STATE OF MICHIGAN
IN THE COURT OF APPEALS

NORTHLAND FAMILY PLANNING CENTER, on behalf of itself, its staff, its clinicians, and its patients; NORTHLAND FAMILY PLANNING CENTER INC. EAST, on behalf of itself, its staff, its clinicians, and its patients; NORTHLAND FAMILY PLANNING CENTER INC. WEST, on behalf of itself, its staff, its clinicians, and its patients; and MEDICAL STUDENTS FOR CHOICE, on behalf of itself, its members, and its members' patients,

Plaintiffs-Appellees,

v.

DANA NESSEL, Attorney General of the State of Michigan; MARLON I. BROWN, Acting Director of Michigan Licensing and Regulatory Affairs; and ELIZABETH HERTEL, Director of the Michigan Department of Health and Human Services, each in their official capacities, as well as their employees, agents, and successors,

Defendants-Appellees,

The PEOPLE OF THE STATE OF MICHIGAN,

Defendant-Appellant.
_____/

Court of Appeals No. 371638

Court of Claims
No. 24-000011-MM

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

ATTORNEY GENERAL DANA NESSEL'S BRIEF IN OPPOSITION TO THE PEOPLE OF THE STATE OF MICHIGAN'S EXPEDITED APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

COUNTER-STATEMENT OF JURISDICTION

The Attorney General does not contest that this Court has jurisdiction over the People of the State of Michigan's timely application for leave to appeal under MCR 7.203(B)(1), MCR 7.205(B)(1), and MCL 600.309.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Article 1, § 28 of the Michigan Constitution guarantees the right to reproductive freedom and prohibits the State from denying, burdening, or infringing on that right absent a compelling state interest justified by the least restrictive means. Based on the record evidence, the Challenged Laws do not overcome the compelling interest test and are instead repugnant to the Michigan Constitution and the goals of healthcare. Should this Court grant leave to appeal?

   The People's answer: Yes.

   Attorney General's answer: No.

   Plaintiffs' answer: No.

   Court of Claims' answer: Did not answer.

INTRODUCTION

In 2022, the U.S. Supreme Court overturned nearly 50 years of federal caselaw ensuring the right to an abortion. Despite this significant incursion into women's reproductive autonomy, Michiganders quickly worked to protect reproductive rights in Michigan. Indeed, even before *Dobbs v Jackson Women's Health Organization*, Michiganders had begun the ballot initiative process in an effort to enshrine the right to reproductive freedom into Michigan's Constitution. That process was successful—voters' resounding choice was to explicitly include the right to reproductive freedom in Article I, § 28 of the Michigan Constitution.

The three statutory provisions at issue in this case are at odds with this constitutional guarantee. Specifically, the 24-Hour Delay, Mandatory Counseling, and Provider Ban (collectively, the Challenged Laws), do not satisfy § 28 because they are not "justified by a compelling state interest achieved by the least restrictive means." Const 1963, art 1, § 28(1). Recognizing this, none of the named Defendants opposed Plaintiffs' request to preliminary enjoin the Challenged Laws. As a result, the People of the State of Michigan intervened to defend the laws.

One of the People's primary arguments below and on appeal is that § 28's compelling interest test codifies federal laws on abortion pre-*Dobbs* and that, under this test, the Challenged Laws survive. The Court of Claims rejected this argument and found that a proper reading of § 28 shows that the laws are likely unconstitutional. As a result, the court granted the preliminary injunction in part, ordering that the majority of MCL 333.17015 cannot be enforced or implemented. This holding should be affirmed for two primary reasons.

First, the People are mistaken that the compelling interest test set forth in § 28(1) codifies pre-*Dobbs* federal abortion caselaw. Under that caselaw, abortion regulations could pass muster so long as there was no undue (i.e., "substantial") burden on the right to decide whether to terminate a pregnancy. *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833, 877 (1992). Pre-*Dobbs* caselaw also recognized the State's interest in life from the outset of a pregnancy when assessing abortion regulations pre-viability. *Id.* at 843, 872. Section 28's compelling interest test, on the other hand, does not permit burdens on the right to reproductive freedom merely because they are not "undue" or "substantial." Nor does it account for a state interest "in potential life" pre-viability. Rather, the State's interest must be *entirely* focused on health of the pregnant person. Consequently, the Court of Claims correctly held that pre-*Dobbs* caselaw has no place in § 28 jurisprudence.

Second, Plaintiffs showed that the Challenged Laws are likely unconstitutional and that the other preliminary injunction factors are satisfied. Based on the record evidence, the laws do not offer any health benefits and result in increased expenses, travel difficulties, and health risks. They are therefore repugnant to the Michigan Constitution and the goals of healthcare.

For these reasons, the Court of Claims did not abuse its discretion in granting Plaintiffs' motion for preliminary injunction or err in its interpretation of Article 1, § 28.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

For purposes of this answer, the Attorney General adopts and incorporates by reference Plaintiffs' Counter-Statement of Facts as set forth in their Answer in Opposition to Intervening Defendant's July 12, 2024 Expedited Application for Leave to Appeal. (Pls' Ans, pp 3–13.)

STANDARDS OF REVIEW

Courts must consider the following factors, for which the moving party has the burden of proof, when determining to issue a preliminary injunction:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Hammel v Speaker of House of Representative*, 297 Mich App 641, 648 (2012) (citation omitted).]

Following the issuance of a preliminary injunction, this Court reviews for an abuse of discretion. *Oshtemo Charter Twp v Kalamazoo Co Road Comm*, 288 Mich App 296, 302 (2010). "An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12 (2007). "Questions of constitutional interpretation . . . are questions of law reviewed de novo[.]" *Dep't of Transp v Tomkins*, 481 Mich 184, 190 (2008).

ARGUMENT

I. The Court of Claims did not err when it determined that the Challenged Laws are likely unconstitutional.

A. The framework set forth in Article I, § 28 does not closely track the framework set forth in federal abortion caselaw pre-*Dobbs*.

In arguing that the challenged laws pass constitutional muster, the People assert that § 28 "primarily recreated the same controlling legal principles in federal law before *Dobbs*." (People's Br, p 28.) For this reason, the People argue, any analysis of the challenged laws should "track closely" the federal pre-*Dobbs* legal framework. (*Id.* at 29–30.) The Court of Claims correctly rejected this argument.

1. Pre-*Dobbs* federal abortion framework

Beginning with *Roe v Wade*, the U.S. Supreme Court in 1973 announced that abortion was a constitutional right protected by the Fourteenth Amendment. 410 U.S. 113, 153 (1973) ("Th[e] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). That right, however, was guaranteed only in the first trimester. *Id.* at 163. Highlighting the two "separate and distinct" state interests—"preserving and protecting the health of the pregnant woman," on the one hand, and "protecting the potentiality of human life[,]" on the other—the Court reasoned that "[e]ach grows in substantiality as the woman approaches term and, at a point during pregnant, each becomes 'compelling.' " *Id.* at 162–63.

The Court then set forth a trimester framework in which a woman and her doctor were left to decide to have an abortion in the first trimester, *id.* at 163, a

State could regulate but not ban abortions in the second trimester, *id.* (holding that the regulation must "reasonably relate[ ] to the preservation and protection of maternal health"), and, in the third trimester, "[i]f the State [was] interested in protecting fetal life . . . , it [could] go so far as to proscribe abortion" altogether, except when "necessary to preserve the life or health of the mother[,]" *id.* at 163–64.

Nearly 20 years later, in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833 (1992), the Supreme Court undercut this framework. While the Court reaffirmed "a constitutional liberty of the woman to have some freedom to terminate her pregnancy[,]" it also emphasized the State's interest in protecting fetal development:

> The woman's liberty is not so unlimited, however, that *from the outset* the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted. [*Id.* at 869 (emphasis added).]

Given the State's "substantial interest in potential life[,]" the Court cast aside *Roe*'s trimester framework for an undue burden analysis. *Id.* at 876. Under this new framework, a law restricting abortion stood so long as it did not "ha[ve] the purpose of effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*; see also *id.* (explaining that unless it presented a substantial obstacle on a women's right to choose, "a state measure designed to persuade her to choose childbirth over abortion [would] be upheld if reasonably related to that goal"). This analysis gave significant weight to the "promoti[on of] fetal life[,]" with the Court noting that "[e]ven in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know

that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term[.]" *Id.* at 872.

Fifteen years later the U.S. Supreme Court further chipped away at abortion rights in *Gonzales v Carhart*, 550 US 124, 163 (2007), again focusing on "the State's interest in promoting respect for human life at all stages in the pregnancy." In *Gonzales*, the Court upheld the federal Partial-Birth Abortion Ban Act of 2003, which prohibited a method of surgical abortion (intact dilation and evacuation) used "both previability and postviability" with no exception to protect a woman's health.[1] *Id.* at 156, 161. While the Court claimed to evaluate whether the ban was an undue burden, it went on to say that a law regulating abortion needed only a "rational basis" to pass muster. *Id.* at 167 ("Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."); see also *id.* at 187 ("Instead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act[.]") (Ginsburg, J., dissenting). Emphasizing the government's "interest in protecting the life of the fetus," the purported "unexceptionable" conclusion that "some women come to regret their choice to abort the infant life they once created and sustained," and the "medical

[1] *Gonzales* departed from an earlier holding, *Stenberg v Carhart*, 530 US 914, 937–938 (2000), in which the Court invalidated a Nebraska law similar to the federal ban in large part because it lacked an exception for the preservation of health of the pregnant woman.

disagreement [on] whether the Act's prohibition would ever impose significant health risks on women," the Court upheld the ban.[2] *Id.* at 158–59, 162.

Two salient points arise from these cases. First, federal caselaw pre-*Dobbs*, while maintaining the right to an abortion, weighed that right against the State's competing interest "in potential life[,]" even pre-viability. *Casey*, 505 US at 878; *Gonzales*, 550 US at 146. Second, far from subjecting regulations on abortion to strict scrutiny, federal caselaw pre-*Dobbs* retreated from a trimester approach to heightened scrutiny and then to seemingly rational basis review. Section 28 of the Michigan Constitution significantly departs from these features as set forth below.

2. Article I, § 28 framework

In January 2022, six months prior to *Dobbs*' release, a ballot committee initiated a petition drive in an effort to amend the Michigan Constitution to guarantee the right to reproductive freedom. (See Ballot Proposal 3 of 2022.) On November 8, 2022, Michigan voters passed Proposal 3, with 56.7% voting in support. As a result, the Michigan Constitution was amended to add § 28 to article I. 1963 Const, art 1, § 28.

[2] Cases after *Gonzales* but pre-*Dobbs*, however, reversed restrictions on abortion. See, e.g., *Whole Woman's Health v Hellerstedt*, 579 US 582, 609–20 (2016) (striking down Louisiana's requirement that a doctor who performs an abortion hold admitting privileges at a hospital within 30 miles from the location at which the abortion is performed and that "abortion facility[ies]" meet standards for surgical centers); *June Med Servs LLC v Russo*, 591 US 299, 342 (2020) (striking down similar Louisiana admitting privileges law).

This provision, which establishes a self-executing constitutional right to reproductive freedom, provides in part as follows:

> Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including but not limited to prenatal care, childbirth, postpartum care, contraception, sterilization, abortion care, miscarriage management, and infertility care. [*Id.*, § 28(1).]

The provision also provides the standards by which regulations on abortion (and other reproductive rights) are to be assessed.

Pre-viability

Prior to fetal viability,[3] "[a]n individual's right to reproductive freedom shall not be denied, burdened, nor infringed upon unless justified by a compelling state interest achieved by the least restrictive means." Const 1963, art 1, § 28(1). In other words, regulations that deny, burden, or infringe on the right to an abortion pre-viability must satisfy strict scrutiny. See *McCullen v Coakley*, 573 US 464, 478 (2014) (explaining that strict scrutiny requires "the least restrictive means of achieving a compelling state interest") (citation omitted); *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 335 (2003) (same) (citations omitted). But § 28 leaves no room for doubt about what satisfies the compelling interest test—"[a] state interest is 'compelling' *only if* it is" (1) "for the limited

[3] Section 28(4) defines "fetal viability" as "the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures."

purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine," and (2) "does not infringe on that individual's autonomous decision-making." *Id.*, § 28(4) (emphasis added). This standard departs from the pre-*Dobbs* legal framework in at least two significant ways.

First, contrary to the People's assertion (People's Br, pp 28–30), this standard is not akin to *Casey*'s undue burden test. The latter test is a less stringent standard of review, which prohibited abortion regulations that "ha[d] the purpose or effect of placing a *substantial* obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 US at 877 (emphasis added). In other words, under this relaxed standard of review "[n]ot all burdens on the right to decide whether to terminate a pregnancy will be undue." *Id.* at 876. Nowhere in § 28's pre-viability provision does it permit burdens on the right to reproductive freedom that are not "substantial" or "undue." Const 1963, art 1, § 28(1). Rather, it prohibits any denial, burden, or infringement unless the provision's compelling interest test is satisfied. *Casey*'s undue burden test is thus inapplicable, which the Court of Claims properly recognized. (Op & Order, pp 35–36) (reiterating § 28's language and holding that " '[u]ndue' is not part of the constitutional test").

Second, and relatedly, while § 28(1) sets forth differing standards of review for pre- and post-viability regulations on abortion care, § 28(1)'s compelling interest test does not in any way account for a state interest "in potential life" like the pre-*Dobbs* legal framework. Rather, the State's interest in a pre-viability abortion

regulation must be *entirely* focused on health of the pregnant person—a significant departure from *Casey* and *Gonzales*, which recognized the State's interest in life pre-viability. See *Casey*, 505 US at 843 ("[T]he State has a legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus . . . ."); see *id.* at 872 ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . ."); *Gonzales*, 550 US at 157 ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman."). In this regard, the People are incorrect § 28 "matches" pre-*Dobbs* caselaw.

Post-viability

For regulations on abortion care after fetal viability, § 28 sets forth a standard different from the compelling interest test. Under this category, "the state may regulate the provision of abortion care . . . provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual." *Id.*, § 28(1). This again differs from pre-*Dobbs* abortion cases. Indeed, while the People argue that this post-viability provision tracks the pre-*Dobbs* framework, particularly *Casey*, the People fail to account for the fact that *Gonzales* permitting a ban on an abortion procedure where the ban did not contain a health exception. Thus, while § 28(1)

expressly requires a health exception on post-viability abortion regulations, later pre-*Dobbs* federal caselaw did not draw this important line.

In summary, neither the pre- nor post-viability framework contained in § 28 mirrors federal abortion caselaw pre-*Dobbs*. The People's argument to the contrary is thus unpersuasive.

B. Under the framework set forth in Article 1, § 28, the Court of Claims did not abuse its discretion in determining that the challenged laws are likely unconstitutional.

Below, the Attorney General did not oppose entry of the preliminary injunction. As stated in her response to Plaintiffs' motion:

> The Attorney General agrees that—given the evidence cited in Plaintiffs' verified complaint and motion for a preliminary injunction (see, e.g., Verified Compl, pp 25–39; Mot for PI, pp 2–8)—Plaintiffs are likely to succeed on the merits of their argument that the 24-Hour Delay, Mandatory Biased Counseling, and Provider Ban provisions of the Challenged Laws do not pass muster under the "compelling interest" test of Article 1, § 28, of Michigan's 1963 Constitution. The Attorney General also agrees that the other preliminary injunction factors are satisfied in this context. [AG Resp, p 3.]

The Attorney General took issue in both her response and at oral argument, however, with the breadth of Plaintiffs' preliminary injunction request to the extent it sought invalidation of MCL 333.17015 and MCL 333.17015a as a *whole* because those statutes contain provisions aimed at confidentiality and domestic violence prevention—specifically, MCL 333.17015(11)(i)(*i*)–(*iv*) and MCL 333.17015a(2)–(5)—which are severable from the Challenged Laws. See MCL 333.17015(17) (explaining that the invalidity of a portion of the statute "does not affect the remaining portions or applications of the act that can be given effect without the

invalid portion or application, if those remaining portions are not determined by the court to be inoperable"). The Court of Claims largely agreed, holding that (1) MCL 333.17015(11)(i) was severable because it implemented MCL 333.17015a, (Op & Order, pp 48–49), and (2) MCL 333.17015a did not, "on the record presented, likely burden or infringe upon a patient's right to make and effectuate decisions regarding abortion care and, as a result, is likely not unconstitutional[,]" (*id.* at 49–50).

The Attorney General's position remains the same on appeal. As explained in Plaintiffs' answer in opposition to the People's application for leave to appeal (Pls' Ans, pp 21–34), they met their burden in demonstrating the Challenged Laws are likely unconstitutional on the ground that they do not meet § 28's compelling interest test. Plaintiffs likewise met their burden of showing the remaining preliminary injunction elements weighed in their favor. (*Id.* at 34–36.) For the reasons articulated in those portions of Plaintiffs' answer in opposition, the Attorney General agrees that the Court of Claims' entry of the preliminary injunction was not an abuse of discretion.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Court of Claims did not err in its interpretation of Article 1, § 28 or abuse its discretion in granting Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

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WORD COUNT STATEMENT

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