

No. 25-1973

**United States Court of Appeals
for the
Sixth Circuit**

**RIGHT TO LIFE OF MICHIGAN; CELINA ASBERG;
GRACE FISHER; ANDREA SMITH; JOHN HUBBARD,**

PLAINTIFFS - APPELLANTS,

v.

**GRETCHEN WHITMER; DANA NESSEL; JOCELYN
BENSON, in their official capacities,**

DEFENDANTS - APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
HONORABLE PAUL L. MALONEY
CIVIL CASE No. 1:23-cv-01189

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Article I, § 28 of the Michigan Constitution grants minors a uniquely far reaching right to “reproductive freedom.” Defendants/Appellees (“Defendants”) do not refute that fact, nor could they. As a direct result, the sweeping provisions of § 28 undermine the fundamental rights of parents protected by the Fourteenth Amendment. Section 28, which is self-executing, has passed, and the harms it creates are here and now. There is nothing speculative about it. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) (“It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress.”).

The district court dismissed this constitutional challenge on standing grounds, finding that § 28 causes no cognizable injury to any Plaintiff (including Plaintiffs/Appellants [“Plaintiffs”] challenging the court’s dismissal of the parental rights claim here). The district court did not address any other issue. Defendants, nonetheless, ask this Court to not only affirm the district court’s erroneous ruling on standing, but should this Court find standing, Defendants ask this Court to rule for the first time on several other issues (*e.g.*, failure to state a claim, no state action, Eleventh Amendment immunity) that were not decided below. Plaintiffs contend that, should this Court reverse the district court on standing, the appropriate action would be to

remand for initial consideration of these issues by the district court. *Baker v. United States*, 848 F. App'x 188, 189 (6th Cir. 2021) (“The government urges us to affirm on one of several alternative grounds. These grounds have not been addressed by the district court, and such consideration would be valuable in our examination of the government’s alternative arguments. We therefore decline to rule on the alternative grounds on this appeal, but instead remand for initial consideration by the district court.”); *Flournoy v. Seiter*, 835 F.2d 878 (6th Cir. 1987) (“This claim was not addressed in the district court. We therefore remand this claim for initial consideration by the district court.”); *Eichaker v. Vicksburg*, 627 F. App'x 527, 534 (6th Cir. 2015) (same); *Nasierowski Bros. Inv. Co. v. Sterling Heights*, 949 F.2d 890, 898 (6th Cir. 1991) (same). Additionally, remand is the appropriate action because if the district court was wrong on organizational standing, for example, a ruling from this Court on that issue could provide a basis for the district court to reconsider its ruling on other issues and/or an opportunity for Plaintiffs to file an amended pleading as the claims were dismissed without prejudice.

In the final analysis, Plaintiffs have standing, they have alleged a plausible violation of parental rights that is ripe for review, state action exists, and Defendants are proper parties who do not enjoy Eleventh Amendment immunity.

ARGUMENT IN REPLY

Section 28, which was enacted via voter initiative, is not immune from federal

constitutional challenge. Defendants cannot dispute this legal reality. *Obergefell v. Hodges*, 576 U.S. 644, 675-76 (2015) (striking down on rational basis grounds Michigan’s marriage amendment, which was likewise enacted via voter initiative, holding that the amendment violated the equal protection and due process guarantees of the Fourteenth Amendment); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a Colorado state constitutional amendment passed via a statewide referendum that prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons, finding that the amendment violated the equal protection guarantee of the Fourteenth Amendment on rational basis grounds). As the U.S. Supreme Court noted in *Obergefell*, “fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.” *Obergefell*, 576 U.S. at 677.

Unlike the relatively new “rights” at issue in *Romer* and *Obergefell*,¹ “the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); see also *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and

¹ See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (“It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. . . . Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”), *rev’d by Lawrence v. Tex.*, 539 U.S. 558, 578 (2003).

nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

The Supreme Court long ago rejected any notion that a child is “the mere creature of the State” and, on the contrary, asserted that parents “have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.” *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *id.* at 529 (“It is not seriously debatable that the parental right to guide one’s child intellectually and religiously is a most substantial part of the liberty and freedom of the parent.”) (citing *Meyer v. Neb.*, 262 U.S. 390, 399-400 (1923); *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.”) (citations omitted); *Wis. v. Yoder*, 406 U. S. 205 (1972) (recognizing that parents have a right “to direct the religious upbringing of their children,” and that this right can be infringed by laws that pose “a very real threat of undermining” the religious beliefs and practices that parents wish to instill in their children); *Mahmoud v. Taylor*, 606 U.S. 522, 550 (2025) (“hold[ing] that the Board’s introduction of the ‘LGBTQ+-inclusive’ storybooks—combined with its decision to withhold notice to parents and to forbid opt outs—substantially interferes with the religious development

of their children and imposes the kind of burden on religious exercise that *Yoder* found unacceptable”).

Defendants offer this Court a dim view of parental rights, and they cannot refute the pernicious effects of § 28 on these rights—effects based on the plain language of § 28 as well as the reasonable inferences drawn from this language and the allegations set forth in the First Amended Complaint. *See infra*. With regard to these adverse effects, Defendants’ citation to *People v. Swider*, No. 363450, 2023 Mich. App. LEXIS 8404, (Ct. App. Nov. 21, 2023), is misplaced. (Defs.’ Br. at 2 n.1). In that case, the prosecution arose from allegations that the defendant inflicted frequent sexual abuse on his granddaughter and her childhood friend when the complainants were around five to eight years old. That situation is hardly comparable to a situation where, for example, a fifteen-year-old engages in a consensual sexual relationship with an adult (school official), who then aids and assists the young girl with obtaining an abortion to hide the misdeed. Section 28 authorizes this abhorrent conduct as it expressly prohibits the state (which includes the Governor and the Attorney General) from “*penalize[ing], prosecut[ing], or otherwise take[ing] adverse action against someone for aiding or assisting a pregnant individual in exercising their right to reproductive freedom with their voluntary consent.*” *See* § 28(3). No exceptions exist for minors. It is rather “disturbing” that Defendants are willfully blind to how this state-granted and exceedingly broad right to “reproductive freedom” undermines the

rights of the minor child's parents, who, as a direct result of § 28, no longer have the protection of laws (or the protection of government officials who are sworn to uphold such laws) designed to protect their vulnerable child. *See Romer*, 517 U.S. 620 (striking down on federal constitutional grounds a state constitutional amendment that precludes all legislative, executive, or judicial action at any level of state or local government designed to protect persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships”). Plaintiffs, who are parents, need not await the consummation of such egregious harms before challenging the law that permits and protects such harms. *See infra*.

I. Plaintiffs Have Standing to Advance Their Parental Rights Claim.

As a direct result of § 28, parents (including Plaintiffs) no longer have the benefit of laws that provide affirmative protection for their children, and which also serve to punish and deter those who would prey on their children. Examples of such laws (which are cited in the First Amended Complaint) that have been nullified because of § 28 include Michigan Compiled Laws § 722.901, *et seq.* (The Parental Rights Restoration Act) and Michigan Compiled Laws § 388.1766, which prevented school personnel from referring a student for an abortion or assisting a student with obtaining an abortion.² (R.23, First Am. Compl. [“FAC”] ¶¶ 99-101, PageID.165-66).

² The Parental Rights Restoration Act, cited in the First Amended Complaint, was one of the many pro-life laws lobbied for and supported by Plaintiff Right to Life of Michigan. *See* 1990 Mich. Adv. Legis. Serv. 211 (“An initiation of Legislation to

As set forth in Plaintiffs’ opening brief and reinforced here, all Plaintiffs have suffered an injury that is fairly traceable to the enforcement of § 28 and that can be redressed by the requested relief.³ *Allen v. Wright*, 468 U.S. 737, 751 (1984) (stating that to invoke the jurisdiction of a federal court “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief”). Moreover, “[i]n evaluating standing at this juncture, [the court] must assume that the party asserting federal jurisdiction is correct on the legal merits of his claim, that a decision on the merits would be favorable, and that the requested relief would be granted.” *Cutler v. United States HHS*, 797 F.3d 1173, 1179 (2015) (internal quotations and punctuation omitted) (emphasis added). Defendants (and the district court) ignore this standard for evaluating standing in this case. If the Court assumes that Plaintiffs are correct on the legal merits of their claim, that a decision on the merits would be favorable, and that the requested relief would be granted, then there is little difficulty with finding that Plaintiffs have standing *and* that Defendants are the appropriate parties. As argued in Plaintiffs’ opening brief:

[I]n *Obergefell*, the Supreme Court struck down Michigan’s marriage

require parental consent for abortions performed on unemancipated minors and to provide a judicial alternative to parental consent; to provide for certain rights, powers, and duties of departments, school districts, individuals, and courts; and to prescribe penalties.”); *see also* Pls.’ Opening Br. at 23 n.5).

³ A declaration that § 28 does not apply to minors and/or an injunction preventing its application to minors due to the constitutional right of parents to direct and control the upbringing of their children would provide a remedy for the injuries Plaintiffs are suffering.

amendment, which was also passed by voter initiative. In *Obergefell*, the defendants were “state officials responsible for enforcing the laws in question.” *Obergefell*, 576 U.S. at 655. As in this case, these “state officials” included the Michigan Governor and the Michigan Attorney General in their official capacities. *See id*; *see also Deboer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014) (filing challenge to the Michigan marriage amendment against the Michigan Governor and Attorney General). Moreover, in *Northland Family Planning Center v. Nessel*, Case No. 24-000011-MM, 2025 Mich. Ct. Cl. LEXIS 1 (May 13, 2025),⁴ a case which struck down several provisions of state law under § 28, the lawsuit was also brought against the Michigan Attorney General. In short, the injuries alleged are the result of state action, and the principal state officials responsible for enforcing § 28 are the Michigan Governor and Attorney General—the senior executive officials for the state. *See generally Denver Area Educ. Telcoms. Consortium*, 518 U.S. at 782 (Kennedy, J., dissenting) (“State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State.”) (citing *Hunter*, 393 U.S. at 389-90 (finding state action under the Fourteenth Amendment)).

Finally, the injury caused by the violation to parental rights can be redressed by a court, as evidenced by the Court’s decisions in *Romer* and *Obergefell*. For example, a declaration that § 28 does not apply to minors as doing so violates the Fourteenth Amendment would provide an appropriate remedy that would redress the alleged harms (as would an injunction halting the application of § 28 as applied to minors). *Friends of the Earth, Inc.*, 528 U.S. at 185-86 (“It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress.”). For example, should a court declare that § 28 does not apply to minors as doing so violates parental rights protected by the Fourteenth Amendment, Plaintiff Michigan Right to Life could again lobby for and

⁴ Contrary to Defendants’ claim, Plaintiffs are not citing to nor relying on *Northland Family Planning Center* for the purpose of using state law to establish standing. (*See Defs.’ Br.* at 13 n.6). Rather, *Northland Family Planning Center* is cited because it confirms that Defendant Nessel is a proper party in this case.

pursue state legislation to protect the rights of parents and their minor children. This alone demonstrates that Plaintiff Right to Life of Michigan has been injured, that the injury is fairly traceable to the challenged state action at issue, and that the injury could be redressed by a favorable court decision. The same is true for the individual Plaintiffs who could now send their children to public schools and government medical facilities without fear of the harms caused by § 28.

(Pls.’ Opening Br. at 45-47).

Additionally, “the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) (emphasis added); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (same); *ACLU v. NSA*, 493 F.3d 644, 652 (6th Cir. 2007) (same).

In determining whether an organization like Plaintiff Right to Life of Michigan has standing, the Court conducts the same inquiry as in the case of an individual. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). An organization may suffer an injury in fact when a defendant’s actions impede its efforts to carry out its mission. *See id.* at 379. For example, in *Havens*, an organization dedicated to promoting equal opportunity in housing sued a real estate company that allegedly practiced racial steering. Because the defendant’s alleged practices “perceptibly impaired [the organization’s] ability to provide counseling and referral services for low- and moderate-income homeseekers,” a key component of the plaintiff organization’s mission, the plaintiff suffered an injury in fact. *Id.* Here, § 28

“perceptibly impair[s]” Plaintiff Right to Life of Michigan’s political action and lobbying services. The First Amended Complaint makes plain that Plaintiff Right to Life of Michigan “operates as a 501(c)(4) organization and proposes, lobbies for, and supports” pro-life legislation. (FAC ¶ 13, PageID.145). “[Plaintiff] Right to Life of Michigan’s activities include political action (*i.e.* getting pro-life politicians elected to local, state, and federal levels of government, specifically including the Michigan Legislature) through a PAC and full-time PAC Director.” (*Id.* ¶ 18, PageID.146). Plaintiff Right to Life of Michigan lobbies for, sponsors, and/or supports pro-life legislation, specifically including laws that protect parental rights. (*Id.* ¶¶ 99-101, 128-29, PageID.165-66, 173); *see also* n.1, *infra*. However, “[t]he passage of Proposal 3 (and the creation of Article I, § 28) adversely affects Right to Life of Michigan’s activities. In particular, Right to Life of Michigan’s legislative efforts are thwarted because lawmakers can no longer pass pro-life laws, and its political action is affected because even if pro-life politicians are elected, they are unable to change the law given the breadth of Article I, § 28” (*Id.* ¶ 20, PageID.146). In other words, § 28 *causes direct harm to the organization and its operation*. This is not simply a “special interest,” as Defendants argue. (Defs.’ Br. at 24-25).

Absent relief from this Court, Plaintiff Right to Life of Michigan’s future lobbying and legislative efforts on behalf of minors and their parents are thwarted as § 28 has robbed the organization and the Michigan legislature of their authority and

power to lobby and regulate on behalf of minors in the area of “reproductive freedom.” In this respect, Plaintiff Right to Life of Michigan as a lobbying organization is in the same position as the individual lobbying plaintiffs in *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”).

As recently stated by this Court:

It is not enough to broadly gesture toward “a drain on an organization’s resources” and call it a day, as some of our pre-*Alliance* cases have done. . . . There must be something more—the court must find that the organization has alleged and shown that the conduct challenged in the suit interfered with the organization’s “core business activities.”

Fair Hous. Ctr. of Metro. Detroit v. Singh Senior Living, LLC, 124 F.4th 990, 992-93 (6th Cir. 2025) (citing *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024)) (emphasis added). Plaintiff Right to Life of Michigan has alleged the “something more” to establish standing in this case. Section 28 interferes with its “core business activities.” The organization has standing.

In summary, and particularly with regard to the individual Plaintiffs who are parents, the Supreme Court’s parental-rights jurisprudence has long treated the authority of parents to direct the upbringing of their children as a liberty exercised

continuously and embedded in the parent–child relationship itself, rather than as a right that arises only at isolated decision points or formal proceedings. In cases like *Meyer*, *Pierce*, *Prince*, *Yoder*, *Troxel*, and *Parham*, for example, the Court consistently understood parental authority as operating throughout the process of upbringing, informing daily guidance, moral formation, education, and medical decision-making, not merely at the moment of a final outcome. *See, e.g., Troxel*, 530 U.S. at 65–66 (2000) (citing a long line of the Court’s precedents emphasizing the “fundamental right of parents to make decisions concerning the care, custody, and control of their children” as a matter of ongoing judgment and recognizing parents as the presumptive decisionmakers for their children). This understanding reflects an implicit but settled premise of the Supreme Court’s cases: parental rights are present and ongoing, relational rather than episodic, and integral to the structure of family life protected by the Constitution.

Consistent with that understanding, the Court has treated the constitutional injury to parental rights as occurring when the State deliberately displaces parents as the primary decisionmakers, not merely when the State imposes a final or irreversible outcome. For example, in *Pierce*, the injury lay in the State’s effort to “standardize” children by supplanting parental choice; in *Yoder*, it arose from the State’s override of parental direction in education; and in *Troxel*, from a court’s substitution of its own judgment for that of a fit parent. In each instance, the constitutional problem was not

simply *what* decision was reached, but *who* was authorized to decide. That framing is especially important in the Article III standing context, because a governmental reordering of decision-making authority inflicts a concrete injury at the moment parental judgment is supplanted, even before downstream consequences materialize. The Court's cases thus recognize that when the State assumes control over decisions the Constitution entrusts to parents, the injury to the parental liberty interest is immediate, structural, and real.

A century of Supreme Court precedents firmly establish that the Constitution protects the right of parents to direct and control the upbringing of their children as a fundamental right. And this precedent firmly establishes that Michigan's usurpation of that right through the voter-initiated passage of § 28 has caused, and will continue to cause, a cognizable injury to Plaintiffs.

II. All Plaintiffs Have Advanced a Parental Rights Claim.

Defendants' argument that only Plaintiffs Hubbard and Smith advanced a parental rights claim is based on a misreading of the First Amended Complaint.

Below are relevant allegations set forth in the operative pleading:

157. *Plaintiffs* hereby incorporate *all stated paragraphs*.

158. Article I, § 28 of the Michigan Constitution, which was created, adopted, and enforced under the color of state law and authority, *interferes with the liberty interests of parents and guardians, specifically including Plaintiff Parents [and not excluding others]*, to control and direct the upbringing and education of their children in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

159. Article I, § 28 permits individuals, including public school officials, medical professionals, and others, to aid or assist a minor child with procuring an abortion, obtaining contraception, obtaining “gender reassignment” medication or procedures, and becoming sterilized without parental knowledge or consent and with impunity in violation of ***Plaintiffs’ parental rights protected by the Fourteenth Amendment.***

160. Article I, § 28 permits adults to engage in sexual acts with minors so long as the minor “consents,” thereby undermining the right of parents to control and direct the upbringing of their children in violation of ***Plaintiffs’ parental rights protected by the Fourteenth Amendment.***

161. As a direct and proximate result of Article I, § 28 and its enforcement by Defendants, ***Plaintiffs*** have suffered irreparable harm, including the loss of their parental rights protected by the Fourteenth Amendment, entitling them to declaratory and injunctive relief.

(FAC ¶¶ 157-61 [emphasis added], PageID.179-80). The specific reference to the “Plaintiff Parents” does not exclude the other Plaintiffs. The focus on these Plaintiffs was based largely on the fact that they had children within the Michigan public school system. However, it is undisputed that both Plaintiffs Celina Asberg and Grace Fisher are parents (FAC ¶¶ 52-55, PageID.153-54) and therefore possess parental rights as a matter of the Fourteenth Amendment, and that Plaintiff Right to Life of Michigan lobbies for and advances candidates and laws that protect the rights of parents, particularly with regard to laws that protect vulnerable minors from predators and the harms caused by abortion (FAC ¶¶ 13, 18-22, PageID.145-46); *see also* § I., *supra*.

Because the Court is required to construe the complaint in the light most favorable to Plaintiffs, accept its factual allegations as true, and construe all reasonable inferences in Plaintiffs’ favor, the allegations establish the claims at issue.

Jones v. City of Cincinnati, 521 F.3d 555, 559 (6th Cir. 2008) (“[W]e construe the

complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.”) (internal quotations and citation omitted).

III. State Action Exists in this Case.

Defendants claim that there is no state action in this case. (*See* Defs.’ Br. at 44-48 [incorrectly arguing that “the amended complaint did not allege any state action interfering with parental rights”]). They are mistaken. State action exists in this case similar to the way in which state action existed in *Romer* or *Obergefell*. This is a federal challenge to a state constitutional amendment. *See also Denver Area Educ. Telcoms. Consortium v. FCC*, 518 U.S. 727, 782 (1996) (Kennedy, J., dissenting) (“State action lies in the enactment of a statute altering legal relations between persons, including *the selective withdrawal from one group of legal protections against private acts*, regardless of whether the private acts are attributable to the State.”) (citing *Hunter v. Erickson*, 393 U.S. 385, 389-90 (1969) (finding state action under the Fourteenth Amendment)) (emphasis added).

In *Romer*, the Court never mentioned “state action,” but, of course, the Court had to find “state action” in order to apply the Fourteenth Amendment. It would be wrong to argue otherwise.⁵ And Defendants’ argument is wrong here.

⁵ It is similarly wrong for Defendants (and the district court) to dismiss Plaintiffs’ claim that if the Supreme Court was willing to exercise jurisdiction in *Romer* (*i.e.*, the challengers had standing), then jurisdiction (*i.e.*, Plaintiffs have standing) should be

IV. The Case Is Ripe for Review.

Article I, § 28 became the law of Michigan upon its passage on November 8, 2022. Pursuant to its own terms, § 28 is “self-executing.” Mich. Const. art. I, § 28(5). Accordingly, it does not require enabling legislation for it to become effective and thus have the full force of law. Moreover, the harmful effects of § 28 have already been realized considering the number of laws that protect women (including minors) and the unborn and which promote legitimate state interests related to abortion that have been nullified or repealed as a result. Defendants admitted as much below. (R.30, Defs.’ Br. in Supp. of Mot. to Dismiss at 13 [“[T]he Michigan Legislature recently enacted the Reproductive Health Act, 2023 PA 286, a package of bills aimed

found here. Jurisdiction is a threshold issue, and it can never be waived. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1988) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”) (internal citation and quotations omitted) (emphasis added). Defendants assert that “[h]ad the Supreme Court delved into Article III standing [in *Romer*] at that point, the inquiry would have focused on the injury caused to the *defendants* by the Colorado Supreme Court’s adverse decision, not on the alleged injury caused to the *plaintiffs* by the constitutional amendment they challenged.” (Defs.’ Br. at 18). Defendants cite no cases for this proposition, and that is because it is wrong. *See id.*; *see also 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”) (emphasis added). The fact that the Supreme Court decided the merits of *Romer* but the district court refused to decide the merits of this case says more about ideology and politics than it does about Article III.

at *expanding* access to abortion in Michigan and which statutorily codify § 28’s protections.”], PageID.229). And they acknowledge it in their brief filed in this Court. (Defs.’ Br. at 5 [“Section 28 establishes a self-executing constitutional right to reproductive freedom.”]). There is nothing hypothetical or speculative about this.

The doctrines of ripeness and standing “originate” from the same Article III limitation. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014). Quite often, Article III standing and ripeness issues “boil down to the same question.” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007). For reasons that Plaintiffs have standing in this case, the ripeness requirement is satisfied as well.

The basic rationale of the ripeness doctrine “is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.” *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). “The problem is best seen in a twofold aspect, requiring [the courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Labs.*, 387 U.S. at 149. We begin with the hardship prong.

As stated by the D.C. Circuit:

“[S]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself.” *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998). Thus, “[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a

constitutional right constitutes irreparable injury for these purposes.” *Id.* (internal citation omitted).

Gordon v. Holder, 721 F.3d 638, 653 (D.C. Cir. 2013).

Moreover, while this Court in *Hile* did not expressly address ripeness (a jurisdictional issue), it is evident that for the reasons the plaintiffs had standing in that case, the case was also ripe for review. The same is true in this case. *See, e.g., MedImmune, Inc.*, 549 U.S. at 128 n.8 (noting that standing and ripeness often “boil down to the same question”). As noted above, Plaintiffs are now subject to the harms caused by § 28.

This case is also fit for judicial review. “In considering the fitness of an issue for judicial review, the court must ensure that a record adequate to support an informed decision exists when the case is heard.” *NRA of Am. v. Magaw*, 132 F.3d 272, 290 (6th Cir. 1997). Given the posture of this case (motion to dismiss at the pleading stage), the record is more than sufficient for the Court to rule as the facts are established in the First Amended Complaint.

Indeed, as noted, in *Romer*, there was no “ripeness” concern even though the legal challenge was filed “[s]oon after Amendment 2 was adopted.” *Romer*, 517 U.S. at 625. The Court didn’t have to wait for any *specific* facts demonstrating that a private entity discriminated against anyone (let alone any plaintiff) on account of his or her sexual preferences. Indeed, as Justice Scalia demonstrated in his dissent, Amendment 2 did not affect “general laws and policies that prohibit arbitrary

discrimination’ [and that these laws] would continue to prohibit discrimination on the basis of homosexual conduct as well.” *Id.* at 638 (Scalia, J., dissenting). Nonetheless, the case proceeded. Plaintiffs’ claims in this case are just as ripe (and even more so) as the claim advanced in *Romer*. Ripeness is not an issue.

V. Defendants Do Not Enjoy Eleventh Amendment Immunity.

Defendants argue that they have Eleventh Amendment immunity. They are mistaken. Although State officials generally enjoy Eleventh Amendment immunity from suits seeking damages, they may be sued in federal court for prospective relief to halt the enforcement of a state law (including a state constitutional amendment passed by the voters) that violates the U.S. Constitution, as in this case. *See Ex parte Young*, 209 U.S. 123 (1908). As stated by the Supreme Court, “In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have *some connection* with the enforcement of the act.” *Id.* at 157 (emphasis added). This is not a high bar.

As Governor, Defendant Whitmer is the head of the executive branch, which includes 20 administrative departments. These departments include, *inter alia*, the Michigan Department of Civil Rights, the Michigan Department of Health and Human Services, the Michigan Department of Licensing and Regulatory Affairs, and the Michigan Department of Education. The executive departments also include the Michigan Department of Attorney General and the Michigan Department of State,

which are headed by executive officials that are separately elected by Michigan voters. (FAC ¶¶ 67, 68, PageID.158). Given the breadth and scope of § 28, the executive branch of government is and will continue to be a primary enforcer of § 28, particularly in light of the demands imposed by §28(2).

As the chief law enforcement officer for the State of Michigan, Defendant Nessel is responsible for enforcing and ensuring compliance with all state laws and regulations, and this includes the Michigan Constitution and thus § 28 (and all laws and regulations affected and mandated by § 28). The same is true for the Governor as she is ultimately responsible for the execution of the government. Consequently, this authority and responsibility also include enforcing state regulations that affect businesses (such as medical facilities and schools, among others) and business and professional licensing in this state (functions of the executive branch of government headed by the Governor), all of which are affected by § 28. As the Attorney General, Defendant Nessel is the top lawyer for the State of Michigan. When public legal matters arise, the Attorney General's Office renders opinions on matters of law and provides legal counsel for the legislature and for each officer, department, board, and commission of state government. The Attorney General's Office provides legal representation in court actions and assists in the conduct of official hearings held by state agencies. (FAC ¶¶ 70, 71, PageID.158).

As Secretary of State, Defendant Benson is responsible for certifying ballot

initiatives such as Proposal 3. She is specifically responsible for enforcing and implementing the ballot initiative procedures that resulted in the passage of Proposal 3. Should this Court declare that a ballot initiative that nullifies the authority of a co-equal branch of government violates the U.S. Constitution, this will unquestionably restrict Defendant Benson's authority as the Secretary of State.

As all Defendants have "some connection" with the enactment and/or enforcement of § 28, Defendants' Eleventh Amendment immunity argument is without merit.

In *Romer*, for example, in addition to the State of Colorado, the two other named defendants were the Governor and the Attorney General of Colorado. *See Romer*, 517 U.S. at 625 ("Although Governor Romer had been on record opposing the adoption of Amendment 2, he was named in his official capacity as a defendant, together with the Colorado Attorney General.").⁶

Even more to the point, in *Obergefell*, the defendants were "state officials responsible for enforcing the laws in question." *Obergefell*, 576 U.S. at 655. These "state officials" included the Michigan Governor and the Michigan Attorney General in their official capacities. *See id*; *see also Deboer v. Snyder*, 973 F. Supp. 2d 757

⁶ Plaintiffs understand that *Romer* originated in state court. However, the ultimate relief was issued by the U.S. Supreme Court on federal constitutional grounds. Moreover, the main point here is that the Colorado Governor and Attorney General certainly had "some connection with the enforcement of the act" to make them appropriate parties in their official capacities, as in this case.

(E.D. Mich. 2014) (filing challenge to the Michigan marriage amendment against the Michigan Governor and Attorney General).⁷ Indeed, the current Michigan Attorney General, Dana Nessel, was counsel of record in the challenge to the Michigan marriage amendment. *See id.* She apparently thought (correctly) that it was proper to sue the Michigan Governor and Attorney General in their official capacities in an effort to strike down a voter-initiated amendment to the Michigan Constitution in order to protect “same-sex marriage” (even though marriage licenses are issued by the Counties and marriage records are kept by the Michigan Department of Health and Human Services). However, she now takes the opposite position (incorrectly), arguing that it is improper to sue these same government officials to challenge a voter-initiated amendment in order to protect women, children, and parents from the harm it causes. In the final analysis, Nessel was correct as a private plaintiff’s attorney, but she is wrong as a government defendant. There is no Eleventh Amendment immunity

⁷ A suit against an individual officer in her official capacity is “another way of pleading an action against an entity of which an officer is an agent.” *Ky. v. Graham*, 473 U.S. 159, 165 (1985). In this case, Defendants are agents of the State of Michigan, which explains why the district court in *Deboer* enjoined the “*State of Michigan*” from enforcing the marriage amendment in a lawsuit against the Michigan Governor and Attorney General. *See Deboer*, 973 F. Supp. 2d at 775 (declaring that the marriage amendment violated the Equal Protection Clause and ordering “that the State of Michigan is enjoined from enforcing Article I, § 25 of the Michigan Constitution and its implementing statutes”). Defendant Nessel obviously had no objections to that result when she was a private litigant representing the plaintiffs in that case. And while the district court noted that the plaintiffs had later amended the complaint to add the Oakland County Clerk (*id.* at 759, n.1), a lawsuit against a county official does not give you relief against the State.

in this case as there was none in *Obergefell*.

CONCLUSION

Based on the foregoing, the Court should reverse the district court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,196 words, excluding those sections identified in Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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**ADDENDUM: DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

No.	PageID #	DESCRIPTION
R.23	141-87	First Amended Complaint
R.30	202-79	Brief in Support of Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint
R.46	441-463	Opinion and Order Granting Defendants' Motion to Dismiss