STATE OF MICHIGAN

COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients, and SARAH WALLET, M.D., M.P.H., FACOG, on her own behalf and on behalf of her patients,

Plaintiffs,

v

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, in her official capacity,

Defendant,

and

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Intervening Defendants.
_____/

OPINION AND ORDER

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION, GRANTING IN PART AND DENYING IN PART INTERVENING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION, AND PERMANENTLY ENJOINING THE ENFORCEMENT OF MCL 750.14

In this declaratory judgment action, plaintiffs, Planned Parenthood of Michigan and Sarah Wallett, M.D., M.P.H., FACOG, challenge the constitutionality of MCL 750.14, which prohibits all abortions except those performed "to preserve the life of [a] woman." Pending before the Court are cross-motions for summary disposition filed by plaintiffs and intervening defendants Michigan House of Representatives and Michigan Senate. The Court GRANTS plaintiffs' motion in part, GRANTS defendant intervenors' motion in part, and permanently enjoins defendant Attorney

General of the State of Michigan from enforcing MCL 750.14. The Court also orders that pursuant to MCL 14.30, the Attorney General must personally serve on the prosecuting attorneys she is statutorily charged with supervising a copy of this opinion and the accompanying order, and must advise the prosecuting attorneys that MCL 750.14 has been declared unconstitutional.

I. PROCEDURAL BACKGROUND

Plaintiffs, Planned Parenthood of Michigan and Dr. Wallett filed this lawsuit on April 7, 2022, naming as defendant the Attorney General of the State of Michigan. Plaintiffs' complaint asserts that MCL 750.14 violates the Due Process, Equal Protection, and Retained Rights provisions of the Michigan Constitution, and the Elliott-Larsen Civil Rights Act, (the ELCRA), MCL 37.2101 *et seq*. The complaint seeks declaratory and injunctive relief.

The Court granted plaintiffs' motion for a preliminary injunction on May 17, 2022. Less than one month later, the Court granted a motion filed by members of the Michigan House of Representatives and Michigan Senate to intervene as party-defendants. The intervenors also sought reconsideration of the Court's May 17 opinion, contending that the Court had incorrectly determined that this case presents an actual controversy and erroneously weighed the preliminary-injunction factors. The Court denied the motion for reconsideration on June 15, 2022.

Pending before the Court are three motions for summary disposition. Plaintiffs moved for summary disposition on June 29, 2022, seeking judgment based on the constitutional and statutory challenges to MCL 750.14 outlined in their complaint. The intervenors' first motion for summary disposition, filed on July 12, 2022, asserts that the Court lacks jurisdiction because the matter is non-adversarial, not ripe, and plaintiffs lack standing. The intervenors filed a second motion for summary disposition on July 26, 2022, arguing that plaintiffs' constitutional and statutory claims

have no merit, and that judgment should be entered in their favor. The intervenors also filed a motion to stay further proceedings, which the Court has addressed in a separate opinion and order.

II. SUMMARY DISPOSITION PRINCIPLES COMMON TO THE MOTIONS

Defendant-intervenors' first motion for summary disposition is brought under MCR 2.116(C)(4) and (C)(8), and the second under (C)(8). Summary disposition is appropriate under MCR 2.116(C)(4) when a court lacks subject-matter jurisdiction. A motion brought under MCR 2.116(C)(8) tests the factual sufficiency of the complaint. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019). When considering a (C)(8) motion, a court accepts the complaint's allegations as true and decides the motion on the pleadings alone. *Id.* at 160. A motion under MCR 2.116(C)(8) may be granted only when a claim is so clearly unenforceable that no factual development might justify recovery. *Id.*

Plaintiffs' motion for summary disposition is brought under MCR 2.116(C)(10). In support of the motion, plaintiffs filed an affidavit signed by Dr. Wallett. The intervenors' response to plaintiffs' (C)(10) motion incudes an "expert declaration" signed by Farr A. Curlin, M.D., a specialist in internal medicine and Co-Director of the Theology, Medicine, and Culture Initiative at Duke Divinity School. Summary disposition is appropriate under MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Emagine Entertainment, Inc v Dep't of Treasury*, 334 Mich App 658, 663; 965 NW2d 720 (2020) (citation and quotation marks omitted). The Court examines the documentary evidence submitted by the parties to determine whether, after drawing all reasonable inferences in favor of the nonmovant, a genuine issue of material fact exists. *Id.*

III. INTERVENORS' FIRST SUMMARY DISPOSITION MOTION

The intervenors' first motion for summary disposition presents three arguments: no actual controversy exists under MCR 2.605, the matter is not ripe for adjudication, and plaintiffs lack standing. These contentions ignore that the purpose of a declaratory-judgment action is to seek the adjudication of rights *before* injury occurs, "to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006). From the start, this lawsuit has fulfilled those purposes.

A. ACTUAL CONTROVERSY

Intervenors' "actual controversy" briefing reprises the same arguments made in their motion for reconsideration. In denying reconsideration, the Court rejected those arguments without elaboration, relying on the analysis contained in its May 17 opinion and order. The Court incorporates that analysis here.

But whether an actual controversy existed when the Court entered its preliminary-injunction order is no longer a relevant legal issue. With the addition of the intervenors as defendants, the parties are indisputably adverse. A controversy presently exists regarding the constitutionality of MCL 750.14, and a declaratory judgment is necessary to guide plaintiffs' future conduct.

Plaintiffs seek a declaration that MCL 750.14 is unconstitutional. Intervenors vigorously assert that the law passes constitutional muster in all regards. Indeed, intervenors highlighted in

their motion for intervention that their adversarial legal position supplied the basis for intervention, in part because it established the adversity requisite to justiciability: "There is no question that the Legislature has strong interests in ensuring that constitutional challenges to Michigan statutes present an actual controversy suitable for judicial resolution and, when necessary, in defending judicial challenges. No existing party will adequately represent those interests here . . . ." The intervenors' adverse participation satisfies the "actual controversy" requirement for a declaratory judgment under MCR 2.605(A)(1). See *City of Springfield v Washington Pub Power Supply Sys*, 752 F2d 1423, 1427 (CA 9, 1985) ("any doubt" regarding the existence of a justiciable controversy at the beginning of the litigation was resolved by the intervention of a party taking an adversarial position), and 13 Fed Prac & Proc Juris § 3530 (3d ed) ("[A] case conceived in cooperation may be saved by intervention of a genuine adversary who represents the rights that otherwise might be adversely affected.").

B. RIPENESS

The intervenors next contend that because "no state authority has sought to enforce the statute at issue," plaintiffs' claims are not ripe for adjudication. This argument elides that the ripeness analysis in a declaratory action differs from that undertaken in an ordinary lawsuit. Under MCR 2.605, "a court is not precluded from reaching issues before actual injuries or losses have occurred." *Shavers v Kelley*, 402 Mich 554, 589; 267 NW2d 72 (1978). The basic purpose of a declaratory judgment act is to provide declaratory judgments without awaiting a breach of existing rights. See *id.* Intervenors have failed to engage with this reasoning, and instead merely re-hash the arguments made in their motion for reconsideration. Moreover, the events that followed this Court's preliminary-injunctive order establish that plaintiffs' claims are ripe for decision.

After the Court entered the preliminary injunction order, the United States Supreme Court overruled *Roe v Wade*, 410 US 113; 132; 93 S Ct 705; 35 L Ed 2d 147 (1973), in *Dobbs v Jackson Women's Health Org*, __ US__ ; 142 S Ct 2228 ; 213 L Ed 2d 545 (2022). The parties agree that MCL 750.14 became enforceable after *Dobbs*, and that absent an injunction, the Attorney General may prosecute abortion providers. And although the current Attorney General has publicly disavowed any intent to do so, her term of office expires at the end of 2022. Whether she will be re-elected is unknown. The Court notes that "[m]id-litigation assurances are all too easy to make and all too hard to enforce[.]" *W Alabama Women's Ctr v Williamson*, 900 F3d 1310, 1328 (CA 11, 2018), abrogated on other grounds by *Dobbs*, 142 S Ct 2228. And this Attorney General's promise will not bind her successor, whether a new Attorney General assumes office in 2023 or later.

More pertinent is that several county prosecutors have publicly expressed an intent to pursue prosecutions of abortion providers unless enjoined from doing so. After this Court entered a preliminary injunction, two county prosecutors filed an action for superintending control in the Court of Appeals seeking to nullify this Court's injunctive order. The Court of Appeals issued an order denying superintending control but suggesting that county prosecutors were not bound by this Court's preliminary injunction. *In re Jarzynka*, unpublished order of the Court of Appeals, entered August 1, 2022 (Docket No. 361470). The petitioning prosecutors promptly announced their intent to begin prosecuting abortion providers. A temporary restraining order entered in a different case by a different judge prevented immediate prosecutions.

The intervenors center their ripeness challenge on the concept that "[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 282; 761 NW2d

210 (2008), aff'd in part and lv den in part 482 Mich 960 (2008). Given the direct and public threats of immediate prosecution, abortion providers face a credible risk of arrest unless MCL 750.14 is deemed unconstitutional, and its enforcement enjoined.

Finally, the United States Supreme Court has held that "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v Thompson*, 415 US 452, 459; 94 S Ct 1209; 39 L Ed 2d 505 (1974). See also *Doe v Bolton*, 410 US 179, 188; 93 S Ct 739; 35 L Ed 2d 201 (1973) ("The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."), abrogated on other grounds by *Dobbs*, 142 S Ct 2228. The very real threat of prosecutions of abortion providers eliminates any ripeness concerns.

C. STANDING

The intervenors next challenge plaintiffs' standing to bring an action intended to vindicate the constitutional rights of their patients. "The general rule is that one person may not raise the denial of another person's constitutional rights." *Citizens for Pretrial Justice v Goldfarb*, 415 Mich 255, 271; 327 NW2d 910 (1982). But "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights," third party standing is recognized. *Warth v Seldin*, 422 US 490, 510; 95 S Ct 2197; 45 L Ed 2d 343 (1975). See also *US Dep't of Labor v Triplett*, 494 US 715, 721; 110 S Ct 1428; 108 L Ed 2d 701 (1990), in which the Supreme Court recognized the third-party standing of an attorney to sue raising the

due-process rights of his clients. In the abortion context, the Supreme Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med Servs LLC v Russo*, ___ US ___; 140 S Ct 2103, 2118; 207 L Ed 2d 566 (2020), abrogated on other grounds by *Dobbs*, 142 S Ct 2228. The Court adopts the reasoning of *June Medical Services* and a plethora of predecessor cases, and finds that plaintiffs have standing to pursue the constitutional claims of their patients here.

D. JUSTICIABILITY SUMMARY

Defendant intervenors' first motion for summary disposition, based on an alleged lack of subject-matter jurisdiction and standing, is DENIED in its entirety for the reasons stated above.

IV. THE DUE-PROCESS ISSUES

Plaintiffs and the intervenors have filed cross-motions for summary disposition regarding the substantive grounds for relief set forth in plaintiffs' complaint. Whether filed under MCR 2.116(C)(8) or (C)(10), a motion for summary disposition posits that a trial is unnecessary because there are no genuine disputes as to any material facts and the movant is entitled to judgment as a matter of law. Although plaintiffs and the intervening defendants have filed affidavits in support of their motions for summary disposition, no material facts are in dispute.

Counts II and VI of plaintiffs' complaint raise due-process challenges to MCL 750.14. Count II asserts that MCL 750.14 violates abortion patients' fundamental right to bodily integrity as guaranteed by the Due Process Clause of the Michigan Constitution, Const 1963, art 1, § 17. Count VI contends that the statute violates a fundamental right to privacy flowing from the same constitutional provision.

The intervenors' July 26, 2022 motion challenges plaintiffs' due-process claims from several angles, contending that: *Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997), forecloses the Court's recognition of a due-process right protective of abortion access distinct from the federal constitution; the right to bodily integrity the Court previously recognized is "properly understood as a part of the right to privacy" and therefore incapable of supporting a right to abortion access under *Mahaffey*; even absent *Mahaffey*, Michigan's Due Process Clause is coextensive with its federal counterpart; and that MCL 750.14 does not violate the right to bodily integrity recognized by our Supreme Court in *Mays v Governor of Mich*, 506 Mich 157, 195; 954 NW2d 139 (2020).

Plaintiffs' motion for summary disposition presents almost mirror image due-process arguments: that the rights of privacy and bodily integrity found in Michigan's Constitution protect the right to abortion, and that *Mahaffey* "insufficiently considered the Michigan Constitution's support for an independent state-law right to abortion grounded in the privacy interests protected by its Due Process Clause[.]"

The Court agrees with the intervenors' interpretation of *Mahaffey* to an extent. In its opinion granting a preliminary injunction, this Court specifically acknowledged that although the Court of Appeals held in *Mahaffey* that Michigan's Constitution provides "a generalized right of privacy," the Court also held that the right does not include a right to abortion. Accordingly, the Court grants summary disposition to intervenors on Count VI of plaintiffs' complaint.[1]

[1] "Michigan has long recognized the common-law tort of invasion of privacy." *Lewis v LeGrow*, 258 Mich App 175, 193, 670 NW2d 675 (2003). Indeed, *De May v Roberts*, 46 Mich 160, 9 NW 146 (1881), is among the first reported decisions in the United States allowing a tort recovery

The Court disagrees with the intervenors, however, regarding the breadth of *Mahaffey*'s holding and its precedential effect on plaintiffs' bodily-integrity claim. Plaintiffs' argument that MCL 750.14 unconstitutionally infringes on the right to bodily integrity was not considered in *Mahaffey*. Indeed, the right of bodily integrity was not of constitutional dimension until 2018, when the Court of Appeals decided *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018), aff'd by equal division 506 Mich 157 (2020). *Mahaffey* did not address the constitutionality of MCL 750.14 through a bodily-integrity lens, nor was it asked to. Contrary to the intervenors' argument, *Mahaffey* does not impede a determination that MCL 750.14 conflicts with the right to bodily integrity.

The Court has also rejected the intervenors' argument that the right to bodily integrity described in *Mays* does not encompass a woman's right to terminate her pregnancy. But with the benefit of additional briefing, including particularly helpful briefs filed by amici curiae, the Court now expands on both its previous bodily-integrity analysis and its conclusion that the meaning of due process under the Michigan Constitution is broad enough to include a woman's right to abortion.

A. FACTUAL BACKGROUND

Before proceeding to the facts, it helps to restate the statute at issue. MCL 750.14 reads:

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premised on an invasion of privacy theory. *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 306; 788 NW2d 679 (2010). *De May* arose from the presence of a non-physician third party during the plaintiff's labor and delivery. Speaking of the birth at the center of the case, the Supreme Court observed: "To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case." *De May*, 46 Mich at 165. If confronted with a privacy theory in the reproductive decision-making context, our Supreme Court may find *De May* instructive.

> Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.
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> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

The parties agree that this statute requires a woman to carry her pregnancy to delivery under nearly all circumstances. Pregnancies resulting from rape or incest are not excepted from the law. If the woman's physician concludes that continuing the pregnancy will permanently damage that woman's health, the law offers no recourse. If the woman has no social support or means to support the child, or if having the child means forgoing an education or employment, the law requires the woman to make the sacrifices. If the fetus suffers from a disability or deformity incompatible with life, the law requires carrying the pregnancy to term regardless of the physical or emotional consequences. This is the legal landscape against which the Court must evaluate the undisputed evidence in this case.

Plaintiffs' motion for summary disposition includes an affidavit signed by plaintiff Sarah Wallett, M.D., a board-certified obstetrician-gynecologist who performs abortions in Michigan. Along with her medical credentials, Dr. Wallett has a Master of Public Health degree from the University of Michigan. Dr. Wallett's affidavit describes the services offered at Planned Parenthood of Michigan, and presents general information related to pregnancy, abortion, and

childbirth. The affidavit signed by Dr. Curlin on behalf of the intervenors does not challenge the health-related information supplied by Dr. Wallett.[2]

Dr. Wallett avers that "pregnancy and childbirth carry significant medical risk." The risk of death associated with childbirth, she reports, is estimated to be 8.8 deaths per 100,000 live births. The estimated overall risk of maternal mortality is 23.8 deaths per 100,000 live births. In contrast, "less than one woman dies for every 100,000 abortion procedures." The affidavit continues that during pregnancy, women "are more prone to blood clots, nausea and vomiting, dyspnea (breathing discomfort), hypertensive disorders, urinary tract infections, and anemia, among other complications." Pregnancy also "may aggravate preexisting health conditions such as hypertension and other cardiac disease, diabetes, kidney disease, autoimmune disorders, obesity, asthma, and other pulmonary disease."

Dr. Wallett explains that health conditions may arise during pregnancy that threaten life or long-term health, including and hematologic (blood) disorders. Some pregnancy complications, such as ectopic pregnancy, are fatal if not treated rapidly. Childbirth, too, is a "significant medical event," carrying risks of death and the need for an open abdominal surgery (cesarean section), which in turn exposes a person to a variety of potentially life-threatening complications.

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[2] Dr. Curlin's affidavit addresses whether enforcement of MCL 750.14 "would violate the right to bodily integrity that is respected in the ethical doctrine of informed consent," and specifically whether "the right to refuse medical interventions entails a corollary right to obtain those interventions." In Dr. Curlin's view, the "right to bodily integrity" corresponds to a right "to refuse" medical intervention rather than a right to obtain an intervention, particularly when the intervention at issue – abortion – involves a "living human fetus." Dr. Carlin asserts: "If the living human fetus is recognized as deserving of any moral regard, then it follows that there can be no general positive right to abortion." Dr. Curlin does not express any opinions or offer any data regarding the public health aspects of criminalizing abortion, or the comparative medical risks of pregnancy, childbirth, and abortion.

Restricting or curtailing the ability to obtain abortion services substantially worsens health outcomes and living conditions during all pregnancies, the affidavit explains, and especially for people of color and the economically vulnerable.

According to Dr. Wallett – and undisputed here – "Abortion is one of the safest and most common medical services performed in the United States today." The risk of death associated with childbirth is more than 12 times higher than that associated with abortion. Pregnancy-related complications are far more common in those who elect to give birth than those who choose to terminate their pregnancies. Dr. Wallett reports that of the 29,669 induced abortions performed in Michigan in 2020, the Michigan Department of Health and Human Services reported just seven immediate complications. And according to Dr. Wallett, approximately one in four Americans will have an abortion by age 45.

The data provided in Dr. Wallett's affidavit establish that abortion is safe and routinely performed. For some, abortion is lifesaving. For others, abortion preserves health and permits a subsequent healthy and desired pregnancy. The uncontested evidence supports that when performed by a physician, the medical risks of abortion are far lower than those of childbirth. The evidence also establishes that abortion is an essential component of obstetrical care because it saves lives and preserves health.

If criminalized, Dr. Wallett attests, abortion will continue to occur. Self-performed abortions, or abortions performed by non-physicians, will endanger lives, health, and reproductive futures. Other likely consequences of criminalizing abortions include an increase in deaths due to complications of pregnancy and childbirth.

The statute's sweeping application, combined with this factual background, informs the Court's consideration of the parties' competing bodily integrity arguments. Manifestly, criminalizing abortion will eliminate access to a mainstay healthcare service. For 50 years, Michiganders have freely exercised the right to safely control their health and their reproductive destinies by deciding when and whether to carry a pregnancy to term. Eliminating abortion access will force pregnant women to forgo control of the integrity of their own bodies, regardless of the effect on their health and lives. The evidence further establishes that the enforcement of a 1931 law withdrawing that right will have dire public-health consequences.

The legal issue presented is whether our state's Constitution empowers the Legislature to override personal health decisions by compelling a person to use her body in a manner not of her own choosing. As discussed below, the Court finds that such compulsion destroys the sphere of bodily integrity and personal autonomy underlying the liberty component of the Due Process Clause, Const 1963, art 1, § 17.

B. BODILY INTEGRITY AND THE MICHIGAN CONSTITUTION

The intervenors insist that the Due Process Clauses of the Michigan and United States Constitutions are coextensive. Similarly, the intervenors propose that the right to privacy and the right to bodily integrity are one and the same, the latter subsumed within and indistinguishable from the former, which *Mahaffey* held inapplicable to abortion access. Michigan's Constitution does not mention abortion, the intervenors continue, and there is no "principled" basis to interpret it differently than the United States Supreme Court interpreted the federal Constitution in *Dobbs*.

The intervenors are surely correct the right to privacy and the right to bodily integrity are both rooted the idea that there are attributes of "personhood" on which the government may not tread. But common philosophical roots do not produce identically aligned rights.

The right to privacy is a generalized "right to be let alone by other people." *Katz v United States*, 389 US 347, 350–351; 88 S Ct 507; 19 L Ed 2d 576 (1967). As conceptualized by Justice Thomas Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley, Torts, 2d ed (1888), p 29. Justice Louis Brandeis understood the right as pertaining to the public disclosure of private facts. See *Beaumont v Brown*, 401 Mich 80, 109; 257 NW2d 522 (1977), overruled on other grounds by *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 302; 565 NW2d 650 (1997). The right to bodily integrity is narrower and more exacting than either of those formulations.

Unlike the common-law right to privacy, the right to bodily integrity emphasizes one's exclusive use and control of one's own *body*. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). The right is "indispensable," declared the Sixth Circuit in *Guertin v Michigan*, 912 F3d 907, 918 (CA 6, 2019), the "first among equals." These recognitions of the primacy of the right correspond with a universal understanding that bodily autonomy is inherent to human dignity.

Contrary to the intervenors' argument, the right to bodily integrity protects more finite interests than those generally falling within the catch-all "privacy" rubric. By analogy, the rights

subsumed under the designation "*Miranda* rights"[3] include the right to counsel during custodial interrogation, and the right to refuse to self-incriminate. The contours of those two rights are readily distinguishable despite their shared label. Similarly, the "right to privacy"—to be let alone—includes a bundle of rights that have nothing to do with bodily integrity. See *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296; 788 NW2d 679 (2010) (the right to privacy includes the right to be free from intrusion upon seclusion); *Pallas v Crowley-Milner & Co*, 334 Mich 282, 285; 54 NW2d 595 (1952) (the right to privacy is violated by the unconsented publication of a photograph); and *Doe v Mills*, 212 Mich App 73, 80; 536 NW2d 824 (1995) (the right to privacy protects against the public disclosure of embarrassing private facts).

The case law describing the right to bodily integrity usually flows from controversies involving medical treatment, characterizing the right as synonymous with the freedom to protect one's self-determination by making autonomous medical choices. Typical cases involve the nonconsensual entry into a person's body for medical purposes, such as *Rochin v California*, 342 US 165, 169; 72 S Ct 205; 96 L Ed 183 (1952), or forced treatment in the face of a competent patient's objection, such as *Cruzan v Director, Mo Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990). Concurring Justice Sandra Day O'Connor acknowledged in *Cruzan* that "Requiring a competent adult to endure . . . procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment." *Id.* at 289 (O'CONNOR, J., concurring). The right to bodily integrity encompasses the freedom to decide how one will use her own body, a right independent of that of privacy generally. The intervenors'

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602 (1966).

argument that the right to bodily integrity and the right to privacy are necessarily co-extensive has no legal or logical validity.

The Court easily dispenses with the intervenors' next argument: that a ban on abortion has nothing to do with bodily integrity because pregnancy "does not involve any 'nonconsensual entry into the body.' " As any woman who has experienced pregnancy and delivery knows, the process is utterly transformative of every bodily function. From early pregnancy through birth, hormonal changes, biochemical adaptations, and the presence of a growing, moving and ultimately exiting fetus take control of a woman's body, not to mention her mind. When pregnancy is desired, the word "intrusion" is likely low on the list of a mother's descriptors of the process. But when pregnancy is unwelcome, dangerous, or likely to result in negative health consequences, it is indeed a "bodily intrusion."

The intervenors' central contention is that the right to bodily integrity now enshrined in Michigan's Constitution does not include a right to abortion. *Mays*' holding that our Constitution's Due Process Clause encompasses "an individual's right to bodily integrity free from unjustifiable governmental interference" constitutes binding precedent. *Mays v Snyder*, 323 Mich App at 58–59 (citation and quotation marks omitted). See also *Mays*, 506 Mich at 195 (affirming the Court of Appeals by equal division).[4] The intervenors tacitly acknowledge that *Mays* recognized a new

[4] Citing *Mays*, the intervenors also contend that "to survive dismissal, the alleged violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." 323 Mich App at 60 (citation and quotation marks omitted). The intervenors fundamentally misunderstand the context of the Court's statement. *Mays* considered whether Michigan courts should recognize a constitutional *tort* claim arising from a violation of the right to bodily integrity. To justify a *tort* claim against the state, a constitutional violation must involve conduct that is not merely negligent, but egregious or outrageous: "To sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and

right protected by *Michigan's* Constitution. Even so, the intervenors urge, the right does not apply to abortion. The *Dobbs* majority opinion, on which the intervenors rely, expressed that view of the federal constitution:

> The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." [*Washington v Glucksberg*, 521 US 702, 721; 117 S Ct 2258; 138 L Ed2d 772 (1997)] (internal quotation marks omitted).
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> The right to abortion does not fall within this category. [*Dobbs*, ___ US at ___; 142 S Ct at 2242].

Decisions of the United States Supreme Court interpreting identically worded provisions do not preclude Michigan Court from adopting a more capacious construction. "In interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004). "[O]ur courts are not 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. We are obligated to interpret our own organic instrument of government." *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993). The Michigan Supreme Court has acknowledged the independent authority of our Due Process Clause, explaining that although its language is identical to that of Fourteenth Amendment, "Const 1963, art 1, § 17 may, in particular circumstances, afford protections *greater than or distinct from* those

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capricious as to shock the conscience." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008). The "egregious" and "outrageous" standard has no bearing in a case challenging a statute's facial unconstitutionality.

offered by US Const Am XIV, § 1." *AFT Mich v Michigan*, 497 Mich 197, 245; 866 NW2d 782 (2015) (footnotes omitted, emphasis added).

"[T]he ultimate task facing" a court confronting the "interpretation of particular Michigan constitutional provisions is to respectfully consider federal interpretations of identical or similar federal constitutional provisions, but then to undertake by traditional interpretive methods to independently ascertain the meaning of the Michigan Constitution." *People v Tanner*, 496 Mich 199, 223 n 17; 853 NW2d 653 (2014). Here, that process yields the conclusion the liberty component of our Due Process Clause must be interpreted more broadly than in *Dobbs*.

Our Supreme Court's paradigm for evaluating whether a right falls within the "liberty" aspect of the Due Process Clause differs from that of the Supreme Court of the United States in an important way. Rather than requiring a right to be "deeply rooted in this Nation's history or tradition," and "implicit in the concept of ordered liberty," when interpreting Michigan's Constitution "the most pressing rule" is "that the provisions for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen." *Lockwood v Nims*, 357 Mich 517, 557; 98 NW2d 753 (1959) (quotation marks omitted). See also *Shavers*, 402 Mich at 598 ("the concepts of 'liberty' and 'property' protected by due process 'are not to be defined in a narrow or technical sense but are to be given broad application.' ") (Citations omitted.) These commands flow from differing constitutional histories and the two instruments' profound dissimilarities.

The differences in the constitutions' language, structure and history are at the heart of the "compelling reason" framework, which guides a court's consideration of whether a Michigan constitutional provision should be interpreted differently than its federal counterpart. *Goldston*,

470 Mich at 534. In evaluating whether Michigan's Constitution includes a right not recognized by the United States Supreme Court we consider:

> 1) [T]he textual language of the state constitution, 2) significant textual differences between parallel provisions of the two constitutions, 3) state constitutional and common-law history, 4) state law preexisting adoption of the relevant constitutional provision, 5) structural differences between the state and federal constitutions, and 6) matters of peculiar state or local interest. [*Id.*, quoting *People v Collins*, 438 Mich 8, 31 n 39; 475 NW2d 684 (1991) (alteration in original).]

Four *Goldston* factors weigh in favor if interpreting Michigan's Due Process Clause more expansively than its federal counterpart: our state's constitutional history charts a unique course for the interpretation of personal rights; the structural differences between the two constitutions warrant interpreting our Due Process Clause more expansively than the United States Supreme Court interprets the federal provision; our Constitution contains text relevant to due process that has no counterpart in the United States Constitution, and a matter of "peculiar" state interest – the promotion of the public health – points toward interpreting our Constitution in a manner that preserves and protects the health of our citizens.[5]

Although the starting point dictated by *Goldston* and its predecessors is the language of the federal Constitution, "this emphatically does not mean that" that the drafters of state constitutions

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[5] The *Goldston* factors originated in a footnote to Justice Boyle's majority opinion in *People v Catania*, 427 Mich 447, 466 n 12; 398 NW2d 343 (1986). Justice Boyle borrowed the factors from an opinion of the Supreme Court of Washington, *State v Gunwall*, 106 Wash 2d 54, 58-63; 720 P2d 808 (Wash, 1986) (en banc). See *id.* In *Catania* and *Gunwall*, the fourth factor is stated as: "[*m*]*atters of particular* state interest or local concern." Gunwall, 106 Wash at 67 (emphasis omitted); see also *Catania*, 427 Mich at 466 n 12 (emphasis added). In *Collins*, 438 Mich at 31 n 39, and later cases including *Goldston*, the word "particular" became "peculiar." One of the definitions of "peculiar" includes "particular," and the Court assumes that is what the Supreme Court meant in the cases that followed *Catania*. See *Merriam-Webster's Collegiate Dictionary* (11th ed).

"intended to hitch interpretation of the state constitution to evolving Supreme Court jurisprudence." Clint Bolick, *Principles of State Constitutional Interpretation*, 53 Ariz St LJ 771, 787 (2021). Rather, the *Goldston* factors implicitly instruct that our state's unique history must drive the inquiry into whether our 1963 Constitution's Due Process Clause should be interpreted more expansively than the parallel provision of the federal constitution.

In finding no federal due-process right to abortion, *Dobbs* relied on a version of history that began in the 13th Century and ended in 1868, when the federal Due Process Clause was ratified. Almost a century, two world wars, a constitutional amendment granting women the right to vote, the emergence of the civil rights movement, and a sea change in the laws regarding women's status in society separate the adoption of the Fourteenth Amendment from the ratification of our 1963 Constitution. The intervenors' insistence that a Michigan court's interpretation of our 1963 Constitution's Due Process Clause should echo *Dobbs*' interpretation of the federal Clause ignores that history, as well as the history-driven underpinnings of the "compelling reason" framework. A court charged with an examination of the ideas giving rise to a 1963 Constitution is not assisted by an historical analysis of a clause drafted in a far different social and legal environment. What was "deeply rooted" in history and tradition in 1868, a focal point in *Dobbs*, bears little resemblance to the understanding of personal freedom, particularly for women and people of color, motivating those who drafted and ratified our 1963 Constitution. The Court therefore rejects the intervenors' claim that this Court must reflexively adhere to *Dobbs*'s conclusions about the reach of the federal Due Process Clause.

Historical changes also play a role in the analysis of the more direct question at the heart of this case: whether a "compelling reason" exists to conclude that the enforcement of MCL 750.14 would violate our Due Process Clause. Thirty consequential years stand between the enactment of

MCL 750.14 and the ratification of our Constitution. In *People v Nixon*, 42 Mich App 332, 339; 201 NW2d 635 (1972), remanded on other grounds, 389 Mich 809 (1973), the Court of Appeals described that during that time,

> medical science has made tremendous strides . . . No longer is an induced abortion, when performed by a licensed physician in an antiseptic environment, a matter of so great a danger that it justifies a blanket denial of the right to secure such medical services. Not only has modern medical science made a therapeutic abortion reasonably safe, but it would now appear that it is safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child.

The Court's previous opinion sketched the history of Michigan's abortion legislation, highlighting that the statutory evolution of the criminal proscriptions demonstrated that their primary purpose was the protection of maternal health. A health purpose can no longer justify criminalizing abortion given the safety of the procedure and our Constitution's specific protection of public health.

Our state's constitutional history confirms that the drafters of our Constitution intended and expected that the document would house new rights. Article 1, § 23, provides that "[t]he enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Official Record reflects that when adding this new provision to our state's Constitution, the drafters foresaw that it would encourage an expansive interpretation of civil and personal rights. They declared that the retained rights provision "recognizes that no bill of rights can ever enumerate or guarantee all the rights of the people and that liberty under law is an ever growing and ever changing conception of a living society developing in a system of ordered liberty." 1 Official Record, Constitutional Convention 1961, p 470. Buttressing that the retained rights provision means that a right need not be specifically name to be included within concept of due process is the Address to the People, 2 Official Record, Constitutional Convention 1961, p

3365, accompanying Const 1963, art 1, § 23, explaining: "This is a new section taken from the 9th amendment to U. S. Constitution. It recognizes that no Declaration of Rights can enumerate or guarantee all the rights of the people – that it is presently difficult to specify all such rights which may encompass the future in a changing society."[6]

In 1963, the People ratified a constitution for the twentieth century and beyond, expecting that their document would safeguard present and newly emerging liberties as our country continued its rapid transformation after the Second World War. In contrast, the *Dobbs* majority looked *backwards*, clinging to a version of history that started "in the earliest days of the common law." *Dobbs*, 142 S Ct at 2254. When it comes to the recognition of civil and political rights, our state's Constitution charges us to look forward, and to inform our conclusions about the liberties enjoyed by our people in the lights of an "ever changing conception of a living society." 1 Official Record, p 470. The intent of the framers, manifested by their explanations of the new Constitution, are pertinent to the third *Goldston* factor ("state constitutional and common-law history") and supplies a compelling reason to interpret Michigan's Due Process Clause independently of the United States Supreme Court—with an eye toward "guaranteeing" rights that become established over time rather than eradicating them.[7]

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[6] Count V of plaintiffs' complaint sets forth a claim under the Article I, § 23 of the Michigan Constitution. The Court respectfully disagrees with plaintiffs that this provision *creates* rights. In the Court's view, this section is an interpretive *rule*. It reminds courts that not every right will be found in the constitutional text, and that when it comes to rights, reflexively searching for a word in the text is an incorrect approach.

[7] Pre-*Dobbs*, the United States Supreme Court employed a similar analysis. See *Obergefell v Hodges*, 576 US 644, 664; 135 S Ct 2584; 192 L Ed 2d 609 (2015) ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting

Relevant to the first, second and fifth *Goldston* factors, the text and structure of Michigan's Constitution also differ from the federal Constitution in several relevant respects, adding more compelling reasons to interpret the charters differently. These dissimilarities are particularly salient because they reinforce that due process includes protecting and fostering the health and the bodily integrity of Michigan women.

It was not an accident that the framers of the 1963 Constitution placed a Declaration of Rights at its very beginning, presenting "constitutionally guaranteed individual rights . . . drawn to restrict governmental conduct and to provide protection from governmental infringement and excesses." *Woodland v Mich Citizens Lobby*, 423 Mich 188, 204; 378 NW2d 337 (1985). While the first three articles of the federal Constitution enumerate and describe the powers of the *government*, Article I of Michigan's Constitution bestows on our *citizens* 24 different and specific personal rights, including several that do not appear in the federal document. The Kansas Constitution shares a similar structure. The Kansas Supreme Court has observed: "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." *Hodes & Nauser, MDS, PA v Schmidt*, 309 Kan 610, 660-661; 440 P3d 461 (Kan, 2019).

Our Constitution also contains a provision that does not appear in the federal Constitution. Article 4, § 51 states: "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the

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the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.").

protection and promotion of the public health." Not long after the 1963 Constitution was ratified, the Supreme Court commented regarding this provision: "This new section, together with the traditional public policy of this State, must be held to limit the powers of the legislature and of government generally to such legislative acts and such governmental powers as exhibit a public purpose." *City of Gaylord v Beckett*, 378 Mich 273, 295; 144 NW2d 460 (1966).

The protection of public health interlaces with plaintiffs' bodily integrity claim. Article 4, § 51 restricts the Legislature's ability to enact statutes that disserve the public health. By depriving women of the right to make autonomous health choices, MCL 750.14 irreconcilably conflicts with the Constitution's public-health mandate. Our Declaration of Rights makes preeminent the personal liberty of our people, protecting against "the arbitrary exercise of governmental power," *AFT Michigan v Michigan*, 497 Mich at 245. Our Constitution's public-health commandment and the primacy of its focus on individual rights support that a statute endangering health by denying a right to abortion deprives Michiganders of due process of law.

The Court previously stated that

> [f]orced pregnancy, and the concomitant compulsion to endure medical and psychological risks accompanying it, contravene the right to make autonomous medical decisions. If a woman's right to bodily integrity is to have any real meaning, it must incorporate her right to make decision about the health events most likely to change the course of her life: pregnancy and childbirth.

A law denying safe, routine medical care not only denies women of their ability to control their bodies and their lives – it denies them of their dignity. Michigan's Constitution forbids this violation of due process.

Because the right to bodily integrity is fundamental, the state may enact laws that burden the right only when the laws serve a compelling governmental interest. *Phillips v Mirac, Inc*, 470

Mich 415, 432–433; 685 NW2d 174 (2004). To justify a law conflicting with a fundamental right, the government must demonstrate that the law is "narrowly tailored to serve a compelling state interest." *Sheardown v Guastella*, 324 Mich App 251, 258; 920 NW2d 172 (2018).

As recognized in *Roe* and all post-*Roe* abortion related cases until *Dobbs*, the state has an interest in protecting both maternal health and potential life. No evidence supports that enforcement of MCL 750.14 would protect maternal health. To the contrary, criminalizing abortion will endanger the lives and health of Michigan women.

In *Roe*, the United States Supreme Court applied the strict scrutiny rubric, concluding that not until fetal viability was "the State's important and legitimate interest in potential life . . . 'compelling.' " *Roe*, 410 US at 163. In *Planned Parenthood of SE Penn v Casey*, 505 US 833, 874; 112 S Ct 2791, 2819; 120 L Ed 2d 674 (1992) (plurality opinion), overruled by *Dobbs*, 142 S Ct 2228, the Supreme Court jettisoned the trimester framework, and adopted an "undue burden" standard: "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."

Casey, however, involved a statute regulating abortion, not criminalizing it. The *Casey* plurality explained: "Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe*'s terms, in practice it undervalues the State's interest in the potential life within the woman." *Id.* at 875. The question presented here is whether the state's interest in protecting potential life justifies a law criminalizing abortion in all circumstances except "to preserve the life of [a] woman." MCL 750.14.

The intervenors advocate that the state's interest in the protection of prenatal life so vastly outweighs a woman's interest in bodily integrity that the latter right should be disregarded.[8] In *Roe*, the Court rejected the intervenors' argument, explaining:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. [*Roe*, 410 US at 160.]

The Court adopts that reasoning. Fifty years of conflict regarding *Roe* have proven that consensus regarding when life begins is impossible. Inherent in the right of bodily integrity is the right to bodily autonomy, to make decisions about how one's body will be used, "a right of self-determination in matters that touch individual opinion and personal attitude." *W Va State Bd of Ed v Barnette*, 319 US 624, 630–631; 63 S Ct 1178; 87 L Ed 1628 (1943). The state has no compelling interest in forcing a woman to surrender her rights to her "individual opinion[s] and personal attitude[s]" about when life begins, or to relinquish her bodily autonomy and integrity, before fetal viability. MCL 750.14 is not narrowly tailored to further the state's interest in viable fetal life, and therefore cannot survive strict scrutiny analysis.[9]

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[8] The Court's previous opinion discounted the intervenors' claim that the Legislature enacted MCL 750.14 to preserve fetal life. Amici curiae have provided an extensive and highly informative discussion of the history of abortion laws that calls into serious question the "fetal life" theory. That history supports that Michigan's abortion statute was enacted during an historical period in which lawmakers were more focused on maintaining women's roles as mothers and caretakers than in fetal well-being. For the purposes of this litigation, however, the Court will assume that MCL 750.14 was intended to preserve fetal life.

[9] Because MCL 750.14 is facially unconstitutional and has not been enforced, the Court need not address its deficiencies as applied to post-viability situations when the health of the mother is at stake, or any other aspects of the statute's potential enforcement.

Summarizing, the Court finds that any enforcement of MCL 750.14 would violate a woman's constitutional right to bodily integrity. Accordingly, the Court DENIES the intervenors' motion for summary disposition regarding Count II of plaintiffs' complaint, and GRANTS plaintiffs' motion for summary disposition on this Count.

V. EQUAL PROTECTION

Count III of plaintiffs' complaint alleges that MCL 750.14 violates Michigan's Equal Protection Clause, Const 1963, art 1, § 2: "No person shall be denied the equal protection of the laws . . . ." The complaint asserts that MCL 750.14 treats pregnant women seeking abortion differently than those seeking to continue their pregnancies, depriving those choosing abortion of their right to bodily integrity. The law also creates an illegal sex-based classification, plaintiffs claim, by withholding from pregnant women (and pregnant women alone) the power to make autonomous decisions related to reproduction, thereby entrenching "stereotypical, antiquated, and overbroad generalizations about the roles and relative abilities of men and women."

The intervening defendants' motion for summary disposition argues that plaintiffs' equal protection arguments are foreclosed by *Mahaffey*'s holding that there is no right to abortion under the Michigan Constitution, and by *Dobbs*' determination that "a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Dobbs*, 142 S Ct at 2245.

The Court is unpersuaded by the intervenors' arguments and DENIES the intervenors' motion for summary disposition of Count III. *Mahaffey* did not address the equal-protection claims articulated here, and this Court's consideration of Michigan's Equal Protection Clause is not cabined by *Dobbs*. Although our Supreme Court has declared that "Michigan's equal protection

provision is coextensive with the Equal Protection Clause of the United States Constitution," *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010), the Court promptly tempered that statement with this footnote:

> By this, we do not mean that we are bound in our understanding of the Michigan Constitution by any particular interpretation of the United States Constitution. We mean only that we have been persuaded in the past that interpretations of the Equal Protection Clause of the Fourteenth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 2 as well. [*Id.* at 318 n 7, quoting *Harvey v Michigan*, *Harvey v Michigan*, 469 Mich 1, 6, n 3; 664 NW2d 767 (2003), 6, n 3; 664 NW2d 767 (2003) (quotation marks omitted)].

As discussed above, the courts of this state may interpret provisions of Michigan's Constitution independently of the Supreme Court of the United States, both to protect Michiganders' individual rights, and when "compelling reasons" support doing so. Compelling reasons exist here.

Our Constitution's structure differs in fundamental ways from that of the United States Constitution. The framers placed our Declaration of Rights at the forefront of the document, conveying the prominence of the liberties it promises. The very first lines of our Constitution's Declaration of Rights create a frame of reference for considering the right to equal protection of the laws that has no counterpart in the United States Constitution: "All political power is inherent in the people. Government is instituted for their equal *benefit*, security and *protection*." Const 1963, art 1, § 1 (emphasis added). The concepts of equal "benefits" and equal "protection" are at the heart of the equal protection clause.

The equal-protection clauses of both constitutions require that the law treat similarly situated similarly, absent a reason to distinguish between them. *Shepherd Montessori Ctr*, 486 Mich at 318. The first question a court confronts when analyzing an equal-protection claim is whether the plaintiff was treated differently than a similarly situated comparator. *Id.* If the answer

is yes, the court considers the level of judicial scrutiny to apply to the reasons offered for the distinction. If the law treats similarly situated people differently based on the exercise of a fundamental constitutional right, as here, the law may be upheld only "if it passes the rigorous strict scrutiny standard of review: that is, the government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest." *Id.* at 319. This means that the Legislature may not disadvantage a group exercising a fundamental unless a compelling reason supports their unequal treatment, and the law is carefully crafted to further an important governmental objective. *Id.*

Plaintiffs' motion for summary disposition contends that MCL 750.14 draws two types of unconstitutional distinctions triggering strict scrutiny. Pregnant women who seek to protect their health and well-being by exercising their fundamental right to abortion are denied a safe medical procedure, while similarly situated women who elect to carry to term receive a full panoply of health services, thereby enjoying their right to bodily integrity. Plaintiffs secondly assert that because MCL 750.14 applies only to women, "in operation it enforces the archaic, sex-based stereotype that the biological capacity for pregnancy should determine the course of a person's life."

Intervenors' response recapitulates the reasoning of *Mahaffey* and *Dobbs*, insisting that they govern plaintiffs' equal-protection claim. Because the law "applies equally to both male and female abortion providers," the intervenors continue, it "does not create a sex-based classification." The intervenors add: "Insofar as the challenged law distinguishes between women who seek abortion and women who seek to carry their children to term, it is still subject to rational basis review; women who seek abortion are not a suspect class."

The Court finds plaintiffs' arguments more persuasive. Michigan's Constitution protects the right of all pregnant people to make autonomous health decisions. MCL 750.14 denies the fundamental rights of bodily integrity and autonomy to one constitutionally protected decision; under the law, women who seek abortion must sacrifice that fundamental right. Because the law's enforcement conflicts with a fundamental right it must be strictly scrutinized to determine whether it serves a compelling state interest.

The intervenors proffered justification for the law is the protection of potential fetal life. The history surrounding the law's 1931 enactment does not support this 2022 view of its purpose.[10] Even if the intervenors' version of the legislative history were accurate, the intervenors have not attempted to explain why that interest must always overcome the constitutionally protected interest of a pregnant woman in the control of her body. By depriving women who choose abortion the ability to exercise a fundamental right while protecting the same right for pregnant women who choose to continue their pregnancies, MCL 750.14 violates Michigan's Equal Protection Clause.

Plaintiffs' second ground for seeking injunctive relief under the Equal Protection Clause flows from *Casey*'s recognition that "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."

[10] An amicus curiae brief submitted by four distinguished professors of history and law makes a far stronger case that passage of the 1931 law was fueled by "a pervasive world view in which women's status in law, and their bodily integrity, were consistently compromised." The professors present abundant evidence supporting their thesis that "sex-stereotyped views of women, nativist sentiments, religious bigotry, eugenic aims, and fears about maternal mortality and morbidity from pregnancy termination have animated Michigan's laws restricting abortion." The intervenors admit to none of these Legislative purposes and have advanced no evidence regarding the legislative history of MCL 750.14. But because this is a motion under MCR 2.116(C)(10), the Court will construe the historical evidence developed by amici in favor of the intervenors' "protection of fetal life" claim, despite that the intervenors have presented nothing to support it.

Casey, 505 US at 856 (opinion of the court). Plaintiffs contend that criminalizing abortion denies the *benefits* of equal citizenship to women, precisely what 1963 Const art 1, §§1 and 2 forbid.

The "benefits" of equal citizenship are myriad and incapable of summary. For some women, the ability to pursue educational or career plans are a central benefit of equal citizenship, and the fundamental rights of bodily integrity and autonomy protect their right to continue along those pathways. For others, pregnancy is much desired, but due to health issues or fetal anomalies, a woman may determine that terminating the pregnancy is the safest option. And many women seeking abortion already have children. For them, concerns about their financial and emotional abilities to take good care of their existing children drive the abortion decision. See Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests In Motherhood*, 17 JL & Pol'y 97, 105 (2008) ("Over 60% of women obtaining abortions already have children. One study found that 61% of the women had children; with 34% having two or more children."). Exercising the right to bodily integrity means exercising the right to determine *when* in her life a woman will be best prepared physically, emotionally, and financially to be a mother. "[A]bortion serves the goal of gaining the freedom to raise children and to mother them in conditions of equality." *Id.* at 138.

Consistent with the Supreme Court's observation in *Casey* that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," 505 US at 856, fifty years of reproductive freedom have seen a vast expansion in the number of Michigan women in the professions, politics, and the workplace. By criminalizing abortion, MCL 750.14 prevents a woman who seeks to exercise a constitutional right from controlling her ability to work or to go to school, and thereby determining for herself the shape of her present and future life.

The law also controls her ability to be the mother she wants to be. The statute not only compels motherhood and its attendant responsibilities; it wipes away the mother's ability to make the plans she considers most beneficial for the futures of her existing or desired children. Despite that men play necessary role in the procreative process, the law deprives only *women* of their ability to thrive as contributing participants in world outside the home and as parents of wanted children. MCL 750.14 forces a pregnant woman to forgo her reproductive choices and to instead serve as "an involuntary vessel entitled to no more respect than other forms of collectively owned property." Lawrence H. Tribe, *Deconstructing Dobbs*, The New York Review of Books, September 22, 2022, available at <https://www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/> (accessed September 6, 2022). In doing so, the statute not only reinforces gender stereotypes, but "perpetuate[s] the legal, social, and economic inferiority of women." *United States v Virginia*, 518 US 515, 534; 116 S Ct 2264; 135 L Ed 2d 735 (1996).

Article I, § 2 of our Constitution does not permit the Legislature to impose unjustifiable burdens on different classes of pregnant women. It also forbids treating pregnant women as unequal to men in terms of their ability to make personal decisions about when and whether to be a parent. Accordingly, the Court GRANTS summary disposition plaintiffs regarding Count III of their complaint.

VI. REMAINING SUMMARY DISPOSITION ARGUMENTS

Because the Court's resolution of two of plaintiffs' claims suffices to grant full relief, the Court will not address the remaining arguments of the parties, including the arguments regarding the Retained Rights Clause and ELCRA.

VII. DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

For the reasons discussed in this opinion, the Court declares MCL 750.14 unconstitutional on its face and GRANTS plaintiffs' motion for a declaratory judgment to that effect.

MCR 3.310(C) governs the form and scope of injunctive orders. It provides that an order granting an injunction:

> (1) must set forth the reasons for its issuance;
>
> (2) must be specific in terms;
>
> (3) must describe in reasonable detail, and not by reference to the complaint or other document, the acts restrained; and
>
> (4) is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The order granting a permanent injunction and accompanying this opinion provides as follows:

Plaintiffs filed this action challenging the constitutionality of MCL 750.14 on multiple grounds. Plaintiffs and the intervening defendants filed cross-motions for summary disposition under MCR 2.116(C)(4), (C)(8), and (C)(10). Extensive briefs were filed by all three parties. The Court also had the benefit of many insightful amici curiae briefs.

In the opinion accompanying this order and incorporated by reference, the Court has detailed the legal and factual bases for its findings that MCL 750.14 violates the Due Process and Equal Protection Clauses of the Michigan Constitution. As explained in the opinion, MCL 750.14 is facially unconstitutional because its enforcement would deprive pregnant women of their right to bodily integrity and autonomy, and the equal protection of the law. Based on the reasoning set

forth in the Court's opinion, plaintiffs have proven actual success on the merits of these two aspects of their pleaded claims, and that they have no alternative or adequate remedy other than permanent injunctive relief to preserve their constitutional rights.

Enforcement of MCL 750.14 will endanger the health and lives of women seeking to exercise their constitutional right to abortion. Enforcement also threatens pregnant women with irreparable injury because without the availability of abortion services, women will be denied appropriate, safe, and constitutionally protected medical care.

MCL 750.14 also threatens plaintiffs Planned Parenthood and Sarah Wallett, M.D., because they are subject to felony prosecution and imprisonment for performing a medically necessary procedure that their patients are constitutionally entitled to have. Thus, the Court finds that plaintiffs and their patients have proved irreparable injury.

The Court further finds that issuing a permanent injunction will cause no damage to the defendant Attorney General or the intervenors. The harm to women, on the other hand, is a wholesale denial of their fundamental right to an abortion, necessitating permanent injunctive relief.

This Court finds that issuing a permanent injunction does not adversely affect the public interest because the public interest is served by an order protecting the constitutional rights of the public: in this case, the constitutionally protected right of women to abortion access.

Accordingly, the Court orders that defendant Attorney General is permanently enjoined from enforcing MCL 750.14.

The Court further orders that the Attorney General shall personally serve a copy of this order and the accompanying opinion on every county prosecuting attorney in the State of Michigan and must advise the county prosecuting attorneys that this Court has declared MCL 750.14 unconstitutional.

Under MCR 3.310(C)(4), the permanent injunction issued today "is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." In an unpublished order, the Court of Appeals has stated that "[b]ecause county prosecutors are local officials, jurisdiction of the Court of Claims does not extend to them." *In re Jarzynka*, unpublished order of the Court of Appeals, entered August 1, 2022 (Docket No 361470), p 3. The Court of Appeals also declared in *Jarzynka* that county prosecutors are not "agents" of the Attorney General, and therefore were not bound by the Court's preliminary injunction. See *id.* at 5.

This Court's permanent-injunctive order does not conflict with the Court of Appeals' order. The "jurisdiction" of the Court of Claims is not at issue today, as the Court's order binds the Attorney General – indisputably, a state officer – and the intervening defendants. In any event, the unambiguous language of MCR 3.310(C)(4) *compels* this Court to order that the injunction also binds the "agents" of the Attorney General as well as those "persons in active concert or participation with [her] who receive actual notice of the order by personal service or otherwise." Although the Court of Appeals stated in *Jarzynka* that county prosecutors are not "agents" of the Attorney General, this Court is not bound by the nonprecedential order issued in *Jarzynka*, a separate case. See MCR 7.215(C). Moreover, published case law and statutory authority call into question the accuracy of the dicta within the Court of Appeals' order. In light of the legal

uncertainty triggered by the *Jarzynka* order, the Court has elected to clarify the legal reasons underlying its order that the Attorney General must notify county prosecutors of the permanent injunction and must serve them with the opinion and order.

MCL 14.30 states: "The attorney general shall *supervise* the work of, consult *and advise* the prosecuting attorneys, in all matters pertaining to the duties of their offices." (Emphasis added.) Informing county prosecutors of the injunction and its basis are consistent with "advising" them regarding a matter "pertaining to the duties of their offices." MCL 14.30 also compels the Attorney General to "supervise" county prosecuting attorneys when they act under the authority of the People of the State of Michigan rather than in their independent capacities or as agents of their respective counties. See *Shirvell v Dep't of Attorney Gen*, 308 Mich App 702, 751; 866 NW2d 478 (2015) ("[T]he Attorney General has supervisory powers over the prosecuting attorneys in this state.").

The Court of Appeals has defined "supervise" as meaning "hav[ing] the charge and direction of." *People v Cline*, 276 Mich App 634, 645; 741 NW2d 563 (2007) (alteration in original). The meaning of the term comprehends having the authority to direct or control. See, e.g., *Smith v City of Bayard*, 625 NW2d 736, 737 (Iowa, 2001) (" 'Supervise' means the act of 'oversee[ing] with the powers of direction and decision the implementation of one's own or another's intentions . . . .' ") (alteration in original; citation omitted), and *Coghlin Electrical Contractors, Inc v Gilbane Bldg Co*, 472 Mass 549; 36 NE3d 505, 517 (Mass 2015) (citation omitted) (" 'to supervise' means 'to oversee, to have oversight of, to superintend the execution of or performance of [a thing], or the movements or work of [a person]; to inspect with authority; to inspect and direct the work of others.' ") (citation omitted; alterations in original). Applying the

common sense meaning of the term "supervise" as it is used in MCL 14.30, the Attorney General has the authority to control and direct the actions of county prosecutors.

Two cases from the Sixth Circuit arising in Michigan have held that when bringing felony charges under state law, county prosecutors act as agents of the state. See *Cady v Arenac Co*, 574 F3d 334, 345 (CA 6, 2009) ("[W]hen County Prosecutor Broughton made the decisions related to the issuance of state criminal charges against Cady, the entry of the DPA, and the prosecution of Cady, he was acting as an agent of the state rather than of Arenac County. His actions therefore cannot be attributed to Arenac County, and Arenac County cannot be held liable for Broughton's actions even if those actions violated Cady's rights."), and *Platinum Sports Ltd v Snyder*, 715 F3d 615, 619 (CA 6, 2013), citing MCL 14.30 ("As for local prosecutors, they answer to the Attorney General, who is obligated to 'supervise the work of . . . prosecuting attorneys.' "). The Sixth Circuit noted in *Platinum Sports* that "[a]ny effort by a prosecutor at this point to enforce" a statute declared unconstitutional "would be *ultra vires*." *Id.* These rulings are in accord with long-standing legal doctrine that a court's declaration that a penal statute is unconstitutional prohibits its enforcement. See, analogously, *Ex parte Young*, 209 US 123, 159; 28 S Ct 441; 52 L Ed 714 (1908):

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

The Court recognizes that federal case law it has cited are considered persuasive rather than precedentially binding. However, no published Michigan case law binding on this Court supports a contrary position. Because county prosecutors are at least arguably agents of the

Attorney General for the purpose of the enforcement and prosecution of felonies, the Court construes MCL 14.30 to require their personal notification of the injunction.

The Court also notes that under MCL 14.101,

> [t]he attorney general of the state is hereby authorized and empowered to intervene in any action heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state. Such right of intervention shall exist at any stage of the proceeding, and the attorney general shall have the same right to prosecute an appeal, or to apply for a re-hearing or to take any other action or step whatsoever that is had or possessed by any of the parties to such litigation.

This statute provides the Attorney General with the power to intervene in any action commenced by a prosecutor that the Attorney General believes to be ultra vires.

This is a final order that resolves the last pending claim and closes the case.

Date: September 7, 2022

Elizabeth L. Gleicher
Judge, Court of Claims