must necessarily use words of general meaning, because greater precision is both impractical and difficult,' and this does not render the statute unconstitutionally vague." *Nunn v. Tenn. Dep't of Corr.*, 547 S.W.3d 163, 200 (Tenn. Ct. App. 2017) (quoting *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990)).

Again, at the motion to dismiss stage, the issue is whether Plaintiff Physicians have sufficiently alleged facts, which are presumed to be true, supporting a vagueness challenge to the Medical Necessity Exception. The parties disagree as to whether Plaintiff Physicians are bringing a facial or as applied challenge. This distinction is important. Under a "facial" challenge, plaintiffs must allege "the statute is impermissibly vague in all its applications." *State v. Burkhart*, 58 S.W.3d 694, 699 (Tenn. 2001). Further, "the complainant must prove that the enactment is vague

'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Id.* (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982)). Plaintiff Physicians would be required to show "that no set of circumstances exist under which the Act would be valid." *Crank*, 468 S.W.3d at 24 (quoting *Davis-Kidd Booksellers*, 866 S.W.2d at 525). In contrast, an "as applied" vagueness challenge to a statute requires a less stringent showing "as construed and applied in actual practice against the plaintiff under the facts and circumstances of the particular case, not under some set of hypothetical circumstances." *Fisher*, 604 S.W.3d at 397 (citing *City of Memphis*, 414 S.W.3d at 107).

The amended complaint repeatedly references that it challenges the criminal abortion statute "as applied" to Plaintiffs, including the allegations regarding Plaintiff Physicians' vagueness challenge. Yet Defendants argue that Plaintiffs are pursuing a facial challenge because they also argue the Medical Necessity Exception "does not provide physicians with adequate guidance" as a whole. Under a fair reading of the amended complaint, Plaintiff Physicians' allegations raise both facial and as applied claims.

With respect to any facial challenge to the criminal abortion statute raised by Plaintiff Physicians, they have not shown that there exist "no set of circumstances exist under which the Act would be valid." *Crank*, 468 S.W.3d at 24 (quoting *Davis-Kidd Booksellers*, 866 S.W.2d at 525). In fact, they seem to argue that the criminal abortion statute *is* valid, but the Court should enter a declaratory judgment clarifying what emergency conditions are covered by the Medical Necessity Exception. Meanwhile, Defendants concede that the Medical Necessity Exception includes some emergency medical conditions.[6] The Court finds that the parties' dispute over the

[6] At least with respect to the parties' preliminary motions, Defendants concede that the medical conditions of Plaintiffs Dulong, Fulton, and Milner described in the amended complaint would come within the Medical Necessity Exception.

Medical Necessity Exception concerns the scope of the statute, not whether it is valid or invalid on its face. Thus, to the extent Plaintiff Physicians assert a "facial" challenge to the criminal abortion statute in their amended complaint, the Court concludes Defendants' *Motion to Dismiss* should be granted.

The Court reaches a different result with respect to Plaintiff Physicians' "as applied" challenge to the statute. They adequately allege that the criminal abortion statute is vague as applied to them. Both Physicians allege that they previously provided medically necessary abortion care before the criminal abortion statute was enacted but have stopped providing such health care due to fear of criminal prosecution. They further allege "widespread fear and confusion regarding the scope of Tennessee's abortion ban has chilled the provision of necessary obstetric care." This allegation is reinforced by Plaintiff Patients' allegations regarding their personal experiences in being unable to access medically necessary abortion care under the statute even after the enactment of the Medical Necessity Exception. For example, Plaintiff Dulong alleges her doctor initially told her they could not induce labor "even though there was no possibility that her son would survive." It was not until Plaintiff Dulong's condition worsened, and her obstetrician "spent two hours on the phone calling legal and ethics personnel," that she was finally able to receive medically necessary emergency care. Plaintiff Milner alleges her doctor declined to provide abortion care because even though he previously would have ordered an abortion "immediately," "now he believed doing so would have placed him in legal jeopardy." And Plaintiff Fulton alleges her doctor interpreted the criminal abortion statute to mean Plaintiff Fulton "had three options: Go out of state for an abortion, wait for her baby to die, or wait until she is in mortal danger so the doctors could legally intervene under Tennessee law."

In all three cases, Defendants concede that the Medical Necessity Exception should have applied and those Plaintiffs should have received medically necessary abortion care. Yet none of

them received abortion care in a timely manner because their doctors did not believe they could provide that care under Tennessee law. Taking the allegations in the amended complaint as true, the criminal abortion statute is "not clearly defined and [is] susceptible to different interpretations as to what conduct is actually proscribed." *Crank*, 468 S.W.3d at 23 (quoting *Pickett*, 211 S.W.3d at 704). Those allegations are sufficient to state a claim for relief that the statute is unconstitutionally vague as applied to Plaintiff Physicians. The Court concludes Defendants' *Motion to Dismiss* on this ground should be denied.

IV. CONCLUSION

Based on the foregoing, the Court concludes that Defendants' *Motion to Dismiss* should be GRANTED, in part, and DENIED, in part as follows:

A. Defendants' *Motion to Dismiss* is **GRANTED** with respect to Plaintiff Blackmon's lack of standing and, to the extent alleged in the amended complaint, Plaintiff Physicians' "facial" challenge to the Medical Necessity Exception on the grounds of vagueness, and those claims are hereby DISMISSED, with prejudice;

B. Defendants' *Motion to Dismiss* is **DENIED** with respect to lack of standing of all other Plaintiffs and with respect to the defense of sovereign immunity under Tenn. R. Civ. P. 12.02(1).

C. Defendants' *Motion to Dismiss* is **DENIED** with respect to Plaintiff Patients' constitutional claims for violation of their right to life and equal protection and Plaintiff Physicians' "as applied" constitutional due process challenge to the Medical Necessity Exception on grounds of void for vagueness under Tenn. R. Civ. P. 12.02(6).

All other issues are reserved.

IT IS SO ORDERED.

s/ Patricia Head Moskal
CHANCELLOR PATRICIA HEAD MOSKAL,
Chief Judge

s/ Sandra Donaghy
JUDGE SANDRA DONAGHY

s/ Kasey A. Culbreath
CHANCELLOR KASEY CULBREATH

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing is being forwarded by electronic service, email, or U.S. Mail, first-class, postage prepaid, as applicable, to the following:

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10/17/2024 — **Date**