IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

RIGHT TO LIFE OF MICHIGAN; **AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS**, on behalf of itself, its members, and their patients; **GINA JOHNSEN**, Representative, Michigan House of Representatives; **LUKE MEERMAN**, Representative, Michigan House of Representatives; **JOSEPH BELLINO, JR.**, Senator, Michigan Senate; **MELISSA HALVORSON, M.D.**; **CHRISTIAN MEDICAL AND DENTAL ASSOCIATIONS**, on behalf of itself, its members, and their patients; **CROSSROADS CARE CENTER**; **CELINA ASBERG**; **GRACE FISHER**; **JANE ROE**, a fictitious name on behalf of preborn babies; **ANDREA SMITH**; **JOHN HUBBARD**; **LARA HUBBARD**; **SAVE THE 1**, on behalf of itself and its members; and **REBECCA KIESSLING**,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan; **DANA NESSEL**, in her official capacity as Attorney General of the State of Michigan; and **JOCELYN BENSON**, in her official capacity as Secretary of State of the State of Michigan,

Defendants.

No. 1:23-cv-01189

Hon. Paul L. Maloney

Magistrate Judge Ray Kent

ORAL ARGUMENT REQUESTED

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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CONCISE STATEMENT OF ISSUES PRESENTED

I. Whether Defendants' arguments promote a double standard for maintaining challenges to voter-initiated amendments to state constitutions based on the popularity of the issues presented or the political views of the plaintiffs challenging the amendments.

II. Whether Plaintiffs, who suffer cognizable injuries and who face imminent harm or a substantial risk of harm, have standing to maintain their claims.

III. Whether Plaintiffs' challenge to § 28, which was passed in November 2022 and which is "self-executing," is ripe for review, particularly when the harm caused by § 28 is real and imminent and the case is fit for judicial review.

IV. Whether the Court should reject Defendants' Eleventh Amendment immunity claim as this case seeks only prospective relief and each Defendant has at least "some connection with the enforcement" of § 28.

V. Whether Plaintiffs' First Amended Complaint, in light of the appropriate standard of review, states plausible claims for relief under the First and Fourteenth Amendments to the U.S. Constitution and the Guarantee Clause of the U.S. Constitution.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm., 576 U.S. 787 (2015)

Bell Atlantic v. Twombly, 550 U.S. 544 (2007)

Bible Believers v. Wayne Cnty., 805 F.3d 228 (6th Cir. 2015)

Dobbs v. Jackson Women's Health Org, 597 U.S. 215 (2022)

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Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)

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Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396 (6th Cir. 2019)

Obergefell v. Hodges, 576 U.S. 644 (2015)

Romer v. Evans, 517 U.S. 620 (1996)

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006)

INTRODUCTION

"*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences." *Dobbs v. Jackson Women's Health Org*, 597 U.S. 215, 231 (2022). In other words, there was *never* a legal or factual basis for concluding that abortion was a right protected by the U.S. Constitution. *Roe* is void *ab initio*. *Dobbs* also expressly overruled *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Dobbs*, 597 U.S. at 231 ("We hold that *Roe* and *Casey* must be overruled."). Consequently, any substantive reliance by Defendants on either *Roe* or *Casey* is misplaced. (*See* Defs.' Br. at 3, 46, 47, 49).

Finding no fundamental right to abortion in the U.S. Constitution, the issue was returned to the states—a natural consequence of the *Dobbs* decision. As the Court stated, "It is time to heed the Constitution and return the issue of abortion to the people's *elected representatives*." *Dobbs*, 597 U.S. at 232 (emphasis added). Allowing "elected representatives" to resolve controversial issues is how a *republican* form of government works. Our Founders did not create a "democracy." In fact, the word "democracy" is not used in either the Declaration of Independence or the U.S. Constitution. The Founding Fathers were fearful of allowing any form of tyranny, including the tyranny of the majority. Accordingly, it is wrong to suggest, as Defendants do here (Defs.' Br. at 1), that *Dobbs* granted states the license to enact an extraordinary and broad super-right to "reproductive freedom" outside of the normal legislative process (and immunizing it from any legislative action) via a state constitutional amendment that itself violates the U.S. Constitution. We are in federal court today as a result.

Rather than heeding the advice of the Supreme Court (and the Constitution) to return the abortion issue to the "people's elected representatives," the proponents of Proposal 3 launched a massive propaganda campaign, which was overwhelmingly funded by out-of-state money, that

deceived the voters into believing that Proposal 3 would merely "Restore *Roe*." (First Am. Compl. ["FAC"] ¶¶ 76, 78). It does no such thing. Proposal 3's exceedingly broad effects are pernicious and unconstitutional.

The U.S. Constitution is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."). Accordingly, federal courts have recognized the propriety of a federal constitutional challenge to a statewide referendum passed by voters resulting in an amendment to a state constitution. For example, in 1992, a Colorado state constitutional amendment was adopted via a statewide referendum. The proposal known as Amendment 2 (Colo. Const. art. II, § 30b) prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons. In *Romer v. Evans*, 517 U.S. 620 (1996), the U.S. Supreme Court held that Amendment 2 violated the equal protection guarantee of the Fourteenth Amendment on rational basis grounds (there was no fundamental right nor suspect class implicated, unlike in this case). More recently, Michigan's marriage amendment (Article I, § 25), which was adopted via a statewide referendum (by a larger majority than Proposal 3)[1] and which provided that marriage was between one man and one woman, was invalidated by the U.S. Supreme Court on due process and equal protection grounds as it "excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples." *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015). Remarkably, Defendants never cite to nor attempt to distinguish *Romer* or *Obergefell*.

As the Court noted in *Obergefell*, "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Obergefell*, 576 U.S. at 677. In the final analysis, there

[1] The Michigan marriage amendment passed by a greater percentage of the vote (58.6%) than did Proposal 3 (56.7%). (FAC ¶ 75).

is nothing sacrosanct about a state constitutional amendment passed by voters, nor are there any barriers to challenging such amendments, including § 28, on federal constitutional grounds.[2] As set forth below, Plaintiffs have standing to advance this ripe constitutional challenge to § 28, and their First Amended Complaint advances "plausible" claims for relief. The Court should promptly deny Defendants' motion to dismiss.[3]

STANDARD OF REVIEW

A. Rule 12(b)(1).

A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction (standing and ripeness) may take the form of a facial challenge, which tests the sufficiency of the pleading, or a factual challenge, which contests the factual basis for jurisdiction. *See Am. Freedom Law Ctr., Inc. v. Nessel*, No. 1:19-cv-153, 2020 U.S. Dist. LEXIS 60622, at *9 (W.D. Mich. Jan. 15, 2020) (Maloney, J.); *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). Defendants have advanced a facial attack as they do not present any relevant or admissible evidence to contest the factual basis for jurisdiction. Consequently, the Court must accept as true all the allegations in the First Amended Complaint regarding the issue of standing. *Id*.

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[2] Defendants' assertion that Plaintiffs are seeking to subvert "the will of Michigan voters" (Defs.' Br. at 2) is disingenuous in the extreme as Defendant Nessel herself spearheaded the legal challenge to Michigan's marriage amendment, which was passed by a larger percentage of the vote than Proposal 3 (FAC ¶ 75). *See DeBoer v. Snyder*, 772 F.3d 388, 395 (6th Cir. 2014), *rev'd*, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (listing Dana Nessel as counsel for the plaintiffs). Rather than seeking to subvert the will of Michigan voters, Plaintiffs seek to vindicate the right of the people to representative governance.

[3] Contrary to Defendants' claim (Defs.' Br. at 1), Plaintiffs' original complaint would have survived their first motion to dismiss. Defendants' repeated references to their prior motion and assertions that Plaintiffs failed to cure alleged deficiencies noted in their now mooted motion (*see id*. at 6, 39, 45, 46, 49, 56, 59, 62) are meaningless. Nonetheless, to leave little doubt that Defendants' arguments lack merit, particularly on the standing issue, Plaintiffs opted to file an amended pleading to make explicit that which was implicit in the original pleading. This case is too important to not proceed to the substantive claims. (*See also* Defs.' Br. at 6 [erroneously stating that Plaintiffs added a free exercise claim]).

B. Rule 12(b)(6).

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege facts sufficient to state a claim for relief that is "plausible on its face" and, when accepted as true, are sufficient to "raise a right to relief above the speculative level." *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). When reviewing Defendants' motion under Rule 12(b)(6), the Court must construe the First Amended Complaint in the light most favorable to Plaintiffs, accept its factual allegations as true, and draw all reasonable inferences in Plaintiffs' favor. *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008); *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) ("[A]ll well-pleaded material allegations of the pleadings of the opposing party must be taken as true."). As the Supreme Court stated in *Twombly*, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007); *see also Nietzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations."); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (stating that a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").[4]

We turn now to this Court's jurisdiction to hear and decide this case.

[4] *Nietzke* and *Scheuer* were both cited favorably in *Twombly*. *Twombly,* 550 U.S. at 555.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO ADVANCE THEIR CLAIMS.

Article III of the Constitution confines federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. To give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 157 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To invoke the Court's jurisdiction, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

In the context of a motion to dismiss, the injury-in-fact requirement is "very generous," only requiring Plaintiffs to "allege [ ] some specific, identifiable trifle of injury." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014) ("In the context of a motion to dismiss, we have held that the [i]njury-in-fact element is not Mount Everest. The contours of the injury-in-fact requirement, while not precisely defined, are very generous, requiring only that claimant allege [ ] some specific, identifiable trifle of injury.") (internal quotations and citation omitted); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.").

"In evaluating standing at this juncture, [the court] ***must*** *assume that the party asserting federal jurisdiction is correct on the legal merits of his claim, that a decision on the merits would be favorable, and that the requested relief would be granted*." *Cutler v. United States HHS*, 797 F.3d 1173, 1179 (2015) (internal quotations and punctuation omitted) (emphasis added).

Additionally, "*the presence of* ***one party*** *with standing is sufficient to satisfy Article III's case-or-controversy requirement*." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (emphasis added); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding it sufficient that at least one plaintiff had standing to invoke the Court's jurisdiction to hear and decide the case); *ACLU v. NSA*, 493 F.3d 644, 652 (6th Cir. 2007) ("[F]or purposes of the asserted declaratory judgment . . . it is only necessary that one plaintiff has standing."). As discussed further below, while all of the parties have standing in this case, the presence of Right to Life of Michigan alone is sufficient for this Court to exercise jurisdiction in this case.

At the end of the day, whether a party has standing to invoke federal court jurisdiction should not be based upon the popularity of the issues presented or the political views of the plaintiffs. To do so would make a mockery of our system of justice. Based on prior precedent, Plaintiffs have standing to challenge § 28. It's not a close call.

For example, the successful challengers of Colorado's Amendment 2, which was held invalid by the U.S. Supreme Court in *Romer v. Evans* on federal constitutional grounds, "included the three municipalities whose ordinances [the Court] cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination *but would be prevented by Amendment 2 from continuing to do so*." *Romer*, 517 U.S. at 625 (emphasis added). Additionally, the successful challengers in *Romer* also included homosexual persons, some of them government employees, who alleged that the amendment's enforcement would subject them to the "*risk* of

discrimination" on the basis of their sexual orientation, *id.* at 625 (emphasis added), as there were no facts demonstrating that Amendment 2 caused any *actual* discrimination.[5]

Indeed, there were no facts in *Romer* that any plaintiff actually suffered a concrete injury of discrimination as a result of the passage of Amendment 2 (nor could there have been as the challenge was immediate). *See Romer*, 517 U.S. at 625 ("Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced. . . ."). And Amendment 2 did far less than § 28 does as it simply prohibited the creation of *special* legal rights based on sexual preferences ("the choice of sexual partners"). *Romer*, 517 U.S. at 624; *see id*. at 638 (demonstrating that "[t]he amendment prohibits *special treatment* of homosexuals, and nothing more") (Scalia, J., dissenting). The exceedingly high bar for standing that Defendants seek to impose upon Plaintiffs in this case must be rejected, lest we become a judicial system where the courtroom doors remain open for some preferred causes yet locked down for others. At a minimum, *Romer* demonstrates that Plaintiffs have standing and that their claims are ripe for review. It also demonstrates that there is state action in this case, thereby triggering constitutional protections.[6] (*Compare* Defs.' Br. at 39-42 [incorrectly arguing that there is no state action in this case]). Indeed, what is good for the homosexual goose should be good for the pro-life gander.

In the case at bar, § 28 *removes* protections for women (as a class) and children (born and soon to be born). It removes protections for parents. It removes protections for medical

[5] It's interesting (if not entirely hypocritical) that "risk of discrimination" is a concrete injury when dealing with cases involving homosexuality, but it is apparently a "hypothetical fear" (*see* Defs.' Br. at 80) when addressing more conservative issues related to abortion. Is there a two-tiered justice system? One would hope not. Yet, Defendants apparently want it that way.

[6] *See generally Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 782 (1996) (Kennedy, J., dissenting) ("State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State.") (citing *Hunter v. Erickson*, 393 U.S. 385, 389-90 (1969) (finding state action under the Fourteenth Amendment)).

professionals; it subjects them to mandates and administrative complaints if they do not violate their medical ethics and religious beliefs;[7] and it further subjects them to the "risk" of losing business and professional licensure. The "risk of discrimination" against these medical professionals is concrete and real. Section 28 prevents pro-life organizations, medical professionals, and legislators from acting to protect women and children (including the unborn) from harm caused by abortion, sterilization, "gender reassignment," and other aspects of "reproduction" through legislative initiatives and other outreach efforts. In other words, these Plaintiffs are "*prevented by* [§ 28] *from continuing*" their pro-life efforts free from government interference. In sum, the harm here is far more concrete and pernicious than any alleged harm caused by Amendment 2, and there is nothing speculative about it. Section 28 passed, and it is "self-executing." Its harmful effects are real and continuing.

Due to their sincerely held religious beliefs, § 28 prevents the plaintiff medical professionals from professionally associating with (*e.g.*, having hospital privileges at) or working in government operated hospitals and facilities (like the ubiquitous University of Michigan Health System) or working for government employers as § 28 contains an anti-discrimination provision mandating government actors to *enforce* § 28's harmful and objectionable provisions.[8] (*See* FAC

[7] All Michigan statutes passed to protect the right of conscience of medical professionals are nullified by § 28 (*see, e.g.,* FAC ¶¶ 29, 32, 34, 51, 84, 99), thus undermining Defendants' claim that statutory protection for religious objections to abortion exists. (Defs.' Br. at 15, 30). And there are no statutory protections for the other objectionable procedures mandated by § 28.

[8] Defendants argue that Plaintiffs "conflate university-operated hospitals and medical facilities, like the University of Michigan Health System, with state-operated hospitals and medical facilities." (Defs.' Br. at 16). This is a strawman argument. Plaintiffs' point, which is irrefutable, is that these "state actors" are *government* actors and thus subject to the Michigan Constitution, including the mandates imposed by § 28. Accordingly, "every individual" who seeks the services of these "state actors" can demand that they abide by the mandates of § 28, and those individuals (*i.e.*, medical professionals) who seek to work at these facilities and institutions are subject to § 28. Furthermore, autonomous decision-making authority does not excuse state universities from the demands of § 28 nor does it excuse them from the rules and regulations promulgated and

¶ 80 [citing § 28(2) ("The state shall not discriminate in the *protection* and *enforcement* of this fundamental right.") (emphasis added)]). Indeed, because the government must "protect" and "enforce" § 28,[9] this subjects *all* (without "discrimination") Michigan businesses and medical professionals (such as the plaintiff medical professionals, including Crossroads Care Center) to the immediate risk of losing business or professional licensure as Plaintiffs cannot comply with § 28 as a matter of sincerely held religious beliefs.[10] (FAC ¶¶ 24, 25, 42, 49, 50, 101, 125-37, 159, 160, 164-66); *see generally Sherbert v. Verner*, 374 U.S. 398 (1963) (finding that the challenger's religious beliefs were substantially burdened by the *indirect* denial of a government unemployment benefit); *Thomas v. Rev. Bd.,* 450 U.S. 707 (1981) (concluding that a state could not withhold unemployment benefits from a Jehovah's Witness who quit his job because he refused to do work that he viewed as violating his religious beliefs).

Additionally, contrary to Defendants' argument, *Raines v. Byrd*, 521 U.S. 811 (1997), is not dispositive on the question of whether any of the plaintiff legislators have standing in this case. *Raines* involved a constitutional challenge to an Act passed by Congress—the Line Item Veto Act. Congress itself could vote to repeal this Act. Nothing about the Act itself, unlike § 28, effectively nullified any vote by any legislator. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm.*, 576 U.S. 787, 804 (2015) (concluding that the Arizona Legislature had standing when the

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enforced by the executive branch of Government pursuant to § 28.

[9] This "nondiscrimination" provision is, in fact, an enforcement mechanism.

[10] In addition to maintaining business and professional licensure from the state, nonprofit organizations (such as the plaintiff organizations) that solicit donations or operate in Michigan are regulated by state law, and the organizations must register with the Michigan Attorney General, who has the authority to "promulgate rules necessary for the administration of this act," a violation of which could subject the organization to "conditions," including "suspension." Mich. Comp. Laws §§ 400.271 *et seq*. ("charitable organizations and solicitations act"); *see also* https://www.michigan.gov/consumerprotection/charities/charitable-organizations, last visited Apr. 9, 2024); (FAC ¶¶ 68, 125-27, 131-134, 173 [noting regulatory harms caused by § 28]).

disputed proposition and the state constitution "would 'nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan'"). Indeed, this case is unique in that § 28 nullifies the vote of *every* Michigan legislator who seeks legislation to regulate in the broad area of "reproduction"; there is no number of legislators who could vote to repeal § 28. *Compare Baird v. Norton*, 266 F.3d 408, 411 (6th Cir. 2001) (concluding that the legislators "have not suffered a vote-nullification injury sufficient to give them standing in the present case"). Consequently, numbers do not matter in this case. It is without question that the plaintiff legislators have in fact suffered a "vote-nullification injury" as a result of § 28 and thus have standing. (FAC ¶¶ 6, 164, 187, 188).

Additionally, as stated by the Supreme Court, "We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118 (2020). Consequently, if those who seek to destroy life through abortion have standing in "challenges to abortion-related regulations," it would be error (not to mention discriminatory and unjust) to deny standing to those who seek to protect life in this context. After all, protecting life (as opposed to destroying it) is the *legitimate* purpose of the medical profession. Accordingly, all of the plaintiff medical professionals and medical professional organizations have standing to invoke the rights of their actual or potential patients who will be harmed by § 28.

The Supreme Court further addressed this standing issue in *June Medical Services, L.L.C.* A lengthy quote from this case is appropriate here:

> The State's argument rests on the rule that a party cannot ordinarily "'rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). This rule is "prudential." 543 U.S., at 128-129. It does not involve the Constitution's "case-or-controversy requirement." *Id.,* at 129; *see Craig v. Boren*, 429 U.S. 190, 193 (1976); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). . . .

> [W]e have generally permitted plaintiffs to assert third-party rights in cases where the "'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *Kowalski*, 543 U.S., at 130 (quoting *Warth*, 422 U.S., at 510 343); *see, e.g., Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (Scalia, J., for the Court) (attorney raising rights of clients to challenge restrictions on fee arrangements); *Craig*, 429 U.S., at 192 (convenience store raising rights of young men to challenge sex-based restriction on beer sales); *Doe*, 410 U.S., at 188 (abortion provider raising the rights of pregnant women to access an abortion); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (distributors of contraceptives raising rights of prospective purchasers to challenge restrictions on sales of contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (similar); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (similar); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (white property owner raising rights of black contractual counterparty to challenge discriminatory restrictions on ability to contract); *Barrows v. Jackson*, 346 U.S. 249 (1953) (similar). In such cases, we have explained, "the obvious claimant" and "the least awkward challenger" is the party upon whom the challenged statute imposes "legal duties and disabilities." *Craig*, 429 U.S., at 196-197; *see Akron*, 462 U.S., at 440, n.30; *Danforth*, 428 U.S., at 62; *Doe*, 410 U.S., at 188.
>
> The case before us lies at the intersection of these two lines of precedent. The plaintiffs are abortion providers challenging a law that regulates their conduct. The "threatened imposition of governmental sanctions" for noncompliance eliminates any risk that their claims are abstract or hypothetical. *Craig*, 429 U.S., at 195. That threat also assures us that the plaintiffs have every incentive to "*resist efforts at restricting their operations by acting as advocates of the rights of third parties* ***who seek access to their market or function***." *Ibid.* . . .
>
> Our dissenting colleagues suggest that this case is different because the plaintiffs *have challenged a law ostensibly enacted to protect the women whose rights they are asserting*. . . . But that is a common feature of cases in which we have found third-party standing. The restriction on sales of 3.2% beer to young men challenged by a drive-through convenience store in *Craig* was defended on "public health and safety grounds," including the premise that young men were particularly susceptible to driving while intoxicated. 429 U.S., at 199-200; *see* Hager, *Gender Discrimination and the Courts: New Ground to Cover*, Washington Post, Sept. 26, 1976, p. 139. And the rule requiring approval from the Department of Labor for attorney fee arrangements challenged by a lawyer in *Triplett* was "designed to protect [their clients] from their improvident contracts, in the interest not only of themselves and their families but of the public." 494 U.S., at 722 (internal quotation marks omitted).

June Med. Servs. L.L.C., 140 S. Ct. at 2117-20 (emphasis added).

Plaintiffs here include individuals and organizations that provide services for the care and protection of women, children, and the unborn, including medical care. These challengers include a nonprofit organization (Right to Life of Michigan) that uses its resources to lobby for laws that protect women, children, and the unborn, and this specifically includes laws that restrict abortion. This organization provides its resources to, *inter alia*, help women and the unborn harmed by abortion. Section 28 directly harms its operations. (FAC ¶¶ 15, 16, 18-20).

Plaintiffs include a nonprofit pro-life organization (Save The 1) whose members include survivors of abortion and who work to oppose laws that facilitate abortion, including laws that facilitate abortion in cases of rape, and who provide services (comfort and a place to be heard and consoled) to those families and individuals harmed by abortion. Section 28 directly harms its operations. (FAC ¶ 65 ["Save The 1 expends resources on its outreach efforts, and these efforts have been significantly undermined by § 28."]).

Plaintiffs include medical organizations and professionals (AAPLOG, CMDA, Crossroads Care Center, Dr. Halvorsen) who oppose abortion and other provisions of § 28 because they cause harm to their patients and potential patients, resulting in the expenditure of time and resources to care for these individuals.[11] Section 28 imposes serious "risks of discrimination" and sanctions based on Plaintiffs' ethical and religious objections to the practices that are codified as constitutionally protected by § 28. Medical professionals face a serious and very real risk of

[11] Due to the nullification of regulations aimed to protect women, including women who seek abortions, the plaintiff medical professionals will be providing care for women and babies harmed by abortion. Women rushed to a hospital due to a perforated uterus or some other common harm caused by abortion (particularly now that abortion is an unregulated industry) or babies rushed to a hospital because they survived a failed abortion are the types of patients that plaintiff medical professionals would provide medical care for, and the types of individuals that the pro-life plaintiff organizations would also provide services to. The unlimited and unrestricted access to abortion will increase costs to Plaintiffs—it is a fact and the only reasonable inference one could draw from the facts.

complaints brought against them to the Michigan Department of Civil Rights and the Michigan Licensing and Regulatory Affairs (LARA), which could result in the loss of licensure and other harms, because Plaintiffs object to practices codified by § 28. (FAC ¶¶ 131-34). This threat is not speculative. It is real, and it is happening now.[12] (*Id*.). And, as noted, § 28 *requires* the government to take affirmative action to enforce § 28 throughout its programs and through the exercise of its regulatory authority.[13]

Plaintiffs also include a crisis pregnancy center (Crossroads Care Center) that dedicates time and resources to helping those who are harmed by abortion. The Michigan Attorney General has committed to targeting crisis pregnancy centers, such as Crossroads, in light of § 28. (FAC ¶¶ 125-26). Crisis pregnancy centers like Crossroads are also subject to the same risk of complaints to the Michigan Department of Civil Rights and LARA, and the loss of licensing as a result. (FAC ¶¶ 40, 45, 125, 126, 134, 170, 173, 174). Section 28 directly harms it operations. (FAC ¶ 39).

Plaintiffs include parents of minor children who attend public school (Andrea Smith, John Hubbard, and Lara Hubbard) and whose rights as parents to protect their minor children from harmful practices have been eviscerated by § 28. (FAC ¶¶ 58-60). Accordingly, these parents face, *inter alia*, the Hobson's choice of either foregoing public school (a government actor subject to § 28) or subjecting their children to the threat of sexual predators. (*See id*.; *see also id*. ¶¶ 81, 102, 128, 129, 136, 159, 160 [immunizing individuals who aid or assist a minor seeking to exercise her right to "reproductive freedom," mandating government actors, which includes public school

[12] (*See* https://www.michiganpublic.org/health/2023-09-06/family-says-catholic-medical-clinic-denied-transgender-girl-care, last visited on Apr, 9, 2024).

[13] Section 28(2) mandates the "state," which includes all departments of the executive branch and all state actors, including state-operated hospitals (*e.g.*, University of Michigan Health System), county hospitals, and public schools, including public school health clinics, to "protect[]" and "enforce[]" this very broad "fundamental right" to "reproductive freedom." (FAC ¶ 83).

officials, to protect and enforce the right to "reproductive freedom," which applies to minors, and nullifying statutory rape laws]).

Plaintiffs include mothers who are or who have been pregnant and who intend to become pregnant again in the immediate future. These mothers (who are part of a class comprised of women) are harmed by, *inter alia*, the way in which § 28 removes legal protections for all pregnant women. (FAC ¶¶ 52-56, 103). Section 28 does not limit its reach to just abortion.

Finally, Jane Roe represents the interests of the unborn, and her interests are also represented by Right to Life of Michigan, AAPLOG, CDMA, Dr. Halvorsen, Celina Asberg, Grace Fisher, and Save The 1 (all "next friends" of Jane Roe). (FAC ¶ 57). There can be no question that § 28 harms Jane Roe's interests in the most profound way. As Justice Brennan noted in the context of state-sanctioned killing of a *guilty* human life through capital punishment (here, § 28 authorizes the state-sanctioned killing of an *innocent* human life through abortion): "The unusual severity of death is manifested most clearly in its finality and enormity," as death forecloses "the right to have rights." *Furman v. Ga.*, 408 U.S. 238, 289-90 (1972) (Brennan, J., concurring). And, as noted above, the courts have long recognized that individuals (this includes the unborn)[14] who may not have the legal capacity to represent themselves in a court of law (or for other reasons) may have their interests protected by a third party that seeks to protect their interests.[15] *See June Med. Servs. L.L.C.*, 140 S. Ct. at 2117-20.

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[14] *See, e.g., O'Neill v. Morse*, 188 N.W.2d 785, 788 (Mich. 1971) ("[T]he court, upon its own motion, or upon the motion of any party, may appoint a suitable person to appear and act as guardian ad litem of the unborn person. The guardian ad litem is authorized to engage counsel and do whatever is necessary to defend and protect the interest of the unborn person."); *see also* Fed. R. Civ. P. 17(c).

[15] It would be reprehensible to conclude that an environmentalist could have a cognizable interest for standing purposes based on his "desire to . . . observe an animal species, even for purely esthetic purposes," *Lujan*, 504 U.S. at 562-63, but that a pro-life organization, medical professional, or mother wouldn't have a similar interest for standing purposes in protecting the life of a baby.

The recent Sixth Circuit's decision in *Hile v. Michigan*, 86 F.4th 269 (6th Cir. 2023), further supports Plaintiffs' standing, particularly as it relates to Right to Life of Michigan, the other organizational plaintiffs (AAPLOG, CMDA, and Save The 1), and the plaintiff parents (who are prevented from "lobbying" for laws to protect their children from sexual exploitation, *see infra*), thus providing this Court with the necessary jurisdiction.

Hile involved a federal constitutional challenge to Article VIII, § 2 of the Michigan Constitution. While the court ultimately concluded that the plaintiffs' constitutional claims failed, the court held that the challengers had standing to advance their claims. As stated by the Sixth Circuit in *Hile*:

> [The] allegations render it at least plausible that if Article VIII, § 2 is declared unconstitutional, Plaintiffs would lobby their representatives to change Michigan's law concerning 529 plans. *See Ashcroft* [556 U.S. at 679].
>
> Plaintiffs have also satisfied the final two elements of standing—causation and redressability. *See Lujan*, 504 U.S. at 560-61. Their injury is caused by Article VIII, § 2 because if there were not a constitutional prohibition on public funding for private schools, Plaintiffs could lobby their representatives for aid "with efficacy." If Plaintiffs obtain declaratory and injunctive relief, moreover, their injury will be redressed because they will be able to lobby on equal footing with those seeking aid for public schools. And if the individual Plaintiffs have standing, the PACE Foundation consequently has organizational standing. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). As a result, Plaintiffs' claims are constitutionally adequate.

Hile, 86 F.4th at 285.

For reasons that the plaintiffs in *Hile* had standing to advance their federal constitutional challenge to a provision of the Michigan Constitution, Plaintiffs in this case similarly have standing.

Finally, in *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993), the Sixth Circuit concluded that an organization "can establish standing by alleging a concrete and demonstrable injury, including an injury arising from a purportedly illegal action [that] increases the resources

the group must devote to programs independent of its suit challenging the action." (quotations and citations omitted). Similarly, in *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), the Court held that the organization had standing, concluding as follows:

> "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's *[sic]* racially discriminatory steering practices." . . .
>
> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests . . . . We therefore conclude, as did the Court of Appeals, that in view of HOME's allegations of injury it was improper for the District Court to dismiss for lack of standing the claims of the organization in its own right.

Havens Realty Corp., 455 U.S. at 379; *see also id*. at 379, n.20 ("That the alleged injury results from the organization's noneconomic interest in encouraging open housing does not affect the nature of the injury suffered . . ., and accordingly does not deprive the organization of standing.") (internal citation omitted). As set forth in the First Amended Complaint:

> Right to Life of Michigan has many programs that assist women in crisis pregnancy situations and/or help women to choose life for their unborn baby. These programs result in the expenditure of the organization's resources, and the need for these programs has substantially increased as a result of Proposal 3 (and the creation of Article I, § 28), thereby resulting in the need to substantially increase the resources the organization must expend for these programs.
>
> As a result of the passage of Proposal 3 (and the creation of Article I, § 28), Right to Life of Michigan has had to devote significant resources to counteract its damaging effects.
>
> * * *
>
> Right to Life of Michigan's activities include political action (*i.e.* getting pro-life politicians elected to local, state, and federal levels of government, specifically including the Michigan Legislature) through a PAC and full-time PAC Director.

> Right to Life of Michigan's activities also include advocating for the passage of laws that protect the unborn, and the organization employs two full-time employees for this purpose.
>
> The passage of Proposal 3 (and the creation of Article I, § 28) adversely affects Right to Life of Michigan's activities. In particular, Right to Life of Michigan's legislative efforts are thwarted because lawmakers can no longer pass pro-life laws, and its political action is affected because even if pro-life politicians are elected, they are unable to change the law given the breadth of Article I, § 28 (also referred to herein as § 28 or Section 28).

(FAC ¶¶ 15, 16, 18-20; *see also id*. ¶ 39 ["Due to the proliferation of unrestricted abortion on demand created by § 28, Crossroads is forced to expend additional and substantial resources to provide care for women harmed by abortion and for its education and counseling efforts to convince pregnant women to choose life for their unborn babies. Section 28 undermines the efforts and operations of Crossroads."], ¶ 65 ["Save The 1 expends resources on its outreach efforts, and these efforts have been significantly undermined by § 28."]).[16]

Here, § 28 has frustrated the plaintiff pro-life organizations' efforts to protect women and children from the harm of abortion. It has frustrated their efforts to assist women in crisis pregnancy situations by facilitating access to unrestricted and unlimited abortion. It has specifically frustrated Right to Life of Michigan's efforts to promote pro-life candidates and causes and to lobby for pro-life laws. In sum, § 28 has caused these plaintiff pro-life organizations to devote significant resources to counteract § 28's discriminatory and harmful effects, thereby causing a direct injury to their pro-life operations.[17] Standing is not an issue. We turn now to ripeness.

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[16] Contrary to Defendants' assertion (Defs.' Br. at 28), neither *Shelby Advocates for Valid Elections v. Hargett,* 947 F.3d 977 (6th Cir. 2020), nor *Fair Housing Council v. Montgomery Newspapers,* 141 F.3d 71 (3d Cir. 1998), undermines Plaintiffs' standing, particularly at this stage of the proceedings. *See id.* at 76 (noting that "there is no dispute that the FHC's damage allegations track the language in *Havens* and were sufficient to withstand a motion to dismiss").

[17] This argument is not undermined by the fact that two lower Michigan courts found/created a

II. PLAINTIFFS' CHALLENGE TO THE "SELF-EXECUTING" § 28 IS RIPE.

Article I, § 28 became the law of Michigan upon its passage on November 8, 2022. Pursuant to its own terms, § 28 is "self-executing." Mich. Const. art. I, § 28(5). Accordingly, it does not require enabling legislation for it to become effective and thus have the full force of law. Moreover, the harmful effects of § 28 have already been realized in light of the number of laws that protect women and the unborn and which promote legitimate state interests related to abortion that have been nullified and or repealed as a result. (*See, e.g.,* FAC ¶¶ 99-102). Defendants admit as much. (Defs.' Br. at 13 ["[T]he Michigan Legislature recently enacted the Reproductive Health Act, 2023 PA 286, a package of bills aimed at *expanding* access to abortion in Michigan and which statutorily codify § 28's protections."]). There is nothing hypothetical or speculative about this. And the threats of discrimination against Plaintiffs and the plaintiff pro-life organizations, including threats against their speech, are real and imminent. (*See, e.g.,* FAC ¶¶ 125-27, 131-34, 173); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact"); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat."). And so too are the impacts on the resources of the plaintiff pro-life organizations (*see*

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constitutional right to abortion under the state constitution irrespective of § 28. (*See* Defs.' Br. at 4, n.2 [citing cases]). As noted throughout, § 28 created a super-right to "reproductive freedom"—a "right" that is not limited to abortion—that prevents any legislative action in this very broad subject area. Even under *Roe*, state legislatures were able to pass commonsense health and safety regulations that placed restrictions on abortion. That is no longer the case under § 28.

supra) as the harmful effects of § 28 and its mandates, which the state must enforce by operation of § 28(2), *are happening now*. Mich. Const. art. I, § 28(2).

The doctrines of ripeness and standing "originate" from the same Article III limitation. *Susan B. Anthony List*, 573 U.S. at 157 n.5. Quite often, Article III standing and ripeness issues "boil down to the same question." *MedImmune, Inc.*, 549 U.S. at 128 n.8. For reasons that Plaintiffs have standing in this case, the ripeness requirement is satisfied as well.

The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). "The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. We begin with the hardship prong.

As stated by the D.C. Circuit:

> "[S]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself." *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998). Thus, "[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes." *Id*. (internal citation omitted).

Gordon v. Holder, 721 F.3d 638, 653 (D.C. Cir. 2013).

Moreover, while the Sixth Circuit in the *Hile* case did not expressly address ripeness (a jurisdictional issue), it is evident that for the reasons the plaintiffs had standing in that case, the case was also ripe for review. The same is true in this case. *See, e.g., MedImmune, Inc.*, 549 U.S. at 128 n.8 (noting that standing and ripeness often "boil down to the same question"). As noted above, Plaintiffs are now subject to the "risk of discrimination" and regulatory harms as a result

of § 28, and the plaintiff pro-life organizations now have to devote significant resources to programs to assist women and others harmed by § 28, thereby causing real and present organizational harm. (*See supra*.).

This case is also fit for judicial review. "In considering the fitness of an issue for judicial review, the court must ensure that a record adequate to support an informed decision exists when the case is heard." *NRA of Am. v. Magaw*, 132 F.3d 272, 290 (6th Cir. 1997). Given the posture of this case (motion to dismiss at the pleading stage), the record is more than sufficient for the Court to rule as the facts are established in the First Amended Complaint.

Indeed, as noted, in *Romer v. Evans*, there was no "ripeness" concern even though the legal challenge was filed "[s]oon after Amendment 2 was adopted." *Romer*, 517 U.S. at 625. The Court didn't have to wait for any *specific* facts demonstrating that a private entity discriminated against anyone (let alone any plaintiff) on account of his or her sexual preferences. Indeed, as Justice Scalia demonstrated in his dissent, Amendment 2 did not affect "'general laws and policies that prohibit arbitrary discrimination' [and that these laws] would continue to prohibit discrimination on the basis of homosexual conduct as well." *Id*. at 638 (Scalia, J., dissenting). Nonetheless, the case proceeded. Plaintiffs' claims in this case are just as ripe (and even more so) as the claim advanced in *Romer*. Ripeness is not an issue.

III. DEFENDANTS DO NOT ENJOY ELEVENTH AMENDMENT IMMUNITY.

Defendants argue that they have Eleventh Amendment immunity. They are mistaken. Although State officials generally enjoy Eleventh Amendment immunity from suits seeking damages, they may be sued in federal court for prospective relief to halt the enforcement of a state law (including a state constitutional amendment passed by the voters) that violates the U.S. Constitution, as in this case. *See Ex parte Young*, 209 U.S. 123 (1908). As stated by the Supreme

Court, "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have *some connection* with the enforcement of the act." *Id.* at 157 (emphasis added). This is not a high bar.

As Governor, Defendant Whitmer is the head of the executive branch, which includes 20 administrative departments. These departments include, *inter alia*, the Michigan Department of Civil Rights (MDCR), the Michigan Department of Health and Human Services, LARA, and the Michigan Department of Education. The executive departments also include the Michigan Department of Attorney General and the Michigan Department of State, which are headed by executive officials that are separately elected by Michigan voters. (FAC ¶¶ 67, 68). Given the breadth and scope of § 28, the executive branch of government is and will continue to be a primary enforcer of § 28, particularly in light of the demands imposed by §28(2).

As the chief law enforcement officer for the State of Michigan, Defendant Nessel is responsible for enforcing and ensuring compliance with all state laws and regulations, and this includes the Michigan Constitution and thus § 28 (and all laws and regulations affected and mandated by § 28). The same is true for the Governor as she is ultimately responsible for the execution of the government. Consequently, this authority and responsibility also includes enforcing state regulations that affect businesses (such as medical facilities and crisis pregnancy centers, among others) and business and professional licensing in this state (functions of the executive branch of government headed by the Governor), all of which are affected by § 28.[18] As

[18] Michigan's Elliot-Larsen Civil Rights Act, which is enforced through the executive branch of government headed by the Governor, prohibits any discrimination based on "sexual orientation, gender identity or expression." Mich. Comp. Laws. § 37.2102. Section 28 <u>now</u> permits *broader* enforcement of this Act against private actors, such as Plaintiffs. (*Compare* Defs.' Br. at 40-41 [making the irrelevant claim that "the MCPA and the ELCRA exist and may be enforced against conduct that violates their provisions regardless of § 28"]).

the Attorney General, Defendant Nessel is the top lawyer for the State of Michigan. When public legal matters arise, the Attorney General's Office renders opinions on matters of law, and provides legal counsel for the legislature and for each officer, department, board, and commission of state government. The Attorney General's Office provides legal representation in court actions and assists in the conduct of official hearings held by state agencies. (FAC ¶¶ 70, 71).

Indeed, Defendant Nessel has publicly vowed to use her power as Attorney General to target crisis pregnancy centers (CPCs), such as Crossroads. As set forth in the First Amended Complaint, Defendant Nessel

> ["]oppose[s] efforts by CPCs to mislead consumers and delay or impede access to the full spectrum of reproductive healthcare, including abortion," and that [she] will take "numerous actions aiming to mitigate the harmful effects of CPC misinformation and delays." Section 28 empowers Defendant Nessel to take her threatened action, including regulatory action, to harm crisis pregnancy centers, including Crossroads, and to force them to accept abortion as a legitimate form of "healthcare" and to advocate a viewpoint that favors abortion.
>
> As a direct result of § 28, Defendants consider those medical professionals who advocate in opposition to abortion, including crisis pregnancy centers such as Crossroads, to be engaging in "disinformation" and thus consumer fraud. This is significant as the Department of Attorney General operates a Consumer Protection Team to fight consumer fraud, and it has an online Consumer Complaint form to submit such complaints to the Department of Attorney General. This has a chilling effect on the speech of those medical professionals, including Plaintiffs, who oppose abortion based on medical ethics and sincerely held religious beliefs.

(FAC ¶¶ 126, 127, *see also id*. ¶ 128).

As Secretary of State, Defendant Benson is responsible for certifying ballot initiatives such as Proposal 3. She is specifically responsible for enforcing and implementing the ballot initiative procedures that resulted in the passage of Proposal 3. Should this Court declare that a ballot initiative that nullifies the authority of a co-equal branch of government violates the U.S. Constitution, this will unquestionably restrict Defendant Benson's authority as the Secretary of State.

As all Defendants have "*some* connection" with the enactment and/or enforcement of § 28, Defendants' Eleventh Amendment immunity argument is without merit.

In *Romer v. Evans*, for example, in addition to the State of Colorado, the two other named-defendants were the Governor and the Attorney General of Colorado. *See Romer*, 517 U.S. at 625 ("Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General.").[19]

Even more to the point, in *Obergefell*, the defendants were "state officials responsible for enforcing the laws in question." *Obergefell*, 576 U.S. at 655. These "state officials" included the Michigan Governor and the Michigan Attorney General in their official capacities. *See id*; *see also Deboer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (filing challenge to the Michigan marriage amendment against the Michigan Governor and Attorney General).[20] As noted, the current Michigan Attorney General, Dana Nessel, was counsel of record in the challenge to the Michigan marriage amendment. *See id.* She apparently thought (correctly) that it was proper to sue the Michigan Governor and Attorney General in their official capacities in an effort to strike down a voter-initiated amendment to the Michigan Constitution in order to protect "same-sex

[19] Plaintiffs understand that *Romer* originated in state court. However, the ultimate relief was issued by the U.S. Supreme Court on federal constitutional grounds. Moreover, the main point here is that the Colorado Governor and Attorney General certainly had "some connection with the enforcement of the act" to make them appropriate parties in their official capacities, as in this case.

[20] A suit against an individual officer in her official capacity is "another way of pleading an action against an entity of which an officer is an agent." *Ky. v. Graham,* 473 U.S. 159, 165 (1985). In this case, Defendants are agents of the State of Michigan, which explains why the district court in *Deboer* enjoined the "*State of Michigan*" from enforcing the marriage amendment in a lawsuit against the Michigan Governor and Attorney General. *See Deboer*, 973 F. Supp. 2d at 775 (declaring that the marriage amendment violated the Equal Protection Clause and ordering "that the State of Michigan is enjoined from enforcing Article I, § 25 of the Michigan Constitution and its implementing statutes"). Defendant Nessel obviously had no objections to that result when she was a private litigant representing the plaintiffs in that case. And while the district court noted that the plaintiffs had later amended the complaint to add the Oakland County Clerk (*id*. at 759, n.1), a lawsuit against a county official does not give you relief against the state.

marriage" (even though marriage licenses are issued by the Counties and marriage records are kept by the Michigan Department of Health and Human Services). However, she now takes the opposite position (incorrectly), arguing that it is improper to sue these same government officials to challenge a voter-initiated amendment in order to protect women, children, and parents from the harm it causes. In the final analysis, Nessel was correct as a private plaintiff's attorney, but she is wrong as a government defendant. There is no Eleventh Amendment immunity in this case as there was none in *Obergefell*. We turn now to the substantive claims.

IV. PLAINTIFFS HAVE ADVANCED A PLAUSIBLE CLAIM FOR RELIEF UNDER THE EQUAL PROTECTION CLAUSE.

In *Romer v. Evans*, the U.S. Supreme Court struck down on equal protection grounds Colorado's Amendment 2, which prohibited the adoption of laws that protected sexual preferences.[21] Since a "choice of sexual partners" triggered no heightened scrutiny under the Fourteenth Amendment as it is not a fundamental right nor are homosexuals a suspect class, the Court found that the amendment failed rational basis review. Per the Court: "A law declaring that *in general* it shall be *more difficult* [*i.e.*, not impossible] for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. 'The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))." *Romer*, 517 U.S. at 633-34. "A State cannot so deem a class of persons a stranger to its laws." *Id.* at 635.

[21] Obviously, there was "state action" in *Romer* (and *Obergefell*) to trigger the application of the Fourteenth Amendment, further demonstrating that Defendants' no-state-action argument is baseless. (*See* Defs.' Br. at 39-42).

Section 28 fails for similar reasons. To begin, only women/females can become pregnant. (FAC ¶ 109). Consequently, § 28 disproportionately harms women (and, in particular, minor females). Women/females (unlike homosexual persons) are a protected class under the Fourteenth Amendment. Accordingly, "gender-based discriminations must serve important governmental objectives and [] the discriminatory means employed must be substantially related to the achievement of those objectives." *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980). As stated by the Supreme Court:

> Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Reed v. Reed*, 404 U.S. 71, 75 (1971). . . . Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler v. Druggists Mutual Ins. Co*., 446 U.S. 142, 150 (1980).

Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982).

Section 28 removes legal protections for women/females (the only gender capable of becoming pregnant and thus subject to the predatory tactics of abortion centers), and it prevents the legislature from passing laws to protect these women/females from the harm caused by abortion, as well as other procedures related to pregnancy (including "perceived" pregnancy).

For example, § 28 changes the standard of reproductive medical care (which adversely affects women as a class) from "informed consent" to simply "voluntary consent" without any rational basis for doing so. "Indeed, the requirement that a doctor obtain informed consent to perform an operation is 'firmly entrenched in American tort law.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (quoting *Cruzan v. Director, Mo. Dept. of*

Health, 497 U.S. 261, 269 (1990)). Consequently, this adverse change in legal protection specifically harms women without any legitimate state interest, in violation of the equal protection guarantee of the Fourteenth Amendment. Similarly, under § 28(3), the state may not "penalize, prosecute, or otherwise take adverse action against someone for aiding or assisting a pregnant [woman] in exercising [her] right to reproductive freedom." This provision protects even negligent doctors from "adverse action"—such as revocation of licensing—for harming a woman during delivery, as just one example, thereby further depriving women of the equal protection of the law.

Under § 28, abortions may be performed by anyone; they are not limited to licensed physicians. Indeed, this super-right to "abortion" trumps *all* abortion regulations so long as the women *voluntarily* consents (*informed* consent is not required). Consequently, a woman could voluntarily consent to a coat hanger abortion by her boyfriend, who is then immunized for aiding or assisting his girlfriend's "voluntary" abortion. (FAC ¶¶ 115-24). Section 28 protects abortion providers by prohibiting the state from penalizing, prosecuting, or otherwise taking adverse action against them for actions that categorically harm women. (*See, e.g.,* FAC ¶ 115).

Section 28 harms minor females as it prohibits the enforcement of criminal statutes against statutory rape and child sexual abuse (Mich. Comp. Laws § 750.520), female genital mutilation (Mich. Comp. Laws § 750.136), and other similar statutes designed to protect children (in particularly, females) from exploitation. Under § 28, sex between a 12-year-old-girl and a 40-year-old man is now protected by this new right so long as the child consents. In fact, § 28 makes it impossible to enforce or enact a statute prohibiting certain sexual activity, such as pedophilia or incest. Section 28 prohibits, for example, Child Protective Services and other mandatory reporters from reporting child sex abuse where the child "consents" to the sexual acts. If a counselor in a public school, for example, discovers that a minor is having sex with her schoolteacher, the minor

can claim she is "consenting" and exercising her right to "reproductive freedom." The counselor could face punishment for violating the anti-discrimination provision of § 28 by reporting the minor's sexual behavior (§ 28 prohibits discriminating "in the protection and enforcement" of the child's fundamental right). Thus, § 28 violates the equal protection rights of minors, in particular, female minors, by removing from them legal protections preventing their sexual exploitation, and it prevents the legislature from passing laws to protect them from such exploitation.

Section 28 removes all legal protection for the unborn and prevents the legislature from passing laws to protect life in the womb and even life that survives a failed abortion. Section 28 prevents the legislature from prohibiting grisly and painful methods of destroying human life, such as partial-birth abortion. While the unborn have fundamental rights under the Fourteenth Amendment that are completely removed by death, § 28 fails rational basis review as it treats this human life with total contempt. There is no rational basis, for example, to permit someone to partially deliver a baby and kill her or to kill a baby born following a failed abortion. Whatever interest a woman has in procuring an abortion (or an abortionist has with performing this procedure), those interests are not without limits. Even *Casey* (and *Roe*) recognized that those interests were not absolute as there were other competing state interests that were superior. For example, "respect for and preservation of prenatal life at all stages of development . . .; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability" were all legitimate state interests for restricting abortion. *Dobbs*, 597 U.S. at 301 (internal quotations and citations omitted). Those legal protections are now removed by § 28.

Finally, as the Supreme Court acknowledged in *Dobbs* and as noted previously, the state has a legitimate interest in the abortion context to "prevent[ ] discrimination on the basis of race, sex, or disability." *Dobbs*, 597 U.S. at 301. Section 28 permits abortion centers to target racial minorities (black babies) and babies with disabilities (classes of persons that are disproportionately harmed by abortion), and *the legislature is without power to restrict such predatory and discriminatory practices*. Section 28 disproportionally harms the black community. "Blacks comprise approximately 13.5% of Michigan's population, yet 54% of all abortions performed on Michigan women in 2022 were on black women. The black community is a target of the abortion industry, which often locates surgical abortion centers in poor black neighborhoods, as is the case in Michigan. In fact, of the 14 surgical abortion centers in Michigan, eight are located in black neighborhoods. This is not surprising as abortion has racist and eugenic roots." (FAC ¶¶ 106-07). Additionally, "[i]t is a stark reality that unborn children with disabilities are disproportionately more likely to become victims of abortion. As a result, abortion discriminates against disabled children." (FAC ¶ 62; *see also id*. ¶¶ 56, 62, 108, 148, 150, 152, 179, 182).

There is no rational basis for permitting the abortion industry to target with impunity the killing in the womb of black babies or babies with disabilities. Section 28 created a super-right to abortion that fails even rational basis review as it completely nullifies any legitimate state interest for regulating in this area of the law. Permitting this inhumane targeting is abhorrent to fundamental notions of justice and the equal protection guarantee of the law, and it fails rational basis review. *See Romer*, 517 U.S. 620.

In sum, for multiple reasons, Plaintiffs have alleged a plausible claim for relief under the Equal Protection Clause.

V. PLAINTIFFS HAVE ADVANCED A PLAUSIBLE CLAIM FOR RELIEF FOR THE VIOLATION OF PARENTAL RIGHTS.

The Supreme Court has long recognized a fundamental right of "parents and guardians to direct the upbringing and education of children under their control." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-55 (1925) (citing *Meyer v. Neb.,* 262 U.S. 390 (1923)).

"[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *see also Prince v. Mass.*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

Accordingly, "[p]arents possess a fundamental right to make decisions concerning the medical care of their children." *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 418 (6th Cir. 2019). In *Kanuszewski*, the Sixth Circuit reviewed a Michigan program under which the state collected and stored blood samples from newborns to test for diseases. *See id.* at 404. The court concluded that qualified immunity shielded state employees from the parent plaintiffs' claims regarding the initial collection, *see id.* at 415-16, but that the ongoing storage without informed consent violated the parents' fundamental right to direct the medical care of their children, *see id.* at 418-21.

The Sixth Circuit's decision was consistent with the long-standing principle, protected by the Fourteenth Amendment, that parents, and not the state, are the primary decision makers for their children. "[O]ur constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.'" *Parham*

v. J.R., 442 U.S. 584, 602 (1979) (second alteration in original) (quoting *Pierce*, 268 U.S. at 535). "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," *id.*, and "historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children," *id.* (citing 1 W. Blackstone, *Commentaries*; 2 J. Kent, *Commentaries on American Law*).

"Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure." *Parham*, 442 U.S. at 603. Ultimately, "[p]arents can and must make those judgments." *Id.*

At the end of the day, "[p]arents possess a fundamental right to make decisions concerning the medical care of their children." *Kanuszewski*, 927 F.3d at 418. Section 28 eviscerates that fundamental right for grave, harmful, and in some cases, immoral procedures such as abortion and sterilization. And worse, § 28 immunizes those individuals who aid or assist a minor in procuring procedures such as abortion. *See Arnold v. Bd. of Educ.*, 880 F.2d 305, 313 (11th Cir. 1989) ("Coercing a minor to obtain an abortion or to assist in procuring an abortion and to refrain from discussing the matter with the parents unduly interferes with parental authority in the household and with the parental responsibility to direct the rearing of their child. This deprives the parents of the opportunity to counter influences on the child the parents find inimical to their religious beliefs or the values they wish instilled in their children.").

Through § 28, the state has granted minors the "right" to obtain highly objectionable and harmful procedures such as "contraception, sterilization, [which includes various "gender

reassignment procedures," and] abortion care" (FAC ¶ 81),[22] without any parental consent, knowledge, or involvement (FAC ¶¶ 84, 99, 101, 128, 129, 136, 159, 160). Moreover, § 28 provides broad immunity for anyone who aids or assists a minor in obtaining such procedures.[23] Accordingly, state medical facilities (*e.g.*, the University of Michigan Health System), must provide these objectionable procedures to a minor, and there is nothing a parent could do about it. Section 28 allows an adult (such as a school official) to aid or assist the minor with impunity. The parent plaintiffs in this case all have children that attend public schools, and public schools and their officials must comply with constitutional mandates.

Contrary to Defendants' arguments (Defs.' Br. at 50-51), this case is unlike *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980), which involved the establishment of a "family planning clinic" that distributed contraceptives to minors without parental notice. As the Sixth Circuit noted, there was "no prohibition against the [parents] participating in decisions of their minor children on issues of sexual activity and birth control." *Id*. at 1168. Here, the state, through § 28, has granted minor children plenary authority as a matter of state constitutional law to make grave and serious decisions "on issues of sexual activity and birth control" without the need for any parental involvement. In fact, the state is required to "protect" and "enforce" the minor's right over and above any right of a parent to intervene. Mich. Const. art. I, § 28(2). Similarly, Defendants' reliance on *Anspach v. City of Philadelphia, Department of Public Health*, 503 F.3d 256 (3d Cir. 2007), is misplaced. (Defs.' Br. 51). *Anspach* involved a situation where a minor received emergency contraception from a city health department without parental notification. Quoting *Anspach*, which cited *Irwin* with approval, Defendants assert that parental liberty interests are

[22] Minors may also be targeted for use as surrogates as this involves "reproductive freedom."
[23] By its own terms, § 28 applies to "perceived" pregnancy outcomes. In other words, the minor asserting the "right" need not be pregnant.

triggered only when the state compels "interference in the parent-child relationship." (Defs. Br. at 51). Here, § 28 eviscerates the rights of parents to direct the upbringing of their children in a most fundamental way, and it compels the state to interfere with the parent-child relationship as the state is required to "protect" and "enforce" the minor's right. *See* Mich. Const. art. I, § 28(2). *Anspach* does not support such direct and broad interference with parental rights.

Section 28 also subjects Plaintiffs' children to sexual predators who seek to hide their misdeeds (and who are permitted to do so as a matter of state constitutional law) by aiding and assisting their minor victims to procure an abortion. Additionally, because "reproductive freedom" is broadly construed, it necessarily includes the act of reproduction (sexual intercourse—a "potential . . . pregnancy outcome"), thus eviscerating laws against statutory rape. So long as the minor consents to the sex act, the "freedom" to engage in the act is protected by § 28. Section 28 prohibits the enforcement of criminal statutes against statutory rape and child sexual abuse, female genital mutilation, and other similar statutes designed to protect children from exploitation. As noted above, sex between a young girl and a middle-aged man is now protected by this new right so long as the child consents. In fact, § 28 makes it impossible to enforce or enact a statute prohibiting certain sexual activity, such as pedophilia and incest.

This parade of horribles, which interferes with the rights of parents to protect and raise their children, is made possible by § 28. And the secrecy of this is a large part of the problem (and a basis for the violation). Through § 28, the state is telling parents that it knows what is best for their children when it comes to "reproductive freedom." Simply put, § 28 is diabolical. It is exceedingly harmful to children, and it eviscerates the fundamental rights of parents in the process.

VI. PLAINTIFFS HAVE ADVANCED A PLAUSIBLE CLAIM FOR RELIEF UNDER THE FREE EXERCISE CLAUSE.

"The right to free exercise of religion includes the right to engage in conduct that is motivated by the religious beliefs held by the individual asserting the claim." *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 255 (6th Cir. 2015) (*en banc*); *see also McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.").

"To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc v. City of Hialeah*, 508 U.S. 520, 546 (1993) (striking down on Free Exercise Clause grounds an ordinance prohibiting animal sacrifice); *see also id.* at 534 (noting that discriminatory treatment "cannot be shielded by mere compliance with the requirement of facial neutrality").

"It is clear that governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion, is the evil prohibited by the Free Exercise Clause." *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1066 (6th Cir. 1987).

Plaintiffs object to, *inter alia*, abortion and "gender reassignment" on religious grounds. Requiring Plaintiffs, specifically including the medical professional plaintiffs, to advocate for or support in any way these immoral procedures directly infringes their religious beliefs, and denying them licensing, preventing them from holding hospital privileges, or denying them any professional benefit based on their religious objections to these immoral procedures violates their religious beliefs, all in violation of their right to free exercise protected by the First Amendment. *See Sherbert*, 374 U.S. 398; *Thomas,* 450 U.S. 707. The harm to Plaintiffs is furthered by the fact

that § 28 permits individuals to demand these repugnant services from state-operated hospitals and other government medical facilities as a matter of constitutional law, and the state must enforce this "right." Section 28 also permits individuals to demand these repugnant services under threats of "civil rights" complaints to the MDCR and complaints of discrimination to LARA and the Consumer Protection Team.

In sum, Plaintiffs have alleged a plausible claim for relief under the Free Exercise Clause.

VII. PLAINTIFFS HAVE ALLEGED A PLAUSIBLE CLAIM FOR RELIEF UNDER THE FREE SPEECH CLAUSE.

Free speech and free exercise claims "are often considered in tandem . . . and may rely entirely on the same set of facts." *Bible Believers*, 805 F.3d at 256. For reasons similar to why § 28 violates the Free Exercise Clause, it also violates the Free Speech Clause (and vice versa). By requiring plaintiff medical professionals to advance and support practices contrary to their professional medical judgment, ethics, and religious convictions (or to deny them benefits and employment opportunities for refusing to do so), § 28 violates the Free Exercise and Free Speech Clauses of the First Amendment.

"Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 573 (1995) (citations omitted) (internal quotation marks omitted); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

In other words, the First Amendment stands as a brake to the government's power to compel speech. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) ("The First Amendment protects

the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.").

A law compelling speech is by its very nature content-based because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent. *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988) ("We turn next to the requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity. Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech.").

As set forth in *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), the state "cannot co-opt [physicians] to deliver its message for it. '[T]he First Amendment does not permit the State to sacrifice speech for efficiency.'" *NIFLA*, 138 S. Ct. at 2376 (quoting *Riley*, 487 U.S. at 795); *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014) ("[T]he state cannot commandeer the doctor-patient relationship to compel a physician to express its preference to the patient."); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 453 (6th Cir. 2019) (same).

The Attorney General, who is enabled by § 28, has already launched an attack against crisis pregnancy centers and other medical professionals that targets speech.

> As a direct result of § 28, Defendants consider those medical professionals *who advocate in opposition to abortion*, including crisis pregnancy centers such as Crossroads, *to be engaging in "disinformation" and thus consumer fraud*. This is significant as the Department of Attorney General operates a Consumer Protection Team to fight consumer fraud, and it has an online Consumer Complaint form to submit such complaints to the Department of Attorney General. This has a *chilling effect on the speech of those medical professionals, including Plaintiffs, who oppose abortion based on medical ethics and sincerely held religious beliefs*.

(FAC ¶ 127, *see also id.* ¶ 128) (emphasis added).

"The principle that has emerged from [Supreme Court] cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination."); *see Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws . . . are presumptively unconstitutional."); (*see* FAC ¶¶ 170-74).

Section 28 imposes mandates and burdens upon Plaintiffs (specifically the plaintiff medical professionals) that commandeer their speech in violation of the First Amendment.

VIII. PLAINTIFFS HAVE ALLEGED PLAUSIBLE CLAIMS FOR RELIEF UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Fourteenth Amendment Protects All Human Life.[24]

The Fourteenth Amendment prohibits States from depriving "any person of life" "without due process of law" or denying "to any person" "the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Defendants ask this Court to conclude that human life in the womb is worthy of *no* legal protections whatsoever. Defendants' position finds no basis in law (especially now that the "egregiously wrong" *Roe* decision has been overruled)[25] or scientific fact. Biology firmly establishes that each *human* life is unique and distinct, and this *human* life begins in the womb.

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[24] *Roe*, 410 U.S. at 156-57 (acknowledging that if the unborn have legal protections under the Fourteenth Amendment, the case for abortion "collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment").

[25] *Roe*, 410 U.S. at 159 (making the demonstrably false assertion that "[w]e need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

The human life pictured above is a fetus in the uterus *at only 12 weeks* following fertilization. Section 28 permits the killing, with impunity, of this and other babies that are even more fully developed, including babies that are partially born or fully born following a failed abortion. Section 28 prohibits the Michigan legislature from enacting *any* laws that provide *any* protection for this human life. As a result, this human life is treated as something less than chattel. We made a grave mistake in our nation's history when we excluded a class of human beings from constitutional protection due to the color of their skin. *See Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) ("[N]either the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."). We remedied that mistake through a civil war and the enactment of the Civil War Amendments, which includes the Fourteenth Amendment. Unfortunately, we repeated that mistake in *Roe v. Wade* by excluding a class of human beings from constitutional protection because they were alive in a womb. That "egregiously wrong" decision was definitively reversed by *Dobbs*.[26] Consequently,

[26] The Court in *Dobbs* did not rule on the Fourteenth Amendment issue because it did not have to. *See Dobbs*, 597 U.S. at 264 ("Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent,

the question of whether the unborn should be afforded *any* rights under the Fourteenth Amendment remains an open question; one that the Court should answer in the affirmative. Innovations in science make clear that this unborn life is fully human—there are no scientific doubts (*compare Roe*, 410 U.S. at 159). (FAC ¶¶ 85-91). Moreover, this Court need not determine the *full* extent of these rights under the Fourteenth Amendment. Because § 28 removes *all* such rights and prevents the legislative branch from enacting any laws that may protect these rights (such as prohibiting particularly gruesome or barbaric medical procedures and providing measures to minimize fetal pain), the exceedingly overbroad nature of § 28 is sufficient for the Court to declare § 28 unlawful and enjoin its enforcement.

The Fourteenth Amendment was adopted against a backdrop of established common-law principles, legal treatises, and statutes recognizing the unborn as possessing legal rights. Authoritative treatises—including those deployed specifically to support the Civil Rights Act of 1866, which the Fourteenth Amendment aimed to sustain and enhance—prominently acknowledged the unborn as possessing legal rights, including the right to life. *See, e.g.,* William Blackstone, *Commentaries* *129-30 ("Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. . . . An infant *en ventre sa mere,* or in the mother's womb, is supposed in law to be born for many purposes."). Leading eighteenth-century English cases, later embraced in authoritative American precedents decades before ratification of the Fourteenth Amendment,

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the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that 'theory of life.'"). Courts will avoid resolving unnecessary constitutional issues. What is clear, however, is that *Dobbs* completely rejected and entirely dismantled the factual, historic, and legal bases that served to support the central holding of *Roe.*

declared the general principle that unborn humans are rights-bearing persons from conception. *See Hall v. Hancock*, 32 Mass. 255, 257-58 (1834) ("[A] child is to be considered *in esse* [in being] at a period commencing nine months previously to its birth, and where there is not evidence to rebut the presumption, it is conclusive. We are also of opinion, that the distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases; and that it does not apply to cases of descents, devises and other gifts; and that, generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered.").[27]

And even before statutory prohibitions on abortion appeared throughout the nation in the mid-nineteenth century, the common law firmly regarded abortion as an offense from the moment when a new individual member of the human species emerged. Once a unique, distinct human being came into existence (based in large measure on the understanding of science at the time, hence laws that triggered protection at "quickening") that life was protected from abortion.[28] We know definitively today that a unique, distinct human being comes into existence at fertilization. (FAC ¶ 86).

More contemporaneously (and prior to the "egregiously wrong" decision in *Roe*), a negligent act that results in harm to an unborn served as the basis for a wrongful death action or a negligence action. *See, e.g., O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971) (wrongful death);

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[27] Shortly after the Fourteenth Amendment was ratified in 1868, American jurisprudence recognized the rights of the unborn. *See, e.g., Botsford v. O'Conner*, 57 Ill. 72, 76 (1870) (holding that a child *en ventre sa mere* is a "person" who "must have an opportunity of being heard, before a court can deprive such person of his rights").

[28] In 1868, the Union consisted of thirty-seven States; thirty of them had statutory prohibitions on abortion. James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29, 33 (1985). Most were classified as "offenses against the person," and twenty-eight applied before and after "quickening." *Id*. at 34, 48.

Womack v. Buchhorn, 187 N.W.2d 218 (Mich. 1971) (permitting a common law negligence action to be brought on behalf of a surviving child negligently injured *during the fourth month of pregnancy*).

Following *Roe* (and before *Dobbs*), a pregnant woman could assert the "defense of others" on behalf of her unborn baby as a defense to a homicide charge. *People v. Kurr*, 654 N.W.2d 651, 654 (Mich. Ct. App. 2002) (reversing the decision denying a "defense of others" instruction for a pregnant woman on trial for killing her boyfriend in defense of her unborn babies and noting that "fetuses are worthy of protection as living entities"); *see also People v. Ambrose*, 895 N.W.2d 198, 200 (Mich. Ct. App. 2016) ("[W]e respect the right of a fetus to calm and peaceful environmental circumstances without threat of harm to them.") (quoting trial court); *Bierkle v. Umble (In re Estate of Koehler)*, 888 N.W.2d 432, 436 (Mich. Ct. App. 2016) ("Posthumous children enjoy a right to intestate inheritance in Michigan if they were 'in gestation' at the time of the father's death and lived for 120 hours or more after birth.").

The Michigan Supreme Court in *O'Neill v. Morse*, provided a rational and reasonable explanation for why the unborn possess legal rights as members of the *human* race:

> If the mother can die and the fetus live, or the fetus die and the mother live, how can it be said that there is only one life?
>
> If tortious conduct can injure one and not the other, how can it be said that there is not a duty owing to each?
>
> The phenomenon of birth is not the beginning of life; it is merely a change in the form of life. The principal feature of that change is the fact of respiration. But the law does not regard the incidence of respiration as the sole determinative of life. Respiration can be artificially induced or mechanically supplied. Life remains.
>
> That the fetus cannot be seen is hardly the measure of life. That it cannot cry or see or remember—can these things control its right to live?
>
> What of the capacity for "independent" life?

> A baby fully born and conceded by all to be "alive" is no more able to survive unaided than the infant *en ventre sa mere*. In fact, the babe in arms is less self-sufficient—more dependent—than his unborn counterpart.
>
> Does he want to eat? He cannot take himself to his mother's breast, or even discover the use of it without her help. He cannot keep himself warm or dry or ward off danger. He lives by the sufferance of others, demanding the means of sustaining his life by the noisy, endearing, obvious fact of his presence.
>
> The demands of the unborn child are no less total, but they are enforced by physical rather than emotional attachments. Ensconced and protected, he takes what he needs without asking. Only the conscious or negligent acts of others can deprive him of sustenance.
>
> The phenomenon of birth is an arbitrary point from which to measure life. True, we reckon age by counting birthdays. The Chinese count from New Years. The choice is arbitrary.
>
> Birth may be natural, where the fetus has commenced the process by chemical changes within himself, and the mother has cooperated; it may be intentional, as in the case of Cesarean section or induced labor; or it may be accidental, as where the child is separated from the mother by trauma.
>
> One need not be alive in order to be born; as the delivery of stillborn babies demonstrates. Neither is it possible for one to be born alive unless he be living prior to the birth.
>
> A fetus having died within its mother's womb is dead; it will not come alive when separated from her. A fetus living within the mother's womb is a living creature; it will not die when separated from her unless the manner, the time or the circumstances of separation constitute a fatal trauma.
>
> The fact of life is not denied.

O'Neill, 188 N.W.2d at 787-88. Indeed, while the *appearance* of human life changes throughout its development (*e.g.,* from an unborn child to a senior citizen), the *essence* never changes. Section 28 is a license to commit homicide, and the victim is afforded no due process whatsoever.

Section 28 eviscerates the rights of the unborn, including the rights of an unborn child that survives an abortion. All of the state's interests (*i.e.*, interests that promote the common good of humanity and that protect the very basic, innate dignity of human life) are eviscerated by § 28.

It cannot be gainsaid (at least not by any rational and just judge, understood in the broadest sense) that the fundamental right to life—a right that is the necessary predicate to all other rights and that is expressly mentioned in the Declaration of Independence, the founding document of our nation—is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). Since § 28 eviscerates *all* legal protections for the unborn, it cannot withstand even rational basis review. *See, e.g., Romer*, 517 U.S. at 633-35.

B. Section 28 Is Unconstitutionally Vague.

Plaintiffs' vagueness challenge is straightforward. Section 28 is internally inconsistent. On one hand, § 28 expressly provides the right to "prenatal" care to "every individual"—that is, to every human being, which includes the preborn—and on the other hand, § 28 strips this individual of the most fundamental right—the right to life—by allowing abortion, which is the opposite of "prenatal care." Accordingly, § 28 creates several untenable dilemmas, forcing medical personnel and others, including Plaintiffs involved in the medical profession, to choose among opposing and impossibly inconsistent courses of action. Because § 28 is internally inconsistent, it violates fundamental principles of due process in violation of the Fourteenth Amendment.

A law "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

Among the most fundamental protections of due process is the principle that no one may be required at peril of life, liberty, or property to speculate as to the meaning of a law. All are entitled to be informed as to what the law commands or forbids. *Lanzetta v. New Jersey*, 306 U.S.

451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."). Section 28 violates this fundamental principle of due process. And a violation of § 28 subjects Plaintiffs (in particular the medical professionals) to civil rights complaints, as well as other adverse actions including loss of employment or loss of business and/or professional licensure. This is particularly problematic when working at or associating with (*e.g.*, having admitting privileges at) a government hospital or working for a government entity/institution.

IX. PLAINTIFFS HAVE ADVANCED A PLAUSIBLE CLAIM FOR RELIEF UNDER THE GUARANTEE CLAUSE.

The U.S. Constitution guarantees that each state will have a republican form of government. Our Founding Fathers knew well that a pure democracy where a simple majority rules will inevitably lead to a tyranny of the majority. In discussing the Guarantee Clause, James Madison emphasized the federal government's obligation to ensure that states maintain a republican form of government: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. . . . *But a right implies a remedy*; and where else could the remedy be deposited, than where it is deposited by the Constitution?" The Federalist No. 43 (James Madison) (emphasis added). This constitutional guarantee is found in Article IV of the Constitution. U.S. Const. art. IV, § 4. It is not expressly set forth as the sole province of the legislative branch (Article I), the executive branch (Article II), or the judiciary (Article III).

While the Guarantee Clause may not always provide the basis for a justiciable claim, Professor Erwin Chemerinsky observed that

> the time is clearly approaching in which the [Supreme] Court may be quite willing to reject the view that cases under the Guarantee Clause should always be dismissed on political questions grounds. . . . [T]he Guarantee Clause should be regarded as a protector of basic individual rights and should not be treated as being solely about the structure of government. Accordingly, judicial interpretation and enforcement is in accord with the preeminent federal judicial mission of protecting individual rights and liberties.

Erwin Chemerinsky, *Cases under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 851 (1994).

In *Phillips v. Snyder*, 836 F.3d 707, 710 (6th Cir. 2016), the plaintiffs, who were voters in areas with emergency managers and local elected officials in those areas, filed suit and argued that by vesting elected officials' powers in appointed individuals, the law (the Local Financial Stability and Choice Act, 2012 Mich. Pub. Acts 436) violated the Constitution's guarantee (Article IV, § 4) of a republican form of government. The court held that this claim was not justiciable. *Phillips*, 836 F.3d at 716-18. However, as the Sixth Circuit further acknowledged:

> The Supreme Court more recently—in a challenge to a federal statute—has *expressed doubt that all Guarantee Clause challenges are not justiciable*, but in doing so did not resolve the issue. *New York v. United States*, 505 U.S. 144, 185 (1992). Even assuming that a challenge based on the Guarantee Clause may be justiciable in some circumstances, we are aware of no case invalidating the structure of *political subdivisions* of states under the Clause. This is not surprising in light of the Supreme Court's repeated indication that states, not federal courts, should determine the structure of political subdivisions within a state. The Court has recognized that "[h]ow power shall be distributed by a state among its governmental organs, is commonly, if not always, a question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

Phillips, 836 F.3d at 717 (emphasis added).

The question of whether a plaintiff may assert a justiciable Guarantee Clause claim has not been definitively resolved by the U.S. Supreme Court. In other words, it is not proper to simply dismiss Plaintiffs' Guarantee Clause claim on justiciability grounds without fully analyzing whether it is or is not justiciable as a matter of fact and law. *See, e.g., New York*, 505 U.S. at 185

(stating that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions") (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guaranty Clause are nonjusticiable.")); *Largess v. Supreme Judicial Court for the State of Mass.*, 373 F.3d 219, 225 (1st Cir. 2004) (per curiam) ("[R]esolving the issue of justiciability in the Guarantee Clause context may also turn on the resolution of the merits of the underlying claim."). Defendants' motion fails to substantively address Plaintiffs' Guarantee Clause claim. Instead, they simply assert, without analysis, that it is nonjusticiable. (Defs.' Br. at 62). Defendants are wrong.

In *Democratic Party of Wisconsin v. Vos*, 966 F.3d 581, 588-89 (7th Cir. 2020), the Seventh Circuit made the following recent and relevant observation:

> We do not interpret *Rucho* [*v. Common Cause*, 139 S. Ct. 2484 (2019)] or any other decision by the Supreme Court as having categorically foreclosed all Guarantee Clause claims as nonjusticiable, even though no such claim has yet survived Supreme Court review. *The district court thus went too far in saying that no Guarantee Clause claim could proceed to adjudication on the merits*. Instead, it should have decided simply whether this particular Guarantee Clause claim is among the rare ones that can survive a motion to dismiss. We conclude that it is not.

Id. (emphasis added).

In 2014, a panel of the Tenth Circuit conducted a thorough analysis of the law in *Kerr v. Hickenlooper*, 744 F.3d 1156, 1173-81 (10th Cir. 2014), *vacated and remanded on other grounds by Hickenlooper v. Kerr*, 576 U.S. 1079 (2015) (*Kerr I*), and concluded that the political question doctrine did not categorically preclude a Guarantee Clause challenge to a state constitutional amendment adopted by popular vote. *See id*. at 1176 ("[W]e reject the proposition that *Luther* and *Pacific States* brand all Guarantee Clause claims as *per se* non-justiciable."). The court reviewed the factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962), to reach its conclusion. *See Kerr*, 744 F.3d at 1173-81. The court's argument is persuasive.

In *Kerr v. Polis*, 20 F.4th 686 (10th Cir. 2021), a subsequent *en banc* panel (*Kerr II*) dismissed the case for failure to state a claim. The three-judge panel's Guarantee Clause decision in *Kerr I* was challenged in a lengthy concurrence written by Circuit Judge Holmes. *See id*. 704-11. In his concurrence, Judge Holmes emphasized the point that Guarantee Clause claims are nonjusticiable for the primary reason that there is a "lack of any judicially manageable standard for resolving" such claims. *Id*. at 709 (stating that "the lack of any judicially manageable standard for resolving this case dooms" the plaintiffs' Guarantee Clause claim). This is a fair criticism. This case, however, *does* present a judicially manageable standard, as we will explain. Indeed, Plaintiffs contend that *this* Guarantee Clause case is "among the rare ones that can survive a motion to dismiss." This case does not raise the issue of whether Michigan's government is non-republican as whole. Rather, this case involves a challenge to a "non-republican *feature*" enacted by popular vote. *See generally* Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U. Colo. L. Rev. 709, 714 (1994) (Chief Justice White "assumed that a state either was republican as a whole, or it would be no proper state at all, and all its acts would be illegal . . . . White's opinion seemed blind to the obvious idea that when a state adopts one non-republican feature, this feature alone might be invalid.").

To be clear, this Guarantee Clause challenge is not a general challenge to Michigan's voter-initiated procedure for amending the state constitution, and this is not a "case invalidating the structure of *political subdivisions* of states." *See Phillips*, 836 F.3d at 717. Rather, this is a challenge to the specific "non-republican feature" passed pursuant to Proposal 3 which nullifies the authority of an entire branch of the state government (legislative branch) to pass laws addressing "reproduction"—an exceedingly broad area that has historically been within its legitimate legislative domain. If by the voter-initiated procedure the Michigan voters passed a

state constitutional amendment that *eliminated* the legislative branch altogether (which, theoretically, it could), is there any question that this constitutional amendment would then eliminate the republican form of government in Michigan that is guaranteed by the U.S. Constitution? Of course it would.

As alleged in the First Amended Complaint:

> A challenge to a provision passed pursuant to the process of amending the Michigan Constitution that *nullifies the legitimate authority of a coordinate branch of government*, such as the removal of the legislative branch altogether or, in the case of Proposal 3 (§ 28), prohibiting it from regulating or governing in a broad area of the law ("reproduction") that has historically been within its legitimate domain is justiciable under the Guarantee Clause. When a state adopts one non-republican feature, this feature alone may be invalid under the Guarantee Clause, as in this case.
>
> Proposal 3, which creates an unprecedented, super-right to "reproductive freedom" that remains immune from legislative action, deprives private citizens, including Plaintiffs, of a republican form of government guaranteed by the United States Constitution.

(FAC ¶¶ 145, 146).

Indeed, even when abortion was a federal constitutional right, the U.S. Supreme Court identified legitimate state interests for regulating abortion (and thus legislating in this area of the law), including, among others, "respect for and preservation of prenatal life at all stages of development . . .; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability." *Dobbs*, 597 U.S. at 301 (internal quotations and citations omitted). Section 28 does not permit the Michigan Legislature to advance <u>*any*</u> of these legitimate interests (including those interests deemed compelling and the least restrictive means for advancing those interests) for regulating abortion as any such interests are subordinate to the newly-created super-right to

"reproductive freedom" and the "autonomous decision-making" of "every individual" to exercise that right.[29] Section 28 similarly prevents the legislature from passing laws to protect women from the harms of abortion, and it prevents the legislature from passing laws to protect children from sexual exploitation, as discussed above. (*See supra* §§ IV, V).

Never in our nation's history has there ever been the creation of a super-right such as this—one that eliminates the legislative branch. *This* Guarantee Clause claim, at the end of the day, "is among the rare ones that can [and should] survive a motion to dismiss."

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion.

Respectfully submitted,

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[29] The abortion industry understands this point. In fact, in a recent lawsuit filed in the Michigan Court of Claims against, *inter alia*, Defendant Nessel in her official capacity as Attorney General, the plaintiff abortion centers are challenging Michigan's informed consent and waiting period laws and laws restricting the performance of abortions to licensed physicians, asserting that § 28 "*explicitly dictates that the State can never advance a compelling state interest* in patient health via means that intrude 'on [an] individual's autonomous decisionmaking.'" (FAC ¶ 137).

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I hereby certify that this brief contains **16,770** words, exclusive of the case caption, cover sheets, any table of contents, any table of authorities, the signature block, attachments, exhibits, and affidavits, and is thus within the word limit (16,800) allowed pursuant to the Court's order granting leave to file excess pages pursuant to Local Civil Rule 7.2(b)(i). (*See* Order, ECF No. 33). The word count was generated by the word processing software used to create this brief: Word for Microsoft Office 365, Version 1904.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2024, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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