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

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

Plaintiffs,

v.

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

Defendants.

No. 1:23-cv-01189

Hon. Paul L. Maloney

Magistrate Judge Ray Kent

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

On August 8, 2024, Defendants filed a Notice of Supplemental Authority, bringing to the Court's attention *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024) ("AHM"), a legal challenge that the Court described as follows:

> In 2016 and 2021, the Food and Drug Administration relaxed its regulatory requirements for mifepristone, an abortion drug. Those changes made it easier for

> doctors to prescribe and pregnant women to obtain mifepristone. Several pro-life doctors and associations sued FDA, arguing that FDA's actions violated the Administrative Procedure Act. But the plaintiffs do not prescribe or use mifepristone. And FDA is not requiring them to do or refrain from doing anything. Rather, the plaintiffs want FDA to make mifepristone more difficult for other doctors to prescribe and for pregnant women to obtain.

AHM, 602 U.S. at 372-74.

Defendants' reliance on *AHM* to argue that Plaintiffs lack standing in this case is misplaced for multiple reasons.

First, *AHM* is not this case. The harm caused by Proposal 3 (Article I, § 28) is not limited to the harms caused by an abortion pill. The injuries inflicted by § 28 are far more pernicious and go well beyond abortion. (*See, e.g.,* Pls.' Resp. Br. at 7-9, ECF No. 34). In short, this challenge to § 28 raises far broader issues than whether FDA approval of an abortion pill violates the APA. Accordingly, the injuries caused by § 28 are not limited to those raised in *AHM*.

Second, as the Court recognized in *AHM*, "The Government correctly acknowledges that a conscience injury of that kind [*i.e.*, the plaintiff doctors alleged that they may be required—against their consciences—to render emergency treatment requiring them to complete an abortion or provide other abortion-related treatment] constitutes a concrete injury in fact for purposes of Article III. . . . So doctors would have standing to challenge a government action that likely would cause them to provide medical treatment against their consciences." *AHM*, 602 U.S. at 387. The plaintiffs in *AHM*, however, couldn't assert this injury due to federal law that broadly protects the right of conscience in the abortion (and sterilization) context. *See id*. at 390. There is no such broad conscience protection for the plaintiff medical professionals in this case as § 28 extends beyond medical treatment related to abortion (or sterilization). Under *AHM*'s holding, therefore, standing clearly exists in the case at bar because no broad conscience protection for the harms caused by § 28 exists. And even more fundamentally, this challenge to § 28 extends beyond simply

providing medical treatment, as the claims asserted by the parents and Right to Life of Michigan illustrate.

Third, while *AHM* held that *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982), did not provide a basis for standing in that case in light of its distinguishable facts, the Court did not overrule *Havens*, and the facts of this case are closer to *Havens* than they are to *AHM.* Moreover, Plaintiffs do not rely solely on *Havens*, as there are other cases that establish standing in this case, including *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993) (concluding that an organization "can establish standing by alleging a concrete and demonstrable injury, including an injury arising from a purportedly illegal action [that] increases the resources the group must devote to programs independent of its suit challenging the action") (quotations and citations omitted), and *Hile v. Michigan*, 86 F.4th 269 (6th Cir. 2023) (holding that the plaintiffs had standing to challenge Article VIII, § 2 of the Michigan Constitution because, *inter alia*, the "allegations render it at least plausible that if Article VIII, § 2 is declared unconstitutional, Plaintiffs would lobby their representatives to change Michigan's law concerning 529 plans").

Fourth, *AHM* does nothing to undermine Plaintiffs' standing in this case based on the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). (*See* Pls.' Resp. Br. at 6-8, ECF No. 34). While the *Romer* plaintiffs filed their original action in state court and satisfied the more broadly construed state court standing rules, in order for the Supreme Court to hear and decide the federal constitutional issues (which it did), the Court had to independently conclude that it had jurisdiction to do so under Article III. *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 6, 8 (1988) (addressing standing under Article III before addressing the merits of a case originating in state court, noting that "the record in this case leaves much to be desired in terms of specificity for purposes of determining the standing of appellants to challenge this ordinance," and observing that

"[u]ndoubtedly this is at least in part a reflection of the fact that the case originated in a state court where Art. III's proscription against advisory opinions may not apply"). As the Court emphasized in *AHM*, standing is a "threshold question" that must be resolved before the Court's power to rule is invoked. *AHM*, 602 U.S. at 378. That fundamental requirement of Article III applied in *Romer* as well. Consequently, since the injuries in *Romer* were sufficient for standing purposes, the similar injuries in this case are likewise sufficient for standing.

Finally, as noted in Plaintiffs' response, so long as one Plaintiff has standing, this Court has jurisdiction to decide this case. (Pls.' Resp. Br. at 6 [citing, *inter alia*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.")]). As there are multiple reasons for finding standing in this case beyond those addressed by the Court in *AHM*, *AHM* does not resolve the standing issue here.

In short, *AHM* does nothing to change the factual and legal conclusion that Plaintiffs have standing to advance their constitutional challenge to § 28. This Court should deny Defendants' motion to dismiss and permit this case to proceed to the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2024, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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