STATE OF MICHIGAN
IN THE SUPREME COURT

In re EXECUTIVE MESSAGE OF THE GOVERNOR REQUESTING THE AUTHORIZATION OF A CERTIFIED QUESTION.

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiffs,

v.

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, DAVID S. LEYTON, Prosecuting Attorney of Genesee County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants,
_____/

Supreme Court No. 164256

AMICI CURIAE BRIEF OF NORTHLAND FAMILY PLANNING, MOTHERING JUSTICE, MEDICAL STUDENTS FOR CHOICE, AND THE CENTER FOR BLACK MATERNAL HEALTH AND REPRODUCTIVE JUSTICE IN SUPPORT OF GOVERNOR'S EXECUTIVE BRIEF

Oakland Circuit Court
No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

This case involves a claim that state governmental action is invalid.

David A. Moran (P45353)
(734) 615-5419
Morand@umich.edu
701 S. State Street
Ann Arbor, MI 48109

Genevieve Scott, NY Bar #4922811
(917) 637-3605
gscott@reprorights.org
Kulsoom Ijaz, NY Bar #5420682
(917) 637-3658
kijaz@reprorights.org
Astrid Ackerman, NY Bar # 5670203
(917) 637-3604
aackerman@reprorights.org
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3666 Fax

Counsel for Amici Northland Family Planning, Mothering Justice, Medical Students for Choice, and the Center for Black Maternal Health and Reproductive Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF INTEREST[1]

Northland Family Planning Center Inc., Northland Family Planning Center Inc., East, and Northland Family Planning Center Inc. West (collectively, "Northland Family Planning") are Michigan reproductive healthcare clinics. NFP has been providing abortion care since 1976, and it provides abortion services up to 23.6 weeks from the pregnant person's last menstrual period. It also trains OB/GYN and Family Medicine residents, OB/GYN fellows, and medical students to provide abortion care.

Mothering Justice is a grassroots policy advocacy organization that provides mothers of color in America with the resources and tools to use their power to make equitable changes in policy. Mothering Justice is dedicated to improving families' quality of life by empowering mothers of color to take action on American policy on behalf of themselves and their families. Mothering Justice's reproductive justice advocacy work is focused on addressing infant and maternal mortality and maternal incarceration.

Medical Students for Choice ("MSFC") is a 501(c)(3) non-profit organization whose mission is to create tomorrow's abortion providers and pro-choice physicians. MSFC believes that family planning, including abortion, is fundamental to individuals' health and touches on every area of medicine. MSFC assists students and residents in maintaining access to abortion and family planning training, including through curriculum reform, training in a clinic setting, and abortion training institutes. MSFC is devoted to expanding access to health services that allow patients to lead safe, healthy lives consistent with their own personal and cultural values, with respect to all aspects of sexual and reproductive health. MSFC has chapters at Central Michigan University College of Medicine, Michigan State University College of Human Medicine East Lansing,

[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief.

Michigan State University College of Human Medicine Grand Rapids, Michigan State University College of Osteopathic Medicine in Macomb, Michigan State University College of Osteopathic Medicine in East Lansing, Michigan State University College of Osteopathic Medicine in Detroit, Oakland University William Beaumont School of Medicine, Western Michigan University Homer Stryker M.D. School of Medicine, Washington State University, Wayne State University School of Medicine, and University of Michigan Medical School.

The Center for Black Maternal Health and Reproductive Justice ("CBMHRJ") at Tufts University School of Medicine works to protect the Black birthing experience by advocating for quality, equitable, and respectful care in childbirth. CBMHRJ was founded by Ndidiamaka Amutah-Onukagha, the Julia A. Okoro Professor of Black Maternal Health at Tufts University School of Medicine, in April 2022 as an extension of the Maternal Outcomes for Translation Health Equity Research (MOTHER) Lab. CBMHRJ's mission is to foster academic and community-engaged research in order to conduct maternal health research with a focus on Black maternal health and eliminating inequities. Through MOTHER Lab, CBMHRJ focuses on reducing maternal health disparities experienced by Black pregnant and birthing people through solution-focused research to support reproductive justice work; research studies with community-based participation; publicly accessible educational efforts on maternal health disparities; and prioritizing professional development for researchers passionate about eradicating maternal health inequities with a focus on representing minoritized communities.

INTRODUCTION

In 1846, when women and Black, Indigenous, and other people of color were disenfranchised and women were subject to coverture, the Michigan Legislature passed an archaic criminal ban on abortion. MCL 750.14 ("Pre-*Roe* Ban" or "Ban"). Last amended in 1931, it bans abortion from conception, even where medically necessary, and even in cases of incest or rape.

This draconian legislation is inconsistent with Michigan's constitutional history and rich legal tradition of protecting the fundamental rights of marginalized communities against discriminatory governmental action. Since the Ban's passage, Michigan reenacted its constitution, following a civil-rights era constitutional convention that, for the first time, included women and people of color. The 1963 Michigan Constitution's Bill of Rights—placed at the forefront of the Constitution— reflects the intent of the delegates to protect liberty in an "ever changing" society.[2] In its first lines, it establishes that "all political power is inherent in the people" and "government is instituted for their equal *benefit*, security, and *protection*," guaranteeing equal protection, due process, civil and political rights, and protection against discrimination "on the basis of . . . race," Const 1963, art 1, §§ 1, 2 (emphasis added), stating that the enumeration of certain rights "shall not be construed to deny or disparage others retained by the people." Const 1963, art 1, § 23.

Abortion restrictions are part of our country's sordid history of reproductive and sexual control policies targeting women and pregnant people.[3] These policies have historically denied women and pregnant people the freedom to make fundamental decisions about their futures by preventing them from having children, coercing them into having children, or denying them the ability to raise their children in conditions of their choosing.

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[2] 1 Official Record, Constitutional Convention 1961, p 470.

[3] People of all genders can and do become pregnant. The Michigan Constitution protects the rights of all people, regardless of gender identity.

Abortion access is essential to full and equal participation of women and pregnant people in our society. For five decades, access to abortion has contributed to greater gender equality, educational and professional advances, and economic security. It has also helped to establish Michigan as a world-class provider of medical care, education, and employment.

If the Ban is allowed to go into effect, women and pregnant people in Michigan seeking abortion care will be forced to carry unwanted pregnancies to term against their will, travel out of state to obtain an abortion with ensuing delays, costs, and logistical burdens, or risk criminalization. This will cause devastating economic, social, and health-related harms to Michiganders who seek abortion, with disproportionate impacts on Black and Indigenous communities and other people of color, people living in poverty, and sexual violence survivors. Due to the already abysmal maternal mortality and morbidity rates, particularly for Black women and pregnant people, for many, allowing the Ban to go into effect would be nothing short of a death sentence. The Ban will perpetuate a public health crisis that will only exacerbate harms caused by the COVID-19 pandemic and Flint water crises. The Ban also threatens Michigan's healthcare system and economy, including the loss of accreditation for medical residency programs and the loss of access to reproductive technologies.

For the first time in history, the U.S. Supreme Court has eliminated protections for a fundamental right. *Dobbs v Jackson Women's Health Organization*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___; 2022 WL 2276808 (US, June 24, 2022) (No. 13-1932), overruling *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), and *Planned Parenthood of Southeast Pennsylvania v Casey*, 505 US 833; 112 S Ct 279; 1120 L Ed 2d 674 (1992). Following the loss of federal protections, Michigan courts are "obligated" to consider the scope of protections independently afforded by the Michigan Constitution. *Sitz v Dep't of State Police*, 443 Mich 744,

761-63; 506 NW2d 209 (1993). Here, the text, structure, and history of the Michigan Constitution, in addition to decades of legal and practical reliance, support recognition of an independent right. This Court has already recognized the right of every individual to the possession and control of her own person, free from all restraint or interference of others. See *Mays v Governor*, 506 Mich 157, 228; 954 NW2d 139 (2020). In accordance with the framers' intent that the Michigan Constitution be read to address the challenges of an "ever changing" society, the collective protections afforded by the Michigan Constitution for equality, liberty, and freedom from government restraint must be read together to protect the rights of people living at the intersection of sex, race, and poverty-based discrimination. The Constitution demands that just as burdens compound, so too must protections. Looking to the totality of these protections, this Court should recognize that the Michigan Constitution confers broad protections for the fundamental right to reproductive autonomy, free from discrimination on the basis of sex and race, including the right to end a pregnancy, and strike down the Ban.

BACKGROUND

I. The History of Reproductive Control in the United States and the Pre-*Roe* Ban

Since the era of slavery, reproductive control policies have been used to systematically deprive women and pregnant people of the liberty to make decisions about when, whether, and under what conditions to birth and raise children. These state-sanctioned policies have ranged from forced birth and sterilization to contraception and abortion restrictions—disproportionately harming low-income individuals, Black and Indigenous communities, and other people of color.

Slavery, as a system of racial domination and subordination, dehumanized Black people on the basis of race. Slavery as an institution stripped Black women of their sexual and reproductive autonomy. Enslaved women could be forced to bear children, including those that

resulted from rape, who could then be forcibly separated from them and solid for profit.[4] Although the Northwest Ordinance of 1787 outlawed slavery, it did not automatically free enslaved people living in the Northwest Territory, including Michigan.[5] Indeed, Michigan was not immune to the ideological basis justifying slavery: "the institution of slavery would not be fully abolished until the adoption of the first Michigan constitution in 1835."[6]

The abolition of the slave trade in 1808 reinforced enslavers' direct economic interest in ensuring the reproduction of enslaved women.[7] To do so, enslavers took possession of children born to enslaved women as property, and forcibly separated women from their children through various methods, including the sale, inheritance, and auctioning off of enslaved children and adults.[8] As such, for enslaved women, "the absence of sexual autonomy and knowledge that their children were not their own and could be sold away from them resulted in efforts to control [their own] reproduction," including through contraceptive use, abstinence, and abortions.[9]

Against this historical backdrop, Michigan adopted the first version of the Pre-*Roe* Ban in 1846. Before then, abortion was legal in Michigan until "quickening," usually occurring in the fourth or fifth month of pregnancy. *People v Nixon*, 42 Mich App 332, 335 n 3; 201 NW2d 635

[4] See Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Random House, 1997), pp 23 (explaining America's social order was based on the dehumanization of Black people and the "control of women's sexuality and reproduction.").
[5] Mich Legislature, *Michigan in the American Civil War* (2015), p 2 <https://www.legislature.mi.gov/Publications/CivilWar.pdf> (accessed August 8, 2022).
[6] Miles, *Slavery in Early Detroit*, Mich Hist Mag, May/June 2013, p 37 available at <http://mappingdetroitslavery.com/images/mich-hist-miles.pdf>; see also Mapping Slavery in Detroit, *Graphs: 1810 "District of Detroit"* <http://mappingdetroitslavery.com/graphs.php> (accessed August 11, 2022) (recording at least 17 Black and Native American enslaved people living just in Detroit as late as 1810).
[7] Murray, *Race-ing* Roe: *Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv L Rev 2025, 2034 (2021).
[8] *Killing the Black Body*, *supra* note 4, at 25-27, 34.
[9] Murray, *supra* note 7, at 2034; see also *Killing the Black Body*, *supra* note 4, at 46-47.

(1972), remanded 389 Mich 809 (1973), on remand 50 Mich App 38 (1973). The Ban prohibited abortion except in cases of life-threatening pregnancies and retained the common law distinction before and after quickening: categorizing "the willful killing of an unborn quick child by any injury to the mother" as manslaughter, and an abortion before quickening as misdemeanor. 1846 RS, ch 153, § 32; see also MCL 750.322.

Just ten years after the Ban was passed, physicians, led in part by gynecologist Dr. Horatio Storer, began an organized national campaign in 1857 to restrict abortion, in part, for discriminatory motives.[10] Physicians pushed to criminalize abortion to deter white Protestant native-born women from obtaining abortions, hoping to increase the white Protestant population.[11]

The physicians' campaign was later strengthened by Anthony Comstock's anti-contraception campaign in the 1870s.[12] Comstock successfully lobbied Congress to pass "anti-obscenity laws," which criminalized sending materials "designed or intended for the prevention of contraception or procuring of abortion."[13] Indeed, in 1869 Michigan adopted a law prohibiting publishing information about "cure[s] of chronic female complaints or private diseases, or recipes . . . designed to prevent conception, or tending to produce . . . abortion." Four years later, it adopted

[10] See, e.g., Mohr, *Abortion in Americ*a: *The Origins and Evolution of National Policy* (Oxford: Oxford University Press 1978), pp 147-159; Caron, *Who Chooses? American Reproductive History since 1830* (Gainesville: University Press of Florida, 2008), pp 21-22; Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States 1867- 1973* (Berkeley: University of California Press, 1997), pp 11-12.

[11] Abdelfatah & Arablouei, *Before Roe: The Physicians' Crusade*, NPR: Throughline (May 19, 2022, 12:10 AM) available at <https://www.npr.org/transcripts/1099795225> (accessed June 10, 2022); Murray, *supra* note 7, at 2036; Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan L Rev 261, 280-323 (1992) (showing how nineteenth-century doctors argued that banning abortion would enforce wives' marital duties and control the relative birthrates of "native" and immigrant populations to preserve the demographic character of the nation).

[12] *Before Roe: The Physicians' Crusade*, *supra* note 11.

[13] *Id.*

another law prohibiting advertising, publishing, and selling medication "designed expressly for the use of females for the purpose of procuring an abortion." In 1871, the Pre-*Roe* Ban was amended to be even more stringent by shifting the burden of proof regarding the existence of a life-threatening exception from the prosecution to the abortion provider. See CL 1871 § 7544.

By the early twentieth century, reproductive control policies coincided with a growing interest throughout the country in eugenics, which aimed to discourage procreation among communities of so-called "inferior lineage."[14] Eugenic policies took on different forms, including forced sterilization of certain populations and individuals deemed undesirable.

Restrictive abortion and birth control policies, curtailing women and pregnant people's right *not to* procreate, and forced sterilization policies, curtailing their right *to* procreate had the same motive and effect: depriving women and pregnant people of the liberty and equality to make decisions about their reproductive lives. Indeed, although forced sterilization policies only applied to the "feebleminded," these policies were in practice applied to populations portrayed as "sexually deviant," such as low-income women who had children outside of marriage.[15] See, e.g., *Buck v Bell*, 274 US 200, 205; 47 S Ct 584; 71 L Ed 1000 (1927) (upholding forced sterilization of a seventeen-year-old working-class girl committed to the Virginia Colony for Epileptics and Feebleminded after she became pregnant out of wedlock). Women and people living in poverty were disproportionately impacted by sterilization policies.[16] Michigan passed forced sterilization laws that applied to "feebleminded" people and "sexual perverts" in 1923 and 1929. *Smith v Wayne*

[14] Murray, *supra* note 7, at 2036-37.
[15] *Killing the Black Body*, *supra* note 4, at 68-70, 200; Villarosa, *The Long Shadow of Eugenics in America*, NY Times (June 8, 2022) <https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html> (accessed July 14, 2022).
[16] Hodges, *Euthenics, Eugenics and Compulsory Sterilization in Michigan, 1897-1960,* (1995), pp 59, 81-84 (Master's thesis, University of Mich) accessed at <https://d.lib.msu.edu/etd/25848/datastream/OBJ/View/>.

Co Probate Judge, 231 Mich 409, 415; 204 NW 140; 40 ALR 515 (1925); *In re Wirsing*, 214 Mich App 131, 143; 542 NW2d 594; 7 NDLR P 218 (1995).[17] In this historical context of discriminatory state-sanctioned reproductive control, Michigan again amended the Ban in 1931, making the provision of abortion at any point in pregnancy a felony. See MCL 750.14.

II. The 1963 Michigan Constitution

Following a progressive constitutional convention at which women and people of color were delegates for the first time, Michigan established a new state constitution in the context of the civil rights movement. The Bill of Rights, which is the first article of the 1963 Michigan Constitution, includes several significant protections, including locating inherent political power in the people, a new equal protection clause, a due process clause, and, for the first time, a retained rights clause recognizing that "no bill of rights can ever enumerate or guarantee all the rights of the people" and "*liberty under law is an ever growing and ever changing conception of a living society . . . .*"[18]

The Declaration's first lines include language not found in the U.S. Constitution, guaranteeing "equal benefits" and reserving political power to the people. Const 1963, art 1 § 1. The Equal Protection Clause includes language virtually identical to the Fourteenth Amendment but goes further: "nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of . . . race." Const 1963, art 1, § 2. As one Michigan Constitutional scholar recognized: "[t]he federal clause simply guarantees equal

[17] Kaelber, *Michigan,* Eugenics: Compulsory Sterilization in 50 American States <https://www.uvm.edu/~lkaelber/eugenics/MI/MI.html> (accessed August 11, 2022); Villarosa, *supra* note 15 (showing records of more than 60,000 survivors of forced sterilization across many states, including Michigan).

[18] 1 Official Record, Constitutional Convention 1961, p 470. (emphasis added); see also 2 Official Record, Constitutional Convention 1961, p 3365 (recognizing that "*it is presently difficult to specify all such rights which may encompass the future in a changing society*" (emphasis added)).

protection; no reference is made to race or any other groups. The Michigan Constitution seems to go further and not only guarantees equality but specifically prohibits certain forms of discrimination . . . [and] specifically protects the equal enjoyment of political and civil rights."[19]

The Equal Protection clause in the Michigan Constitution was introduced by the Committee on Suffrage, Rights, and Elections based on: 1) the necessity of protecting minorities against discrimination; 2) reports from the Michigan Advisory Commission on Civil Rights detailing issues communities of color faced with housing, education, employment, and law enforcement; and 3) President Eisenhower's advice to the Convention, "emphasizing the matter of states retaining and preserving the reserved powers."[20] The new Constitution also created a Civil Rights Commission to secure the protection of civil rights, noting the Michigan Legislature's refusal to adopt civil rights bills proposed during the prior five years.[21] Delegates formed the Commission to address racial discrimination and protect economically-disadvantaged people, who were more likely to be discriminated against and without the economic ability to seek legal redress for rights violations.[22] Delegates described the mistreatment of minority groups as "the most significant, single domestic problem" facing America, stating: "it is important that Michigan be a leader in eliminating racial discrimination."[23]

III. The Devastating Impacts of the Ban

Abortion is an essential and time-sensitive component of comprehensive healthcare and benefits the wellbeing of pregnant people and their families, including those who already have

[19] Fino, *The Michigan State Constitution* (Oxford: Oxford University Press, 2011), p 37.
[20] 1 Official Record, Constitutional Convention 1961, p 740.
[21] Const 1963, art 5 § 29.1; 1 Official Record, Constitutional Convention 1961, pp 1921-22.
[22] 1 Official Record, Constitutional Convention 1961, pp 1922-23, 1927-28, 1934.
[23] 1 Official Record, Constitutional Convention 1961, p 1929, 1933.

children. Nationally, nearly 60% of abortion patients already have at least one child.[24] Women and pregnant people's equal participation in the economic and social fabric of Michigan depends in part on abortion access. Indeed, despite historic and present-day discrimination, more Black women are earning advanced degrees and becoming entrepreneurs than ever before, and under the leadership of organizations like *amici* Mothering Justice, engaging on issues that impact their lives and health, including choosing when to become a parent, the ability to parent children in safe communities, childcare, paid parental leave, and higher education. As states throughout the country ban abortion, clinics close, and patients are forced to travel hundreds of miles to access care, patients will be delayed and forced to birth unwanted pregnancies—spurring on a public health crisis. If permitted to go into effect, the Ban will compound health and economic disparities, especially for low-income, Black and Indigenous communities, and other people of color.

a. The Ban Will Harm Healthcare in Michigan

Forcing women and pregnant people to carry unwanted pregnancies to term will worsen our country's maternal mortality crisis and exacerbate racial health disparities, particularly for Black women and pregnant people. According to a recent report by the World Health Organization, our country is one of only 13 countries worldwide with a rising maternal mortality ratio and is the only country with an advanced economy where the ratio is worsening.[25] During the COVID-19

[24] Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Inst (May 2016), p 7, 11, available at <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>.

[25] World Health Organization et al., *Trends in Maternal Mortality: 1990 to 2015: Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division* (2015), pp 70-77, available at <http://apps.who.int/iris/bitstream/10665/194254/1/9789241565141_eng.pdf> (accessed August 11, 2022).

pandemic, maternal mortality worsened.[26]

In Michigan, maternal mortality is already higher for Black women than white women. Between 2014 and 2018, Black women were approximately 2.8 times more likely to die from pregnancy-related causes.[27] This racial disparity is even higher in Detroit. In general, the maternal death rate in Detroit is three times the national average. But pregnant Black women in Detroit are at even greater risk; they are 4.5 times more likely to die than white women.[28]

Nationwide, maternal morbidity also reflects racial inequality.[29] Maternal morbidity refers to cases in which a pregnant person faces a life-threatening diagnosis or must undergo a life-saving medical procedure—like a hysterectomy, blood transfusion, or mechanical ventilation—to avoid death.[30] For every maternal death in the country, there are close to 100 cases of severe maternal morbidity.[31] Black women are twice as likely as their white counterparts to suffer severe maternal morbidity.[32] Indeed, Black women have the highest rates for 22 of 25 severe morbidity indicators

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[26] Rabin, *Maternal Deaths Rose During the First Year of the Pandemic*, NY Times (February 23, 2022) available at <https://www.nytimes.com/2022/02/23/health/maternal-deaths-pandemic.html>; Mich Dep't of Health and Hum Servs, Mich Coronavirus Racial Disparities Task Force, *Recommendations for Collaborative Policy, Programming and Systemic Change* (February 2022), p 3, available at <https://wdet.org/wp-content/uploads/2022/02/Racial-Disparities-Task-Force_Recommendations-for-Collaborative-Policy-Programming-and-Systemic-Change.pdf> (showing how Black Michiganders were disproportionately affected by COVID-19).

[27] Mich Dep't of Health and Hum Servs, *Maternal Deaths in Michigan, 2014-2018 Data Update*, p 6, <https://www.michigan.gov/mdhhs/-/media/Project/Websites/mdhhs/MCH-Epidemiology/MMMS_2014-2018_Pub_Approved.pdf> (accessed July 14, 2022).

[28] Letter from Whitaker, *Black Maternal Mortality Rat*e, City of Detroit: City Council Legislative Policy Division (May 4, 2022) https://detroitmi.gov/sites/detroitmi.localhost/files/2022-05/Black%20Maternal%20Mortality%20Rate%205-5-2022%20final%20-%20ST.pdf>.

[29] See Creanga et al, *Racial and ethnic disparities in severe maternal morbidity: a multistate analysis, 2008-2010*, 210 Am J Obstetrics & Gynecology 435 (2014); Admon et al., *Racial and Ethnic Disparities in the Incidence of Severe Maternal Morbidity in the United States, 2012-2015*, 132 Obstetrics & Gynecology 1158 (November 2018).

[30] Howell, *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61 Clin Obstetrics & Gynecology 387, 387 (2018).

[31] *Id.*

[32] Creanga et al., *supra* note 30.

used by the Center for Disease Control ("CDC").[33] Pregnancy carries numerous risks of complications and conditions that pose a substantial mortality risk, such as preeclampsia, pulmonary hypertension and maternal cardiac disease, some with mortality risks as high as 50 percent: conditions that affect Black women at higher rates than white women.[34] Delivery through cesarean section, which carries risks of hemorrhage, infection, and injury to internal organs, is also higher among Black than white women.[35] For people with existing medical comorbidities, forced pregnancy will result in more high-risk pregnancies and increased risk for severe maternal morbidity and mortality.[36] Such severe maternal morbidity disproportionately affects Black women.[37]

The higher rates of maternal mortality and morbidity for Black women and pregnant people are in part due to structural racism. Research shows that the stress of racism itself creates a "weathering" effect that may lead to poor health outcomes, including the development of chronic conditions.[38] During pregnancy, these health risks increase for Black people because they disproportionately face systemic racism, poverty, provider bias, and lack of access to prenatal and post-natal care.[39]

Health impacts for pregnant people in Michigan under the ban are illustrated by the effects of Texas' Senate Bill 8 ("S.B. 8"), which prohibited abortions after six weeks of pregnancy. News

[33] Howell, *supra* note 330, at 388.
[34] Minhas et al, *Racial Disparities in Cardiovascular Complications With Pregnancy-Induced Hypertension in the United States,* 78 Hypertension 480 (August 2021).
[35] Martin et al., *Birth: Final Data for 2019,* 70 Nat'l Vital Stats Report 8 (March 23, 2021).
[36] Azis, et al., *Termination of Pregnancy as a Means to Reduce Maternal Mortality in Pregnant Women With Medical Comorbidities,* 134 Obstetrics and Gynecology 1105 (November 2019).
[37] Howell, *supra* note 30, at 387.
[38] Roeder, *America is Failing Its Black Mothers,* Harvard Public Health (Winter 2019), available at <https://www.hsph.harvard.edu/magazine/magazine_article/america-is-failing-its-black-mothers/>.
[39] *Id.*

reports show emergency room physicians in Texas were unwilling to terminate patients' pregnancies, even when medically-necessary, due to fear of civil liability.[40] A recent study of two urban, inner city-healthcare systems in Texas analyzed the experiences of pregnant patients in state-mandated expectant management, finding 57% of patients developed a serious maternal morbidity, compared to only 33% of patients who chose immediate pregnancy interruption under similar clinical circumstances in states without a ban.[41]

Travelling out of state to obtain an abortion is an incomplete solution at best. Many pregnant people will be unable to access care due to logistical obstacles involved in traveling to another state, such as transportation and child or elder care arrangements, and long wait times at clinics that are overwhelmed with patients. For instance, within the first 30 days of S.B. 8 in Texas, patients who traveled out of state faced devastatingly increased wait times: approximately half of the facilities in neighboring states had wait times of two weeks or more.[42] Financial obstacles will make traveling to another state practical for only abortion patients with sufficient funds to cover the costs of the procedure itself, given that the Hyde Amendment bans federal funds from being used for abortion coverage under Medicaid, and given the costs related to travel, such as

[40] Klibanoff, *Doctors report compromising care out of fear of Texas abortion law*, Tex Tribune (June 23, 2022), available at < https://www.texastribune.org/2022/06/23/texas-abortion-law-doctors-delay-care/>.

[41] Nambiar, et al., *Maternal morbidity and fetal outcomes among pregnant women at 22 weeks' gestation or less with complications in two Texas hospitals after legislation on abortion,* Am J Obstetrics & Gynecology (forthcoming 2022) p 1, 2 <https://www.ajog.org/action/showPdf?pii=S0002-9378%2822%2900536-1>.

[42]See also White et al, *Out-of-State Travel for Abortion Following Implementation of Texas Senate Bill 8*, Tex Pol'y Evaluation Project (March 2022), p 4, available at <http://sites.utexas.edu/txpep/files/2022/03/TxPEP-out-of-state-SB8.pdf> (finding S.B. 8 created higher patient volume at out-of-state facilities in Texas).

accommodations, paying for child or elder care, and taking time off work.[43] For Black women, who routinely face the perils of racist policing through traffic stops, travel will pose additional physical risks as they are forced to travel longer distances to seek abortion care outside Michigan.[44]

b. The Ban Will Perpetuate Economic Inequality

Forcing women and pregnant people to give birth will deprive them of the ability to make the fundamental decision of when and under what conditions to have children. Particularly for those living in poverty, it will force parents to raise children in undignified living conditions.

The Ban will further entrench cycles of poverty, with disproportionate effects on Black communities. People with low-incomes experience unintended pregnancy at a disproportionately higher rate, due in large part to systemic barriers to contraceptive access.[45] In fact, most people who access abortion care in our country are living in poverty, making up around 75% of people who have abortions.[46] In Michigan, more than half of abortion patients are Black, and the poverty rate among Black residents between 2015-2020 was higher than the national rate at 27.5%.[47] Many

[43] See Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, Guttmacher Inst: Guttmacher Pol'y Rev (July 14, 2016) <https://www.guttmacher.org/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters> (accessed July 15, 2022).

[44] Iati, Jenkins, and Brugal, *Nearly 250 Women Have Been Fatally Shot by Police since 2015,* Wash Post (September 4, 2020) <https://www.washingtonpost.com/graphics/2020/investigations/police-shootings-women/> (accessed June 15, 2022) ("Black women are fatally shot at rates higher than women of other races.").

[45] Barber et al., *Contraceptive Desert? Black-white differences in characteristics of nearby pharmacies*, 6 J Racial Ethnic Health Disparities 719 (August 2019).

[46] Jerman, *supra* note 25.

[47] You et al., *Induced Abortions in Michigan: January 1 through December 31, 2020,* Mich Dep't of Health & Hum Servs (June 2021), p 28 tbl 5, available at <https://www.mdch.state.mi.us/osr/annuals/Abortion%202020.pdf>; US Census Bureau, *2020 American Community Survey 5-Year Estimates: Poverty Status in Michigan,* available at <https://data.census.gov/cedsci/table?t=Poverty&g=0100000US0400000US26&tid=ACSST5Y2020.S1701> (accessed July 14, 2022).

abortion patients state they cannot afford to become a parent or to add to their families, and that having a child would interfere with work, school, or the ability to care for dependents.[48]

In addition, a person's ability to access abortion has consequences not only for that person, but also for a whole network of other people who rely on those individuals. In Michigan, two-thirds of abortion patients have already given birth, and over 40% have given birth at least twice.[49] In situations where women face intimate partner violence, preventing access to abortion may put women and their children at increased risk of violence and other negative health outcomes,[50] as studies show that women who carry an unwanted pregnancy to term are less likely to leave an abusive relationship because birthing a child tethers them to their abuser.[51] Indeed, a national study found that homicide "exceeded all the leading causes of maternal mortality by more than twofold. Pregnancy was associated with a significantly elevated homicide risk in the Black population and among . . . women [aged 10-24 years] across racial and ethnic subgroups."[52] Financial hardship also stresses parent-child relationships and increases the likelihood that children grow up without access to basic needs.[53] Studies show worse child development outcomes for children of women who have been denied an abortion, and children born out of abortion denial are more likely to live

[48] Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual and Reproductive Health 110, 114-116 (September 2005), available at <https://www.guttmacher.org/sites/default/files/article_files/3711005.pdf>.
[49] See You et al., *supra* note 48, p 1.
[50] Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion* 12 BCM Med 1 (2014).
[51] *Id*; Advancing New Standards in Reproductive Health, *The Harms of Denying a Woman a Wanted Abortion: Findings from the Turnaway Study*, Univ of CA San Francisco <https://www.ansirh.org/sites/default/files/publications/files/the_harms_of_denying_a_woman_a_wanted_abortion_4-16-2020.pdf> (accessed August 11, 2022).
[52] Wallace et al., *Homicide During Pregnancy and the Postpartum Period in the United States, 2018-2019*, 138 Obstetrics & Gynecology 762, 762 (November 2021).
[53] *The Harms of Denying a Woman a Wanted Abortion*, supra note 52.

below the federal poverty guidelines compared to children born from a subsequent pregnancy to women who received the abortion.[54]

Forced birth will compel women and pregnant people to parent children under inequitable living conditions. States with abortion restrictions have inferior infant health outcomes.[55] In Michigan, Black infants are already more likely to die than white infants.[56] The Flint water crisis too caused adverse health outcomes for infants, particularly Black and low-income Flint residents.[57] Other contributors to these racial disparities include Black communities' disproportionate lack of access to prenatal, lactation support, childcare, and parental leave from work to take care of their children.[58] The Ban will exacerbate an already fragile state of food insecurity, financial distress, barriers to healthcare and stable housing, diminishing any hope of intergenerational wealth.[59] More importantly, an abortion ban will deny women and pregnant

[54] *Id.*
[55] Ravi, *Limiting Abortion Access Contributes to Poor Maternal Health Outcomes*, Ctr for Am Progress (June 13, 2018) available at <https://www.americanprogress.org/article/limiting-abortion-access-contributes-poor-maternal-health-outcomes/>; Pabayo, et al., *Laws Restricting Access to Abortion Services and Infant Mortality Risk in the United States*, 17 Int'l J Env't Rsch and Pub Health 3773 (May 26, 2020).
[56] Mich Dep't of Health & Hum Servs, *Number of Infant Deaths, Live Births and Infant Death Rates by Race: Michigan Residents, 1970-2020* <https://www.mdch.state.mi.us/osr/InDxMain/Tab2.asp> (accessed July 14, 2022).
[57] See Kristofferson, *Flint Water Crisis Worsened Birth Outcomes, Disproportionally Affected Black Babies, YSPH Study Finds*, Yale School of Public Health (October 19, 2021) <https://ysph.yale.edu/news-article/flint-water-crisis-worsened-birth-outcomes-disproportionally-affected-black-babies-ysph-study-finds/> (accessed July 14, 2022).
[58] Howell, *supra* note 30; Robinson, et al. *Racism, Bias, and Discrimination as Modifiable Barriers to Breastfeeding for African American Women: A Scoping Review of the Literature* 64 J Midwifery Womens Health 734 (November 2019); Milli, Frye, and Buchanan, *Black Women Need Access to Paid Family and Medical Leave*, Ctr for American Progress (March 4, 2022) accessed at <https://www.americanprogress.org/article/black-women-need-access-to-paid-family-and-medical-leave/>; Johnson-Staub, *Equity Starts Early: Addressing Racial Inequities in Child Care and Early Education Policy*, The Ctr for Law and Social Policy (December 2017) accessed at <https://www.clasp.org/sites/default/files/publications/2017/12/2017_EquityStartsEarly_0.pdf>.
[59] *The Harms of Denying a Woman a Wanted Abortion*, supra note 52.

people, particularly from Black communities, the right to determine when and under what conditions to raise children.

c. Banning Abortion Will Devastate Reproductive Healthcare

The Ban will inhibit access to groundbreaking assisted reproductive technology. Physicians offering fertility treatment in Michigan will either transfer services elsewhere or endure financial and criminal risks. For example, physicians will be disincentivized from providing in vitro fertilization because, in order to increase the probability of a successful pregnancy, it may involve transferring multiple embryos to the uterus at the same time, then reducing the number of implanted embryos and, after a successful pregnancy, disposal of fertilized embryos. Under the Ban, OB/GYNs may be chilled from providing assisted reproductive technology to avoid the risk of prosecution for reducing the number of embryos, disposing of fertilized embryos, or the inadvertent death of the fetus during surgery. Curtailed access to assisted reproductive technology will disparately impact LGBTQ communities, people with disabilities, and low-income people, who are disproportionately Black and Indigenous communities, and other people of color.

If the Ban goes into effect, medical education, an essential component of Michigan's economy, could be devastated. A ban on abortion—essentially a ban on comprehensive reproductive healthcare and training—will disincentivize medical students and residents from attending Michigan programs. Under the Ban's extraordinarily narrow life exception, physicians will be forced to wait to provide an abortion—even an urgently medically necessary abortion—until their patients are dying, deterring healthcare providers devoted to caring for pregnant patients from providing care in Michigan. Further, the American College of Obstetricians and Gynecologists and the Society for Family Medicine set out requirements for the standard of care for OB/GYN and family medicine doctors used to determine whether residency programs are

accredited. That standard care requires abortion training, and loss or risk of loss of accreditation will further discourage medical students and physicians from all practice areas from joining Michigan medical schools and programs.

ARGUMENT

I. Michigan Courts Have An Independent Duty To Evaluate The Scope Of Its Constitutional Protections When The U.S. Supreme Court Eliminates Federal Rights

It is clearly established that the Michigan Constitution may provide greater protection than the U.S. Constitution. *Sitz*, 443 Mich at 761-63; *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004); *People v Bullock*, 440 Mich 15, 37; 485 NW2d 866 (1992). Under binding Michigan Supreme Court precedent, following the contraction of rights occasioned by the overturn of *Roe* and *Casey*—and decades of reliance on the right to abortion both by Michigan courts and by its citizens—this Court has a duty to answer a question of first impression: whether the Michigan Constitution provides greater protections than the federal constitution. *Sitz*, 443 Mich at 761-63.

In an analogous case, this Court held that the Michigan Constitution provides greater protection against illegal search and seizure than the Fourth Amendment of the U.S. Constitution, following a decision by the U.S. Supreme Court diminishing those protections. *Id.* This Court rejected the notion that it was "obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so," and held that it was "obligated to interpret our own organic instrument of government." *Id.* at 763 & n 3. The Court applied the "compelling reason" test, looking to the (1) text, (2) structure and (3) history of the Michigan Constitution to determine the scope of the protections afforded. *Id*. The *Sitz* Court emphasized that state courts have a duty to fill gaps in the federal constitution: "With federal scrutiny diminished, state courts must respond by increasing

their own." *Sitz*, 443 Mich at 751 (quoting Brennan Jr., *State constitutions and the protection of individual rights*, 90 Harv LR 489, 503 (1977)).

Although the U.S. Supreme Court significantly reduced Fourth Amendment protections, the *Sitz* Court declined to limit those protections, despite a history of finding the protections afforded against illegal searches and seizures under the Michigan Constitution to be equivalent to those under the federal constitution. As the Court explained, "appropriate analysis of our constitution does not begin from the conclusive premise of a federal floor [because] . . . the fragile foundation of the federal floor as a bulwark against arbitrary action is clearly revealed when . . . the federal floor falls below minimum state protection." *Id*. at 761-62. "As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Id*. at 762.

Further, the *Sitz* Court held that its prior decisions "should not be understood as having created a ladder of precedent that is contrary to the language of the Michigan Constitution" nor be read to require the Court to ignore its general power to construe state constitutional provisions. *Id*. at 762-63 (quoting *People v Nash*, 418 Mich 196, 214; 341 NW2d 439 (1983)). Recognizing that Michigan courts cannot engraft onto the Constitution, the Court cautioned that "[b]y the same token, we may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection." *Sitz*, 443 Mich at 758.

The principle outlined in *Sitz* applies with even greater force here. For decades, Michigan state and federal courts have relied on the fundamental right to abortion under the U.S. Constitution to strike down abortion restrictions. See *People v Bricker*, 389 Mich 524, 531; 208 NW2d 172 (1973); *Northland Family Planning Clinic v Olszewski, et al*, (ED Mich 2003). However, Michigan

courts have never been squarely presented with whether the Michigan Constitution protects against the severe harms that would befall the people of Michigan should there be no federal protection for abortion access. Here, those harms would be unquestionably grave, with disproportionate impacts on Black communities and those living in poverty, the very groups the Michigan Constitution is designed to protect.

The obligation to extend protection under the Michigan Constitution is supported by the factors outlined under the compelling reason test. First, under the first two factors, Michigan Courts look to the text and structure of the Michigan Constitution. See *supra* at 17. See also *Sitz*, 443 Mich at 763 n 3; *Mahaffey v Attorney Gen*, 222 Mich App 325, 335; 564 NW2d 104 (1997) (citing *People v Catania*, 427 Mich 447, 466, n 12, 398 NW2d 343 (1986)). "It is 'a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the people adopting it,' *Holland v. Heavlin*, 299 Mich. 465, 470; 300 N.W. 777 (1941), and we do this principally by examining its language. *Bond v. Ann Arbor Sch. Dist.*, 383 Mich. 693, 699–700; 178 N.W.2d 484 (1970)." *People v Tanner*, 496 Mich 199, 220; 853 NW2d 653 (2014). "[W]e must do this even in the face of existing decisions of this Court pertaining to the same subject because there is no other judicial body, state or federal, that possesses the authority to correct misinterpretations of the Michigan Constitution." *Id* at 221. 4.5

The text and structure of the Michigan Constitution are distinct from the federal constitution. The placement of the Bill of Rights at the beginning of the Michigan Constitution demonstrates the supremacy of those rights over the power of government. Cf. *Hodes & Nauser, MDs, PA v Schmidt*, 309 Kan 610, 611; 440 P3d 461 (2019) (finding right to abortion under Kansas Constitution where it does not begin with an enumeration of the powers of government; it instead begins with a Bill of Rights for all Kansans). "By this ordering, demonstrating the supremacy

placed on the rights of individuals, preservation of these natural rights is given precedence over the establishment of government." *Id*. at 611.

Under the third *Sitz* factor, history, the high priority accorded to civil rights under the Michigan Constitution demonstrate an intention to protect women and pregnant peoples' autonomy and decision-making, including people of color, and that extends to the decision to terminate a pregnancy. As in *Sitz*, "there is no support in the constitutional history of Michigan" for the state to strip citizens of their basic rights to make decisions about their own medical care, bodies, and lives. 443 Mich at 747. On the contrary, Article 4, Section 51 of the 1963 Michigan Constitution specifically provides that: "[t]he public health and general welfare of the people of the State are hereby declared to be matters of primary concern" and tasks the legislature with enacting "suitable laws for the protection and promotion of the public health." As discussed, *infra*, the history of the constitutional convention demonstrates the intent of the framers to protect against precisely this type of governmental intrusion. See *State v Gunwall*, 106 Wash2d 54, 62; 720 P2d 808 (1986) ("The explicit affirmation of fundamental rights in our state constitution may be seen as a guarantee of those rights rather than as a restriction on them."). "[A] state constitution's bill of rights 'is inserted in the constitution for the express purpose of operating as a restriction upon legislative power.'" *Hodes*, 309 Kan at 661. Moreover, Article 1, Section 23 was added during the 1961-62 Constitutional Convention, recognizing that a right need not be enumerated in the constitution to be protected under its guarantee of "liberty under law." See *supra* p 7.

II. The Rights to Privacy and to Bodily Integrity Found in Michigan's Due Process Clause Protect the Right to Reproductive Autonomy as Fundamental, and the Ban Violates those Rights

The due process rights in the Michigan Constitution are buttressed by the collective enactment of the Constitution's equal protection guarantees, protections for public health, and the Retained Rights clause. See *supra* pp 7-8, 20. These interrelated rights reinforce each other and

"furthers our understanding of what freedom is and must become." *Obergefell v Hodges*, 576 US 644, 672; 135 S Ct 2584; 192 L Ed 2d 609 (2015). "A constitutional limitation must be construed to effectuate, not to abolish, the protection sought by it to be afforded." *People v DeJonge*, 442 Mich 266; 501 NW2d 127, 132 (1993) (citing *Lockwood v Comm'r of Revenue*, 357 Mich 517, 556–557; 98 NW2d 753 (1959)). That analysis leads to a clear mandate for Michigan courts to recognize that the Michigan Constitution protects a broadly understood right to reproductive autonomy free from race and sex discrimination, including the decision to terminate a pregnancy.

This Court has "long recognized privacy to be a highly valued right." *Mahaffey*, 222 Mich App at 334 (citing *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 465, 504; 242 NW2d 3 (1976); *De May v Roberts*, 46 Mich 160; 9 NW 146 (1881)). "The right to privacy includes certain activities which are fundamental to our concept of ordered liberty." *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich at 505. Likewise, recognizing the sacred nature of the right to "one's person" and quoting Justice Bernstein's comprehensive explanation of the right to bodily integrity, the Court of Claims correctly recognized that the "right to be let alone" is a foundational common law recognition of the right to bodily integrity and personal autonomy encompassed in the Michigan Constitution. See *Planned Parenthood of Mich*, Case No. 22-000044-MM, Prelim. Inj. Opinion and Order at 19 ("[G]iven its historical provenance and widespread judicial acceptance, there can be no doubt that the right to be let alone—the right to bodily integrity—was understood by the ratifiers of the 1963 Michigan Constitution as a fundamental component of due process.").

This Court and the Michigan Court of Appeals have further recognized that the substantive due process right in the Michigan Constitution protects childbearing decisions. See *Mays*, 506 Mich 228 (Viviano, J., concurring in part, dissenting in part) (stating due-process rights "have been

recognized in 'matters relating to marriage, family, procreation, and the right to bodily integrity.") (citing *People v Sierb*, 456 Mich 519, 529; 581 NW2d 219, 223 (1998)); *Doe v Attorney General*, 194 Mich App 432, 436–37; 487 NW2d 484 (1992) (internal citations omitted) (reviewing surrogacy statute acknowledging that "the Due Process Clauses of the state and federal constitutions . . . protect individual decisions in matters of childbearing."). And this Court has already recognized "the possibility that [Michigan Constitution's] Due Process Clause grants greater protection than the federal clause." *Mays*, 506 Mich at 225 n 3 (Viviano, J., concurring in part and dissenting in part).

Against this backdrop of recognized protections, this Court must consider the scope of protections afforded by the Michigan Constitution following the unprecedented contraction of rights occasioned by the Supreme Court's decision. As in *Sitz*, the U.S. Supreme Court cannot undo decades of legal and practical reliance by Michiganders on the ability to control their reproductive lives and health or revoke Michigan's rich history of protections for bodily integrity and privacy. Michigan courts are duty-bound to independently interpret the Michigan Constitution. Based on the text of the constitution, decades of legal precedent, and the intent of the framers, the Ban violates Michigan's due process clause. Indeed, the Court of Claims rightly reasoned that "[f]orced pregnancy, and the concomitant compulsion to endure medical and psychological risks accompanying it, contravene the right to make autonomous medical decisions." *Planned Parenthood of Mich*, Case No. 22-000044-MM, Prelim. Inj. Opinion and Order at 22. "If a woman's right to bodily integrity has any real meaning, it must incorporate her right to make decisions about the health events most likely to change the course of her life: pregnancy and childbirth." *Id.* at 22–23.

For these reasons, this Court should locate the right to reproductive autonomy within the text and debates surrounding the enactment of Michigan's 1963 Constitution, the caselaw recognizing rights to privacy and bodily integrity as cornerstones of protection against government intrusion, as well as Michigan's rich history of protecting against attacks on social, political, and economic equality. Taken together, these clauses provide "an integrated notion of citizenship and equal dignity before the law that embraces notions of both liberty and equality."[60]

III. The Ban Violates the Michigan Constitution's Equal Protection Guarantee, Which Provides Robust Protections against Race-Based and Sex-Based Discrimination

A. The Ban Violates Equal Protection Guarantees Based on Race

As discussed above, see *supra* p 7-8, the Michigan Constitution contains broad protections for individual rights—far broader than the federal constitution—providing equal benefits, equal protection under the law, and safeguarding against race-based discrimination. Const 1963, art 1 §§ 1, 2. These protections reflect the intent of the framers to zealously protect the rights of communities of color and minorities in Michigan against governmental incursions.[61] Although Michigan Courts have previously held that the Michigan Equal Protection Clause is coextensive with the federal constitution, here, where a fundamental right has been eliminated following fifty years of reliance, the duty of Michigan Courts to reconsider the scope of Michigan Constitutional protections is at its apex. *Sitz*, 443 Mich at 761–63.

Under the *Sitz* Court's "compelling reason test," looking to the text, structure, and history of the Constitution, this Court should find that Michigan's equal protection guarantee is more protective than the federal constitution and that the Ban infringes the Michigan Constitution's equal protection guarantees based on race for two reasons: First, the Ban violates an individual's

[60] Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGeorge L Rev 473, 475 (2002).
[61] Fino Michigan State Constitution, *p* 37.

exercise of their fundamental right to abortion—based on race. And second, it discriminates against members of a protected class because it disproportionately impacts Black pregnant people's ability to make informed, autonomous decisions about their reproductive health and lives, imposing devastating health harms and economic hardships on Black communities.

1. The Michigan Constitution Provides Broader Protections Against Race Discrimination than the U.S. Constitution

The Michigan Constitution's unique (1) text, (2) structure, and (3) history demonstrate that the Michigan Constitution provides safeguards against racial discrimination not contained in the U.S. Constitution. *Sitz*, 443 Mich at 763 n 3. First, a side-by-side textual comparison demonstrates that the Michigan Constitution not only provides an equal benefits clause not found in the U.S. Constitution, but also significant additional language protecting against discrimination. Indeed, although the first portion of Michigan's equal protection clause mirrors the language of the federal constitution, Michigan's equal protection clause additionally guarantees that no person shall "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." US Const Am XIV; Const 1963, art 1, § 2 (emphasis added). "The words 'discriminate,' 'discrimination' and 'non-discrimination' are words that do not appear in the Fourteenth Amendment, and it is clear that the drafters of the Michigan Constitution, by the use of these words, intended the Michigan Constitution to have a broader reach than the Fourteenth Amendment." *Berry v Benton Harbor School Dist*, 467 F Supp 721, 729–30 (WD Mich 1978). Second, regarding structure, these protections comprise the first lines of the Michigan Constitution, and the placement of the equal benefits and equal protection clauses at the top of the body of the state constitution further evinces the supremacy of individual rights over the power of government.

Third, the history of the Michigan Constitution and state interest in protecting against racial discrimination further supports a recognition of greater protection under the Michigan Constitution. See, e.g., *Holland*, 299 Mich at 470 ("It is a fundamental principle of constitutional construction that we determine the intent of the framers of the Constitution and of the people adopting it"). The intent of the delegates to expand equal protection rights in Michigan was manifest. See s*upra* p 7.

In line with that intent, the Michigan Constitution's robust language demonstrates that a showing of disparate impact is sufficient to demonstrate an equal protection violation based on race under the Michigan Constitution. Although there are a variety of opinions on the scope of Michigan's equal protection guarantee and the applicable standard, no prior case considered that question following the contraction of federal protections under the standard set out in *Sitz*. Further, prior cases declining to apply a disparate impact standard are distinguishable and based on an inaccurate history of the federal equal protection clause: the standard required only a showing of disparate impact in 1963.[62]

In line with the applicable standard when it was enacted, one of the earliest cases to address the scope of protections against discrimination based on race applied the disparate impact standard to a school desegregation lawsuit, holding that Article 1, Section 2 "plainly" "go[es] beyond the limits of the Fourteenth Amendment by prohibiting all racial segregation, without regard to whether it was caused by a segregative purpose." *Berry*, 467 F Supp at 729–30. The Court opined that a discriminatory purpose requirement "would defeat the clear, plain intent of the drafters,"

[62] See Huq, *What is Discriminatory Intent?*, 103 Cornell L Rev 1211, 1213, 1225-31 (2018) (discussing unsettled doctrine of discrimination in late twentieth century and use of disparate impact standard by lower courts before *Washington v Davis*, 426 US 229; 96 S Ct 2040; 48 L Ed 2d 597 (1976)).

holding such a requirement "would violate basic principles of constitutional interpretation" by failing to give plain meaning to the word "discrimination." *Id.*

And although in *People v Ford*, 417 Mich 66, 100; 331 NW2d 878 (1982), this Court required a showing of discriminatory intent, as the Michigan Court of Appeals made clear in *Detroit Branch, NAACP v Dearborn*, 173 Mich App 602, 615; 434 NW2d 444 (1988), *Ford* has a limited application and does not extend to a challenge "on the basis of racial discrimination to individuals *exercising their civil rights*." (Emphasis added).[63] Adopting *Berry*'s reasoning, the court held that disparate impact was sufficient to demonstrate a violation of Michigan Constitution's prohibition against racial discrimination. *Detroit Branch, NAACP*, 173 Mich at 615.

Two cases reached the wrong result based on the correct reasoning, requiring a showing of disparate intent based on the inaccurate assumption that it was required under federal equal protection jurisprudence in 1963. But the prevailing standard in 1963 required only a showing of disparate impact, and the reasoning of those courts that "the delegates intended to affirm and incorporate the basic notions of equal protection that prevailed at the time,"[64] only further supports application of the disparate impact standard. *Doe v Dep't of Social Servs*, 439 Mich 650, 673–74; 487 NW2d 166 (1992); *Harville v State Plumbing & Heating Inc*, 218 Mich App 302, 311; 553 NW2d 377 (1996) ("[N]o drafting history . . . suggest[s] anything other than an intention to affirm and continue the equal protection standards applied at that time."). Indeed, the "central role of intent in the doctrinal framing of individual rights against unconstitutional discrimination is a

[63] The *Ford* Court also relied in its decision on federal caselaw and did not consider the text, structure, or history of the Michigan Constitution, nor whether the scope of protections under the Michigan Constitution are broader than under the federal constitution. *Ford*, 417 Mich at 100.
[64] *Doe*, 439 Mich was also a sex discrimination case that did not address a race discrimination claim or the proper legal standard.

surprisingly recent doctrinal innovation."[65] Giving meaning to the term "discrimination" in the Michigan Constitution is buttressed by the application of the disparate impact standard to Elliot-Larsen Civil Rights Act suits, a statute which provides parallel equal protection guarantees in the private sphere and similarly includes the term "discrimination." See, e.g., *Smith v Consol Rail Corp*, 168 Mich App 773; 425 NW2d 220 (1988) (citing *Albemarle Paper Co v Moody*, 422 US 405, 425; 95 S Ct 2362; 45 L Ed 2d 280 (1975)).

2. The Ban Disproportionately Impacts Black Women and Pregnant People's Fundamental Right to Abortion

As the largest group to access abortion services in Michigan, and also the group with the highest maternal mortality rates, Black women and pregnant people will be disproportionately harmed by the Ban. *Supra* pp 10, 13. The Ban's restrictions will only compound existing barriers and structural inequalities. *Supra* pp 13-16. Courts have been particularly sensitive where, as here, people who face economic or other structural barriers suffer the brunt of constitutional violations. See, e.g., *MLB v SLJ*, 519 US 102, 102; 117 S Ct 555; 136 L Ed 2d 473 (1996) (invalidating law burdening low-income persons' due process and liberty interest in child-rearing).

Even if this Court finds no violation of a fundamental right, the Ban is an unconstitutional infringement of Michigan's equal protection and equal benefits clauses. The barriers to access imposed by the Ban will fall more harshly on Black women and pregnant people by disproportionately impeding their ability to make informed, autonomous decisions about their reproductive health and lives. Compared to other similarly situated groups, Black Michiganders are significantly more likely to face unintended pregnancy and poverty. In fact, in Michigan, the poverty rate in the Black community is significantly higher than the national rate. See *supra* p 13.

[65] *Id.*

Since people who carry an unwanted pregnancy to term are more likely to fall into poverty and face adverse health outcomes, allowing the Ban to restrict safe and effective abortion care will only entrench poverty in Black communities and exacerbate the very harms the framers sought to protect against. Black women and pregnant people face multiple barriers to accessing reproductive healthcare, including lack of healthcare coverage, provider bias, transportation deserts, lack of medical or family accommodations at work, and other logistical hurdles in obtaining reproductive care. By stripping them of the ability to choose whether to continue or end a pregnancy, the Ban reinforces and compounds these structural barriers. See *supra* p 9-13.

Traveling out of state and paying for an abortion presents financial barriers, particularly for people living in poverty. See *supra* p 12. The Ban will also perpetuate a longstanding history of systemic burdens and social and economic segregation against Black women and pregnant people, including those caused by the Flint water crisis, the Black maternal mortality crisis, and the Covid-19 pandemic. See *supra* p 2. Michigan's Constitution, which explicitly protects against racial discrimination and enshrines rights to equal benefits, security, and protection to all Michiganders, demands that people living at the intersection of multiple forms of oppression, and who face such cumulative and distinct harms, [66] be afforded protections against these grim realities. Const 1963, art 1, §§ 1, 2.

B. The Ban Violates Equal Protection Guarantees on the Basis of Sex

The Ban also violates the robust protection against sex discrimination in the Michigan Constitution. It is well established that the protections afforded under the Michigan Constitution for equal protection based on sex are at least coextensive with the federal constitution. *Doe*, 439

[66] See, e.g., Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Legal Theory and Antiracist Politics*, 1989 U Chi Legal F 146 (1989).

Mich at 673–74. First, the Ban discriminates based on an individual's exercise of the fundamental rights to privacy and bodily integrity based on the reproductive healthcare they seek. The Ban perpetuates a longstanding history of systemic infringement on the reproductive rights of women and pregnant people of color, including those with low-income, exacerbating the inequities they face.[67]

Second, by depriving only pregnant people of the power to make informed, autonomous decisions about their reproductive health and lives, the Ban, on its face, classifies based on sex. See *Nev Dep't of Hum Res v Hibbs*, 538 US 721, 728–34; 123 S Ct 1972; 55 L Ed 2d 953 (2003). Michigan courts have already defined sex discrimination to include pregnancy discrimination. See *Haynie v State*, 468 Mich 302, 311–12; 664 NW2d 129, 134 (2003) (in the context of a sexual harassment suit, interpreting ELCRA's provision that defines "sex to include pregnancy" to mean that "[p]regnancy discrimination is sex discrimination"). Sex-based classifications are suspect because they are often grounded in "gross, stereotyped distinctions between the sexes." *Frontiero v Richardson*, 411 US 677, 684; 93 S Ct 1764; 36 L Ed 2d 583 (1973). These "stereotyped distinctions," *id.* at 685, are based on assumptions and expectations about an individuals' capacity for childbearing. See, e.g., *Muller v Oregon*, 208 US 412, 422; 28 S Ct 324; 52 L Ed 551 (1908) (a woman is "[d]ifferentiated by" "her physical structure and a proper discharge of her maternal functions," which "having in view not merely her own health, but the well-being of the race—

[67] State courts have held that treating abortion differently from other medical decisions violates equal protection. See *State, Dep't of Health & Soc Servs v Planned Parenthood of Alaska*, 28 P3d 904 (Alas, 2001); *Planned Parenthood of the Great NW v State*, 375 P3d 1122 (Alas, 2016); *State v Planned Parenthood of the Great NW*, 436 P3d 984 (Alas, 2019); *Simat Corp v Ariz Health Care Cost Containment Sys*, 56 P3d 28 (2002); *Moe v Sec'y of Admin & Fin*, 382 Mass 629; 417 NE2d 387 (1981); *Jeannette R v Ellery*, No BDV-94-811, 1995 Mont Dist LEXIS 795 (Mont Jud Dist Ct May 22, 1995); *Wicklund v State*, No ADV 97-671, 1999 Mont Dist LEXIS 1116 (Mont Dist Ct Feb 11, 1999); *Planned Parenthood of Cent NJ v Farmer*, 165 NJ 609; 762 A2d 620 (2000*); NM Right to Choose/NARAL v Johnson*, 126 NM 788; 1999 -NMSC- 005; 975 P2d 841 (1998).

justify legislation to protect her"); *Bradwell v Illinois*, 83 US 130, 141–42; 21 L Ed 442 (1872) ("The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother").[68]

C. The Ban Cannot Survive Strict Scrutiny

As outlined above, the ban is subject to strict scrutiny because it 1) violates a fundamental right; 2) discriminates against those who choose to exercise a fundamental right; and 3) discriminates based on sex and race. It is uncontroversial that violation of a fundamental right is subject to strict scrutiny. See, e.g., *Doe*, 439 Mich at 662, 667–68. A statute reviewed under strict scrutiny will be upheld only if the state demonstrates it is narrowly tailored to serve a compelling governmental interest. *Id*. at 662; *In re B and J*, 279 Mich App 12, 22; 756 NW2d 234 (2008); see also *Shepherd Montessori Ctr Milan v Ann Arbor Charter Tp.*, 486 Mich 311, 319; 783 NW2d 695 (2010); *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich at 505 ("Rights of this magnitude can only be abridged by governmental action where there exists a compelling state interest." (internal quotations omitted).

Further, where, as here, the Ban implicates intersecting, heightened constitutional concerns—penalizing individuals who exercise their fundamental rights and discriminating against women, trans and nonbinary pregnant people, and people of color—the equal protection guarantee demands application of strict scrutiny. *Doe*, 439 Mich at 662 (citing *Plyler v Doe*, 457

[68] Several state courts have held abortion restrictions are a form of sex discrimination, because they disproportionately burden women and reflect sexist beliefs about women's autonomy and role in society. See *Doe v Maher*, 40 Conn Supp 394; 515 A2d 134, 159 (1986); *NM Right to Choose/NARAL*, 975 P2d 841. State courts have also emphasized the burden of abortion restrictions on low-income women as a form of invidious discrimination. *Comm to Defend Reprod Rights v Myers*, 625 P2d 779, 796 (Cal 1981); *State, Dep't of Health & Soc Servs,* 28 P3d at 910; *Doe*, 40 Conn Supp at 408 ("Members of the class have significantly more medical problems than the general population as a result of their existence under poverty conditions. Therefore, they are likely to encounter significantly more medical problems as a result of their pregnancies").

US 202, 216–217; 102 S Ct 2382, 2394–2395; 72 L Ed 2d 786 (1982)); see also *Shepherd*, 486 Mich at 319. "Close consideration" of the means-end fit should be undertaken where people who face structural barriers, including racism and economic hardship, suffer the brunt of state-sanctioned discrimination, see, e.g., *MLB*, 519 US at 116–17, to guard against further subordinating the historically disadvantaged. See *id.*; *Plyer*, 457 US at 226, 230; *Gaston Cnty, NC v United States*, 395 US 285, 296–97; 89 S Ct 1720; 23 L Ed 2d 309 (1969). Where laws, "perpetuate racial subordination through the denial of procreative rights, which threaten both racial equality and privacy at once," they must be subject to the "most intense" scrutiny.[69]

The state cannot meet its heavy burden of demonstrating a compelling interest. See generally *Hodes*, 309 Kan at 663 ("[A] compelling interest is… not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.") (internal citations and quotations omitted). Even assuming a purpose of protecting health, because of medical advancements, that purpose is undermined, rather than served. See *Nixon*, 42 Mich App at 339–40 (holding modern science not only made abortion safe, but "[w]hat state interest there is in the continued protection of the woman is counterbalanced and offset by the superior right of the woman and her physician to undertake such medical treatment as is deemed appropriate.").

To the extent the purpose of the ban was to prevent access, that discriminatory purpose does not rise to the level of a compelling interest and necessarily fails strict scrutiny. The Ban perpetuates harmful race and sex stereotypes that pregnant people, and people of color, lack the capacity to make decisions about their reproductive lives and that childbearing capacity determines one's role in society. *JEB v Alabama ex rel TB*, 511 US 127, 141–42; 114 S Ct 1419; 128 L Ed 2d

[69] See *Killing the Black Body*, *supra* note 3, at 308.

89 (holding unconstitutional jury exclusion rooted in stereotypes about decision-making ability and role in society). Classifications that rely on such "outmoded notions of … relative capabilities" are impermissible. *Id*. at 139 n 11 (citation omitted).

Likewise, any interest in fetal life does not rise to being compelling, and certainly not prior to viability. See, e.g., *DeRose v DeRose*, 469 Mich 320, 353; 666 NW2d 636 (2003) (Weaver, J. concurring) ("[T]here are few, if any, governmental interests that will meet this burden."); *Armstrong v State*, 296 Mont 361, 385; 1999 MT 261; 989 P2d 364 (1999) (holding only "a medically-acknowledged, *bona fide* health risk, clearly and convincingly demonstrated," suffices to show a compelling state interest that could "justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure."); *Women of State of Minn by Doe v Gomez*, 542 NW2d 17, 27, 31 (Minn, 1995) (holding that an interest in "the preservation of potential human life and the encouragement and support of childbirth" is not compelling prior to viability); *Valley Hosp Ass'n, Inc v Mat-Su Coal for Choice*, 948 P2d 963, 965, 971 (Alas, 1997) (rejecting asserted interest in "conscience" as not sufficiently compelling); accord *Right to Choose v Byrne*, 91 NJ 287, 305–06, 308; 450 A2d 925 (1982) (holding asserted interest in potential life not compelling state interest justifying discrimination against people seeking abortion).

Simply put, there is no non-stereotype-based justification for banning abortion, and any purported interest in "protecting the life of the unborn" is inextricably linked with the assumption that pregnant people are either incapable of considering these interests or cannot be trusted to do so competently. By forcing people to remain pregnant and bear children against their will, the Ban

prevents their full and equal participation in social, political, economic, and family life.[70] Reproductive control measures that "turn the capacity to bear children . . . into a source of social disadvantage" have been struck down because of their detrimental effect, notwithstanding any purportedly benign justifications. See *NM Right to Choose/NARAL v Johnson*, 975 P2d at 855 (striking down abortion restriction where discriminatory means did not advance legitimate goal).[71]

Because the State's interests are not compelling, the Court need not consider whether the law is narrowly tailored, but here too, the state cannot meet its burden. The Ban is a blanket criminal prohibition on all abortion services, and that is not a narrowly tailored means of achieving any state interest. Accord Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am J Legal Hist 355, 360 (2006) ("Narrow tailoring demands that the fit between the government's action and its asserted purpose be 'as perfect as practicable.'" (citations omitted)). "Constitutional rights 'cannot be allowed to yield simply because of disagreement with them'" *Valley Hosp Ass'n, Inc*, 948 P2d at 972 (quoting *Brown v Bd of Educ*, 349 US 294, 300; 75 S Ct 753; 99 L Ed 1083 (1955)); *Armstrong*, 296 Mont at 387. To the extent the State wishes to permissibly advance interests in pregnant peoples' health and fetal life, it could do so through any

[70] See also Br. of Amici Curiae Reproductive Justice Scholars Supp. Pets.-Cross-Respts., 2019 WL 6609232, **17–31 *June Medical Servs. v Russo*, 140 S Ct 2103 (2020).

[71] Examples of state courts striking down abortion restrictions where the state failed to demonstrate narrow tailoring abound. See *State v Planned Parenthood of Alaska*, 171 P3d 577, 579 (Alas, 2007) (striking parental consent statute as not narrowly tailored because parental notice was a less restrictive and widely-used option); *Am Acad of Pediatrics v Lungren*, 16 Cal 4th 307, 356–57; 940 P2d 797 (1997) (striking down similar requirement as not "necessary to further the state's interests in protecting the health of minors or the parent-child relationship" given state laws allowing minors to make other significant healthcare decisions); *cf. Planned Parenthood of the Heartland v Reynolds ex rel State*, 915 NW2d 206, 212, 243 (2018) (finding a 72 hour mandatory delay was not narrowly tailored because the requirement "takes no care to target patients who are uncertain . . . but, instead, imposes blanket hardship upon all women").

number of less restrictive means, such as funding programs to ensure all Michiganders have access to quality healthcare, including prenatal and post-natal care.

CONCLUSION

For these reasons, this Court should authorize the circuit court to certify questions of public law concerning the right to abortion under the Michigan Constitution and the enforceability of the Ban to this Court, and this Court should declare the Ban unconstitutional.

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Respectfully submitted,

David A. Moran (P45353)
(734) 615-5419
Morand@umich.edu
701 S. State Street
Ann Arbor, MI 48109

Genevieve Scott, NY Bar #4922811
(917) 637-3605
gscott@reprorights.org
Kulsoom Ijaz, NY Bar #5420682
(917) 637-3658
kijaz@reprorights.org
Astrid Ackerman, NY Bar # 5670203
(917) 637-3604
aackerman@reprorights.org
Center for Reproductive Rights
199 Water Street, 22nd Floor
New York, NY 10038
(917) 637-3666 Fax

Counsel for Amici Northland Family Planning, Mothering Justice, Medical Students for Choice, and the Center for Black Maternal Health and Reproductive Justice