STATE OF MICHIGAN
COURT OF CLAIMS

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,

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,

The PEOPLE OF THE STATE OF MICHIGAN,

Intervening Defendant.

No. 24-000011-MM

HON. SIMA G. PATEL

DEFENDANT ATTORNEY GENERAL'S 4/4/25 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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DEFENDANT ATTORNEY GENERAL DANA NESSEL'S 4/4/25 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to this Court's March 13, 2025 Order, Defendant Attorney General Dana Nessel, through counsel, submits the following proposed findings of fact and conclusions of law:

INTRODUCTION

By enshrining a fundamental right to reproductive freedom in its Constitution and repealing archaic laws impeding access to abortion, Michigan has spoken: Reproductive healthcare—in all forms—is essential. While these steps are significant and established Michigan as a safe haven for those seeking to access reproductive healthcare services, barriers still remain in this State.

Certain of those barriers—the requirements for undergoing an abortion contained within MCL 333.17015 and MCL 333.17015a (the "Challenged Laws")—are the subject of this lawsuit. Under MCL 333.17015, only a physician may perform an abortion, and a patient may not undergo an abortion unless she waits at least 24 hours (but not more than 14 days) after the receipt of certain mandatory informed consent information. And under MCL 333.17015a, patients and providers must comply with various coercion screening and notice requirements.

The Attorney General believes that Plaintiffs have carried their burden of establishing that these two statutes are unconstitutional under Article 1, Section 28 of the Michigan Constitution, and anticipates that Plaintiffs will outline more than sufficient proposed findings of fact in support. However, to assist the Court in reaching its decision, the Attorney General writes to outline the non-discrimination provision of § 28(2) and how the Challenged Laws violate this provision.

PROPOSED FINDINGS OF FACT

1. Undergoing an abortion is safer than carrying a pregnancy to term and childbirth.

Record citations: (2/13/25 Afternoon Tr 55:9–24, 57:13–24, 58:18–21, 59:1–6, 60:6–15, 88:2–7, 88:17–89:7, 131:4–6; 2/14/25 Tr 31:19–32:19; 2/18/25 Tr 54:18–24.)

2. The medications and procedures utilized in performing an abortion are identical to those utilized for miscarriage management.

Record citations: (2/13/25 Afternoon Tr 51:1–13, 63:10–14; 2/14/25 Tr 27:18–22; 2/18/25 Tr 54:15–17.)

3. Unlike individuals seeking an abortion, individuals seeking to continue a pregnancy may receive prenatal care and care associated with childbirth from an advanced practice clinician. Unlike individuals seeking an abortion, individuals undergoing miscarriage management may receive care from an advanced practice clinician.

Record citations: (2/13/25 Afternoon Tr 110:21–111:8, 111:13–112:24; 2/14/25 Tr 27:18–22, 28:5–10, 29:3–17, 31:14–18, 32:20–23, 35:18–23; 2/18/25 Tr 54:12–14.)

4. Unlike individuals seeking an abortion, individuals seeking to continue a pregnancy are not required to wait 24 hours before receiving prenatal care. Unlike individuals seeking an abortion, individuals seeking to undergo miscarriage management are not required to wait 24 hours before receiving such care.

Record citations: (2/13/25 Afternoon Tr 62:24–63:9, 80:11–13; 2/18/25 Tr 49:14–18, 226:1–11.)

5. Unlike individuals seeking an abortion, individuals seeking to continue a pregnancy are not required to review statutorily mandated informed consent

materials prior to receiving prenatal care or care associated with childbirth. Unlike individuals seeking an abortion, individuals seeking to undergo miscarriage management are not required to review statutorily mandated informed consent materials prior to receiving such care.

> **Record citations:** (2/13/25 Afternoon Tr 18:21–19:1, 28:11–15, 62:24–63:9, 80:11–13, 168:8–15, 170:12–14; 2/14/25 Tr 153:7–17; 2/18/25 Tr 31:22–32:18, 61:25–62:24, 80:1–4, 84:18–85:4, 86:15–19, 87:6–16, 103:22–104:6, 105:7–10, 105:19–23, 174:13–16, 209:14–20, 212:17–213:5, 216:4–9, 217:6–10.)

6. Unlike individuals seeking an abortion, individuals seeking to continue a pregnancy are not required to undergo a statutorily mandated coercion screen to receive prenatal care or medical care associated with childbirth. Unlike individuals seeking an abortion, individuals seeking to undergo miscarriage management are not required to undergo a statutorily mandated coercion screen to receive such care.

> **Record citations:** (2/13/25 Morning Tr 56:24–57:10, 59:21–60:6; 2/13/25 Afternoon Tr 20:20–21:5, 103:11–17, 164:13–165:15; 2/18/25 Tr 44:8–15, 176:2–5.)

7. Treating an individual seeking an abortion differently than an individual seeking to continue a pregnancy or an individual undergoing miscarriage management does not protect the health of the individual seeking care.

> **Record citations:** (2/13/25 Morning Tr 37:13–15, 55:18–24, 62:24–63:3, 72:7–10, 73:8–18, 81:8–21; 2/13/25 Afternoon Tr 61:5–25, 75:12–77:25, 78:20–80:2, 93:11–94:8, 95:3–10, 101:25–102:2, 114:2–11, 115:1–4; 2/14/25 Tr 19:10–24, 27:15–32:23, 34:8–35:14, 35:24–36:9, 36:16–18, 73:25–74:1, 77:1–22, 95:22–96:15, 97:3–10, 103:5–10, 104:16–25, 105:17–25, 106:9–13, 107:10–24, 111:12–112:12, 119:20–25, 121:6–122:22, 161:13–163:3; 2/18/25 Tr 31:18–20, 44:16–23, 46:2–6, 47:2–22, 48:2–49:13, 50:18–51:2, 54:25–55:23, 57:7–58:8, 62:25–63:8, 85:16–22, 180:24–181:14, 186:17–187:3.)

8. Treating an individual seeking an abortion differently than an individual seeking to continue a pregnancy or an individual undergoing miscarriage

management is not consistent with accepted clinical standards of practice and evidence-based medicine.

Record citations: (2/13/25 Morning Tr 37:16–18, 51:3–17, 63:4–7; 2/13/25 Afternoon Tr 20:20–21:5, 26:12–25, 75:20–77:25, 80:3–22, 93:5–94:16, 95:3–10, 102:3–8, 109:2–12, 115:5–13; 2/14/25 Tr 36:19–37:17, 106:22–107:9, 113:20–114:6, 120:1–3, 122:5–11; 2/18/25 Tr 27:11–21, 44:24–45:6, 47:2–22, 62:25–63:2, 180:24–181:14, 199:21–201:2, 208:19–210:7, 210:13–211:10, 212:6–213:19, 214:4–20, 215:3–216:3, 216:19–217:5, 229:15–230:5.)

9. Other, less intrusive methods are available to the State to achieve any interest that it alleges may be advanced under the Challenged Laws.

Record citations: (2/18/25 Tr 61:4–24, 100:4–102:6.)

PROPOSED CONCLUSIONS OF LAW

Faced with one of the first cases addressing the newly minted right to reproductive freedom contained within Article 1, Section 28 of the Michigan Constitution, this Court has the unique opportunity to define the contours of various aspects of the provision. One of those aspects—the non-discrimination provision of § 28(2)—has been the subject of contention between Plaintiffs and Intervening Defendant throughout the pendency of this litigation. Intervening Defendant argues in favor of a three-prong test under § 28(2), requiring a showing of (1) disparate impact; (2) unreasonableness; and (3) discriminatory intent. (See, e.g., Intervenor's Br Supp MSD, p 36.) On the other hand, Plaintiffs argue that § 28(2) requires a showing of disparate impact only. (See, e.g., Plaintiffs' Resp to Intervenor's MSD, p 12.)

Notably, this Court need not resolve this dispute. Nor must it reinvent the wheel. Instead, under longstanding equal-protection principles—which should inform this Court's interpretation of § 28(2)—the Challenged Laws are facially discriminatory and do not satisfy the level of scrutiny applicable under § 28(2).

I. Traditional equal-protection principles should apply to § 28(2).

Article 1, § 28 of the Michigan Constitution establishes a "fundamental right to reproductive freedom" for "[e]very individual." Const 1963, art 1, § 28(1). That fundamental right "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.* When taking action to "protect[ ] or enforce[ ]" this fundamental right, the State is prohibited from discriminating. *Id.* at § 28(2).

This case presents an issue of first impression as to the scope of discrimination prohibited under § 28(2). However, discrimination—and, in particular, discrimination in the context of a fundamental constitutional right—is not a new concept under the law. Indeed, decades of case law under the Michigan Equal Protection Clause (and over a century of case law under its federal counterpart)[1] should serve as a starting point for this Court's analysis.

A. Section 28(2) applies to legislative classifications that, on their face, implicate the fundamental right to reproductive freedom.

In relevant part, the Michigan equal protection clause provides: "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." Const 1963, art 1, § 2.[2] Like § 28(2), this provision prohibits the State from discriminating against

[1] Michigan's equal protection guarantee is often interpreted coextensively with its federal counterpart. *Harvey v Michigan*, 469 Mich 1, 11 (2003). As such, case law interpreting the federal Equal Protection Clause is instructive in defining the contours of unconstitutional discrimination.

[2] The federal Equal Protection Clause similarly provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV.

individuals who choose to exercise their constitutional rights.[3] The parallels between the language of § 28(2) and the language of the equal protection clause—including the use of a form of the word "discriminate" in each—support the application of equal-protection principles to Plaintiffs' claims of discrimination under § 28(2).

"Discrimination, in constitutional terms, refers to baseless and irrational line drawing." *Dep't of Civil Rights v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 189 (1986). Under this definition, courts have interpreted the equal protection clause as "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 439 (1985). In other words, the State may "not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Heidelberg Bldg, LLC v Dep't of Treasury*, 270 Mich App 12, 17 (2006), citing *Miller v Johnson,* 515 US 900, 919 (1995); *El Souri v Dep't of Social Servs,* 429 Mich 203, 207 (1987).

Ordinarily, a plaintiff asserting an equal protection challenge must present evidence of "intentional or purposeful discrimination." *Harville v State Plumbing & Heating Inc*, 218 Mich App 302, 318–319 (1996). And, while disparate impact "may constitute evidence that demonstrates an intent to discriminate," disparate impact

[3] It may appear, at first glance, that § 2 applies to discrimination in the exercise of the fundamental right to reproductive freedom, which would render § 28(2) redundant. However, as explained in Section I.B., *infra*, by its terms, § 28 requires the application of a narrower form of scrutiny than § 2, eliminating any such redundancy.

alone "is insufficient to demonstrate" an equal protection violation. *Id.* at 319. However, "[a] showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification." *Wayte v United States*, 470 US 598, 608 n 10 (1985). See also *Village of Willowbrook v Olech,* 528 US 562, 564 (2000). In short, a facially discriminatory law implicates the equal protection clause, even absent further evidence of discriminatory intent.

So too in the context of § 28. Laws that facially discriminate in the "protection or enforcement" of the fundamental right to reproductive freedom trigger the non-discrimination clause of § 28(2). Additional evidence of animus is unnecessary.

B. Section 28 requires the application of a narrowed form of strict scrutiny.

If a law implicates the Equal Protection Clause, a court then determines the level of scrutiny under which it must evaluate the law to determine its constitutionality. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 US at 440. However, where a classification is "based on 'suspect' factors such as race, national origin, ethnicity, or a 'fundamental right[,]' " a heightened form of scrutiny, strict scrutiny, applies. *Phillips v Mirac, Inc*, 470 Mich 415, 432 (2004). "A statute reviewed under this strict standard will be upheld only if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling governmental interest."

Doe v Dep't of Social Servs, 439 Mich 650, 662 (1992). See also *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 319 (2010) ("[T]he government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest.").

The same test should apply to claims under § 28(2). That is, a law that classifies based on the exercise of the fundamental right to reproductive freedom must satisfy strict scrutiny. Under that test, the State must demonstrate that the classification within the law is narrowly tailored to satisfy a compelling governmental interest.

At first blush, this test may appear redundant of § 2, rendering § 28(2) superfluous. But notably, in the context of the fundamental right to reproductive freedom, the State may advance only a limited compelling interest: Under § 28(4)—which provides definitions that must be used in analyzing all claims under § 28, see Const 1963, art 1, § 28(4) (outlining definitions "[f]or the purposes of this section")—"[a] state interest is 'compelling' only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual's autonomous decision-making." *Id.* Thus, § 28(2)'s prohibition against classifications premised on the fundamental right to reproductive freedom is distinct from § 2's prohibition on classifications that are premised on other fundamental constitutional rights, applying a narrower form of strict scrutiny.

II. The Challenged Laws are unconstitutional under § 28(2).

Applying these principles here, the Challenged Laws unconstitutionally discriminate against those seeking to exercise their fundamental constitutional right to reproductive freedom in violation of § 28(2).

A. The Challenged Laws are facially discriminatory.

On their face, the Challenged Laws draw a classification based on the exercise of the fundamental right to reproductive freedom; namely, the "right to make and effectuate decisions about . . . abortion care." Const 1963, art 1, § 28(1).

As evidenced in a variety of provisions, some of which are listed below, MCL 333.17015 applies only when a pregnant individual seeks an abortion:

- "[A] physician shall not *perform an abortion*. . . ." MCL 333.17015(1) (emphasis added).
- "[A] physician . . . shall do all of the following not less than 24 hours before that physician *performs an abortion upon a patient who is pregnant*. . . ." MCL 333.17015(3) (emphasis added).
- "If the attending physician, utilizing the physician's experience, judgment, and professional competence, determines that a medical emergency exists and necessitates *performance of an abortion*. . . ." MCL 333.17015(10) (emphasis added).

The same goes for the coercion screening provisions of MCL 333.17015a:

- "At the time a patient first presents at . . . [*a*] *facility or clinic in which abortions are performed for the purpose of obtaining an abortion* . . . the physician . . . shall orally screen the patient for *coercion to abort*. . . ." MCL 333.17015a(1) (emphases added).
- "A . . . *facility or clinic in which abortions are performed* shall post in a conspicuous place in an area of its facility that is accessible to patients, employees, and visitors" a notice developed by the Michigan Department of Health and Human Services that it is "illegal under Michigan law to

coerce an individual to have an abortion." MCL 333.17015a(5) (emphasis added); MCL 333.17015(11)(i)(*i*)(A) (emphasis added).

Notably, those similarly situated (i.e., those pregnant patients who seek to continue their pregnancy to term) are not subject to the same restrictions—either as a result of the Challenged Laws or under any other statutory provision. Consequently, the Challenged Laws facially classify on the basis of the exercise of the fundamental right to reproductive freedom. Further evidence of discriminatory intent is not required.[4] *Wayte*, 470 US at 608 n 10.

B. The Challenged Laws do not pass muster under § 28(2)'s strict scrutiny test.

Because they facially discriminate on the basis of the exercise of the fundamental right to reproductive freedom, the burden shifts to the State to demonstrate that the Challenged Laws satisfy the narrow version of strict scrutiny applicable under § 28(2). Under this test, as outlined above, Intervening Defendant must demonstrate that the classification is narrowly tailored to satisfy the particular compelling governmental interest of "protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine." *Doe*, 439 Mich at 662; Const 1963, art 1, § 28(4). Intervening Defendant has not done so here.

[4] Here, however, Plaintiffs did present evidence of discriminatory intent, further demonstrating the discriminatory nature of the Challenged Laws. (2/13/25 Morning Tr 27:1–24 ("My understanding was [that the Challenged Laws were passed] to make it more difficult for women to get abortions [and to] to delay their abortion. . . . [The Challenged Laws] would deter women that when they read the [the mandatory informed consent] materials, they would change their mind.").)

At most, Intervening Defendant has offered evidence that the Challenged Laws were intended to protect those seeking to terminate their pregnancies.[5] But, setting aside both the credibility of that evidence and whether the Challenged Laws truly do provide any such protection, this evidence does not explain why the *classification* drawn within the Challenged Laws advances that interest. Stated differently, Intervening Defendant does not justify the differential treatment of those seeking to terminate their pregnancies and those seeking to carry their pregnancy to term.

In fact, Plaintiffs presented more than sufficient evidence from which this Court could draw the opposite conclusion. Plaintiffs showed that there is no reason to treat pregnant patients seeking an abortion differently than those who seek to carry their pregnancy to term or those undergoing miscarriage management. (See, e.g., Proposed Findings of Fact, *supra*, ¶ 7.) They also demonstrated that laws requiring such differential treatment—like the Challenged Laws here—are not "consistent with accepted clinical standards of practice and evidence-based medicine." (See, e.g., Proposed Findings of Fact, *supra*, ¶ 8); Const 1963, art 1, § 28(4).

In addition to its failure to meet the compelling interest portion of the strict scrutiny test applicable under § 28(2), Intervening Defendant has not demonstrated narrow tailoring. To the contrary, Plaintiffs elicited evidence that the State has

[5] (E.g., 2/19/25 Tr 41:20–42:6, 70:15–22, 86:24–87:5, 89:9–18, 90:22–91:17, 101:12–22, 114:2–17, 120:13–121:14, 125:7–9, 163:14–18; 2/20/25 Tr 59:23–60:19, 78:21–80:21, 81:2–87:13, 88:9–89:7.)

numerous, less restrictive options to attempt to protect pregnant individuals seeking to terminate their pregnancies, including non-mandatory informational websites or public health media campaigns utilizing billboards, radio and television advertisements, and social media. (See, e.g., Proposed Findings of Fact, *supra*, ¶ 9.)

In sum, the Challenged Laws, which single out pregnant individuals seeking to exercise the right to make and effectuate the decision to undergo an abortion, facially discriminate on the basis of the exercise of the fundamental right to reproductive freedom and are not narrowly tailored to serve a compelling interest (as such interest is defined in § 28(4)). Consequently, the Challenged Laws do not satisfy strict scrutiny under § 28(2).

CONCLUSION

For these reasons, Plaintiffs met their burden of demonstrating that MCL 333.17015 and MCL 333.17015a violate Article 1, Section 28(2) of the Michigan Constitution. Plaintiffs therefore are entitled to declaratory and injunctive relief.

Respectfully submitted,

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