STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	SECOND JUDICIAL DISTRICT

Dr. Jane Doe, Mary Moe, and Our Justice, Plaintiffs, vs. State of Minnesota, Governor of Minnesota, Attorney General of Minnesota, Minnesota Commissioner of Health, Minnesota Board of Medical Practice, and Minnesota Board of Nursing, Defendants.	Court File No.: 62-CV-19-3868 Case Type: Civil – Other

ORDER & MEMORANDUM

This matter came before the undersigned on December 20, 2021, and January 31, 2022, upon cross motions for summary judgment. Plaintiffs were represented by Attorneys Juanluis Rodriguez, Stephanie Toti, Melissa Shube, and Jess Braverman at both hearings, along with Attorney Amanda Allen on January 31, 2022. Defendants were represented by Solicitor General Liz Kramer at both hearings, along with Assistant Attorney General Qortney McLeod on December 20, 2021, and Assistant Attorney General Alexander Hsu on January 31, 2022.

Based on the files, records, and proceedings herein, **IT IS HEREBY ORDERED**:

1. Plaintiffs' motions for summary judgment are **GRANTED** in part and **DENIED** in part.

a. Plaintiffs' motions for summary judgment on Count I (privacy) for the Physician Only Law, Hospitalization Law, Felony Penalties, Two-Parent Notification Law, Mandatory Disclosure Law, Physician Disclosure Law, and Mandatory Delay Law are **GRANTED**.

b. Plaintiffs' motion for summary judgment on Count II (equal protection) for the Two-Parent Notification Law is **GRANTED**.

c. Plaintiffs' motion for summary judgment on Count IV (free speech) for the Mandatory Disclosure Law is **GRANTED**.

d. Plaintiffs motion for summary judgment on Count I (privacy) for the Reporting Laws is **DENIED**.

2. Defendants' motions for summary judgment are **GRANTED** in part and **DENIED** in part.

a. Defendants' motions for summary judgment on Counts I, II and III (special legislation) for the Reporting Laws are **GRANTED**.

b. Defendants' motions for Counts II and III for the Felony Penalties are **GRANTED**.

c. Defendants' motions for summary judgment on Counts I, II and III for Physician Only Law, Hospitalization Law, Felony Penalties (Count I only), Mandatory Disclosure Law, Physician Disclosure Law, and Mandatory Delay Law are **DENIED**.

3. Minn. Stat. § 145.412, subd 1(1)(the Physician-Only Law) is unconstitutional.

4. Minn. Stat. § 145.412, subds. 1(2), 3(1)(the Hospitalization Law) are unconstitutional.

5. Minn. Stat. § 145.412, subds. 1(3), 1(4), 4, and Minn. Stat. § 145.413, subd. 3 (the Felony Penalties) are unconstitutional.

6. Minn. Stat. § 144.343, subds. 2–6 (the Two-Parent Notification Law) are unconstitutional.

7. Minn. Stat. § 145.4242(a)-(c)(the Mandatory Disclosure Law, Physician Disclosure Law and Mandatory Delay Law) are unconstitutional.

8. Plaintiffs' demand for declaratory relief is **GRANTED** as to all laws that this court has declared unconstitutional.

9. Plaintiffs' demand for a permanent injunction is **GRANTED** as to the enforcement of all laws that this court has declared unconstitutional.

10. The attached Memorandum shall be incorporated into this Order.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Gilligan, Thomas(Judge)
Jul 11 2022 10:10 AM

Dated: July 11, 2022

THOMAS A. GILLIGAN, JR.
JUDGE OF DISTRICT COURT

MEMORANDUM

INTRODUCTION

In this case, the court must decide whether certain Minnesota laws regulating abortion are constitutional under various provisions of the Minnesota Constitution. After three years of litigation, a thorough review of a well-developed factual record, and due consideration of the landmark decision of the Minnesota Supreme Court in *Women of the State ex rel. Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) and other reproductive rights jurisprudence, this court concludes that Minnesota abortion laws relating to mandated physician care, hospitalization, criminalization, parental notification, and informed consent are unconstitutional.

These abortion laws violate the right to privacy because they infringe upon the fundamental right under the Minnesota Constitution to access abortion care and do not withstand strict scrutiny. The parental notification law violates the guarantee of equal protection for the same reasons. The informed consent law also violates the right to free speech under the Minnesota Constitution, because it is misleading and confusing, and does not withstand intermediate scrutiny. Accordingly, this court is declaring those laws unconstitutional and permanently enjoining their enforcement.

While there are other constitutional claims that Plaintiffs raised in this lawsuit that cannot be decided here, this court does not need to decide whether these laws are unconstitutional on those other grounds as well, since this court is either denying or granting all of the relief requested by Plaintiffs.

This Memorandum will provide a summary of the constitutional claims raised by Plaintiffs in this lawsuit, a discussion of the procedural course that this litigation has followed,

the facts established in the record by the parties regarding the constitutional claims at issue, an overview of the law which this court must apply in consideration of the claims made by Plaintiffs, and the analysis and conclusions of this court as to each of those claims.

PARTIES AND CLAIMS

Plaintiff Dr. Jane Doe ("Dr. Doe") is a board-certified and licensed obstetrician-gynecologist, who provides abortions or referrals for abortions for her patients. She is a party on her own behalf and on behalf of her patients. Plaintiff Mary Moe ("Ms. Moe")[1] is a certified nurse midwife who provides referrals for abortions for her patients and seeks the ability to provide abortion care for her patients. She is a party on her own behalf and on behalf of her patients. Plaintiff Our Justice ("Our Justice") is a Minnesota nonprofit corporation that provides support and financial assistance for persons seeking abortions.

Defendant Governor of Minnesota (the "Governor") is the chief executive officer of the State of Minnesota. Defendant Attorney General of Minnesota (the "Attorney General") is a constitutional executive officer in the State of Minnesota who may enforce its criminal laws, and who acts as the attorney for all state officers, boards or commissions acting in their official duty. Defendant Minnesota Commissioner of Health (the "Health Commissioner") has general authority as the state's official health agency and has statutory authority to enforce certain health laws. Defendant Minnesota Board of Medical Practice (the "Medical Board") has statutory authority to impose professional discipline on licensed medical professionals, including physicians and physician assistants, for violating Minnesota's healthcare laws.

[1] Both Dr. Doe and Ms. Moe have been allowed to proceed as Plaintiffs under pseudonyms pursuant to Minn. R. Civ. P. 10.01 and 26.03(a). (ECF No. 168)

Defendant Minnesota Board of Nursing (the "Nursing Board") has statutory authority to impose professional discipline on licensed nurses, including nurse practitioners and nurse midwives, for violating Minnesota's healthcare laws.

Plaintiffs originally filed their lawsuit just over three years ago. The current lawsuit alleges that certain Minnesota abortion laws (the "Challenged Laws") violate (1) the right to privacy guaranteed by the Minnesota Constitution ("Count I), (2) the guarantee of equal protection of the laws embodied in the Minnesota Constitution ("Count II"), (3) the prohibition on special legislation set forth in the Minnesota Constitution ("Count III"), (4) the right to free speech guaranteed by the Minnesota Constitution ("Count IV"), and (5) the prohibition on vague laws embodied in the Minnesota Constitution ("Count V"). (ECF No. 347)[2] They seek a declaration from this court that the Challenged Laws are unconstitutional or "otherwise unenforceable," and seek to permanently enjoin Defendants from enforcing them. (*Id.*)

The Challenged Laws that Plaintiffs contend are unconstitutional are (1) the "Physician-Only Law" - Minn. Stat. § 145.412, subd. 1(1), which provides that an abortion may only be performed "by a physician licensed to practice medicine…or a physician in training under the supervision of a licensed, (2) the "Hospitalization Law" – Minn. Stat. § 145.412, subds. 1(2), 3(1), which provides that certain abortions must be performed in a hospital, (3) the "Reporting Laws" – Minn. Stat. §§ 145.413, 145.4131, subd. 1(b)(1)-(12), 145.4132, 145.4134, 145.4246, subd. 3, and Minn. R. 4615.3600, which require physicians or

[2] This court previously granted Defendants' motion for summary judgment on Count V in an Order issued on June 25, 2020 (ECF No. 115).

facilities providing abortions to report certain information to the state or face criminal prosecution or professional discipline, (4) the "Felony Penalties for Regulatory Infractions," collectively the "Felony Penalties" – Minn. Stat. § 145.412, subds. 1(3), 4, which make willfully performing abortions in a manner inconsistent with rules promulgated by the Health Commissioner a felony, (5) the "Two-Parent Notification Law" – Minn. Stat. § 144.343, subds. 2–6, which requires abortion providers to notify both parents of a minor and observe a forty-eight hour waiting period prior to consent, (6) the "Mandatory Disclosure Law" – Minn. Stat. § 145.4242, which requires a physician performing an abortion and/or their agents to provide a patient with certain information during the informed consent process, (7) the "Physician Disclosure Law" – Minn. Stat. § 145.4242(a)(1), which requires that certain information specified by the Mandatory Disclosure Law given during the informed consent process must only be provided by a licensed physician, (8) the "Mandatory Delay Law" – Minn. Stat. § 145.4242(a)(1)–(2), which provides that an abortion provider must delay the provision of abortion care to a patient for at least twenty-four hours after the Mandatory Disclosure is made to the patient, and (9) the "Felony Penalty for Failure to Obtain Informed Consent," collectively the "Felony Penalties" – Minn. Stat. § 145.412, subds. 1(4), 4, which makes willful failure to provide Mandatory Disclosure a felony. (*Id.*)[3]

[3] As this court will further explain, Plaintiffs have dismissed their constitutional challenges to Minn. Stat. § 145.1621-22, Minn. R. 4675.2205, under which fetal tissue "resulting from an abortion or miscarriage" must be disposed of by "cremation, interment by burial, or in a manner directed by the commissioner of health" (the "Fetal Tissue Disposition Laws"), and to Minn. Stat. § 617.267, which bans advertising for the treatment of sexually transmitted infections (the "STI Advertising Law"). Since these claims have been dismissed, the motions for summary judgment related to them are moot. (ECF No. 351)

PROCEDURAL POSTURE

After Plaintiffs filed this lawsuit, Defendants moved to dismiss all claims against them and to stay discovery while the motion to dismiss was being decided by the court. (ECF Nos. 50, 77)[4] In the meantime, Pro-Life Action Ministries, Incorporated and Association for Government Accountability ("First Proposed Defendant-Intervenors) sought to intervene in the lawsuit, to assert certain defenses which were not made by Defendants. (ECF No. 72) This court denied the intervention motion of First Proposed Defendant-Intervenors, which they appealed to the Minnesota Court of Appeals. (ECF Nos. 95, 97)[5] This court also granted the motion to stay discovery. (ECF No. 96)

This court denied Defendants' motion to dismiss, with the exception of the motion to dismiss Count V of the First Amended Complaint, that challenged the Hospitalization Law based on the Minnesota Constitution's prohibition on vague laws. (ECF No. 115).

Prior to the commencement of discovery, the Ninety-First Minnesota State Senate ("Second Proposed Defendant-Intervenors) also sought to intervene in the lawsuit. (ECF No. 142) Second Proposed Defendant-Intervenors contended that it was the "only institution in Minnesota's State Government that is able to defend the challenged statutes without conflict or qualification." (ECF No. 143) Several months later, this court denied the intervention motion of Second Proposed Defendant-Intervenors. (ECF No. 159) The parties then conducted discovery.

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[4] Ordinarily, this section would be rather brief. In light of the extensive and complicated litigation of this matter and its extraordinary nature, this court thought it helpful to provide a detailed overview.

[5] The court of appeals determined that First Proposed Defendant-Intervenors failed to demonstrate a basis for intervention as of right. (ECF No. 157) The Minnesota Supreme Court declined to review the decision of the court of appeals. (ECF No. 162)

At the request of the parties, this court allowed them to make their motions for summary judgment in three rounds. (ECF No. 166) The first round of summary judgment motions would address issues of standing, proper parties or justiciability. (*Id.*) The second round of summary judgment motions would address the constitutionality of the Two-Parent Notification Law, Physician-Only Law, Reporting Laws, Felony Penalties for Regulatory Infractions, and Hospitalization Law. (*Id.*) The third round of summary judgment motions would address the constitutionality of the Mandatory Disclosure Law, Physician Disclosure Law, Mandatory Delay Law, and Felony Penalties for Failure to Obtain Informed Consent. This court issued its decision on the first round of summary judgment motions (the "First Round Order") in late November of 2021. (ECF No. 227) This court granted summary judgment in favor of Defendant State of Minnesota (the "State") because it determined that the State was not a proper party to this lawsuit. (*Id.*) This court also granted summary judgment in favor of Defendants on Plaintiff First Unitarian Society of Minneapolis' ("FUS") constitutional challenge to the STI Advertising Law, because FUS lacked standing. (*Id.*) This court otherwise denied the remainder of Defendants' first round motion for summary judgment. (*Id.*)

In late December of 2021, after additional briefing, this court heard the second round of summary judgment motions. (ECF No. 261) These motions were brought by both Plaintiffs and Defendants and presented equal protection, privacy and special legislation arguments to five of the Challenged Laws. (ECF Nos. 229, 238) Defendants also filed a motion to exclude seven of Plaintiffs' expert witnesses, which was heard on the same day as

the second round of summary judgment motions. (ECF No. 220) Plaintiffs opposed that motion. (ECF No. 250)

In mid-January of 2022, Defendants filed a Notice of Appeal of the First Round Order with the Minnesota Court of Appeals. (ECF No. 289) A short time later, Plaintiffs filed a Conditional Notice of Related Appeal to seek review of another aspect of the First Round Order. (ECF No. 304) Defendants then filed a motion to stay all of the proceedings before this court, pending the outcome of the appeal of the First Round Order. (ECF No. 295) Plaintiffs opposed the stay motion. (ECF No. 306)

In late January of 2022, after yet additional briefing, this court heard the third round of summary judgment motions brought by both Plaintiffs and Defendants. (ECF No. 307) This third round presented equal protection, privacy, special legislation, free speech and religious freedom and neutrality arguments to the remaining five Challenged Laws. (ECF Nos. 273, 292) This court also heard argument on the motion to stay the proceedings.

The Minnesota Court of Appeals questioned whether it had jurisdiction to hear the appeal of the First Round Order and directed the parties to submit jurisdictional briefs or a notice of voluntary dismissal. (ECF No. 310) In light of the directive from the court of appeals, this court temporarily stayed the proceedings before it, pending the decision of the court of appeals on jurisdiction (the "First Temporary Stay Order"). (ECF No. 311) About one month later, the court of appeals accepted jurisdiction over part of the decisions made

by this court in the First Round Order. (ECF No. 319) The court of appeals dismissed the remainder of the appeal for lack of jurisdiction.[6] (*Id.*)

In late March of 2022, Defendants filed a Petition for Review in the Minnesota Supreme Court, regarding the court of appeals' declination of jurisdiction on the parts of the First Round Order which the court of appeals dismissed. (ECF No. 322) Plaintiffs filed a Response and Cross-Review with the Minnesota Supreme Court.

In early April 2022, this court denied the motion to stay proceedings in district court (the "Stay Order") and denied the motion to exclude expert witnesses in a separate Order (the "Expert Order"). (ECF Nos. 323, 324) Several days later, Defendants moved the court of appeals to stay all proceedings before this court. Shortly before this court's decision deadline for the second and third round motions for summary judgment, this court issued another Order temporarily staying the district court proceedings pending the decision of the court of appeals on the motion to stay (the "Second Temporary Stay Order"). (ECF No. 331) Plaintiffs requested permission to file a motion for reconsideration of the Second Temporary Stay Order, which this court granted. (ECF Nos. 332, 333)

In early May of 2022, the court of appeals issued an Order (the "Appellate Stay Order") granting a stay of the district court proceedings pending resolution of the appeal. (ECF No. 334) Two weeks later, the Minnesota Supreme Court denied the Petition for Review and Conditional Cross-Review on the court of appeals' declination of jurisdiction on

[6] In light of the delay caused by the appeal and questions regarding this court's continuing jurisdiction over the various pending motions, this court received permission in writing from the parties to a consolidated decision date to resolve the motions. (ECF No. 320)

parts of the First Round Order. (ECF No. 336) Plaintiffs then moved the court of appeals to dissolve the Appellate Stay Order, so that they could seek dismissal of all claims that were the subject of Defendants' appeal. The court of appeals granted Plaintiffs' motion, lifted the Appellate Stay Order, and remanded the case back to the district court so that Plaintiffs could seek voluntary dismissal of the claims on appeal. (ECF No. 340)

The parties have now stipulated to the dismissal of all of Plaintiffs' claims relating to the constitutional challenges to the STI Advertising Law and Fetal Tissue Disposition Law. (ECF No. 346) In light of this stipulation, the parties also agreed that FUS should no longer be a party to the case, since it no longer has any claims against Defendants. (*Id.*) This court dismissed the STI Advertising Law claims in Counts II, III and IV of the First Amended Complaint and the Fetal Tissue Disposition Law in Count VI and concluded that the motions for summary judgment related to those dismissed claims were moot. (ECF No. 351). It also dismissed FUS as a party. (*Id.*)

SUMMARY OF THE CHALLENGED LAWS AND FACTS PRESENTED TO THE COURT

Plaintiffs challenge several laws in whole or in part which regulate the provision of abortion. First, they challenge portions of Minn. Stat. § 145.412, which criminalize the provision of abortion (1) by anyone other than a doctor (Physician-Only Law), (2) outside a hospital or "abortion facility" if performed after the first trimester (Hospitalization Law), (3) in a manner inconsistent with regulations promulgated by the Commissioner of Health (Felony Penalties for Regulatory Infractions), or (4) without informed consent (Felony Penalty for Failure to Obtain Informed Consent). *Id.* subd. 1. Minn. Stat. § 145.4242 governs informed consent with respect to abortions, and Plaintiffs challenge the law in its entirety

(Mandatory Disclosure Law) as well as portions of the law. Specifically, Plaintiffs challenge the requirement that certain disclosures are made only by a physician (Physician Disclosure Law), and that the disclosures are made at least 24 hours before an abortion is performed (Mandatory Delay Law). *Id.* (a)(1).

Plaintiffs also challenge laws and regulations which require reports to be made to the Health Commissioner by physicians and abortion facilities, some of which impose a civil or criminal penalty for noncompliance. Minn. Stat. §§ 145.413; 145.4131, subd. 1(b)(1)–(12); 145.4132; 145.4242; 145.4246, subd. 3; Minn. R. 4615.3600. Included in their challenge is a law that also requires the Commissioner to issue a public report of the reported data. Minn. Stat. § 145.4134 (Reporting Laws).

Finally, Plaintiffs challenge a law that requires minors seeking abortions to provide notice to both parents or undergo a court proceeding known as a "judicial bypass," which acts as an exemption to the parental notification (Two-Parent Notification Law). Minn. Stat. § 144.343, subds. 2, 6. The law imposes a criminal penalty for its violation and provides a private cause of action. *Id.* subd. 5.

The relevant factual record is laid out here, or later in this Memorandum, to the extent that it is useful in this court's analysis of the Challenged Laws for the purpose of resolving the dispositive motions of the parties, or to provide broader context for this court's decision.

I. Physician-Only Law

The Physician-Only Law limits the provision of abortions to physicians. Minn. Stat. § 145.412, subd. 1(1). Plaintiffs' expert Monica McLemore, Ph.D. issued a declaration with

regard to the Physician-Only Law.[7] (ECF No. 231, Ex. 3) She contends that Minnesota recognizes two categories of advance-practice clinicians ("APC"). (*Id.* ¶12) The first are advanced practice registered nurses ("APRN"), such as a Clinical Nurse Specialist ("CNS"), Certified Nurse Practitioner ("CNP"), or Certified Nurse Midwife ("CNM"). (*Id.* ¶13) The Nursing Board issues licenses and disciplines ARPNs for misconduct. (*Id.* ¶16) The second are Physician Assistants, who are licensed and disciplined by the Medical Practice Board. (*Id.* ¶¶13, 16) APCs are subject to scope of practice rules issued and enforced by their licensing body. (*Id.* ¶17) APCs are trained in the provision of medical care. (ECF No. 231, Ex. 3, ¶ 20) The basic components of such training include the skills required for abortion care, including prescribing medication, pain management, assessing the need for follow-up care, emotional and physical support, and more. (*Id.*) Dr. McLemore is of the opinion that "APCs can be well-trained to provide high quality first trimester abortion care" and "can safely and effectively provide both medication[8] and aspiration abortion[9] care." (*Id.* ¶¶ 19, 22) Dr. McLemore is also of the opinion that studies show that the effectiveness of care provided by APCs is similar to that provided by physicians, and that there is no evidence that complication

[7] Plaintiffs' expert Monica McLemore, Ph.D., is an Associate Professor of Nursing at the University of California – San Francisco. (ECF No. 231, Ex. 3, ¶¶ 1, 5) She holds a joint appointment as a Research Scientist at the Bixby Center for Global Reproductive Health and as Affiliate Faculty in the School of Medicine Center for Vulnerable Populations and the Institute for Health Policy Studies.

[8] "Medication abortion involves terminating a pregnancy through a combination of two medications: mifepristone and misoprostol. Mifepristone works by blocking the hormone progesterone, which is necessary to maintain pregnancy. Misoprostol then causes the cervix to open and the uterus to contract and expel its contents, thereby completing the abortion. Medication abortion requires no anesthesia or sedation." (ECF 231, Ex. 6, ¶ 29) Studies have shown that mifepristone and misoprostol are safe and effective for pregnancy termination through eleven weeks LMP. (*Id.* ¶ 31)

[9] "Aspiration abortion, also referred to as suction curettage, entails the use of suction to empty the contents of the uterus. It does not entail making any incision in the patient's body. Following cervical dilation, a hollow curette is inserted into the uterus. At the other end of the curette, a hand-held syringe or an electric device is applied to create suction and empty the uterus. The procedure time is typically less than 15 minutes." (*Id.* ¶ 37) Oral medications or local anesthetic are typically used for pain management. (*Id.* ¶ 38) This method of abortion may be used up to fourteen to sixteen weeks LMP. (*Id.* ¶ 39) Aspiration abortions rarely result in complications. (*Id.* ¶ 40)

rates are significantly different for first trimester abortions provided by APCs as compared to physicians. (*Id.* ¶¶ 23-24) She further opines that APCs are authorized to prescribe medications, including controlled substances, yet the Physician-Only Law bars APCs from prescribing the medications necessary for the purpose of inducing an abortion, "despite it being squarely within their scope of practice." (*Id.* ¶ 27) According to Dr. McLemore, APCs routinely provide "intrauterine clinical care" which provides similar or higher risk and complexity to first trimester aspiration abortions. (*Id.* ¶ 28) CNMs provide prenatal care and deliver babies, though an abortion carries far less risk than carrying a pregnancy to term, yet APCs are barred by the Physician-Only Law from providing abortion care. (*Id.* ¶¶ 28-29) Ultimately, Dr. McLemore concludes that the "Physician-Only Law harms people seeking abortion by making abortion less accessible and less affordable, and by depriving patients of access to quality, culturally competent healthcare services delivered by APCs," and that its elimination would "greatly increase abortion access." (*Id.* ¶¶ 31, 36)

Dr. Carrie Terrell is another expert offered by Plaintiffs on the Physician-Only Law.[10] She says that abortion is a common medical intervention and that at current rates, approximately one in every four women in the United States will have an abortion by age forty-five. (Ex. 231, Ex. 6, ¶¶ 31, 36) She contends that as currently practiced in the United States, abortion is highly safe and effective, serious complications of abortion are rare, and that abortion does not increase the risk of long-term physical or mental health disorders. (*Id.* ¶¶ 19-22) Like Dr. McLemore, Dr. Terrell is of the opinion that qualified APCs may provide

[10] Plaintiffs' expert Carrie Terrell, M.D., is Associate Professor and Division Director for Obstetrics, Midwifery, and Family Planning at the University of Minnesota Medical School (ECF No. 231, Ex. 6, ¶ 3)

first-trimester medication and aspiration abortion safely. (*Id.* ¶ 57) She contends that the Physician-Only Law "arbitrarily limits the availability of abortion care in Minnesota, and that because APCs "are generally able to provide medical care lower cost than physicians," the prevention of APCs from providing abortion care increases its cost. (*Id.* ¶¶ 59-61)

Dr. Donald Wothe[11] is an expert offered by Defendants and has issued opinions on several of the Challenged Laws, including the Physician-Only Law. Dr. Wothe opines that abortion in the first twelve weeks of pregnancy is "extremely safe," and 89% of abortions in Minnesota occur at or before twelve weeks. (ECF No. 240, Ex. A, ¶ 43) In fact, the parties' experts agree the risks of medication abortions (as opposed to aspiration abortions) are identical to those of miscarriages. (*Id.* ¶ 46; ECF No. 231, Ex. 3, ¶ 24) Therefore, although Dr. Wothe maintains the use of APRNs is "controversial," he opines that such abortions and miscarriages do not require the supervision of a physician. (ECF No. 240, Ex. A, ¶ 46) Dr. Wothe observes that the training of physicians is considerably different from that of APRNs, and he is unaware of any APRN who desires to perform abortion care. (*Id.* ¶¶ 40, 46)

The data comparing early abortions managed by physicians as opposed to those managed by APRNs is apparently scant, however, the only empirical studies cited by either side of this litigation show physician-managed abortions do not necessarily result in better outcomes. (*Id.* ¶ 48; ECF No. 231, Ex. 6, ¶ 57; Ex. 3, ¶ 23) Dr. Wothe admits there is "minimal support" for the Physician-Only Law and believes there is not a "clinically significant" difference in outcomes between physician- and APRN-managed abortions before

[11] Dr. Wothe is a medical doctor who specializes in high-risk pregnancies. (ECF No. 240, Ex. A, ¶ 2) He practices with Minnesota Perinatal Physicians and teaches Obstetrics and Gynecology at the University of Minnesota Medical School. (*Id.*)

10 weeks in pregnancy. (ECF No. 240, Ex. A, ¶ 49) The parties' experts agree that APRNs have the skills to prescribe medication abortions and handle most complications, with the expectation that they consult a physician for more significant or complex complications. (*Id.*; ECF No. 231, Ex. 6, ¶¶ 50, 55, 57; Ex. 3, ¶ 21) They agree that medical and aspiration abortions before ten weeks are safe and appropriate for APRNs to handle, and that state laws which restrict abortion provision to physicians is not supported by the data. (ECF No. 240, Ex. A, ¶ 51; No. 231, Ex. 6, ¶ 57; Ex. 3, ¶ 22) In fact, the American College of Obstetricians and Gynecologists ("ACOG"), the American Public Health Association ("APHA"), and the World Health Organization, all endorse the use of APRNs for first-trimester abortion care. (ECF No. 231, Ex. 6, ¶ 58)

II. Hospitalization Law

The Hospitalization Law mandates that abortions after the first trimester be performed in a hospital or abortion facility. Minn. Stat. § 145.412, subd. 1(2); 3(1). According to Dr. Wothe, the purpose of the Hospitalization Law is to "safeguard the health of the pregnant woman, by ensuring that higher-risk abortions will happen in a safe and sanitary facility." (ECF No. 240, Ex. A., ¶ 52) Although the law permits second-trimester abortions to take place in a hospital or an "abortion facility," currently, there is no mechanism for licensure as an abortion facility under Minnesota law. Minn. Stat. § 145.412, subd. 1(2). (ECF No. 231, Ex. 6, ¶ 63) As a result, there are no licensed abortion facilities in Minnesota. (ECF No. 238, xviii) It is undisputed that the Hospitalization Law is not being enforced. (ECF No. 231, Ex. 6, ¶ 72)

Later abortions are higher risk. (ECF No. 240, Ex. A, ¶ 53) The primary reason for this is that the appropriate procedure for later term abortions—known as dilation and extraction ("D&E")[12]—causes more discomfort to the patient, requiring more pain management—known as analgesia—which in turn increases the risks associated with the procedure. (*Id.*) Thus, according to Dr. Wothe's report, when a D&E is performed, the increased risk is associated with analgesia, including whether it is required, and if so, what type. (*Id.* ¶¶ 53, 57)

Although Dr. Terrell does not dispute the facts stated in Dr. Wothe's report, she opines that D&Es are equally safe, whether performed in outpatient abortion facilities or hospitals. (ECF No. 231, Ex. 6, ¶ 65) Therefore, according to Dr. Terrell, there are no health or safety benefits to performing them in hospitals over abortion facilities. (*Id.* ¶ 68) In fact, a working group which includes ACOG, APHA, the American College of Physicians, and the American Academy of Family Physicians stated that the D&E is "currently and appropriately performed in offices and clinics." (*Id.* ¶ 68)

Not only does Dr. Terrell opine that hospitals provide no health or safety advantage over abortion facilities, but she also contends that abortion facilities have their own set of advantages over hospitals. These include lower risk of contracting illness, shorter delays, and lower costs. (*Id.* ¶ 70) However, she admits that some second-trimester abortions should be

[12] "Beginning at fourteen to sixteen weeks LMP, when aspiration alone is insufficient to complete an abortion, D&E is typically used…As currently practiced, D&E entails the use of both suction and medical instruments to remove the contents of the uterus. The cervix is prepared with osmotic dilators and/or medications, and then a combination of suction and forceps is used to remove the products of conception. D&E does not require making an incision in the patient's body, and after appropriate cervical dilation is achieved, the procedure takes less than thirty minutes. Pain is typically managed with a local anesthetic together with oral analgesics. Moderate or deep sedation or general anesthesia may also be used." (ECF No. 231, Ex. 6, ¶¶ 42-43)

performed at hospitals when complicating health conditions are present. (*Id.* ¶ 71) Dr. Terrell's own experience is that clinics refer patients to hospitals when appropriate, and this is incentivized by accountability measures such as malpractice liability and disciplinary action by the Medical Practice Board. (*Id.*)

III. Reporting Laws

Physicians and abortion facilities must make specific reports to the Health Commissioner. Minn. Stat. § 145.413, subd. 1 requires a physician to report the death of a woman who dies from any cause within 30 days of an abortion, or who dies within 90 days of an abortion from "any cause potentially related to the abortion." Minn. Stat. § 145.4131, subd. 1(b)(1)–(13) requires a physician or abortion facility to report to the Health Commissioner thirteen categories of data on abortions performed by them in the calendar year. Minn. Stat. § 145.4132, subd. 2 requires physicians to report to the Health Commissioner on abortion complications. Minn. Stat. § 145.4246, subd. 3 requires physicians to report information on the informed consent provided to patients to the Health Commissioner. Minn. Stat. § 145.4134 requires the Health Commissioner to issue a public report regarding the data included in the physician and abortion facilities reports.

Dr. Wothe is of the opinion that it is "important for public dialogue, to understand how frequently abortion occurs, how safe it is, and how available it is." (ECF No. 240, Ex. A, ¶ 19) He contends that the information is useful for public health purposes and for peer review. (*Id.*) Dr. Wothe also contends that filling out the statutorily mandated forms involves the physician, the nurse and administrative staff and takes five minutes or less to fill out. (*Id.*)

Dr. Terrell is of the opinion that the reports required to be submitted to the Health Commissioner are extensive and that complying with them "burdens both patients and healthcare providers and adds to the inflationary costs of medicine." (ECF No. 231, Ex. 6, ¶ 74) She also contends that filling out the reports wastes the time of physicians, which could otherwise be spent on patient care. (*Id.*) Dr. Terrell is of the opinion that the Reporting Laws "decreases access, lengthens wait times, and increases distances traveled for the women of Minnesota." (*Id.*) Finally, Dr. Terrell observes that unlike voluntary methods of data collection from patients and physicians, the Reporting Laws "coerce the disclosure of information under threat of criminal prosecution and denial of care." (*Id.* ¶ 76)

IV. Felony Penalties

Minn. Stat. § 145.412, subd. 1(3) provides that "[i]t shall be unlawful to willfully perform an abortion unless the abortion is performed" "in a manner consistent with the lawful rules promulgated by the state commissioner of health." *Id.* § 145.412, subd. 1(3). It is also unlawful to willfully perform an abortion unless the abortion is performed "with the consent of the woman submitting to the abortion after a full explanation of the procedure and effect of the abortion." Minn. Stat. § 145.412, subd. 1(4). "A person who performs an abortion in violation of this section is guilty of a felony." *Id.* § 145.412, subd. 4.

Minn. R. 4615.3500 requires a "pregnancy termination facility" to "keep a signed consent form of each patient undergoing a pregnancy termination procedure." Under Minn. Stat. § 145.412, subds. 1(3) and 4, loss of a patient's form may subject the facility and its employees to felony criminal liability. Further, Minn. R. 4615.3600 requires an "ambulatory

facility" specializing in abortion care to report 13 categories of information about each patient to the Health Commissioner.

Under Minn. Stat. § 145.412, subds. 1(3), 1(4) and 4, willful omission of details or willful failure to submit the required reports and documents, or failure to follow the Mandatory Disclosure Law may subject the facility and its employees to felony criminal liability.

According to Dr. Terrell, medical practitioners providing abortions are treated differently from medical practitioners providing all other healthcare, because they are subject to criminal prosecution. (ECF No. 231, Ex. 6, ¶ 86) A felony conviction for a physician can result in license revocation or other discipline by the Medical Board. (ECF No. 278, Ex. 11, 79:10-18) In other areas of medicine, practitioners who violate professional standards of care are subject to civil malpractice liability and those who engage in professional misconduct are subject to disciplinary action through their licensing boards. (*Id.*)

According to Dr. Doe and Dr. Terrell, criminal felony penalties for abortion providers exist solely to intimidate qualified providers by exposing them to unique and onerous penalties, decrease access to safe medical care, and reinforce the stigma around abortion. (*Id.* ¶ 87; ECF No. 231, Ex. 7, 104:24-105:7; 120:6-11; ECF No. 231, Ex. 12, 119:8-120:18; 155:21-156:15) According to them, laws that subject abortion providers to disparate criminal liability discourage qualified clinicians from providing abortion care. (*Id.*)

Defendants' expert Jason Lindo, Ph.D.[13] is of the opinion that empirical data from Minnesota "casts doubt" that there are "substantial effects on abortion rates" because of the enactment of the Challenged Laws, including the Felony Penalties for Regulatory Infractions. (ECF No. 240, Ex. D, ¶ 23)[14]

V. Two-Parent Notification Law

The Two-Parent Notification Law requires that, forty-eight hours before an abortion may be performed on a minor, notice to be given to both of the minor's parents. Minn. Stat. § 144.343, subds. 2, 3. Alternatively, the minor may obtain a judicial order to bypass the parental notice requirement. *Id.* at subd. 6. The law does not require notice in the event of a medical emergency, when the parents provide written authorization, or when the minor declares she is a victim of sexual abuse, neglect, or physician abuse, in which case, a maltreatment report must be made pursuant to Minn. Stat. § 260E.06. *Id.* at subd. 4.

Research shows that abortion is safer than continuing a pregnancy. (ECF No. 231, Ex. 5, ¶ 30; Ex. 6, ¶ 24) The risk of death is higher during childbirth than abortion, and continuing unwanted pregnancies leads to greater anxiety and lower self-esteem, more life-threatening conditions, poorer overall health, increased likelihood of domestic violence, and economic insecurity. (ECF No. 231, Ex. 5, ¶ 30) Abortion-related mortality is lower than

[13] Dr. Lindo is a Professor of Economics at Texas A&M University. (ECF No. 240, Ex. D, ¶ 1) He has taught classes which focus on the quantitative methods that economists use to evaluate the causal effects of government programs and other interventions. (*Id.* ¶ 4) He has a research interest in health economics and issues concerning youth, including the effects of abortion policies. (*Id.* ¶ 5)

[14] Generally, "casting doubt" fails to demonstrate that there is no genuine issue of material fact in support of Defendants' motions for summary judgment on the equal protection claims. Especially in light of Dr. Lindo's acknowledgment that "there is no question that abortion laws can and sometimes have significantly impaired people's ability to obtain abortions…[such as] when they require clients to make an additional trip to a clinic to receive counseling before the procedure can be done." (ECF No. 240, Ex. D, ¶ 80)

that for colonoscopies, plastic surgery, dental procedures, and adult tonsillectomies. (ECF No. 231, Ex. 6, ¶ 20)

According to Dr. Kelsey Leonardsmith,[15] an expert advanced by Plaintiffs, informed consent is required of all forms of medical care. (ECF No. 231, Ex. 2, ¶ 8) Informed consent requires the ability to understand information; appreciation of the information in the context of one's life; ability to reason about treatment options; and to communicate a choice consistent with one's values. (*Id.* ¶ 10) Dr. Leonardsmith and Dr. Amanda Stephenson[16] opine that minors are generally capable of making the informed decision to obtain an abortion. (ECF No. 231, Ex. 5, ¶ 40; Ex. 2, ¶ 17) This is because, by the age of 14, "most adolescents are able to provide informed consent for medical care to the same extent as adults." (ECF No. 231, Ex. 2, ¶¶ 16–20; Ex. 6, ¶ 79) In Dr. Leonardsmith's experience, "adolescents can provide their medical history sufficiently to illuminate potential risks" which will allow her to provide appropriate medical care. (ECF No. 231, Ex. 2, ¶ 17) Adolescents are able reflect back the central tenets of informed consent, such as benefits, risks and treatment alternatives, are able to reason through possible treatment options, and come to a decision consistent with their own values. (*Id.*) Dr. Terrell generally agrees with this opinion. (ECF No. 231, Ex. 6, ¶ 79)

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[15] Kelsey Leonardsmith, M.D., practices at Minnesota Community Care – La Clinica in Saint Paul, Minnesota, where she provides pregnancy-related and primary care for adolescents, and at Family Tree Clinic, where she provides sexual and reproductive healthcare, including abortion referrals. (ECF No. 231, Ex. 2, ¶ 3) She is also an Adjunct Assistant Professor at the University of Minnesota Medical School. (*Id.* ¶ 4)

[16] Amanda Stephenson, Ph.D., is an expert retained by Plaintiffs and an Assistant Professor of sociology at the University of Colorado Boulder, specializing in "abortion, contraception, fertility, reproduction, demographic methods, statistics, and policy evaluation." (ECF No. 231, Ex. 5, ¶¶ 1, 3)

Dr. Leonardsmith also explains that Minnesota adolescents can consent, without notifying a parent or guardian, to comparable and riskier medical interventions than abortions, such as those which follow a miscarriage (which use the same procedures and medications used in abortion) or a Cesarean section (which carries higher risks of hemorrhage, injury to the patient, and death) than either vaginal delivery or abortion. (ECF No. 231, Ex. 2, ¶ 20) In Dr. Leonardsmith's assessment, such complex medical decisions can be made by adolescents with the same ability as adults. (*Id.*) In Dr. Leonardsmith's opinion, "there is no medical basis for allowing adolescents to have control over their contraceptive, STI, prenatal, and alcohol and drug abuse care, but not their abortion care." (*Id.* ¶ 23)

60–70% or more of adolescents seek support from parental figures or other trusted adults, including involving at least one parent, when making abortion decisions. (ECF No. 231, Ex. 2, ¶ 26; Ex. 5, ¶ 31; Ex. 6, ¶ 80) Adolescents who do not involve their parents report fearing damage to their familial relationship, abuse, abandonment, or being denied the abortion. (ECF No. 231, Ex. 2, ¶ 32; Ex. 5, ¶ 32; Ex. 6, ¶ 81) Their concern may be based on their actual experiences, including acrimonious relationships with their parents, previous conversations with their parents about their religious or moral beliefs, or their parents' reactions to older siblings or other events. (ECF No. 231, Ex. 2, ¶ 32; Ex. 5, ¶ 32) Studies have shown that minors can correctly predict parental responses to the minor seeking abortion, which may include violence and abandonment, whether financially, emotionally, or removing access to housing. (ECF No. 231, Ex. 2, ¶¶ 33–36; Ex. 5, ¶ 36; Ex. 6, ¶ 81) Research has shown that parental notification and consent laws do not promote adolescent health, nor do they improve family communication. (ECF No. 231, Ex. 2, ¶¶ 30–31; Ex. 6,

¶ 82) Dr. Leonardsmith is also of the opinion that the Two-Parent Notification Law forces physicians to encourage disclosure of otherwise protected health information against a patient's wishes, and "badly undermines the doctor-patient relationship, which is crucial to long term trust, health, and safety." (ECF No. 231, Ex. 2, ¶ 37)

Adolescents may not be able to fulfill the requirement to notify two parents even if they want to. Not all adolescents are raised by or living with a parent or legal guardian. (ECF No. 231, Ex. 2, ¶ 32, 44; Ex. 5, ¶ 32) One or more parents may refuse to accept notification, requiring the minor to undergo the judicial bypass even after attempting notification. (ECF No. 231, Ex. 5, ¶ 36) Alternatively, forced or accidental disclosure may occur during or as a result of the judicial bypass process, which can lead to similar parental responses. (*Id.* ¶¶ 46–48) Minors who undergo the judicial bypass experience fear and intimidation, as well as the gamut of shaming and harmful responses by authority figures, including judges and guardians ad litem. (*Id.* ¶¶ 49–51; ECF No. 231, Ex. 2, ¶ 45)

Two-parent notification laws may delay access to abortion due to the administrative burden imposed by the law, including the judicial bypass process, delaying until the minor's eighteenth birthday, or delays associated with traveling to another state to access care. (*Id.* ¶¶ 37, 41, 42; ECF No. 231, Ex. 2, ¶¶ 39–41, 47; Ex. 6, ¶ 83) According to Dr. Leonardsmith, the Two-Parent Notification Law causes delays which make some adolescents unable to obtain medication abortion anywhere in Minnesota, and pushes others later into their pregnancy, which imposes additional logistical and financial obstacles, and also increases the risks associated with pregnancy and abortion. (ECF No. 231, Ex. 2, ¶ 40)

VI. Mandatory Disclosure Law

The Mandatory Disclosure Law allows abortions to be performed only after informed consent, which is defined under the law. Minn. Stat. § 145.4242(a). First, the abortion patient must be told, at least twenty-four hours before the abortion, by a physician (1) "the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility," (2) the gestational age of the fetus, (3) the medical risks associated with continuing the pregnancy, and (4) for abortions after 20 weeks, "whether or not an anesthetic or analgesic would eliminate or alleviate organic pain to the unborn child caused by the particular method of abortion to be employed and the particular medical benefits and risks associated with the particular anesthetic or analgesic." *Id.* (a)(1). Also, at least twenty-four hours before the abortion, the doctor or their agent must inform the patient (1) that medical assistance benefits may be available for prenatal and neonatal care and childcare, (2) that the father is liable for child support, and (3) that the patient has the right to review the materials published by the Health Department under Minn. Stat. § 145.4243, and how to find them. *Id.* (a)(2). The person providing the disclosure must tell the patient that the materials "have been provided by the state of Minnesota and that they describe the unborn child, list agencies that offer alternatives to abortion, and contain information on fetal pain." *Id.* (a)(2)(iii). A patient who chooses to view the printed materials shall have 24 hours to view them or 72 hours if they are mailed to the patient. *Id.*

The printed materials are approximately twenty-two pages long. (ECF No. 270, Ex. X) They include the following:

Long-Term Medical Risks

Future childbearing: Early abortions that are not complicated by infection do not cause infertility. Complications associated with an abortion may make it difficult to become pregnant in the future or carry a pregnancy to term.

Premature Birth: Increased risk of premature birth has been shown to be associated with abortion. Premature babies ("preemies") have higher risk of death in their first year of life and raised risk of autism, cerebral palsy, deafness, blindness, and cognitive impairments (developmental disability).

Cancer of the Breast: The National Cancer Institute (NCI) and the American Cancer Society (ACS) report that scientific research studies have shown no increased risk of developing breast cancer if a woman has had an abortion.

* * *

Fetal Pain

There is no evidence to suggest that a fetus experiences pain. According to the American College of Obstetricians and Gynecologists, scientific studies have found that a human fetus does not have the capacity to experience pain until at least 24 weeks gestation.

The current information in the Health Department's informational booklet, therefore, contradicts the information included in the Mandatory Disclosure Law.

Defendants' expert Dr. Wothe is of the opinion that the Mandatory Disclosure Law "ensures that consistent up-to-date information is provided to each patient," but that he is also required by the law to distribute information "which is not supported by evidence." (ECF No. 267, Ex. A, ¶¶ 28, 29, 31) For example, Dr. Wothe admits that the informed consent form which his hospital uses to comply with the Mandatory Disclosure Law includes

"information on infertility risk post abortion which is not substantiated," and that he must contradict the informed consent when he counsels his patients. (*Id.* ¶ 29) Dr. Wothe contends that the Mandatory Disclosure Law's phrase "when medically accurate" gives a physician the discretion to tailor the information they provide in their informed consent, he admits that "there is pressure to conform closely to the statute due to the felony penalty." (ECF No. 267, Ex. A, ¶ 32)

In Dr. Terrell's opinion, research and leading medical associations indicate that contrary to the Mandatory Disclosure Law, abortion does not increase a woman's risk (1) for breast cancer, (2) of future pregnancy complications, or (3) of infertility. (ECF No. 277, Ex. 6, ¶¶ 53-54) Dr. Terrell also opines that, contrary to the Mandatory Disclosure Law, there is no evidence that fetuses experience pain. (*Id.* ¶ 56; ECF No. 270, Ex. X) She contends that providing patients with "a litany of state-mandated information that is irrelevant or misleading undermines the informed consent process and practitioners' ability to engage in shared decision-making." (ECF No. 277, Ex. 6, ¶ 52) Similarly, Dr. Terrell maintains that even if providers tell their patients that risks in the Mandatory Disclosure Law are not significant, "damage is done." (*Id.* ¶ 55) According to Dr. Terrell, "[b]ringing up the risks of breast cancer, future pregnancy complications, and infertility – apropos of nothing – suggests that they are important risks for patients to consider, which is misleading." (*Id.*). In her opinion, the Mandatory Disclosure Law undermines the informed consent process and abortion patients "would be better served if their healthcare providers were free to exercise their professional judgment to provide them with relevant and scientifically accurate information in accordance with the standard of care." (*Id.* ¶ 58)

VII. Physician Disclosure Law

As indicated in Section VI above, Minn. Stat. § 145.4242(a)(1) requires that some of the informed consent by the Mandatory Disclosure Law be made only by a physician – "the physician who is to perform the abortion" or "a referring physician." According to Dr. Terrell, however, the provision of information can be delegated to qualified personnel by a physician in other medical procedures. (ECF No. 285, Ex. 17, 138:4–139:2) In the words of Amy Hagstrom Miller,[17] the Physician Disclosure Law "sets abortion aside" and it is "shocking to the patient when they're required to have this extra step with a physician" when they are considering abortion, but not when they were considering other pregnancy outcomes. (ECF No. 279, Ex. 12, 34:1-15) While Hagstrom Miller admits that she has not seen that the Physician Disclosure Law has prevented a woman from choosing abortion, she testified that it will delay their appointment sometimes. (*Id.* 34:18-20) Plaintiffs' experts generally opine that the Physician Disclosure contained in the Mandatory Disclosure Law limits the amount of time physicians have to provide other services, which increases the cost of abortion care. (ECF No. 277, Ex. 6, ¶ 62; ECF No. 279, Ex. 12, 33:6–17; ECF No. 278, Ex. 8, 133:3–12)

VIII. Mandatory Delay Law

The Mandatory Disclosure Law mandates a twenty-four hour waiting period, unless there is a medical emergency, between the time that the "physician who is to perform the abortion or by a referring physician" provides mandated information to the patient and the

[17] Since only a portion of Hagstrom Miller's deposition was provided to this court, Hagstrom Miller's qualifications are somewhat unclear, however, from the context of her deposition, it appears that she has a leadership or ownership interest in Whole Women's Health, which appears to be an abortion provider. (ECF No. 232, Ex. 10)

abortion procedure, concerning (1) risks associated with the abortion procedure to be employed, (2) the probable gestational age of the fetus, (3) the medical risks of carrying a child to term, and (4) fetal pain and the effect of analgesics. Minn. Stat. § 145.4242(a)(1)(i-iv). The Mandatory Disclosure Law also mandates a twenty-four hour waiting period between the time that a physician who is to perform the abortion, by a referring physician, or by an agent of either physician and the abortion procedure, that (1) medical assistance benefits may be available for prenatal care, childbirth, and neonatal care, (2) the father of the child is liable for child support, and (3) that the patient has the right to review printed materials from the Health Department. Minn. Stat. §§ 145.4242(a)(2)(i-iii); 145.4243. According to Dr. Wothe, the intention of the Mandatory Delay Law is "to provide the patient one more chance to consider the decision, now with the information mandated by the state available." (ECF No. 287, Ex. 22, ¶ 33) He contends that delay "may serve the purpose of allowing further consideration for abortions of non-anomalous, non-maternal life-threatening fetuses," but Dr. Wothe concedes that "there is a downside of potentially delaying an abortion to a later and more dangerous time." (*Id.* ¶ 35) With statutory exceptions, Dr. Wothe does not see "how the interest in ensuring a short period of reflection after receiving all medical information could be achieved in a more targeted way;" however, Dr. Wothe also is of the opinion that "[d]elay for abortion increases both the risk and the cost of the procedure." (*Id.* ¶¶ 38-39)

Dr. Terrell contends that, like some of the other Challenged Laws, the Mandatory Delay Law "singles out abortion patients for unique treatment" because while "[m]any healthcare interventions have potentially life-altering consequences…only pregnant

individuals seeking abortion care are subject to a mandatory waiting period as a condition of obtaining care." (ECF No. 277, Ex. 6, ¶ 64) Her clinical experience and the medical literature demonstrate that the vast majority of patients are firm in their decision to have an abortion by the time they meet with an abortion provider, and that there is no medical reason to require patients who are firm in their decision to delay their care. (*Id.* ¶¶ 65-66) According to Dr. Terrell, the Mandatory Delay Law "often delays patients' abortion care by more than twenty-four hours because of scheduling constraints that both patients and providers face." (*Id.* ¶ 67) In Dr. Terrell's experience, delays cause patients "to cope with the physical symptoms of pregnancy for a longer period of time, and those seeking to conceal their pregnancy from an abusive partner or family member must work harder to do so. Delays of more than a few days may also increase the medical risks that patients face from abortion." (*Id.* ¶ 68) Ultimately, Dr. Terrell is of the opinion that the Mandatory Delay Law does not enhance patient decision-making and that they would be better off "if the State treated them as competent decision-makers and afforded them the same agency to direct the course of their medical treatment as all other competent patients are afforded." (*Id.* ¶ 69)

Dr. Doe also provided testimony regarding the effect of the Mandatory Delay Law on her patients' decision-making: "[it] causes a delay that sometimes then spirals into a three- or four-day delay in their care; and I don't find it, you know, at all – I don't feel like it protects a patient at all, it doesn't provide any benefit for that patient to need to wait 24 hours. I've never had a patient…that has changed their mind based on the consent form about how they were going to proceed." (ECF No. 8, Ex. 8, 104:2-9) Dr. Doe also testified that the Mandatory Delay Law has resulted in patient complaints about timeliness and scheduling.

(*Id.* 134:12-21) As a result of the twenty-four hour delay, a patient who is already upset and grieving, according to Dr. Doe, must further delay their care. (*Id.*) Though Dr. Doe also testified that the twenty-four hour delay did not "infringe" on her patients' decisions on whether to obtain abortions. (ECF No. 268, Ex. G, 135:13–15)

STANDARDS OF REVIEW

I. Summary Judgment

Rule 56 of the Minnesota Rules of Civil Procedure is designed to secure a just, speedy, and inexpensive determination of an action, by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Thus, Rule 56 provides that summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, submitted show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. Minn. R. Civ. P. 56.03. When a motion for summary judgment is made and supported, the nonmoving party must present specific facts showing that there is a genuine issue for trial. Minn. R. Civ. P. 56.05. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party. *Id.*

The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. *See Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). The court must not weigh the evidence on a motion for summary judgment. *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535

N.W.2d 337, 341 (Minn. 1995). That said, a court must view the evidence in a light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). When "determining whether a genuine issue of material fact for trial exists, the court is not required to ignore its conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *DLH, Inc.*, 566 N.W.2d at 70.

II. The Summary Judgment Motions and the Nature of the Dispute

The second and third rounds of summary judgment motions are the subject of this Order and Memorandum. As previously indicated, the parties filed cross motions for summary judgment on Plaintiffs' claims which relate to the Physician-Only Law, the Hospitalization Law, the Reporting Laws, the Felony Penalties for Regulatory Infractions, the Two-Parent Notification Law, the Mandatory Disclosure Law, the Physician Disclosure Law, the Mandatory Delay Law, and the Felony Penalty for Failure to Obtain Informed Consent. Plaintiffs seek summary judgment on each of their privacy claims, their equal protection claim under the Two-Parent Notification Law, and their free speech claim on the Mandatory Disclosure Law. Defendants seek summary judgment on the privacy claims for all the relevant Challenged Laws except the Two-Parent Notification Law, equal protection claims for all the relevant Challenged Laws except the Two-Parent Notification Law, special legislation claims for all the relevant Challenged Laws except the Two-Parent Notification Law, and free speech for the Mandatory Disclosure Law.

The parties dispute whether the Challenged Laws under the privacy and equal protection claims are properly analyzed using strict scrutiny or rational basis review. Defendants further argue the special legislation claims fail under the rational basis test.

With regard to the privacy and equal protection claim review, the parties dispute the fundamental right at issue. Once the right at issue is established, Defendants urge this court to first engage in a factual analysis to determine whether the Challenged Laws implicate the fundamental right to privacy. Plaintiffs argue that a factual analysis is unnecessary. The parties further dispute whether Plaintiffs must identify a comparator group of similarly-situated individuals for the purposes of their equal protection claims. The outcomes of each of those inquiries will determine whether the Challenged Laws are subject to strict scrutiny or rational basis review under the privacy and equal protection claims, on which the parties diverge as well.

On their privacy claim, Plaintiffs contend the Challenged Laws infringe on the fundamental right to abortion protected by the constitutional right to privacy. On their special legislation and equal protection claims, Plaintiffs contend abortion is medically similar to other reproductive healthcare procedures, including contraception, pregnancy, and miscarriage management, yet the Challenged Laws impermissibly treat abortion providers and patients differently from providers and patients of comparable procedures. Defendants contend the Challenged Laws advance the State's justified interest, irrespective of the standard of review that this court applies.

The parties dispute the proper standard of review for the Mandatory Disclosure on the free speech claim. Plaintiffs contend the mandatory disclosures impermissibly burden

commercial speech. Defendants, again, contend the laws are appropriately tailored to and justified by the State's interest.

III. Fundamental Right

As indicated above, the parties dispute the framework for review this court should apply in reviewing Plaintiffs' privacy and equal protection claims. First, the parties dispute whether the right at issue is the right *to obtain* an abortion or the right *to choose* to obtain an abortion. Accordingly, before moving onto the appropriate standard of review for Plaintiffs' privacy and equal protection claims, the court must identify the fundamental right (or rights) at issue. Based on the Minnesota Supreme Court's holding in *Gomez*, this court concludes that the rights at issue here are both the right to obtain an abortion and the decision of whether to terminate a pregnancy with an abortion. 542 N.W.2d at 31.

The parties agree that any fundamental right at issue in Plaintiffs' privacy and equal protection claims was articulated most recently in *Gomez*. Beyond that, the parties disagree about the essential holding in *Gomez*. Plaintiffs contend the essential holding in *Gomez* protects the "fundamental right to obtain an abortion before fetal viability." *Id.* at 19. Defendants contend the essential holding of *Gomez* offers the narrower protection of the "right to choose to have an abortion." *Id.* at 27.

The *Gomez* case is significant and historic. First, it determined that under the Minnesota Constitution's guaranteed right to privacy, "the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor." Second, it determined that the Minnesota Constitution offered greater protection of individual privacy rights than the United States Supreme Court has

afforded under the Federal Constitution. *Id.* at 19, 30-31 ("In reaching our decision, we have interpreted the Minnesota Constitution to afford broader protection than the United States Constitution of a woman's fundamental right to reach a private decision on whether to obtain an abortion…[and] conclude that the challenged provisions impermissibly infringe upon a woman's fundamental right of privacy under Article I, Sections 2, 7 and 10 of the Minnesota Constitution."). As this court will explain, the *Gomez* decision and its essential holding is unaffected by the United States Supreme Court decision in *Dobbs v. Jackson Women's Health Org.*, 2022 WL 2276808 (U.S. June 24, 2022).

In *Gomez*, the supreme court considered whether Minnesota statutes violated the right to privacy and equal protection under the Minnesota Constitution, because they restricted the use of public funds for abortion-related medical services but permitted the use of those funds for childbirth-related medical services. *Id.* at 19. The district court certified the class of plaintiffs as:

> all women eligible for Minnesota's Medical Assistance, General Assistance Medical Care, or County Poor Relief programs, who seek abortions for health reasons during the pendency of this litigation or have obtained abortions for health reasons within the one year period prior to the filing of this action.

Id. at 20–21. The court explicitly departed from the United States Supreme Court's analysis and holding in *Harris v. McRae*, which involved a similar issue under the Federal Constitution. 448 U.S. 297 (1980). A brief explanation of the *McRae* case is appropriate here to understand the basis for the court's decision in *Gomez*.

The *McRae* Court considered whether the Hyde Amendment to the Medicaid Act, which denied public funding for certain medically necessary abortions, violated various constitutional guarantees, including liberty and equal protection under the Fifth Amendment.

Id. at 300–01. The right that the Court considered was the "freedom to decide whether to terminate [a] pregnancy." *Id.* at 314. The Court concluded that the Hyde Amendment did not violate the Fifth Amendment because that freedom does not carry with it "a constitutional entitlement to the financial resources" required to enjoy the "full range of protected choices." *Id.* at 316. Thus, "although government may not place obstacles in the path of a woman's exercise of [their] freedom of choice, it need not remove those not of its own creation." *Id.*

The Minnesota Supreme Court in *Gomez*, however, adopted the reasoning in Justice Brennan's dissent in *McRae*: "In the abstract, of course, this choice is woman's alone . . . . But the reality of the situation is that the Hyde Amendment has effectively removed this choice from the indigent woman's hands." 542 N.W.2d at 29 (quoting *McRae*, 448 U.S. at 333). *Gomez* expanded the "fundamental right to choose to have an abortion" under the Minnesota Constitution beyond that protection under the U.S. Constitution articulated in *McRae*. *Id.* at 30. "*McRae* has the practical effect of not protecting a woman's fundamental right to choose to have an abortion and allowing funding decisions to accomplish its nullification of that right." *Id.* at 31. The court went on to emphasize: "the right of privacy under [the Minnesota] [C]onstitution protects not simply the right to an abortion, but rather it protects the woman's *decision* to abort; any legislation infringing on the decision-making process, then, violates this fundamental right." *Id.* (emphasis in original). Thus, the supreme court concluded that the State cannot refuse to fund abortion services, limiting its decision to "the class of plaintiffs certified to the district court and the narrow statutory provisions at issue in this case." *Id.* at 32. The supreme court concluded: "We can think of few decisions more intimate, personal and profound than a woman's decision between childbirth and abortion. Indeed, this

decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities. We therefore conclude that the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy." *Id.* at 27.

Plaintiffs contend the reasoning by which *Gomez* departed from *McRae* necessarily protects the decision *and* the ability to effectuate the decision to have an abortion. *Id.* at 31 ("It is critical to note that the right of privacy under our constitution protects not simply the right to have an abortion, but rather it protects the woman's *decision* to abort…")(emphasis in original). They argue that the supreme court's use of the phrase "not simply" signifies that the right to privacy under the Minnesota Constitution encompasses both the ability to access abortion care and the ability to deliberate about one's options. Defendants point to the repeated references in *Gomez* to the "right to choose" and to the "decision" whether to have an abortion as support for its contentions on the limits of the fundamental right identified in that case.

There is no dispute that *Gomez* protects the right to choose whether to have an abortion. For example, in *Gomez*, evidence was presented that women who were denied public funds delayed abortion while seeking other funding, therefore the funding scheme at issue impacted when an abortion was obtained and its attendant risks. *Id.* at 26. There was apparently no evidence provided, however, about the impact of the availability of funding on the choice of whether to have an abortion at all. *See id.* Nevertheless, the court concluded that the state's historical "tradition of affording persons on the periphery of society a greater measure of government protection and support" rendered the funding scheme an effective

"nullification" of the right to choose whether to have an abortion. *Id.* at 30–31. In light of those traditions, the court concluded a funding scheme which removed the choice, rather than merely impacting the choice, for indigent pregnant women[18] violated the Minnesota Constitution. *Id.* at 32 ("The statutory scheme, as it exists, takes the decision from the hands of such women in a manner that, in light of the protections afforded by our own constitution, we simply cannot condone.").

The right to choose to have an abortion, however, would be meaningless without the right to access abortion care. The Minnesota Supreme Court in *Gomez* recognized this when it asserted that it was "critical" to note that "the right of privacy under our constitution protects *not simply the right to an abortion*, but rather it protects the woman's decision to abort…" *Id.* at 31 (emphasis added and cleaned up). Implicit in that conclusion is that the choice to terminate a pregnancy is a subset of the broader privacy right of abortion access. *See In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 133 (Minn. 2014)(right to parent is fundamental and includes the right to make decisions concerning the care, custody and control of their children); *see also Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653 (Miss. 1998)(citing *Gomez* for the proposition that the "right to abortion is included in the right to autonomous bodily integrity protected under state constitutional right to privacy"). In fact, this was not a matter of dispute between the parties in *Gomez*: ""[b]oth parties agree that women have a *fundamental right to obtain an abortion* before fetal viability under the Minnesota and United States Constitutions." *Id.* at 19 (emphasis added). *But see Dobbs*, 2022 WL 2276808, *43 ("The

[18] This court will use "women," "pregnant women," and "abortion patients," not to be exclusive, but because they may help better match the court's analysis to the commonly used terms in the various court decisions that are discussed throughout this Memorandum.

[United States] Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.").

This court concludes that the fundamental rights conferred by *Gomez* are the right to obtain an abortion and the right to choose whether to obtain an abortion. For the sake of clarity, unless the distinction is meaningful for this court's application of *Gomez* in its analysis for any particular challenged law, this will refer to the fundamental right as the right to abortion access. Plaintiffs' privacy and equal protection claims are subject to strict scrutiny only if the Challenged Laws place that right at issue. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007).

IV. Privacy

Plaintiffs contend the Challenged Laws violate their right to privacy encompassed by the Minnesota Constitution in Article I, Sections 2, 7, and 10.[19] The right to privacy under the Minnesota Constitution protects abortion access. *Gomez*, 542 N.W.2d at 31. This right, therefore, is fundamental. *Id.* ("any legislation infringing on the decision-making process, then, violates this fundamental right."). Plaintiffs contend this court should apply strict scrutiny to laws limiting abortion access, such as the Challenged Laws. *SooHoo*, 731 N.W.2d at 821. Defendants, on the other hand, read into *Gomez* a two-step analysis, which first places on Plaintiffs the factual burden of demonstrating an impermissible infringement upon a fundamental right, before the court can apply strict scrutiny. *Gomez*, 542 N.W.2d at 27;

[19] Section 2 states in part: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Section 7 states in part: "No person shall…be deprived of life, liberty or property without due process of law." Section 10 states in part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated…".

Schroeder v. Simon, 962 N.W.2d 471, 484 (Minn. Ct. App. 2021), *review granted* (Minn. Aug. 10, 2021). Defendants contend, in the absence of an infringement of a fundamental right, the court must review the challenged statutes under the rational basis standard. Plaintiffs dispute that any of the cases cited by Defendants in support of their position involve a threshold factual inquiry of the infringement at issue. This court agrees. Although *Gomez* clearly requires an analysis of whether the Challenged Laws infringe on the fundamental right, that analysis is not driven by the facts in evidence. *Gomez*, 542 N.W.2d at 31.

The court in *Gomez* noted that "any legislation infringing on the decision-making process [whether to abort] . . . violates this fundamental right" to privacy. *Id.* The court went on to analyze whether the challenged legislation infringed on the fundamental right to privacy:

> In the present case, the infringement is the state's offer of money to women for health care services necessary to carry the pregnancy to term, and the state's ban on health care funding for women who choose therapeutic abortions. . . . Indigent women . . . would be most affected by an offer of monetary assistance, and it is these women who are targeted by the statutory funding ban. We simply cannot say that an indigent woman's decision whether to terminate [a] pregnancy is not significantly impacted by the state's offer of comprehensive medical services if the woman carries the pregnancy to term.

Id. After concluding that the challenged provisions infringed on the fundamental right to privacy, the court determined it "must subject [the challenged provisions] to strict scrutiny." *Id.* (citing *Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993)).

Gomez makes clear that courts must first determine whether a challenged law infringes on the fundamental right to privacy. Here, such an infringement would involve a significant impact to a pregnant woman's decision whether to abort, and more broadly the pregnant woman's access to abortion care. *Id.*

Defendants contend *Schroeder* requires Plaintiffs to "affirmatively prove that their fundamental right has been infringed before they are entitled to strict scrutiny." Indeed, *Schroeder* places the "burden of establishing that the statute implicates a fundamental right" on the "individual seeking to apply strict scrutiny." 962 N.W.2d at 484. However, the issue in *Schroeder* was about whether a right is fundamental, not whether a fundamental right has been infringed. *Id.* ("There is no deeply rooted history or tradition in Minnesota by which a person who has been convicted of a felony has been assured of a right to vote.") Nor does *Schroeder* impose a factual inquiry about infringement. *Id.*

In fact, there is nothing in the cases cited by Defendants which indicates that Plaintiffs bear a factual burden to prove the fundamental right has been infringed or implicated. Instead, those cases focus on (1) as in *Schroeder*, whether the right advanced by the individual seeking to apply strict scrutiny is, as a matter of law, fundamental, *State v. Holloway*, 916 N.W.2d 338, 345 (Minn. 2018) (citing "historical practice," such as legislative history to determine whether there is a fundamental right to obtain a mistake of age defense); *State v. Gray*, 413 N.W.2d 107, 113–14 (Minn. 1987) (declining to apply the fundamental right of privacy to a sodomy law based on public policy); or (2) whether an already established fundamental right is at issue in the particular case, *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 725–26 (Minn. 2008) (concluding, as a matter of law, that the challenged law did not place the fundamental right to interstate travel at issue); *Gomez*, 542 N.W.2d at 31 (relying on logic and common sense to conclude a law imposing limitations on Medicaid disbursement for abortion infringed on the fundamental right to privacy); *Hickman v. Grp. Health Plan, Inc.*, 396 N.W.2d 10, 13 (Minn. 1986) (concluding the law prohibiting

wrongful life and wrongful birth actions did not "directly affect or impose a significant burden on a woman's right to an abortion").

The question of whether a fundamental right exists is not at issue here as it was in *Holloway*, *Gray*, and *Schroeder* because, as this court has discussed at length, *Gomez* answered that question. 542 N.W.2d at 31. Thus, Plaintiffs have already met their burden of establishing that a right is fundamental, as identified in *Schroeder*, as a matter of law. 962 N.W.2d at 471. Instead, the inquiry here is whether each of the Challenged Laws would impact a pregnant woman's access to abortion care. If a Challenged Law infringes on this fundamental right, this court will review that law under strict scrutiny. If not, Plaintiffs' claims fail with respect to that law. *See Gomez*, 542 N.W.2d at 31 ("a law must impermissibly infringe upon a fundamental right before it will be declared unconstitutional as violative of the right of privacy") (citation omitted).

Once the court determines a fundamental right is involved, the burden of proof shifts to the state. *Skeen*, 505 N.W.2d at 312. A law subject to strict scrutiny must be narrowly tailored to serve a compelling government interest. *Gomez*, 542 N.W.2d at 31.

V. Equal Protection

Plaintiffs contend the Challenged Laws violate their right to equal protection guaranteed under Article I, section 2 of the Minnesota Constitution. The supreme court found it unnecessary to address the equal protection claims of the plaintiffs in *Gomez*, in light of its conclusion that the Challenged Laws impermissibly infringed on the right to privacy, so

that decision provides little guidance for this court's consideration of Plaintiffs' equal protect claims here. *Gomez*, 542 N.W.2d at 19.[20]

This court's analysis of Plaintiffs' equal protection claim requires three preliminary considerations (1) whether the Challenged Laws infringe on a fundamental right, (2) if they infringe on a fundamental right, and therefore are subject to strict scrutiny, whether Plaintiffs must make a threshold showing of differential treatment from similarly situated people, (3) if they must make the threshold showing, how to apply the similarly situated test. *R.D.L.*, 853 N.W.2d at 132–33. Plaintiffs contend the Challenged Laws infringe on a fundamental right, and that the Minnesota Supreme Court has not resolved whether the "similarly situated" threshold test should be applied when statutes are subject to strict scrutiny. *See Forslund v. State*, 924 N.W.2d 25, 35 (Minn. Ct. App. 2019). Defendants contend the Challenged Laws do not infringe on a fundamental right, but that even if they do, the "similarly situated" test applies. *See id.* Because this court concludes the "similarly situated" test applies irrespective of the level of scrutiny, the court will address that question first.

The constitutional equal protection guarantee begins "with the mandate that all similarly situated individuals must be treated alike." *R.D.L.*, 853 N.W.2d at 131. The parties dispute whether Plaintiffs must make a threshold showing of differential treatment among themselves and other, similarly situated people. *Forslund*, 924 N.W.2d at 35. Plaintiffs contend the question is as-yet unresolved by the Minnesota Supreme Court, while Defendants contend the threshold showing was required in *Forslund*. *Id.*

[20] The majority in *Gomez* did comment on the dissent's equal protection contentions and concluded that: "the statutory scheme would still be an unconstitutional interference with a woman's right to privacy, leading us to the same result." *Id.*, n. 1.

A party must "establish that he or she is similarly situated to persons who have been treated differently in order to support an equal protection claim." *R.D.L.*, 853 N.W.2d at 132 (citing *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011)). In *R.D.L.*, the court acknowledged but declined to address a question which has been raised by other state courts, which is "whether the 'similarly situated' threshold test should be applied when the statute at issue is subject to strict scrutiny review." *Id.* The *Forslund* Court also acknowledged that question, but did not address it because it was not a question before the court. 924 N.W.2d at 35 n.12 ("Our supreme court recently questioned the continued wisdom of requiring a similarly-situated analysis . . . . The issue in this case is more basic . . . ."). There is no authority invalidating the rule stated in *R.D.L.* Until the Minnesota Supreme Court indicates otherwise, the prevailing rule is that plaintiffs must establish, as a threshold to an equal protection claim, that they are similarly situated to persons who were treated differently. *R.D.L.*, 853 N.W.2d at 132. Thus, for each Challenged Law, this court will first determine whether Plaintiffs have established the laws subject them to differential treatment from those to whom they are similarly situated.

In *Fletcher Props., Inc. v. City of Minneapolis*, the supreme court identified the first step of the "similarly situated" analysis as the question "whether the law creates distinct classes within a broader group of similarly situated persons or whether those treated differently by the law are sufficiently dissimilar from others such that the law does not create different classes within a group of similarly situated persons." 947 N.W.2d 1, 22 (Minn. 2020). However, in its analysis of the facts, the supreme court implicitly added a few more steps for this analysis (1) identifying the relevant group, then (2) identifying the distinction in the group. *Id.* at 27–28.

The supreme court then determined whether the group is similarly situated despite the distinction by examining "the positions of the claimant and all others in light of the broad purpose and operation of the statute." *Id.* at 22.

Throughout their briefing, the parties dispute the manner of application of the "similarly situated" test. Specifically, Plaintiffs contend the relevant groups (except for the Two-Parent Notification Law) are (1) reproductive health providers and (2) their patients. Defendants dispute that medical patients are relevant to the inquiry because the Challenged Laws do not regulate patients. *Id.* at 28. Because the parties find themselves in the relatively unusual circumstance of disagreeing about the relevant groups, this court must identify the relevant group under each challenged law before assessing whether, in light of the purpose of the statute, and despite its internal distinction under law, the group as a whole is similarly situated.

In *Fletcher*, the supreme court identified the relevant group as those whose conduct was regulated by the ordinance at issue. *Id.* at 27. This conclusion is supported by the cases cited in *Fletcher*. *Holloway*, 916 N.W.2d at 347 (dividing group of people accused of criminal sexual conduct into those who could claim the mistake-of-age defense under statute, and those who could not); *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 656 (Minn. 2012) (concluding statute that limits an employer's liability for worker's compensation distinguishes between costs payable to in- and out-of-state medical providers, not workers); *see also R.D.L.*, 853 N.W.2d at 132 (concluding statute "which addresses the termination of parental rights . . . undoubtedly classifies parents into two di]fferent groups"). Thus, Defendants seek to limit

the comparative groups in this case under the similarly situated test to healthcare providers because the Challenged Laws only regulate the conduct of those providers.

Plaintiffs oppose limiting the similarly situated test to providers because they contend doing so ignores this court's previous ruling on third-party standing in its Order denying Defendants' motion to dismiss over two years ago. (ECF No. 115) In that Order, this court determined that Dr. Doe and Ms. Moe had both direct standing – to pursue their constitutional claims on their own behalf, as a physician and a nurse midwife respectively – and third-party standing – to pursue their constitutional claims on behalf of their patients. (*Id.* at 13-15) *See Gomez*, 542 N.W.2d at 20 n. 2; *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976); *Planned Parenthood of Wisc., Inc. v. Schimel*, 806 F.3d 908, 910 (7th Cir. 2015); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 865 n. 3 (8th Cir. 1977). It is clear enough that equal protection claims may be made by third parties. *See Craig v. Boren*, 429 U.S. 190, 193 (1976) (permitting a liquor vendor third-party standing to bring an equal protection challenge to a liquor law based on age-sex differentials of customers); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972) (permitting a college lecturer to assert the third-party rights of "unmarried persons denied access to contraceptives" as compared to married persons).

Once the court identifies the group and relevant distinction, the analysis requires courts to determine whether "the claimant is treated differently from other persons with whom the claimant is similarly situated *in all relevant respects*." *Fletcher*, 947 N.W.2d at 22 (cleaned up). This involves an examination of "the positions of the claimant and all others in light of the broad purpose and operation of the statute." *Id.* For example, in *R.D.L.*, pursuant to the "paramount consideration" of the statute at issue, which was the "best

interests of the children," the court determined that the groups were similarly situated for the purpose of the statute. 853 N.W.2d at 133. In *Holloway*, the court concluded that the group of defendants was similarly situated because they were both "subject to criminal liability for engaging in identical conduct." 916 N.W.2d at 347–48.

Every law which passes the "similarly situated" test must then be analyzed for infringement upon the fundamental right to access abortion care or to choose whether to obtain an abortion. Laws which do not infringe upon a fundamental right are subject only to rational basis review. *R.D.L.*, 853 N.W.2d at 132–33. Laws which do infringe on a fundamental right are subject to strict scrutiny. *Id.* (equal protection).

Generally, the party "challenging a statute's constitutionality bears the burden of establishing that the statute is unconstitutional beyond a reasonable doubt." *Greene*, 755 N.W.2d at 725. "[S]tatutory classifications are generally permissible as long as they rationally serve some legitimate state purpose" under the rational basis test. *R.D.L.*, 853 N.W.2d at 133.

Once the court determines a fundamental right is involved, however, the burden of proof shifts to the state and the law is subject to strict scrutiny. *Skeen*, 505 N.W.2d at 312. A law subject to strict scrutiny "must be narrowly tailored to serve a compelling government interest." *R.D.L.*, 853 N.W.2d at 133.

With regard to each of the equal protection claims for the Challenged Laws, this court will identify the relevant group and distinction as a threshold determination.

VI. Special Legislation

Article XII, Section 1 of the Minnesota Constitution prohibits special legislation:

> In all cases when a general law can be made applicable, a special law shall not be enacted . . . . Whether a general law could have been made applicable in any case shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law . . . granting to any private corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever . . . .

The legislature may "create classes and apply different rules to different classes, [but] it must adopt a proper classification basis." *In re Tveten*, 402 N.W.2d 551, 558 (Minn. 1987). A proper classification basis involves "substantial distinctions, which make one class substantially different, in a real sense, from another." *Id.* A classification is not unconstitutional special legislation if:

> (a) the classification applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation; (b) the distinctions are not manifestly arbitrary or fanciful but are genuine and substantial so as to provide a natural and reasonable basis justifying the distinction; and (c) there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide.

Id. at 558–59.

For example, in *De La Fuente v. Simon*, plaintiffs challenged a statute which governs the selection of candidates on a political primary ballot as special legislation. 940 N.W.2d 477, 486 (Minn. 2020). First, the court identified the statutory classification, noting the statute applies "to all who are similarly situated at the time of a state presidential nomination primary." *Id.* at 488. In other words, the statute was "framed so as to apply automatically to other[s] . . . as they may acquire the characteristics of the class . . . ." *State v. Indep. Sch. Dist. of Granite Falls*, 174 N.W. 414, 415 (Minn. 1919). Second, the court concluded the distinction

had a reasonable basis in "the needs of a specific class of political parties, those whose presidential candidates for the general election are determined by events that occur outside of Minnesota." *De La Fuente*, 940 at 489. Finally, the court identified the "evident connection" between the class needs and the statute as balancing national nomination processes and the State's need to prepare a ballot for only one election. *Id.* at 489–90.

Citing their argument and cases relating to equal protection, Defendants contend the classifications required for special legislation analysis must also encompass providers, not patients. None of those cases squarely address the relation between constitutional equal protection and special legislation claims, but Minnesota courts have historically intertwined equal protection and special legislation claims, and still analyze them in tandem. *Fletcher*, 947 N.W.2d at 20 n.13, 21 n.14; *Mitchell v. Steffen*, 504 N.W.2d 198, 209 (Minn. 1993) (Tomljanovich, J., dissenting); *State v. Forge*, 262 N.W.2d 341, 347–48 (Minn. 1977). The special legislation clause and state equal protection clauses are coextensive with the federal equal protection clause. *AFSCME Councils 6, 14, 65, and 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560, 570 n.12 (Minn. 1983), *superseded by statute on other grounds*. Accordingly, this court is persuaded that the classifications under the equal protection similarly situated test are generally appropriate to consider for Plaintiffs' special legislation claims, unless Plaintiffs have identified otherwise in their briefing.

VII. Free Speech

Plaintiffs contend the Mandatory Disclosure Law violates the right to free speech under the Minnesota Constitution, Article I, Section 3.[21] The right to free speech under the Minnesota Constitution is coextensive with that afforded by the U.S. Constitution. *State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999). The right to free speech "includes both the right to speak freely and the right to refrain from speaking at all." *Janus v. Am. Fed'n of State, County, and Mun. Employees, Council 31*, 138 S.Ct. 2448, 2463 (2018).

Plaintiffs contend this court should apply the standard for the incidental burdening of speech, articulated in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Nat'l Inst. Of Fam. And Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("*NIFLA*"). Defendants dispute that *NIFLA* stands for the proposition that the standard for incidental speech is appropriate for informed consent challenges.

The Supreme Court considered an informed consent requirement in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881 (1992), *overruled by Dobbs*, 2022 WL 2276808, *7. The Court held regulations which require "truthful, nonmisleading information" could be upheld. *Id.* at 882. The Court confirmed a physician's First Amendment right not to speak is implicated, subject to the state's regulation of the practice of medicine. *Id.* at 884. The Supreme Court later clarified its position on informed consent mandatory disclosures in *NIFLA*.

[21] Section 3 states in part: "all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

NIFLA involved a constitutional challenge to a California law that requires pregnancy clinics to provide certain notices. *Id.* at 2368. The Court began by classifying the required notices as content-based speech regulation, which is "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2371 (citation omitted). In so doing, it rejected the lower court's application of rational basis review to the category of "professional speech." *Id.* at 2372. The Court clarified that professional conduct may be subject to a lower standard in certain circumstances, one of which is the regulation of professional conduct which incidentally involves speech. *Id.* (citing *Casey*, 505 U.S. at 884). Thus, the Court explained that the mandatory disclosures in *Casey* were upheld under a lower standard than the notices in *NIFLA* because they involved "regulations of professional conduct that incidentally burden speech." *Id.* at 2373. A regulation which does not contain an "informed-consent requirement or any other regulation of professional conduct" regulates speech as speech, under strict scrutiny. *Id.* at 2373–74; *see also id.* at 2385 (Breyer, J., dissenting) ("*Casey*, in its view, applies only when obtaining 'informed consent' to a medical procedure is directly at issue.").

Following *NIFLA*, a split in federal courts has arisen. Plaintiffs advocate for one of the approaches under the split. They contend this court should apply the standard for incidental limitations of free speech, which requires that the regulation (1) is within the constitutional power of the government, (2) furthers an important or substantial government interest, (3) which is unrelated to the suppression of free expression, and (4) is no greater than essential to furthering the interest. *O'Brien*, 391 U.S. at 377; *see also Capital Assoc. Indus.,*

Inc. v. Stein, 922 F.3d 198, 207 (4th Cir. 2019) (applying intermediate scrutiny "for reviewing conduct regulations that incidentally impact speech"); *Am. Med. Ass'n v. Stenehjem*, 412 F. Supp. 3d 1134, 1148–49 (D.N.D. 2019) (applying intermediate scrutiny to mandatory disclosure law). Defendants oppose this standard because "the Court clarified that no heightened First Amendment scrutiny should apply to informed-consent statutes like the abortion-informed-consent statute at issue in" *Casey*. *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 424 (6th Cir. 2019). Instead, Defendants contend the *Casey* standard remains appropriate for informed consent laws. Under that rule, laws which (1) relate to a medical procedure, (2) are truthful and not misleading, and (3) are relevant to the patient's decision whether to undertake the procedure should be upheld. *Id.* To the extent that *Casey* has been overruled by *Dobbs*, any reliance on it may be subject to question – though the Supreme Court's prior analysis on free speech challenges was not addressed by *Dobbs*.

No Minnesota court has had occasion to consider the correct standard to apply to free speech challenges to informed consent laws. This court agrees with Plaintiffs that the reasoning in *Beshear* is flawed. There is nothing in *NIFLA* which indicates "no heightened standard" should be applied to informed consent laws, but only that strict scrutiny is inappropriate. Law from the Sixth Circuit is not binding on this court, and it is no more persuasive than law from other circuits, such as the Fourth. *See Stein*, 922 F.3d at 207 (intermediate scrutiny). Defendants have not explained why *Beshear* would be more persuasive to this court than, for example, *Stein*. Moreover, the Court expressly identified the mandatory disclosure speech in *Casey* as an incidental limitation on free speech, and the standard for analyzing incidental burdens on free speech is equivalent to intermediate

scrutiny. *Compare O'Brien*, 391 U.S. at 377 *with Stein*, 922 F.3d at 207. Admittedly, *Stein* is not an abortion case. Although this court has not identified any authority which has applied intermediate scrutiny to an abortion mandatory disclosure law, this court's reading of *NIFLA* requires the application of intermediate scrutiny to Plaintiffs' free speech claim under the Mandatory Disclosure Law.

VIII. Alternative Unresolved Constitutional Claims

In the disposition of the motions made by the parties, this court has determined that certain Challenged Laws are unconstitutional because they violate the right to privacy or the right to free speech. This court has also determined that Defendants are not entitled to summary judgment for equal protection and special legislation claims related to the Challenged Laws. Though those claims are not resolved by this court's decision here, it is not necessary for this court to resolve them because (1) this court has already found the Challenged Law unconstitutional, and (2) this court has granted Plaintiffs all declaratory and injunctive relief they demanded with regard to the Challenged Law. *See State v. Losh*, 721 N.W.2d 886, 892-3 n. 9 (Minn. 2006)(because statute invalidated on separation of powers grounds, court did not need to address claim for violation of constitutional right to appellate review of her sentence); *State v. Henning*, 666 N.W.2d 379, 386 (Minn. 2003)("Having concluded that Minn. Stat. § 168.0422 is unconstitutional under the Fourth Amendment and Article I, Section 10 of the Minnesota Constitution, we need not address appellant's other arguments."); *Gomez*, 542 N.W.2d at 19 (unnecessary to address equal protection arguments, when court found statute violated right to privacy); *Bolin v. State, Dept. of Public Safety*, 313 N.W.2d 381, 384 (Minn. 1981)("Because we find this rule to be in violation of plaintiff's

fourteenth amendment rights, we need not address his first amendment challenge."). If a law is unconstitutional on one ground, it is unnecessary to determine whether it is unconstitutional on another ground, because it would lead to the same result.

IX. A Return to *Gomez* and *Dobbs*

For nearly a half century, *Roe* and later *Casey*, protected the liberty and equality of women. *Dobbs*, 2022 WL 2276808, *71 (Breyer, Sotomayor and Kagan dissenting). "*Roe* held, and *Casey* reaffirmed, that the [United States] Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions." *Id.* (citations omitted).

Just days ago, however, the United States Supreme Court in *Dobbs* overturned both *Roe* and *Casey*. The majority in *Dobbs* reasoned that *Roe* was "egregiously wrong from the start," its "reasoning was exceptionally weak," and has had "damaging consequences," which *Casey* failed to rectify. *Id.* at *7, 31. The *Dobbs* Court held that "the [United States] Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives." *Id.* at *38.

So why doesn't the *Dobbs* decision resolve the constitutional challenges to the laws at issue in this case? That is because Plaintiffs here have brought their challenges only under

the Minnesota Constitution, not the United States Constitution, and the Minnesota Supreme Court has interpreted the Minnesota Constitution to offer greater protection of individual rights than the United States Supreme Court has afforded under the United States Constitution. *Gomez*, 542 N.W.2d at 30 (citations omitted)("We find that this is one of those limited circumstances in which we will interpret our constitution to provide more protection than that afforded under the federal constitution."). Unlike the *Dobbs* Court, which threw out nearly fifty years of precedent, this court must respect the precedent set by the Minnesota Supreme Court in *Gomez* and that precedent will guide this court's decisions in this case.

The Minnesota Supreme Court has not stood alone in its recognition that a state constitution independently protects a pregnant woman's right to decide to have an abortion without unjustifiable government interference. Of states that have considered the matter, a number have found a right to privacy that requires the application of strict scrutiny in reviewing state regulation of abortion – Alaska, California, Florida, Kansas, Massachusetts, Montana, Tennessee and Washington.[22] Broadly, this court finds those cases helpful in its consideration of the privacy claims at issue in this case.

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[22] *Valley Hosp. Ass'n v. Mat-Su Coalition*, 948 P.2d 963, 969 (Alaska 1997)(reproductive rights, including right to abortion, are fundamental and encompassed within state constitution's right to privacy); *Committee to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252, 262, 274, 172 Cal.Rptr. 866, 625 P.2d 779 (1981)(state's asserted interest in protecting a nonviable fetus is subordinate to the woman's right of privacy under the California Constitution); *In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989)(the Florida Constitution's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 660, 440 P.3d 461 (Kan. 2019)(state constitution's declaration of natural rights protects the core right of personal autonomy which includes ability to control one's own body, assert bodily integrity, and to exercise self-determination); *Moe v. Secretary of Administration & Finance*, 382 Mass. 629, 649, 417 N.E.2d 387 (1981)(the decision of whether or not to bear a child is at the very heart of the state constitution's protected choices); *Armstrong v. State*, 296 Mont. 361, 376, 989 P.2d 364 (1999)(procreative autonomy is a constitutional right of individual privacy); *Planned Parenthood v. Sundquist*, 38 S.W.3d 1, 11, 15 (Tenn. 2000), *superseded by amendment* Tenn. Const. art. I, § 36 (2014)(though abortion not mentioned in the state constitution, right to an abortion protected by a larger privacy interest in procreational autonomy); *State v. Koome*, 84 Wash. 2d 901, 904, 530 P.2d 260 (1975)(abortion parental consent law infringed on right of minor to terminate pregnancy under implicit right to privacy in state constitution).

This court will now address the motions for summary judgment made by both Plaintiffs and Defendants regarding the constitutionality of the Challenged Laws.

THE CHALLENGED LAWS

On Plaintiffs' claims for privacy and equal protection, this court has determined (1) the fundamental right at issue is the right to abortion access (and the corresponding right to choose to have an abortion), and (2) a fundamental right must be infringed in order for the privacy claims to survive and in order for the equal protection claim to be analyzed under strict scrutiny rather than rational basis, but that (3) the showing of infringement is not a factual burden placed on Plaintiffs. On the free speech claim, this court has determined that intermediate scrutiny is appropriate to apply to the informed consent requirements of the Mandatory Disclosure Law.

On the privacy claim, the remaining issues are (1) whether each challenged law infringes the fundamental right at issue, and if it does, (2) whether the challenged law survives strict scrutiny.

On the equal protection claim, (1) the claimants must pass the threshold similarly situated test before reaching the infringement inquiry, and (2) the similarly situated test applies to a classification of the people whose conduct the challenged law regulates, or which are the subject of the statute's purpose. Once those issues are determined, the remaining issues on the equal protection claim are (1) whether Plaintiffs' claim on each challenged law passes the similarly situated test, and if it does, (2) whether the challenged law infringes on the fundamental right at issue, and if it does, (3) whether the challenged law passes strict scrutiny, or if it does not, (4) whether the challenged law passes the rational basis test.

Defendants contend Plaintiffs' equal protection claims are subject only to rational basis review because they are limited to healthcare providers, and there is no fundamental right to provide abortions. *State v. Buchmann*, 830 N.W.2d 895, 901 (Minn. Ct. App. 2013) ("The United States Supreme Court has never held that the right to pursue a particular profession, such as commercial truck driving, is a fundamental right; instead, the right to employment is a protected interest subject to rational basis review."). Plaintiffs contend that since abortion access is a fundamental right under *Gomez*, the equal protection analysis is likewise subject to strict scrutiny.

On the free speech claim, the remaining issues are, (1) whether the Mandatory Disclosures incidentally impact speech, and if they do, (2) whether they survive intermediate scrutiny.

I. Physician-Only Law

The parties bring cross motions for summary judgment on Plaintiffs' privacy claim related to the Physician-Only Law, which prohibits non-physicians from providing abortion care. Defendants seek summary judgment on the equal protection and special legislation claims for this challenged law, as well. Plaintiffs are entitled to summary judgment on their privacy claim. Although summary judgment is denied on Defendants' motion for summary judgment on the equal protection and special legislation claims, since this court has declared the Physician-Only Law unconstitutional and permanently enjoined its enforcement, this court does not need to resolve those claims.

A. Privacy

Plaintiffs' privacy claim related to the Physician-Only Law survives only if the law infringes on the fundamental right to abortion access. It does, so the law is subject to strict scrutiny. This court concludes the Physician-Only Law cannot withstand strict scrutiny.

i. Infringement on the Fundamental Right

The thrust of Plaintiffs' argument is that the Physician-Only Law limits the number of abortion providers to physicians, which increases the cost of care, impacting pregnant women's decisions whether to have abortions. Defendants contend this purported infringement is too far afield from the Physician-Only Law to be construed as a direct effect of the law.

The argument advanced in *Gomez* and accepted by the supreme court as an infringement of the fundamental right, was that the offer of money for pregnancy care, combined with the ban on funding for abortion services, would significantly impact the choice of whether to have an abortion. 542 N.W.2d at 31. Accordingly, part of the analysis for this court under *Gomez* is whether access to abortion care is significantly impacted by the lack of abortion care provided by otherwise qualified, licensed APCs. The Physician-Only Law prevents a pregnant woman from making medical decisions affecting their bodily integrity and health, specifically regarding decisions concerning abortion, with their chosen health provider. The Physician-Only law also impacts the cost of abortion care, by limiting the provision of such care to physicians, rather than APCs who could provide more cost-effective abortion care. This court concludes that the Physician-Only Law significantly impacts both a pregnant woman's choice and their access to abortion care.

The only other state supreme court to consider whether a physician-only law infringed on a state constitutional right to privacy was the Montana Supreme Court in *Armstrong*, 989 P.2d at 384. In that case, the fundamental right the supreme court concluded was infringed was the "personal autonomy component" of "the fundamental right of individual privacy," which "protects a woman's right of procreative autonomy—here, the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice." *Id.*

The fundamental right to abortion access conferred by the Minnesota Constitution at issue here is similar to Montana's privacy right to procreative autonomy. In this case, the right to seek and obtain a specific lawful medical procedure – a pre-viability abortion – from a healthcare provider of the pregnant woman's choice is infringed just as it was by the challenged law in *Armstrong*. Accordingly, the infringement analysis of the Montana Supreme Court in *Armstrong* is helpful here.

Though this court has already concluded that the question of whether the law infringes on the fundamental right is not a factual inquiry, *See Greene*, 755 N.W.2d at 725–26; *Gomez*, 542 N.W.2d at 31; *Hickman*, 396 N.W.2d at 13; *see also Schroeder*, 962 N.W.2d at 484, the undisputed material facts demonstrate that the fundamental right of abortion access is infringed by the Physician-Only Law.

Plaintiffs have submitted evidence from their experts Dr. McLemore and Dr. Terrell that APCs are subject to licensing and discipline from either the Medical Board or the Nursing Board, are highly trained with skills that are compatible to the provision of medical care that entails greater risk and complexity than the provision of first trimester medication and

aspiration abortions, and can provide such abortion care safely. (ECF No. 231, Ex. 3, ¶¶ 19-22; Ex. 6, ¶ 57) Plaintiffs' experts have also rendered opinions that the Physician-Only Law (1) arbitrarily limits the availability of abortion care in Minnesota, (2) APCs are generally able to provide medical care at a lower cost than physicians, (3) the prevention of APCs from providing abortion care increases its cost, (4) harms people seeking abortion care by making it less accessible, and (5) its elimination would greatly increase abortion access. (ECF No. 231, Ex. 3, ¶¶ 31, 36; Ex. 6, ¶¶ 59-61)

Defendants' expert Dr. Wothe admits that abortion is safer today than when the Physicians-Only Law was enacted in 1974, and that abortion during the first 12 weeks of pregnancy is extremely safe. (ECF No. 240, Ex. A, ¶¶ 41, 43) He agrees that changes in medical practice have led to APRNs treating patients in hospitals and clinics, without seeing a physician. (*Id.* ¶42) Significantly, Dr. Wothe contends:

> While data provides minimal support for the legislative policy choice to limit abortion care to physicians, I personally believe that the difference in outcomes below 10 weeks is not clinically significant. In current medical practice, an emphasis is made on operating at the top of your license. This provides both optimal utilization of scarce medical expertise as well as good stewardship of scarce medical dollars. Just as advanced practice nurses can manage a spontaneous abortion without the use of a physician as a backup for complications, so could [a] medically induced abortion below 10 weeks be managed by an advanced practice nurse with physician backup. The APRN possesses the requisite skills to prescribe medical abortion regimens and deal with most complications of the abortion, such as mild pain and cramping, or menstrual like bleeding. They would typically consult with a physician about more significant complications related to the medication abortions practiced in the first 10 weeks. For more medically complicated patients, the APRNs are always expected to refer or consult with the physician early in the treatment. This would be no different for abortion.

(*Id.* ¶ 49)

This evidence establishes that the Physician-Only Law significantly infringes upon a patient's abortion access. Pregnant women in Minnesota see APCs for prenatal care, medication, miscarriage care, delivery of their babies, and other general medical care. They cannot, however, choose to have their APC provide them with abortion care, despite the fact that APCs could provide such care (medication or aspiration abortions for example), safely and cost-effectively, during the first trimester. Therefore, the Physician-Only Law impermissibly infringes on a pregnant woman's fundamental right.

ii. Strict Scrutiny

Once the court determines a fundamental right is involved, the burden of proof shifts to the state and the law is subject to strict scrutiny. *Skeen*, 505 N.W.2d at 312. A law subject to strict scrutiny must be narrowly tailored to serve a compelling government interest. *Gomez*, 542 N.W.2d at 31.

Defendants contend that the Physician-Only Law is narrowly tailored to serve a compelling state interest. As support, they submit the opinion of Dr. Wothe, who states that the "common sense purpose of this law is to ensure safe abortion is available [to] protect the health of pregnant women." Defendants also contend that the United States Supreme Court has repeatedly upheld physician-only laws as promoting a substantial state interest in ensuring maternal health. *See Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997); *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975); and *Roe*, 410 U.S. at 165. They contend that the Montana Supreme Court's decision in *Armstrong*, discussed further above, is the only case to reach the opposite conclusion. 989 P.2d at 384.

Plaintiffs contend that Defendants cannot meet their burden of demonstrating a compelling government interest by the assertion of a general interest in patient health. They maintain that Defendants must identify an actual problem that the Physician-Only Law is needed to solve, and that Defendants have failed in that regard. *See State v. Melchert Dinkel*, 844 N.W.2d 13, 21 (Minn. 2014). They further maintain that Dr. Wothe's opinions undermine any argument that the Physician-Only Law is needed to solve an actual problem. Finally, they contend that the Physician-Only Law is both overinclusive and underinclusive. It is overinclusive, according to Plaintiffs, because Dr. Wothe concedes that APCs can safely provide abortion care during at least the first ten weeks of pregnancy – the majority of the first trimester. Plaintiffs contend that the law is underinclusive, because the Physician-Only Law prohibits APCs from performing abortions, but does not otherwise affect an APC's scope of practice to manage miscarriage or labor and delivery to patients giving birth, which carry far greater risk to a pregnant woman's health than abortion.

In *Gomez*, the Minnesota Supreme Court held that "a woman's right of privacy encompasses her decision whether to choose health care services necessary to terminate or to continue a pregnancy without interference from the state "at least until such time as the state's important interest in protecting the potentiality of human life predominates over the right to privacy, which is usually at viability." 542 N.W.2d at 31 (citing *State v. Merrill*, 450 N.W.2d 318, 322 (Minn. 1990), *cert. denied* 496 U.S. 931(1990)). It applied that reasoning to conclude the challenged provisions in *Gomez* "apply at all stages of pregnancy, including prior to viability, [therefore] they do not withstand strict scrutiny, and thus must be invalidated." *Gomez*, 542 N.W.2d at 32.

This court does not find the authority relied upon by Defendants persuasive. While it is true that *Menillo* and *Roe* upheld physician-only laws as promoting a substantial state interest in ensuring maternal health, the safety of abortion care and the use of APCs is substantially different now than when those cases were decided nearly fifty years ago. Dr. Wothe discusses this at length in his affidavit. Moreover, *Mazurek* applied the *Casey* undue burden test to a physician-only law, which is not helpful in this court's application of strict scrutiny under *Gomez*. Further, while Defendants contend that *Armstrong* stands alone, it is the only case to speak directly to a more expansive right to abortion under a state constitution.

Again, in making its strict scrutiny determination on the Physician-Only Law, this court finds *Armstrong* helpful. In that case, the Montana Supreme Court summarized its determination that a physician-only law did not survive strict scrutiny: "Simply put, except in the face of a medically-acknowledged, *bona fide* health risk, clearly and convincingly demonstrated, the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so." *Armstrong*, 989 P.2d at 385 (emphasis in original).

This court agrees with Plaintiffs that Defendants have not established that the Physician-Only Law is narrowly tailored to meet a compelling state interest. First, Defendants have not made a convincing case that there is a compelling state interest in limiting abortion care to physicians in the first trimester of a pregnancy. In fact, all of the experts agree that APC-managed abortions can be safely and cost-effectively performed in

the first 10 weeks of a pregnancy – the majority of the first trimester. They also agree that there is no clinically significant difference in abortion outcomes, between those managed by physicians and those managed by APCs during this ten-week period. Last, they agree that APCs have the skills and training necessary to manage medication abortions and their complications. The Physician-Only Law, however, applies to all stages of pregnancy. It interferes with a pregnant woman's decision whether to choose health care services necessary to terminate a pregnancy, certainly during the first trimester, without interference from the state. Defendants have not demonstrated that their interest in having only physicians perform first-trimester abortions is compelling.

Even if Defendants were to meet their burden of establishing a compelling state interest to support the Physician-Only Law, it would fail nonetheless, because it is not narrowly tailored. This court agrees with Plaintiffs that the Physician-Only Law is both overinclusive and underinclusive. As this court just concluded, this challenged law is overinclusive because APCs can safely provide abortion care during at least the first ten weeks of pregnancy – the majority of the first trimester. It is underinclusive because APCs already have a scope of practice which allows them to perform similar medical care to abortion, which involves far greater risk.

Since the Physician-Only Law infringes on a fundamental right and does not withstand strict scrutiny, it must be invalidated. *See Gomez,* 542 N.W.2d at 32.

B. Equal Protection

Defendants have moved for summary judgment on Plaintiffs' equal protection claim related to the Physician-Only Law. Plaintiffs have not moved for summary judgment on this

claim as they did on their privacy claim. This court's determination, therefore, is whether Defendants have demonstrated entitlement to judgment as a matter of law on Plaintiff's equal protection claim on the Physician-Only Law. This court concludes that they have not.

i. Similarly Situated Test

The threshold showing required for an equal protection claim is that Plaintiffs are similarly situated to persons who were treated differently. *R.D.L.*, 853 N.W.2d at 132. Under this analysis, the court will first identify the relevant group, then identify the distinction in the group. *Id.* at 27–28. The court then determines whether the group is similarly situated despite the distinction by examining "the positions of the claimant and all others in light of the broad purpose and operation of the statute." *Id.* at 22.

Plaintiffs first contend that the classification which the Physician-Only Law creates is based on its prohibition of "people seeking abortion care, but not those seeking other medical care similar in risk, from being treated by APCs." Defendants maintain, similar to the arguments they have made throughout their briefing, that the classification is providers of medical care which are similarly-situated in all respects to providers outside of the abortion context. They also contend Plaintiffs have not established that they are so similarly-situated, whether assessed as providers, or when assessed in a representative capacity on behalf of their patients.

Defendants contend abortion providers are not similarly situated to providers of other medical care of similar risk because abortions "involve a second potential life [and] a medical procedure that inspires regular public protest." Defendants further contend the "similarly situated" inquiry must consider the "broad purpose and operation of the statute," which as

they state, is "to ensure safe abortion is available and to protect the health" of pregnant women.

Dr. Doe and Ms. Moe bring this claim in their representative capacity for their patients, so a distinction among patients is important for this court's consideration of Plaintiffs' equal protection claim. The Physician-Only Law creates a classification among pregnant women – those seeking to terminate their pregnancy who can only be treated by a physician, and those seeking to obtain intrauterine and prenatal healthcare – and treats them differently.

Turning to Dr. Doe and Ms. Moe's claims in their individual capacity, the question is whether abortion providers and other reproductive healthcare providers are similarly situated with respect to providing safe reproductive care and the protection of patient health. Plaintiffs contend the risks to patient health attendant to abortion are comparable to other reproductive healthcare procedures. Defendants have not offered any evidence to the contrary. Nor have Defendants indicated how the potential for a second life or public protest factor into the purpose and operation of the Physician-Only Law. Reproductive healthcare providers, regardless of whether they provide abortions, are responsible for the safety and wellness of their patients. Therefore, the actual and would-be abortion providers whose conduct is regulated by the Physician-Only Law are similarly situated to other reproductive healthcare providers.

ii. Infringement on the Fundamental Right

This court has already determined that the Physician-Only Law infringes on the fundamental right of a pregnant woman to access abortion care. As such, the equal protection

claim related to the classification of pregnant women seeking abortion care and those seeking other intrauterine and prenatal care is subject to strict scrutiny.

Defendants contend there is no fundamental right for providers to perform abortions. *Buchanan*, 830 N.W.2d at 901. Although Plaintiffs vigorously defend the application of the equal protection analysis to patients in addition to providers, they do not dispute that, if limited to providers, there is no infringement of a fundamental right. This court agrees. Accordingly, if limited to healthcare providers, Plaintiffs' equal protection claim related to the Physician-Only Law is subject only to rational basis review.

iii. Strict Scrutiny

This court has already determined that the Physician-Only Law fails strict scrutiny on the privacy claim, so there is no need to revisit that determination for the equal protection claim for the classification of patients.

iv. Rational Basis Review

Under rational basis review, Plaintiffs "bear[ ] the burden of establishing that the statute is unconstitutional beyond a reasonable doubt." *Greene*, 755 N.W.2d at 725. Plaintiffs contend the medical care required for first-trimester abortions is "identical" to miscarriage management, and that abortion is no riskier than other medical interventions. They also contend, as they did with regard to the privacy claim, that Dr. Wothe's opinions undermine the claim that the law is rationally related to a legitimate government interest.[23]

[23] Plaintiffs also claim Dr. Wothe's report supports their argument that the physician-only law is both underinclusive and over-inclusive, but that standard is only applicable for strict scrutiny. *See R.D.L.*, 853 N.W.2d at 135.

Defendants do not dispute that abortion is less risky than it was when the Physician-Only law was passed, nor that its risks are equivalent to miscarriages up to ten weeks. Defendants contend limiting the provision of abortions to physicians is rationally related to the government interest in protecting the health of pregnant women because non-physician practitioners, such as nurses or other APCs, have less training than physicians. They contend that according to the undue burden standard, physician-only laws have been upheld. *Mazurek*, 520 U.S. at 971–76. However, this court has not identified any cases which apply the rational basis test to other physician-only laws.

The bulk of Dr. Wothe's report focuses on abortions in the first trimester. (ECF No. 240, Ex. A, at ¶¶ 43, 46, 48, 49, 51) In general, his findings are consistent with those of Plaintiffs' experts, Dr. McLemore and Dr. Terrell. (ECF No. 231, Ex. 3, ¶¶ 19–29; Ex. 6, ¶¶ 50, 52–58) Dr. Wothe draws the following conclusions which do not support a physician-only law in the first trimester:

- Two of the three empirical studies cited by Dr. Terrell support the conclusion that patient outcomes are not statistically different when medication abortions are provided by physicians than when provided by APRNs. (ECF No. 240, Ex. A, ¶ 48)

- "While data provides minimal support for the legislative policy choice to limit abortion care to physicians, I personally believe that the difference in outcomes below 10 weeks is not clinically significant. . . [An APRN] possesses the requisite skills to prescribe medical abortion regimens and deal with most complications of the abortion . . . . They would typically consult with a physician about more significant complications . . . . " (*Id.* ¶ 49)

- "[B]oth medical and aspiration abortions before 10 weeks would be appropriate for APRNs. . . The restriction in most states which prevents medical abortion management by APRNs does not reflect current safety data." (*Id.* ¶ 51)

Defendants have offered no evidence that supports the purported relationship between the training afforded APCs and the government interest in protecting the health and safety of

pregnant women. Dr. Wothe does not claim that there is a relationship between risks posed to abortion patients and the level of training their provider has. Dr. Wothe, moreover, does not opine on the difference in outcomes for physician-provided and APC-provided abortions after ten weeks. Defendants have not met their burden to demonstrate that there is no genuine issue of material fact as to the relationship between the law and the government interest.

Defendants are not entitled to summary judgment on the Physician-Only Law portion of Plaintiffs' equal protection claim.

C. Special Legislation

Plaintiffs' special legislation claim is subject to the same inquiry as their equal protection claim. *Tveten*, 402 N.W.2d at 559; *see also Sundquist*, 338 N.W.2d at 569 n. 11, 570 n.12 (equal protection is co-extensive with special legislation). Because they are subject to the same or similar analysis, it is appropriate to deny summary judgment to Defendants on the special legislation claim as well. *See Forge*, 262 N.W.2d at 348.

II. Hospitalization Law

The Hospitalization Requirement mandates that abortions performed after the first trimester must be performed in a hospital or abortion facility, or in a hospital after potential viability. Minn. Stat. § 145.412, subds. 1(2), 3(1).[24]

The parties bring cross motions for summary judgment on Plaintiffs' privacy claim related to the Hospitalization Law. Defendants also seek summary judgment on the equal

[24] The bulk of Plaintiffs' argument rests on the premise that "there is no way for an abortion clinic to satisfy the definition of 'abortion facility' under the law," because the Health Department does not administer any programs through which abortion clinics may become licensed, effectively limiting the provision of second-trimester abortions to hospitals only.

protection and special legislation claims for this challenged law. Plaintiffs are entitled to summary judgment on their privacy claim. Although summary judgment is denied on Defendants' motion for summary judgment on the equal protection and special legislation claims, since this court has declared the Hospitalization Law unconstitutional and permanently enjoined its enforcement, this court does not need to resolve those claims.

A. Privacy

Plaintiffs' privacy claim related to the Hospitalization Requirements survives only if the law infringes on the fundamental right to access abortion care. This court concludes that the Hospitalization Law infringes on this fundamental right.

Plaintiffs contend the medical evidence shows there is no necessity for hospitalization for most second-trimester abortions and limiting such abortions to hospitals functionally limits access to abortion overall. Defendants contend there is no support for the proposition that the Hospitalization Law plays a role in a pregnant woman's decision whether to obtain an abortion. To the extent that Defendants are reiterating their interpretation of *Gomez* to limit its fundamental right holding, this court again rejects that limitation.

Both sides cite cases which they claim support their position. However, the cases cited by Defendants, upholding hospitalization laws in other states, are generally inapposite here because they analyze the statutes under the federal constitution, applying the undue burden standard where appropriate. *See, e.g.*, *Whole Woman's Health All. v. Rokita*, 13 F.4th 595, 598 (7th Cir. 2021) (citing *Simopoulos v. Virginia*, 462 U.S. 506 (1983)) (reviewing injunction); *Falls Church Med. Ctr., LLC v. Oliver*, 412 F. Supp. 3d 668, 692 (E.D. Va. 2019) (undue burden). The most recent case cited by Plaintiffs is more persuasive here, in part because it was decided

with reference to *Gomez*. *Sundquist*, 38 S.W.3d at 15. In *Sundquist*, the Tennessee Supreme Court rejected the undue burden standard, applying strict scrutiny to the question of whether its statutory requirement for second-trimester hospitalizations for abortion violated the right to privacy under the Tennessee Constitution.[25] *Id.* at 15, 17–18.

Because this is not a factual inquiry, the court is left to determine whether the Hospitalization Requirement infringes the fundamental right to access abortion care as a matter of law. *Gomez*, 542 N.W.2d at 31.

i. Infringement on the Fundamental Right

The Hospitalization Law limits access to second-trimester abortion care in several fundamental ways. First, by its very terms, the Hospitalization Law limits the choices of a pregnant woman to obtain abortion care in the second trimester – specifically to a hospital, rather than an outpatient setting. Second, this challenged law presents a false choice for pregnant women between having a second-trimester, pre-viability abortion at an "abortion facility" as defined by Minnesota law or a hospital. There is no program administered by the Health Department through which abortion clinics may become licensed. So, despite the fact that there are providers who perform second-trimester, pre-viability abortions outside of a hospital, they do so as an unlicensed abortion facility in contravention of the risks presented by the Hospitalization Law. The Hospitalization Law, therefore, infringes on the fundament right to abortion access.

[25] As this court previously noted, the Tennessee Constitution was later amended to include a provision to clarify that it does not secure or protect "a right to abortion." Tenn. Const. Art. 1, § 36.

Though this court has already concluded that the question of whether the law infringes on the fundamental right is not a factual inquiry, the undisputed material facts demonstrate that the fundamental right of abortion access is infringed by the Hospitalization Law.

The evidence in this case establishes that D&E is routinely offered, and safely performed in Minnesota outpatient abortion clinics through 24 weeks lmp.[26] (ECF No. 231, Ex. 6, ¶¶ 65-66). According to Dr. Terrell, "a hospital's heightened physical plant and staffing requirements provide no health or safety benefits for D&E patients" because it is a low-risk intervention procedure. (*Id.* ¶ 68) She also is of the opinion that: "[h]aving a D&E procedure in an outpatient abortion clinic rather than a hospital provides several advantages for patients. First, the risk of contracting a contagious illness is lower in a clinic than in a hospital. Second, clinics can typically schedule patient appointments sooner than hospitals, where there is more bureaucratic red tape and operating rooms often need to be booked days or weeks in advance for non-emergency procedures. Third, the cost of providing a D&E procedure is significantly less expensive in a clinic than a hospital. For patients without health insurance or whose health insurance does not fully cover the procedure, the cost of having a D&E in a hospital may be prohibitively expensive." (*Id.* ¶ 70) For those second-trimester abortion patients who need to be seen at a hospital for whatever reason, the standard of care already requires a referral to a hospital when it is the most appropriate setting for a patient's care. (*Id.* ¶ 71) Patients are "very aware that they only have one option for a second trimester abortion." (ECF No. 232, Ex. 10, 204:11-15)

[26] Last menstrual period.

While there are no current measures being taken by Minnesota officials to act against abortion providers, Plaintiffs contend nonetheless that the fear of enforcement has a chilling effect on the provision of second-trimester abortions. (ECF No. 232, Ex. 10, 201:1-202:1) According to Dr. Terrell, last year "all abortion providers in the State ceased second-trimester abortions for a period of weeks," for fear that an enforcement action may be imminent. (*Id.* ¶ 72; ECF No. 232, Ex. 10, 191: 6-21) She contended that this shutdown "had a devastating impact on people seeking access to that care." (ECF No. 231, Ex. 6, ¶72) Removing the Hospitalization Law and the criminal penalties which accompany it would "open the door for other providers who are now worried about that law who might consider adding second trimester abortion to their offerings." (ECF No. 232, Ex. 10, 205:10-13)

Dr. Wothe is of the opinion that D&Es "do not require a surgical suite and can be performed with a variety of analgesic options, [and] some procedures can be performed in a clinic setting with appropriate limitations and training requirements on which anesthetic techniques are allowed." (ECF No. 240, Ex. A, ¶ 55) He testified that the circumstances which would merit hospitalization for a second-trimester abortion are "relatively infrequent." (ECF No. 232, Ex. 13, 149:3-16) He would have no reason to believe that in the absence of the Hospitalization Law, that abortion providers would fail to transfer their patients to a more appropriate facility if their care called for it. (*Id.* 150:1-3) Dr. Wothe does not disagree with Dr. Terrell's opinion on the advantages of second-trimester abortions taking place in an outpatient clinic, but says that such advantages must be weighed against risks attendant with limited analgesia or the use of anesthesia. (ECF No. 240, Ex. A, ¶ 58) While Dr. Wothe does provide some qualifications to the opinions of Dr. Terrell, he does not contradict the

evidence submitted by Plaintiffs in support of their contention that the Hospitalization Law infringes on the fundamental right to abortion access under *Gomez*.

Therefore, the Hospitalization Law impermissibly infringes on a pregnant woman's fundamental right.

ii. Strict Scrutiny

Since this court has found that a fundamental right is infringed by the Hospitalization Law, the burden of proof shifts to Defendants and is subject to strict scrutiny. *Skeen*, 505 N.W.2d at 312. Defendants must demonstrate that the Hospitalization Law is narrowly tailored to serve a compelling government interest. *Gomez*, 542 N.W.2d at 31.

Defendants contend that the Hospitalization Law is narrowly tailored to serve a compelling state interest. Dr. Wothe contends the Hospitalization Law "is intended to safeguard the health of the pregnant woman, by ensuring that higher-risk abortions will happen in a safe and sanitary facility with appropriate capacity to handle complications. Since most second trimester abortions take place at facilities specializing in abortion, ensuring that measured standards are in place to protect the patient is a legitimate state concern." (ECF No. 240, Ex. A, ¶ 52) Although Defendants offer legal support for their contention that hospitalization laws have been upheld by other federal and state courts, they all apply the undue burden standard and are not of assistance to this court in making a strict scrutiny determination. *See, e.g., Rokita*, 13 F.4th at 598; *Falls Church*, 412 F. Supp.3d at 692 and *Davis v. Fieker*, 952 P.2d 505, 515-16 (Okla. 1997).

Plaintiffs argue that the stated interest by Defendants for the Hospitalization Law is not compelling, because it is not consistently enforced. They also maintain that there is no

dispute that D&E, which is the most common method of second-trimester abortion, can be safely performed in outpatient clinics, and that abortion providers routinely refer higher-risk patients to hospitals to receive proper care. Plaintiffs contend that Defendants have offered no evidence to demonstrate that the Hospitalization Law is necessary to ensure second-trimester abortion patients receive proper care.

Plaintiffs also maintain that the Hospitalization Law is not narrowly tailored because Dr. Wothe has effectively acknowledged that the Hospitalization Law could be narrowed, because only a small subset of second-trimester abortion patients would benefit from obtaining their care in a hospital. (ECF No. 240, Ex. A, ¶¶ 57, 59; ECF No. 232, Ex. 13, 149:22-150:16) They agree that there are some second-trimester abortion patients who should be treated in a hospital, where their care poses higher risk or where they receive certain types of anesthesia, but the Hospitalization Law is overinclusive because it applies to all abortions performed in the second-trimester, irrespective of individualized risk.

In its consideration of whether the Hospitalization Law passes strict scrutiny, this court returns to *Sundquist*, which addressed the constitutionality of a similar second-trimester hospitalization law. Like *Sundquist*, there appears to be ample evidence and agreement in the record here that second-trimester abortions can be safely performed in outpatient abortion clinics, especially with advances in safety, and at lower cost to patients than hospitalization. 38 S.W.3d at 18-19. If Defendants were seriously concerned about the health and safety of second-trimester abortions, they would either adopt standards or regulations for "licensing facilities where second trimester abortions may be performed such as requiring facilities to be properly equipped and staffed," or they would enforce the Hospitalization Law to ensure

all second-trimester abortions were performed in a hospital. *Id.* at 19. Defendants do neither. Accordingly, this is not a credible compelling state interest.

Even if Defendants could credibly make the connection between its stated compelling interest and the Hospitalization Law, it still would not be narrowly tailored. This court agrees with Plaintiffs that the evidence in this case demonstrates that only a small subset of second-trimester abortion patients would benefit from obtaining their care in a hospital, but the Hospitalization Law applies to all patients, irrespective of their individual risk assessment. The majority of pregnant women seeking a second-trimester abortion are forced to undergo the procedure in a more costly, less convenient care setting. The Hospitalization Law, therefore, is overinclusive.

Since the Hospitalization Law infringes on a fundamental right and does not withstand strict scrutiny, it must be invalidated. *See Gomez*, 542 N.W.2d at 32.

B. Equal Protection

In light of this court's conclusion on Plaintiffs' privacy claim related to the Hospitalization Law, this court will address Defendants' motion for summary judgment on Plaintiffs' equal protection claim related to the Hospitalization Law in the same manner as it did for the Physician-Only Requirement. This court's determination, therefore, is whether Defendants have demonstrated entitlement to judgment as a matter of law on Plaintiffs' equal protection claim on the Hospitalization Law. This court concludes they have not.

i. Similarly Situated Test

Plaintiffs contend that the differential treatment of abortion patients and patients undergoing medical procedures of equal or greater risk is sufficient to demonstrate that they

are similarly situated. Defendants make the same arguments regarding patient standing as they did on the Physician-Only Law. This court agrees with Plaintiffs. Abortion patients are treated differently under the Physician-Only Law, from patients seeking intrauterine or prenatal care that have comparable or greater risks.

Plaintiffs contend the provider classification created by the Hospitalization Law is for providers of "medical procedures that do not require an incision into sterile body tissue." More specifically, they state that the comparison here is between second trimester abortion providers and other healthcare providers who perform procedures that do not require an incision into sterile body tissue. However, Plaintiffs have offered no detailed evidence about such procedures outside the realm of reproductive healthcare. Accordingly, this court's review of the relevant group is functionally limited to providers who perform reproductive healthcare procedures.

Defendants contend the purpose of the Hospitalization Law is to "ensur[e] that higher-risk abortions happen in a safe and sanitary facility, with appropriate capacity to handle complications." Defendants contend risks attendant to second trimester abortions arise from higher risks associated with greater analgesia. Second trimester abortions require a different procedure, during which "more discomfort is anticipated, and many patients have greater analgesia." (ECF No. 240, Ex. A, ¶ 53) General anesthesia, if used, significantly increases the risk of complications. (*Id.* ¶ 57)

Plaintiffs offer evidence of one similar procedure, removal of a cerclage, which is commonly performed in an outpatient clinic, but may require hospitalization if general anesthetic is required. (ECF No. 255, Ex. 24, 155:7-157:1) Such a procedure is not required

under law to be performed in a hospital. There is no evidence offered by Defendants that the use of general anesthesia for abortions is riskier than for cerclage removal. However, providers who remove cerclages are not subject to criminal penalties if not performed in a hospital. This showing by Plaintiffs is sufficient to meet their threshold burden of showing the group whose conduct is regulated by statute is similarly situated to other healthcare providers.

ii. Infringement on the Fundamental Right

This court has already determined that the Hospitalization Law infringes on the fundamental right of a pregnant woman to access abortion care. As such, the equal protection claim related to the classification of pregnant women seeking abortion care and those seeking other intrauterine and prenatal care with comparable or greater risk, is subject to strict scrutiny.

As before, with regard to the infringement analysis for providers, Defendants contend there is no fundamental right for providers to perform abortions. *Buchanan*, 830 N.W.2d at 901. This court agrees, for the purpose of Defendants' motion for summary judgment on equal protection. Accordingly, Plaintiffs' equal protection claim related to the Hospitalization Requirement for providers is subject only to rational basis review.

iii. Strict Scrutiny

This court has already determined that the Hospitalization Law fails strict scrutiny on the privacy claim, so there is no need to revisit that determination for the equal protection claim for the classification of patients.

iv. Rational Basis Review

With regard to the provider analysis, Plaintiffs contend D&Es, the most common method of second-trimester abortion, are equally safe irrespective of where they are performed.

Dr. Wothe's report states the purpose of the Hospitalization Law is to "safeguard the health" of pregnant women. (ECF No. 240, Ex. A, ¶ 52) It is undisputed that later abortions are riskier, due to the increased use of analgesics. (*Id.* ¶ 53) Plaintiffs emphasize, however, that Dr. Wothe admits general anesthesia is not always used. (*Id.* ¶¶ 53, 57) Plaintiffs contend, therefore, that a statute which requires all second-trimester abortions to be performed in a hospital goes too far. Dr. Terrell's report states that when the hospital setting is appropriate, patients are transferred there, and in any event, providers are ethically obligated to do so when necessary. (ECF No. 231, Ex. 6, ¶ 71) Dr. Terrell also cites the health benefits of performing outpatient abortions, including lower risks of contracting illness and decreased cost and delays. (*Id.* ¶ 70) Finally, Dr. Terrell states there is no health benefit to performing second-trimester abortions in a hospital over an outpatient clinic. (*Id.* ¶ 68)

It is undisputed that the protection of the health of pregnant women is a legitimate state interest. However, based on the competing information from Dr. Wothe and Dr. Terrell, there is a question of material fact as to whether the Hospitalization Requirement helps to achieve that interest, or can be rationally said to advance it in any way. Accordingly, Defendants have not demonstrated their entitlement to judgment as a matter of law on the Hospitalization Requirement.

Because Plaintiffs have demonstrated that they are similarly situated, because Defendants cannot meet their burden of demonstrating that there is no genuine issue of material fact on infringement of the representative patient claim under strict scrutiny, or on the provider claim under the rational basis test, summary judgment is denied.

C. Special Legislation

Plaintiffs' special legislation claim is subject to the same inquiry as their equal protection claim: whether there is a rational basis for partitioning reproductive healthcare patients and providers into two classes. *Tveten*, 402 N.W.2d at 559. Because they are subject to the same or similar analysis, it is appropriate to deny summary judgment to Defendants on the special legislation claim as well. *See Forge*, 262 N.W.2d at 348.

III. Reporting Laws

The Reporting Laws mandate the following reports by physicians and abortion facilities made to the Health Commissioner: the death of a person within a specified timeframe following an abortion, Minn. Stat. § 145.413; various data regarding abortions provided in a calendar year, § 145.4131, subd. 1(b)(1)–(12); complications arising from abortions, § 145.4132; the number of females who received informed consent regarding abortion under § 145.4242, § 145.4246, subd. 3; and monthly reports of various abortion patient data, Minn. R. 4615.3600. Some, but not all, reporting requirement laws impose a criminal or civil penalty for noncompliance.[27] Finally, Plaintiffs challenge a law which requires the Health Commissioner to issue a public report of the data compiled pursuant to those statutes. Minn. Stat. § 145.4134.

[27] This court will address the criminal penalties component of the Reporting Laws in a separate section.

The parties bring cross motions for summary judgment on the privacy claim. Defendants seek summary judgment on Plaintiffs' claims for equal protection and special legislation, as well. Defendants are entitled to summary judgment on all three claims.

A. Privacy

Plaintiffs' privacy claim related to the Reporting Laws survives only if the law infringes on the fundamental right to access abortion care. This court concludes there is no infringement on this fundamental right.

Plaintiffs contend the Reporting Laws burden abortion providers, deter competent providers, waste time, and increase abortion costs, which in turn limit access to abortion and affect the decision whether to obtain an abortion. They also contend that the collection and reporting of the required categories of information is invasive and medically irrelevant. Finally, they maintain that public health information on abortion is already available through governmental or non-governmental organizations such as the CDC or the Guttmacher Institute.

Defendants contend that the Health Department collects public health data to inform policies, change behavior, help communities uncover issues, and to develop solutions and protections for the hazards, exposures and socioeconomic factors that influence health. The collection of the specific information subject to the Reporting Laws, according to Defendants, is useful for public health purposes and for peer review. They also contend, through Dr. Wothe, that the information is "important for public dialogue, to understand how frequently abortion occurs, how safe it is, and how available it is." (ECF No. 240, Ex.

A, ¶ 19) Dr. Wothe also contends that filling out the statutorily mandated forms involves the physician, the nurse and administrative staff and takes five minutes or less to fill out. (*Id.*).

The parties both discuss *Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976), that addressed the constitutionality of a previous version of Minn. Stat. § 145.413, subd. 1, now repealed, that required the reporting of certain information regarding abortions. *Id.* at 1357. The trial court held subdivision 1 of that statute unconstitutional "in that it authorized previability abortion regulation unrelated to maternal health." *Id.* The Court of Appeals for the Eighth Circuit reversed, and based its decision on *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 80-81 (1976): "[r]ecordkeeping of this kind, if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." *Id.* at 1357. *Hodgson* also concluded: "Recordkeeping and reporting requirements that are so directed to the preservation of maternal health and which respect a patient's confidence and privacy, as these do here, are permissible regardless of the stage of pregnancy." *Id.* (citing *Danforth*, 428 U.S. at 80). Defendants contend that *Hodgson* supports its position that the collection of the information in the Reporting Laws promotes the state's interest. Plaintiffs claim that *Hodgson* supports its position that the utility of information collected in the Reporting Laws is undermined when it is "abused or overdone."

The judicial task in addressing Plaintiffs' contention that the Reporting Laws violate the right to privacy, is to determine whether those laws infringe on a pregnant woman's access to abortion care as a matter of law. *Gomez*, 542 N.W.2d at 31. This court concludes that they do not.

Some of the Reporting Laws require the reporting of information which does not appear to have the woman accessing abortion care as its source. *See, e.g.,* Minn. Stat. § 145.413, subd. 2 (reporting information regarding maternal death post-abortion); Minn. Stat. § 145.4132, subd. 2 (reporting information on abortion complications); Minn. Stat. § 145.4246, subd. 1 (reporting information regarding informed consent); and Minn. Stat. § 145.4134 (requiring the Health Commissioner to issue a public report regarding data collected from abortion providers). It is difficult to see how the collection or reporting of such post-abortion care information could be considered invasive, medically irrelevant or how it would otherwise affect access to abortion.

Other Reporting Laws require the collection and reporting of information where the source may be the woman accessing abortion care, but it appears that the information reported is anonymized. *See, e.g.,* Minn. Stat. § 145.4131 (reporting information on abortion data). While the information to be collected and reported under that provision includes information that could be considered invasive ("the specific reason for the abortion"), it allows the pregnant woman to decline to provide that information. *Id.* subd. 1(b)(5). It does not appear from this record that this information would be medically irrelevant, nor does it appear to be "abused or overdone." *Hodgson*, 542 F.2d at 1357.

It also does not appear from the undisputed facts that the Reporting Laws would significantly impact either abortion access or the decision to have an abortion. Adding minutes to the administrative work of an abortion clinic, or physician, or its staff in reporting information that the state collects for public health purposes is *de minimis* at best and does not appear to directly increase the cost of abortion care. This collection and reporting do not

seem appreciably different from the administrative work that providers, physicians and staff do on a daily basis in providing patient care, facilitating private or governmental health insurance claims, or reporting live births or deaths. It also does not appear to be appreciably different than the information that abortion providers voluntarily provide to the CDC or the Guttmacher Institute, which Plaintiffs contend are surrogate sources for the information that are subject to the Reporting Laws.

Defendants are entitled to summary judgment on the privacy claim because there is no infringement of a fundamental right by the Reporting Requirements.

B. Equal Protection

Plaintiffs' equal protection claim related to the Reporting Requirements survives only if they pass the similarly situated test. The court concludes that they do not.

Plaintiffs contend the relevant classification for patients is "abortion patients" with comparison to "patients obtaining other types of sexual and reproductive healthcare," and with regard to providers, those who provide "sexual and reproductive healthcare." In the case of Section 145.4134, the Health Commissioner is the person whose conduct is regulated.

As a preliminary matter, it is self-evident that the Health Commissioner has no comparator under Section 145.4134. She cannot be said to be similarly situated to anyone else or any other group because the law provides that there is only one Health Commissioner. Minn. Stat. § 144.011. In other words, there is no distinction within a relevant group created by Section 145.4134. *Fletcher*, 947 N.W.2d at 27–28. Accordingly, Plaintiffs have not met the similarly situated test with respect to their equal protection claim challenging Section 145.4134. That portion of Plaintiffs' equal protection claim fails.

Turning to the remainder of the Reporting Laws, Defendants contend the purposes of the Reporting Requirements are to (1) promote public dialogue about a "controversial issue" and (2) "protect[ ] the health of its . . . citizens [by providing] a resource that is relevant to decisions involving medical experience and judgment." *Hodgson*, 542 F.2d at 1357.

Plaintiffs compare abortion to pregnancy and childbirth, in vitro fertilization, and emergency contraception. They contend that there is no valid justification for gathering information from abortion patients and not from other patients. Defendants contend physicians are under similar reporting requirements for live births. (ECF No. 248, Ex. U, 118:5-23) This court agrees that the members of the group, whether patients or providers, are similarly situated in all relevant respects. The beginning and ending of pregnancy, and the manner in which they occur, are frequent subjects of public debate which may be informed by public access to empirical data. They also involve significant medical events which require specialized care and which the state has an interest in protecting against the attendant risks.

The next question for the court is whether abortion patients or providers of abortions are treated differently, despite being similarly situated, from other members of the same group.

Plaintiffs contend abortion providers, and indirectly their patients, are treated differently from other providers by the Reporting Requirements in the following ways (1) wasted time that would otherwise be spent on patient care, (2) increased cost of abortion care. However, Defendants have shown the burden of time spent on reports and any corresponding increased cost of reporting is not appreciably different between live birth and

abortion, or for the myriad forms and reporting that abortion providers, physicians and staff do for any other area of their practice. (*Id.*)

Defendants are entitled to summary judgment on Plaintiffs' equal protection claim with respect to the Reporting Laws

C. Special Legislation

Plaintiffs' special legislation claim is subject to the same inquiry as their equal protection claim. *Tveten*, 402 N.W.2d at 559; *see also Sundquist*, 338 N.W.2d at 569 n. 11, 570 n.12 (equal protection is co-extensive with special legislation). Because they are subject to the same or similar analysis, it is appropriate to grant summary judgment to Defendants on the special legislation claim as well. *See Forge*, 262 N.W.2d at 348.

IV. Felony Penalties

The parties bring cross motions for summary judgment on Plaintiffs' privacy claim related to the Felony Penalties. Defendants seek summary judgment on Plaintiffs' claims for equal protection and special legislation, as well. Plaintiffs are entitled to summary judgment on their privacy claim. Defendants are entitled to summary judgment on the claims for equal protection and special legislation.

The Felony Penalties criminalize the performance of an abortion in a manner inconsistent with the rules promulgated by the Commissioner. Minn. Stat. § 145.412, subds. 1(3). The Felony Penalties also criminalize the performance of abortions in the absence of informed consent. Minn. Stat. § 145.412, subd. 1(4). Anyone who performs an abortion in violation of Section 145.412 is guilty of a felony. *Id.* at subd. 4.

Minn. R. 4615.3500 requires a "pregnancy termination facility" to "keep a signed consent form of each patient undergoing a pregnancy termination procedure." Under Minn. Stat. § 145.412, subds. 1(3), 4, loss of a patient's form may subject the facility and its employees to felony criminal liability. Further, Minn. R. 4615.3600 requires an "ambulatory facility" specializing in abortion care to report 13 categories of information about each patient to the Health Commissioner.

Minn. Stat. § 145.413, subd. 2, requires the reporting of a woman's death following an abortion, under specific circumstances, to the Health Commissioner. A physician who fails to transmit the required information to the Health Commissioner within 30 days after the abortion is guilty of a misdemeanor. *Id.* subd. 3.[28]

A. Privacy

Plaintiffs' privacy claim related to the Felony Penalties survives only if the law infringes on the fundamental right to obtain abortion access. It does, so the law is subject to strict scrutiny. This court concludes the Felony Penalties cannot withstand strict scrutiny.

i. Infringement on the Fundamental Right

Plaintiffs argue that while all physicians must abide by Health Department regulations, provide their patients with informed consent for medical procedures and maintain proper health care records, only abortion providers are singled out for criminal exposure for failure to do so. Plaintiffs contend the Felony Penalties and the collateral consequences of felony convictions "discourage qualified clinicians from providing abortion care," which makes it more difficult to meet patient needs in Minnesota. Defendants contend that the Felony

[28] This section will incorporate this provision into the ambit of the Felony Penalties discussion.

Penalties do not impact patient decision-making regarding abortion care, so they do not infringe upon a fundamental right. They also contend that the Felony Penalties have not been practically used as an enforcement tool against Minnesota abortion providers.

As this court has previously determined with regard to other Challenged Laws, whether the Felony Penalties infringe on the fundamental right to access abortion care is a legal determination. *Gomez*, 542 N.W.2d at 31. Moreover, this court has already rejected Defendants' contention that the privacy right under *Gomez* is limited to an abortion patient's right to decide.

The Felony Penalties create a potential punishment regime for abortion providers that has no corollary for providers of other medical care. The threat of criminal prosecution hangs over abortion providers like a Sword of Damocles and whether the blade drops is subject to the discretion of law enforcement, prosecutors and state officials. It is not difficult to appreciate that the threat of felony prosecution would have a chilling effect on current or potential abortion providers, which indirectly affects access to abortion care. In other words, the Felony Penalties are a structural government disincentive to provide abortion care. The Felony Penalties, therefore, infringe on the fundamental right to abortion access.

Though this court has already concluded that the question of whether the law infringes on the fundamental right is not a factual inquiry, the undisputed material facts demonstrate that the fundamental right of abortion access is infringed by the Felony Penalties.

As Plaintiffs contended with regard to the Hospitalization Law, the fear of enforcement has a chilling effect on the provision of abortion care, even though there are no current measures being taken by Minnesota officials to act against abortion providers. (ECF

No. 232, Ex. 10, 201:1-202:1) According to Dr. Terrell, last year "all abortion providers in the State ceased second-trimester abortions for a period of weeks," for fear that an enforcement action may be imminent. (*Id.* ¶ 72; ECF No. 232, Ex. 10, 191: 6-21) She contended that this shutdown "had a devastating impact on people seeking access to that care." (ECF No. 231, Ex. 6, ¶72) In her opinion, "criminal penalties…exist solely to intimidate qualified providers and decrease access to standard, safe medical care" and otherwise create a disincentive to provide abortion care by exposing those who do so to onerous penalties. (*Id.* ¶ 87) Dr. Terrell had direct experience attempting to recruit physicians, who made statements to her that their fear of being charged with a felony crime was a reason they did not want to provide abortions. (ECF No. 248, Ex. U, 119:20-120:18)

Dr. Wothe does not respond directly to Dr. Terrell's opinion on the chilling effect of the Felony Penalties on current or potential providers and their effect on abortion access; rather he contends that other mechanisms of deterring poor care, such as the tort system "may not operate reliably in the case of abortions. Due to the stigma that has been attached to abortion, patients may be less willing to disclose the abortion when a medical injury occurs, fearing they will not be judged fairly by a jury." (ECF No. 240, Ex. A, ¶ 12) Dr. Lindo opines that empirical data from Minnesota "casts doubt" on whether there are "substantial effects on abortion rates" because of the enactment of the Challenged Laws, including Felony Penalties. (ECF No. 240, Ex. D, ¶ 23)

If there is stigma attached to abortion when a medical injury occurs that would deter a patient from disclosure in a tort setting, it does not follow that a stigmatized patient would be more likely to make the same disclosure in a criminal setting. While abortion rates may be

steady or declining, that does not mean that qualified physicians are not providing abortion care because of the Felony Penalties. In the end, Defendants' evidence does not create a genuine issue of material fact on whether the Felony Penalties have impacted abortion access, because of their chilling effect.

Therefore, the Felony Penalties impermissibly infringe on a pregnant woman's fundamental right.

ii. Strict Scrutiny

Once the court determines a fundamental right is involved, the burden of proof shifts to the state and the law is subject to strict scrutiny. *Skeen*, 505 N.W.2d at 312. A law subject to strict scrutiny must be narrowly tailored to serve a compelling government interest. *Gomez*, 542 N.W.2d at 31.

Defendants contend that the state has asserted compelling interests in safeguarding health, maintaining medical standards and in collecting data to inform public health measures. They argue that those same interests support imposing Felony Penalties when abortion statutes are not followed. They contend that abortion is unique and that criminal penalties may be needed as a deterrent in this area in ways they are not in other areas of medicine.

Plaintiffs argue that Defendants provide no record evidence that the same generalized asserted interests of the state apply to the imposition of Felony Penalties. They also claim that the opinion of Dr. Wothe regarding the insufficiency of the tort system to deter poor abortion care fails to support a compelling state interest in the Felony Penalties. They argue that Dr. Wothe's opinion regarding the tort system has nothing to do with the Felony Penalties, since they penalize neither "medical injury" nor "poor care," but rather penalize

such things as reporting, recordkeeping, the location of abortion care, and informed consent. Finally, Plaintiffs contend that there are already regulations in place to provide standard of care, obtain informed consent and maintain medical records.

Defendants have failed to demonstrate that the Felony Penalties are narrowly tailored to meet a compelling state interest. Just as with the Hospitalization Law, if Defendants were seriously concerned about the health and safety of abortion care and compliance with the regulatory and reporting regime in the Challenged Laws, they would enforce them. Moreover, Defendants have not demonstrated that lesser means, such as professional discipline or administrative penalties, which are considerably less onerous than criminal prosecution, would be a sufficient method of ensuring compliance with the Challenged Laws.

Since the Felony Penalties infringe on a fundamental right and do not withstand strict scrutiny, they must be invalidated. *See Gomez*, 542 N.W.2d at 32.

B. Equal Protection

In light of this court's conclusion on Plaintiffs' privacy claim related to the Felony Penalties, this court will address Defendants' motion for summary judgment on Plaintiffs' equal protection claim related to the Felony Penalties in the same manner as it did for the Physician-Only Law and Hospitalization Law. This court's determination, therefore, is whether Defendants have demonstrated entitlement to judgment as a matter of law on Plaintiffs' equal protection claim on the Felony Penalties. This court concludes that they have.

i. Similarly Situated Test

Plaintiffs contend that the Felony Penalties "single out abortion providers for harsher treatment than other medical providers and uniquely burden patients seeking abortion care." The thrust of their arguments on this point, emphasizes the effect on providers, not patients. Defendants don't appear to disagree on the classification of providers.

All healthcare providers are subject to standards of care, licensure, discipline and professional liability. Only abortion providers, however, are subject to felony prosecution for failing to comply with reporting obligations and providing mandated informed consent. Plaintiffs have demonstrated that abortion providers are similarly-situated, yet treated differently, than other healthcare providers.

ii. Infringement on the Fundamental Right

Defendants contend there is no fundamental right for providers to perform abortions. *Buchanan*, 830 N.W.2d at 901. This court agrees, for the purpose of Defendants' motion for summary judgment on equal protection. Accordingly, Plaintiffs' equal protection claim related to the Felony Penalties is subject only to rational basis review.

iii. Rational Basis Review

Defendants contend the Felony Penalties are driven by a combination of purposes similar to the previously addressed laws: "safeguarding health and maintaining medical standards and . . . collecting data to inform public health measures," which "support imposing felony penalties when the regulations are not followed." They maintain that the Felony Penalties are a means of furthering those interests because the typical mechanisms of

deterring poor care may not function as effectively in the unique context of abortion," as opposed to "other, less controversial areas of medicine."

Plaintiffs have not addressed the Felony Penalties under the rational basis test. Instead, they reiterate many of the same arguments they made under strict scrutiny. When assessed against strict scrutiny for the privacy claim, the Felony Penalties fail to establish that they are narrowly tailored to meet a compelling state interest. The court cannot draw the same conclusion when these criminal penalties are assessed against the much less demanding rational basis standard for the equal protection claim. While the necessity of criminal punishment for abortion providers who fail to, for example, report mandated information and convey mandated disclosures, appears extreme and unnecessary, this court cannot draw the conclusion that it is not rationally related to safeguarding health, maintaining medical standards and obtaining medical data.

Defendants' motion for summary judgment on Plaintiffs' equal protection claim under the Felony Penalties is therefore granted.

C. Special Legislation

Plaintiffs' special legislation claim is subject to the same inquiry as their equal protection claim: whether there is a rational basis for partitioning reproductive healthcare providers into two classes. *Tveten*, 402 N.W.2d at 559. Because they are subject to the same or similar analysis, summary judgment is granted to Defendants on Plaintiffs' special legislation claim as well. *See Forge*, 262 N.W.2d at 348.

V. Two-Parent Notification Law

Plaintiffs seek summary judgment on their claims for privacy and equal protection. Defendants do not seek summary judgment on any of Plaintiffs' claims challenging the constitutionality of the Two-Parent Notification Law. Plaintiffs are entitled to summary judgment on their privacy and equal protection claims.

The Two-Parent Notification Law prohibits abortions performed on minors before notice is given to their parents. Minn. Stat. § 144.343, subd. 2. Certain exceptions apply, including what is known as a "judicial bypass," which requires a court proceeding, followed by a court's authorization in the place of parental notification. *Id.* subd. 6. Performance of an abortion in violation of the Two-Parent Notification Law is a misdemeanor offense and provides a private cause of action by a parent not notified. *Id.* subd. 5.

A. Privacy

Plaintiffs' privacy claim related to the Two-Parent Notification Law survives only if the law infringes on the fundamental right to access abortion care. It does, so the law is subject to strict scrutiny. This court concludes the law cannot withstand strict scrutiny.

i. Infringement on the Fundamental Right

Plaintiffs contend the Two-Parent Notification Law prevents some minors from obtaining abortions because they cannot or will not (1) notify both parents, or (2) undergo a court proceeding to obtain a judicial bypass. Defendants contend the Two-Parent Notification Law has already been upheld by the Supreme Court in a plurality opinion under the U.S. Constitution. *Hodgson v. Minnesota*, 497 U.S. 417, 422, 429 (1990). Plaintiffs dispute that *Hodgson* is apposite here because (1) the Supreme Court did not reach consensus on its

reasoning, (2) it was decided under the U.S. Constitution, and (3) developments since the case was decided.

This court agrees. Because *Hodgson* was decided before *Gomez*, and not under the Minnesota Constitution, the Supreme Court in *Hodgson* did not address whether the law infringed a fundamental right. *See id.* at 444–446 (applying the rational basis test); *Gomez*, 542 N.W.2d at 31 (applying strict scrutiny). Moreover, the focus of the plurality opinion by Justice Stevens in *Hodgson* was "the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit." *Hodgson*, 497 U.S. at 444; *see also id.* at 436 ("In these cases the State of Minnesota . . . affirmatively disavows [a state policy favoring childbirth over abortion] as a basis for upholding this law."). The parties do not dispute that the focus here must be the pregnant minor's right to choose to have an abortion – and this court has already determined that the fundamental right includes access to abortion care.

However, this court finds persuasive the court's reasoning in *N. Florida Women's Health and Counseling Servs., Inc. v. State*, 866 So.2d 612, 631–32 (Fla. 2003), which is the most recent case cited by either party which analyzed a parental notification law under privacy standards. In that case, the court adopted the trial court's findings that the parental notification law imposed a "significant restriction" on a minor's right to privacy. *Id.* at 632. The court cited "the ability of parents, for better or worse, to persuade, influence, coerce, intimidate, and otherwise affect the decisions and conduct of their children;" "delay and thus increased risk;" the risk of embarrassment and intimidation in court; breach of confidentiality in small communities; and the risks of self-induced abortions or physician hesitancy. *Id.* at 631–633. Some or all of these risks apply to the choice pregnant minors face in Minnesota.

The Two-Parent Notification Law is unique from the previously addressed laws because it necessitates an affirmative act by the pregnant minor considering an abortion. While the mandates set forth in the Physician-Only Law, Hospitalization Law, and Felony Penalties may limit abortion access to patients because they control the actions of abortion providers, there is no way for a pregnant minor to obtain an abortion without first complying with the Two-Parent Notification Law. The purported impacts on pregnant minors under the Two-Parent Notification Law are immediate and direct.

The requirement to either notify both parents or obtain a judicial bypass through a formal court proceeding significantly impacts a pregnant minor's decision whether to obtain an abortion, and therefore the Two-Parent Notification Law impermissibly infringes on a pregnant minor's fundamental right to abortion access. The law is subject to strict scrutiny on Plaintiffs' privacy claim.

Though this court has already concluded that the question of whether the law infringes on the fundamental right is not a factual inquiry, *See Greene*, 755 N.W.2d at 725–26; *Gomez*, 542 N.W.2d at 31; *Hickman*, 396 N.W.2d at 13; *see also Schroeder*, 962 N.W.2d at 484, the undisputed material facts demonstrate that the fundamental right of abortion access is infringed by the Two-Parent Notification Law.

While this court previously discussed the undisputed record evidence on this point, it bears repeating here. Informed consent is required for all forms of medical care and requires the ability to understand information; appreciate the information in the context of one's life; ability to reason about treatment options; and to communicate a choice consistent with one's values. (ECF No. 231, Ex. 2, ¶¶ 8, 10) By the age of 14, minors are generally capable of

making the informed decision to obtain an abortion to the same extent as adults. (ECF No. 231, Ex. 5, ¶ 40; Ex. 2, ¶¶ 16-20; Ex. 6, ¶ 79) Adolescents can provide their medical history to allow a physician to provide appropriate medical care. (ECF No. 231, Ex. 2, ¶ 17; Ex. 6, ¶ 79)

Minnesota adolescents can consent themselves, without notifying a parent or guardian, to vaginal delivery and comparable and riskier medical interventions than abortions. (ECF No. 231, Ex. 2, ¶ 20) According to one expert, "there is no medical basis for allowing adolescents to have control over their contraceptive, STI, prenatal, and alcohol and drug abuse care, but not their abortion care." (*Id.* ¶ 23)

Most adolescents seek support from parents, parental figures or other trusted adults when making abortion decisions. (ECF No. 231, Ex. 2, ¶ 26; Ex. 5, ¶ 31; Ex. 6, ¶ 80) Adolescents who do not involve their parents report fearing damage to their familial relationship, abuse, abandonment, or being denied the abortion. (ECF No. 231, Ex. 2, ¶ 32; Ex. 5, ¶ 32; Ex. 6, ¶ 81) Studies have shown that minors can correctly predict parental responses to the minor seeking abortion, which may include violence and abandonment, whether financially, emotionally, or removing access to housing. (ECF No. 231, Ex. 2, ¶¶ 33–36; Ex. 5, ¶ 36; Ex. 6, ¶ 81) Research has also shown that parental notification and consent laws do not promote adolescent health, nor do they improve family communication. (ECF No. 231, Ex. 2, ¶¶ 30–31; Ex. 6, ¶ 82) The Two-Parent Notification Law forces physicians to encourage disclosure of otherwise protected health information against a patient's wishes, and "badly undermines the doctor-patient relationship, which is crucial to long term trust, health, and safety." (ECF No. 231, Ex. 2, ¶ 37)

Not all adolescents are raised by or living with a parent or legal guardian, and may not be able to fulfill the requirement to notify two parents. (ECF No. 231, Ex. 2, ¶¶ 32, 44; Ex. 5, ¶ 32) One or more parents may refuse to accept notification, requiring the minor to undergo the judicial bypass even after attempting notification. (ECF No. 231, Ex. 5, ¶ 36) Minors who undergo the judicial bypass experience fear and intimidation, as well as the gamut of shaming and harmful responses by authority figures, including judges and guardians ad litem. (*Id.* ¶¶ 49–51; ECF No. 231, Ex. 2, ¶ 45)

The Two-Parent Notification Law causes delays which make some adolescents unable to obtain medication abortion anywhere in Minnesota, and pushes others later into their pregnancy, which imposes additional logistical and financial obstacles, and also increases the risks associated with pregnancy and abortion. (ECF No. 231, Ex. 2, ¶ 40)

This undisputed evidence clearly demonstrates that the Two-Parent Notification Law infringes upon a pregnant minor's access to abortion care.

ii. Strict Scrutiny

Once the court determines a fundamental right is involved, the burden of proof shifts to the state and the law is subject to strict scrutiny. *Skeen*, 505 N.W.2d at 312. A law subject to strict scrutiny must be narrowly tailored to serve a compelling government interest. *Gomez*, 542 N.W.2d at 31.

Defendants contend the state's compelling interest is "in promoting parental involvement in children, ensuring that teens receive support from family members during a difficult time of acute stress, and ensuring that teenagers are helped to consider all aspects of their decisions." Defendants cite the interests identified in *Hodgson*, 497 U.S. 417.

Plaintiffs, again, dispute that *Hodgson* is controlling here because it was decided under the Federal Constitution. *Id.* at 434. Plaintiffs cite several cases in other courts which struck down parental notification laws under strict scrutiny. *N. Florida Women's Health*, 866 So.2d at 640; *Am. Academy of Pediatrics v. Lungren*, 940 P.2d 797, 830 (Cal. 1997); *see also Planned Parenthood of the Great Northwest v. Alaska*, 375 P.3d 1122, 1143 (Alaska 2016) (equal protection). On the other hand, Defendants cite cases which have upheld similar laws under the federal constitution using the undue burden standard. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *Memphis Planned Parenthood v. Sundquist*, 175 F.3d 456, 460–61 (6th Cir. 1999).

Defendants contend Plaintiffs have not rebutted their evidence that the Two-Parent Notification Law does not actually reduce abortions in the State of Minnesota, increase costs to patients, or lower provider availability. Defendants also argue minors are treated differently than adults under the law. Finally, they contend, in line with *Hodgson*, the judicial bypass option makes the law narrowly tailored. Plaintiffs contend they have proffered evidence which shows the Two-Parent Notification Law does not provide the intended benefits, and instead poses other risks to minors' health and safety.

This court agrees with Plaintiffs that the outcome in *Hodgson* is not controlling here because it was decided under a different standard. *See N. Florida*, 866 So. 2d at 635 (declining to apply *Casey* to a two-parent notification law because it was decided under undue burden standard). Indeed, the cases cited by Plaintiffs, which use the appropriate standard of review, are more persuasive than the cases cited by Defendants which use the undue burden standard. Moreover, this court is not convinced that empirical evidence of a reduction in abortions is

necessary for Plaintiffs' claim to prevail. Access to abortion care may be affected without affecting the incidence of abortion.

In *North Florida Women's Health*, the court rejected the State's argument that the interest in protecting minors and preserving family unity was so compelling as to interfere with a minor's fundamental right to privacy, particularly where that interest was not sufficiently compelling to do so in other contexts. *Id.* at 633. "It is not enough for the state to say that an interest is compelling. It must be demonstrated through comprehensive and consistent legislative treatment." *Id.* The Florida Supreme Court also recounted the trial court's determination that the parental notification law forced a minor to "make a choice between being forced to openly disclose both her pregnancy and her decision to terminate, or file a public lawsuit to avoid such disclosure, [leaving] the pregnant minor with a Hobson's choice that openly violated her right to privacy and her choice under that right to keep the decision-making process personal and private." *Id.* at 642.

In *Lungren*, the California Supreme Court concluded similar interests cited in *North Florida* and *Hodgson* are compelling interests held by the state. 940 P.2d at 824. Relying on a case which struck down a parental consent law in Florida, *In re T.W.*, 551 So.2d at 1195, and other state laws which permitted minors to obtain medical care without parental consent or judicial authorization, the court rejected the state's argument that the parental notification law served the state's compelling interests. 940 P.2d at 825–27. The court also noted the observation in *Hodgson* that "the Minnesota two-parent notification requirement is an oddity among state and federal consent provisions governing the health, welfare, and education in

children."[29] 497 U.S. at 454; *Lungren*, 940 P.2d at 828. Finally, the court cited myriad evidence in the record, including (1) the comparatively low risk of abortion to the alternative, carrying a pregnancy to term, (2) the majority of minors have the maturity to give informed consent, (3) an abortion may not be performed without informed consent, (4) the majority of minors consult their parents before an abortion, (5) the fraction who do not have good reason to do so, and (6) the judicial bypass mechanism delayed abortion access, increasing the risks of the procedure, and increasing emotional and psychological stress. *Lungren*, 940 P.2d at 828–29.

Plaintiffs have introduced unrebutted evidence which supports each of the points relied upon by the *Lungren* Court:

- Abortion poses less risk than its alternative. (ECF No. 231, Ex. 5, ¶ 30; Ex. 6, ¶¶ 19–25)
- The majority of minors are mature enough to give informed consent. (ECF No. 231, Ex. 2, ¶¶ 16–17; Ex. 5, ¶ 40; Ex. 6, ¶ 79)
- Abortions require informed consent. (ECF No. 231, Ex. 2, ¶¶ 8–10)
- Most minors consult their parents before an abortion. (ECF No. 231, Ex. 2, ¶ 26; Ex. 5, ¶ 31; Ex. 6, ¶ 80)
- Those who do not have good reason not to. (ECF No. 231, Ex. 2, ¶¶ 29, 33–36; Ex. 5, ¶¶ 28, 32, 36; Ex. 6, ¶ 81)
- The judicial bypass mechanism is emotionally and psychologically harmful. (ECF No. 231, Ex. 2, ¶¶ 44–47; Ex. 5, ¶¶ 46–54)

Plaintiffs' experts stated they were not aware of evidence that the Two-Parent Notification Law enhances the interests proffered by Defendants, nor were they aware of evidence that it harms those interests. (ECF No. 231, Ex. 2, ¶¶ 30–31; Ex. 5, ¶¶ 32–36; Ex. 65, ¶ 82) In fact,

[29] When *Hodgson* was decided, the only other Minnesota statute requiring two-parent consent or notification was the one permitting a minor's name change. 497 U.S. at 454–55.

the requirement may cause harm in the form of delay. (ECF No. 231, Ex. 2, ¶¶ 37–41; Ex. 5, ¶¶37, 41–42; Ex. 6, ¶ 83)

This court must first determine whether the interests cited by Defendants are compelling. To establish an interest is compelling, the "State must specifically identify an actual problem in need of solving," which is "paramount" and "of vital importance." *State v. Casillas*, 952 N.W.2d 629, 641 (Minn. 2020) (cleaned up). Defendants have not identified an actual problem in need of solving. Citing *Hodgson* is insufficient to demonstrate the interests they cite are compelling because there, the Court only identified them as "legitimate." 497 U.S. at 444–446. Even if Defendants had established their interests are compelling, they have not shown the Two-Parent Notification Law serves the interests it has identified. They have failed to rebut the evidence introduced by Plaintiffs that the Two-Parent Notification Law actually undermines those interests. As Plaintiffs point out, a statute which does not serve compelling interests cannot be narrowly tailored.

Because Defendants have not met their burden of showing the Two-Parent Notification Law is narrowly tailored to meet a compelling state interest, Plaintiffs are entitled to summary judgment on their privacy claim.

Since the Two-Parent Notification Law infringes on a fundamental right and does not withstand strict scrutiny, it must be invalidated. *See Gomez*, 542 N.W.2d at 32.

B. Equal Protection

This is the only equal protection claim on which Plaintiffs have moved for summary judgment. It is also the only equal protection claim on which Defendants have not moved for summary judgment. Accordingly, this claim provides an independent basis for challenging

the constitutionality of the Two-Parent Notification Law which can be addressed in a dispositive motion. This court's determination, therefore, is whether Plaintiffs have demonstrated entitlement to judgment as a matter of law on their equal protection claim on the Two-Parent Notification Law. This court concludes they have.

i. Similarly Situated Test

Plaintiffs contend the relevant groups for the court to compare are "pregnant minors who seek abortion care" and "pregnant minors who choose to carry to term and give birth." Defendants contend that Plaintiffs have failed to demonstrate that their chosen comparators are similarly situated. For example, Defendants contend that abortion is "a unique medical procedure" and that it is inappropriate to compare pregnant minors who wish to have an abortion at the early stages of a pregnancy, with pregnant minors who labor and deliver a baby at later or final stages of a pregnancy, because their decisions take place at different gestational periods. This court agrees with Plaintiffs' comparator groups. Adolescents who seek abortion care and those who carry their pregnancy to term and give birth are alike in all relevant respects.

The effect of the Two-Parent Notification Law is to treat those two similar groups of pregnant minors differently. This seems quite clear from the law's explicit text. *Compare* Minn. Stat. § 144.343, subd. 1 ("Any minor may give effective consent for medical, mental and other health services…treat pregnancy and conditions associated therewith…and the consent of no other person is required." *to* Minn. Stat. § 144.343, subd. 2 ("no abortion operation shall be performed upon an unemancipated minor…until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in

subdivisions 2 to 4."). The effect of that law is that only a minor seeking termination must notify their parents, or seek a judicial bypass. Pregnant minors who seek to carry a pregnancy to term do not need to notify their parents, seek their advice or consent, or go through an alternate route of taking their private decision to court for permission to make their decision.

ii. Infringement on the Fundamental Right

This court has already determined that the Two-Parent Notification Law infringes on the fundamental right of a pregnant minor to access abortion care. As such, the equal protection claim related to the classification of pregnant minors seeking to terminate their pregnancy and those pregnant minors seeking to carry their pregnancy to term and give birth is subject to strict scrutiny.

iii. Strict Scrutiny

This court has also already determined that the Two-Parent Notification Law fails strict scrutiny on the privacy claim, because it is not narrowly tailored to serve a compelling state interest. Nonetheless, this court will provide some additional analysis on this element, since it provides a separate reason for finding the Two-Parent Notification Law unconstitutional.

For this equal protection claim, the parties rely on the interests regarding the two-parent notification requirement identified in *Hodgson*. The relevant interests here are (1) the welfare of minors, *id.* at 497 U.S. 417, 420, 444 and (2) parents' interests in "controlling the education and upbringing of their children." *Id.* at 445.

In this regard, Defendants contend that the Two-Parent Notification Law protects the state's "legitimate interest in the welfare of its younger citizens, whose immaturity,

inexperience, and lack of judgment may impair their ability to exercise their rights wisely, as well as in the interest of encouraging family support and parental involvement." They contend that the law is narrowly-tailored because it both offers a judicial bypass procedure who do not wish to provide notification, and also offers exemptions from the bypass procedure under certain circumstances.

Plaintiffs contend that the concern about the welfare of pregnant minors is not met by the Two-Parent Notification Law, because pregnant minors who carry to term and give birth will face greater health risks over a longer period of time than pregnant minors who have abortions. Despite those greater risks, pregnant minors who want to carry a pregnancy and give birth are under no obligation to notify both of their parents or seek judicial authorization to proceed with their pregnancy. They also argue that the interest in acknowledging and promoting parental involvement in the care of their children is not met, because that interest should not vary depending upon the decision of the pregnant minor.

Plaintiffs offer *Great Northwest*, 375 P.3d at 1128 and *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620, 621-22 (N.J. 2000) as support for their contentions that parental notification laws do not survive strict scrutiny to equal protection challenges. Defendants contend that both cases are distinguishable on their facts, and because they (1) did not apply a rational basis standard of review, and (2) were decided after a full trial.

This court finds *Great Northwest* in particular helpful and persuasive. In that case, the Alaska Supreme Court was asked to strike down a one-parent notification statute because it violated equal protection principles under the Alaska Constitution. 375 P.3d at 1128. The state offered the same essential justifications for the law as offered here (1) encouraging

parental involvement in a minor's pregnancy-related decisions, and (2) the protection of the physician and mental health of minors. *Id.* at 1139-41.

The Alaska Supreme Court acknowledged the value of consultation of supportive parents, but reasoned:

> All pregnant minors, not just those seeking termination, may need their parents' assistance and counsel when making reproductive choices; and parents who might counsel termination are as entitled to the support of laws designed to aid in the discharge of their responsibility to guide their children as are the parents who might counsel carrying to term. Yet the Notification Law's effect is that only a minor seeking termination obtains parental guidance and only the parents of a minor seeking termination are given an opportunity to counsel their daughter about alternatives…the State's compelling interest in fostering parental involvement extends equally to pregnant minors and that interests' vindication does not justify treating the classes differently.

Id. at 1140 (cleaned up). The result should be no different here. If the state interest for the Two-Parent Notification Law is truly parental involvement and counsel for their children's reproductive choices, it cannot apply to a pregnant minor's decision to terminate a pregnancy, but not to their decision to carry to term and give birth.

Moreover, the evidence considered by the supreme court in *Great Northwest* on the state's asserted interest in protecting a minor's physical and mental health is not unlike the evidence before this court. The trial court in that case found that abortion raises fewer health concerns for minors than giving birth, that abortion is very safe, and that the majority consensus of American psychiatry is that abortion does not cause mental illness. *Id.* at 1141. It also determined that no physicians testified that parental notification was medically helpful. *Id.* Those same physicians testified that minors were capable of providing their own medical histories and managing post-abortion care. *Id.*

Plaintiffs have introduced unrebutted evidence which supports many of the points relied upon by the *Great Northwest* Court:

- Abortion is safer than continuing a pregnancy, and the risk of death is higher during childbirth than abortion. (ECF No. 231, Ex. 5, ¶ 30; Ex. 6, ¶ 24)

- Continuing unwanted pregnancies leads to greater anxiety and lower self-esteem, more life-threatening conditions, poorer overall health, increased likelihood of domestic violence, and economic insecurity. (ECF No. 231, Ex. 5, ¶ 30)

- Adolescents are capable of providing informed consent for medical care to the same extent as adults. (ECF No. 231, Ex. 2, ¶¶ 16–20; Ex. 6, ¶ 79)

- Research has shown that parental notification and consent laws do not promote adolescent health, nor do they improve family communication. (ECF No. 231, Ex. 2, ¶¶ 30–31; Ex. 6, ¶ 82)

Again, if the state's concern is the promotion of a minor's physical and mental health, Defendants have not identified a compelling reason to treat pregnant minors differently, depending upon the constitutionally protected choice they wish to make.

This court agrees with Plaintiffs, that the state's asserted interests do not justify a distinction between pregnant minors seeking to terminate and those seeking to carry to term. The Two-Parent Notification Law is underinclusive, because the governmental interests asserted in this case are implicated for all pregnant minors, yet it applies only to those who want to decide to terminate their pregnancy. Any asserted justification by Defendants for different treatment based upon a pregnant minor's reproductive choice does not meet their burden of proof.

Since the Two-Parent Notification Law infringes on a fundamental right, and does not withstand strict scrutiny, it must be invalidated. *See Gomez*, 542 N.W.2d at 32.[30]

VI. Mandatory Disclosure Law

The parties bring cross motions for summary judgment on the privacy and freedom of speech counts. Defendants seek summary judgment on Plaintiffs' claims for equal protection and special legislation, as well. Plaintiffs are entitled to summary judgment on independent bases for their privacy and freedom of speech claims. Although summary judgment is denied on Defendants' motion for summary judgment on the equal protection and special legislation claims, since this court has declared the Mandatory Disclosure Law unconstitutional and permanently enjoined its enforcement, this court does not need to resolve those claims.

The Mandatory Disclosure Law prohibits performing abortions in the absence of informed consent. Minn. Stat. § 145.4242. Consent is not considered "informed" without certain disclosures to the woman seeking an abortion, including (1) the "particular medical risks" associated with the abortion procedure, "when medically accurate," (2) the "probable gestational age of the unborn child," (3) the medical risks associated with continuing the pregnancy, (4) the impact of pain relievers to the "unborn child" for abortions after 20 weeks, (5) the additional cost of such pain relievers, (6) that medical assistance may be available if the woman continues the pregnancy, (7) that the father is liable for child support, (8) the woman's right to review certain materials issued by the Health Department under Section

[30] Plaintiffs have also made a special legislation claim on the Two-Parent Notification Law; however, they did not move for summary judgment on that claim. This court does not need to reach that claim, in light of its decisions on their privacy and equal protection claims.

145.4243, and (9) the option for "perinatal hospice services" is offered as an "alternative to abortion" in the case of an "unborn child diagnosed with fetal anomaly incompatible with life." § 145.4242.

A. Privacy

Plaintiffs' privacy claim related to the Mandatory Disclosure Law survives only if the law infringes on the fundamental right to abortion access. It does, so the law is subject to strict scrutiny. This court concludes the law cannot withstand strict scrutiny and Plaintiffs are entitled to summary judgment.

i. Infringement on the Fundamental Right

Plaintiffs contend mandatory disclosures have been struck down by the Supreme Court. *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747, 763 (1986) (strict scrutiny); *City of Akron v. Akron Ctr. For Reprod. Health, Inc.*, 462 U.S. 416, 445 (1983).[31] However, in *Planned Parenthood v. Casey*, the Court later applied the undue burden standard to depart from those decisions by concluding that:

> requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should [they] decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.

505 U.S. at 883; *see also Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734 (8th Cir. 2008) (citing *Casey*, 505 U.S. at 881–884; *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007)) (free speech).

[31] The Court left open the question of the proper standard of review in *City of Akron*. 462 U.S. at 463–64 (O'Connor, J., dissenting) (advocating for undue burden standard).

Those cases did not squarely present the question of whether the fundamental right at issue was infringed by a mandatory disclosure law. However, the Court in *Casey* acknowledged that mandatory disclosure is a measure "which might cause the woman to choose childbirth over abortion." 505 U.S. at 883; *see also City of Akron*, 462 U.S. at 444 ("[I]t is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."). This court agrees. The information contained in the Mandatory Disclosures Law could reasonably affect or change the choice whether to obtain an abortion. Like the Two-Parent Notification Law, the Mandatory Disclosure Law requires an affirmative act by the pregnant woman; namely to consent or not give consent after the Mandatory Disclosures are made by the abortion provider. The Mandatory Disclosure Law directly impacts a pregnant woman's choice of whether to have an abortion. The Mandatory Disclosure Law, therefore, infringes on a pregnant woman's fundamental right. The law is subject to strict scrutiny on Plaintiffs' privacy claim.

Although this court has addressed the factual record in the alternative in its analysis of Plaintiffs' privacy claims in relation to other Challenged Laws, it will address the factual record related to the privacy claim on the Mandatory Disclosure Law in the following section on strict scrutiny, rather than here.

ii. Strict Scrutiny

Defendants contend the compelling state interest which the Mandatory Disclosures serve is "ensuring that full and accurate information is being provided to all patients about the abortion procedure and the risks related to it and in reducing the health impacts, including

the mental health aspects of abortion." Defendants argue this interest arises from the "unique and complex circumstances of the abortion procedure, and its potential implications." Plaintiffs do not dispute that this state interest is compelling, but rather, they dispute that the law actually serves the interest, or that it serves the interest in a narrowly tailored way.

Plaintiffs contend the Mandatory Disclosure Law undermines the state's interest because the Mandatory Disclosures require providers to give irrelevant and medically inaccurate information. They contend Defendants have not provided any evidence that the Mandatory Disclosures advance the state's interests because there is no evidence that abortion increases risks of mental health problems, nor evidence to show how the Mandatory Disclosures mitigate the alleged problems. With respect to mental health care, Plaintiffs argue the Mandatory Disclosures are underinclusive of patients carrying pregnancies to term, and overinclusive of patients experiencing a mental health issue. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802–03 (2011). Plaintiffs argue the Mandatory Disclosures are further overinclusive because providers may not tailor their disclosures to patients' specific circumstances. Defendants argue that the "when medically accurate" clause saves the law as being narrowly tailored because it permits physician discretion. Defendants contend the statute is also narrowly tailored with the statutory exemptions for medical emergencies or fetal anomalies incompatible with life. Plaintiffs dispute those exemptions tailor the law, because they are so infrequently applicable.

Plaintiffs cite Supreme Court cases in which mandatory disclosure requirements were struck down under strict scrutiny before the Court adopted the undue burden standard in *Casey*. *See City of Akron*, 462 U.S. at 445; *Thornburgh*, 476 U.S. at 763. In *City of Akron*, the

court held the mandatory disclosure was an "attempt to extend the State's interest in ensuring 'informed consent' beyond permissible limits." 462 U.S. at 444. The *City of Akron* Court cited the following reasons for its conclusion (1) a disclosure that "the unborn child is a human life from the moment of conception" was inconsistent with the holding in *Roe*, 410 U.S. at 159–62, (2) the required detailed anatomical description "would involve at best speculation," (3) the statement that "abortion is a major surgical procedure" followed by a "parade of horribles" was designed to unduly emphasize the risks of abortion, and (4) the "litany of information that the physician must recite" violated the discretion of the physician in tailoring the information for the patient. *Id.* at 445. Although the Court struck down the mandatory disclosure law in that case, it nevertheless clarified that "a State may require a physician to make certain that his patient understands the physical and emotional implications of having an abortion." *Id.*

In *Thornburgh*, the Court struck down another mandatory disclosure law, which included information that printed materials issued by the state government were available for the patient's review. 476 U.S. at 764–65. The Court objected to the printed materials because they contained a "description of fetal characteristics at 2-week intervals," which was "not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety." *Id.* at 762. Additionally, the inclusion of agencies on the printed materials was problematic because they "well may be out of step with the needs of the particular woman and thus place[ ] the physician in an awkward position and infringe[ ] upon his or her professional responsibilities." *Id.* at 763–64. The verbal mandatory disclosure was struck down for the following reasons (1) the availability of medical

assistance and child support from the father was "nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate," and (2) information relating to "detrimental physical and psychological effects" and "particular medical risks" "increase the patient's anxiety, and intrude upon the physician's exercise of proper professional judgment." *Id.*

Defendants cite federal cases upholding mandatory disclosures which were decided under the undue burden standard. *Casey*, 505 U.S. at 882; *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d at 734. For that reason, those cases are less persuasive here than the ones cited by Plaintiffs, particularly *Thornburgh*, which was decided under strict scrutiny. 476 U.S. at 763.

The Mandatory Disclosure Law requires the printed materials in this case to include fetal descriptions and referrals to pregnancy agencies. The materials have the same potential effect of serving to "confuse and punish" pregnant women, or heighten their anxiety. *Thornburgh*, 476 U.S. at 762. This is because they include inaccurate or irrelevant information, such as the risk of breast cancer, future pregnancy complications, and infertility, none of which is linked to abortion. (ECF No. 277, Ex. 6, ¶¶ 54–55) Likewise, the mandated disclosure about fetal pain, in combination with the admission in the printed materials that "There is no evidence to suggest that a fetus experiences pain," is confusing. (ECF No. 277, Ex. 6, ¶ 56) Defendants' claim that providers need only disseminate the information to patients if requested is unavailing, as the same was true of the printed materials in *Thornburgh*. Although there is information in the printed materials which is accurate, as Defendants claim, (ECF No. 268, Ex. G, 123:20–124:4) it is couched in terms which are confusing, as Plaintiffs

claim. For example, under large, boldface font, which says, "Long-Term Medical Risks," are three paragraphs beginning "Future childbearing," "Premature Birth," and "Cancer of the Breast," also in boldface font. (ECF No. 270, Ex. X, at 18) Only by reading these paragraphs in full, and not simply skimming them, would a patient understand some—but not all— risks listed are not shown to be associated with abortion. This ultimately has the effect of creating a confusing and misleading handout.

Turning to the verbal Mandatory Disclosures, this court finds the requirements in *Thornburgh* to be most comparable here. *Id.* at 763–64. As in *Thornburgh*, the mandatory disclosure about medical assistance and child support from the father is "nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate." *Id.* at 763. This court need not rule on whether the "when medically accurate" clause saves the law as narrowly tailored because Defendants have not shown that the Mandatory Disclosure serves the state's stated interests at all. Defendants have not offered evidence which shows disclosures such as the ones in this law moderate the mental health or other health outcomes of abortion. Nor is this court inclined to "radical[ly] dissect[ ]" the Mandatory Disclosure, leaving "little resemblance to that intended by" the legislature. *Id.* at 764.

Defendants have not met their burden of demonstrating that the Mandatory Disclosure Law is narrowly tailored to serve a compelling state interest. Accordingly, Plaintiffs are entitled to summary judgment on their privacy claim with respect to the entire statute.

Since the Mandatory Disclosure Law infringes on a fundamental right and does not withstand strict scrutiny, it must be invalidated. *See Gomez*, 542 N.W.2d at 32.

B. Equal Protection

In light of this court's conclusion on Plaintiffs' privacy claim related to the Mandatory Disclosure Law, this court will address Defendants' motion for summary judgment on the equal protection claim here in the same manner as it has for other Challenged Laws. This court's determination, therefore, is whether Defendants have demonstrated entitlement to judgment as a matter of law on Plaintiffs' equal protection claim on the Mandatory Disclosure Law. This court concludes they have not.

i. Similarly Situated Test

Plaintiffs contend that the Mandatory Disclosure Law creates impermissible classifications between (1) abortion patients and providers on the one hand, and (2) patients and providers of other comparable healthcare procedures on the other. They contend that there is no other area of medicine where practitioners must provide, and patients must receive, a specific mandated disclosure as a condition of informed consent. Plaintiffs contend abortion providers are similarly situated to "comparable" healthcare providers because the state has an interest in providing "fulsome and accurate information" to anyone considering a comparable healthcare procedure, but abortion providers are treated differently because of the "specific, mandated disclosures."

Defendants contend the purpose of the Mandatory Disclosure is to provide patients with "fulsome and accurate information regarding the abortion procedure and the risks

related to it when providing informed consent" so as to "minimize or reduce potential post-operative mental distress."

This court agrees with Plaintiffs' classifications.

The state has an interest in all medical patients, including reproductive health patients, receiving equivalent information in other settings, including the impacts and risks of choosing or not choosing a course of treatment or its alternative. Likewise, medical providers have a responsibility to disclose such information to their patients. The fact that only abortion providers are under a statutory obligation to do so in a very specific way—and to provide information well beyond the scope of the medical procedure, such as the availability of medical assistance benefits for care not sought by the patient and child support—indicates that they are treated differently from other, comparable providers. As a result of the provision of the information covered by the Mandatory Disclosure Law, abortion patients are also treated differently from other reproductive healthcare patients.

ii. Infringement on the Fundamental Right

This court has already determined that the Mandatory Disclosure Law infringes on the fundamental right of a pregnant woman to access abortion care. As such, the equal protection claim related to the classification of pregnant women seeking abortion care and those seeking other reproductive healthcare is subject to strict scrutiny.

As with regard to the other equal protection claims which focus on the provider, there is no fundamental right for providers to perform abortions. *Buchanan*, 830 N.W.2d at 901. This court agrees, for the purpose of Defendants' motion for summary judgment on equal

protection. Accordingly, Plaintiffs' equal protection claim related to the Mandatory Disclosure Law for providers is subject only to rational basis review.

iii. Strict Scrutiny

This court has already determined that the Mandatory Disclosure Law fails strict scrutiny on the privacy claim, so there is no need to revisit that determination for the equal protection claim for the classification of patients.

iv. Rational Basis Review

Plaintiffs contend Defendants have failed to show the Mandatory Disclosure Law advances the purported state interests when applied to abortion providers, but not other providers. For example, Dr. Wothe admits mental illness may be triggered or exacerbated by childbirth as much as it may be by abortion. (ECF No. 285, Ex. 19, 113:4–13; 168:1–18) Defendants summarily contend the "when medically accurate" language permits the mandatory disclosures to pass rational basis review. Although they contend "many courts" have concluded it is rational to distinguish abortion from other medical services, Defendants do not cite any binding caselaw, nor even factually analogous caselaw. *See Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 159 (4th Cir. 2000) (addressing the question of whether a "regulation establishing standards for licensing abortion clinics" violated the U.S. Constitution under the undue burden standard).

For the same reasons as articulated in the privacy claim analysis for the Mandatory Disclosures, this court cannot conclude Defendants are entitled to judgment as a matter of law on Plaintiffs' equal protection claim. Defendants have offered little to no evidence which supports the argument that the Mandatory Disclosures are rationally related to the legitimate

government interest they have cited. Defendants' expert Dr. Wothe contends the Mandatory Disclosures "ensure[ ] that consistent up-to-date information is provided to each patient," but admits that, in order to comply with the law, his hospital distributes forms containing information "which is not supported by evidence." (ECF No. 267, Ex. A, at 5) Dr. Wothe contends the "when medically accurate" clause permits physicians to tailor the information provided under the law, but admits "there is pressure to conform closely to the statute due to the felony penalty." These aspects of the law described by Dr. Wothe may actually support the argument that the law is irrational with respect to its objectives. Under the rational basis standard of review applied to the providers, Defendants have not demonstrated their entitlement to summary judgment on Plaintiffs' equal protection claim. Plaintiffs' equal protection claim in this regard would ordinarily proceed to trial. However, because Plaintiffs are entitled to summary judgment on their privacy challenge to this law, this court does not need to resolve that claim.

C. Special Legislation

Plaintiffs' special legislation claim is subject to the same inquiry as their equal protection claim. *Tveten*, 402 N.W.2d at 559; *see also Sundquist*, 338 N.W.2d at 569 n. 11, 570 n.12 (equal protection is co-extensive with special legislation). Because they are subject to the same or similar analysis, it is appropriate to deny summary judgment to Defendants on the special legislation claim as well. *See Forge*, 262 N.W.2d at 348.

D. Free Speech

Plaintiffs' free speech claim provides an independent basis for summary judgment on the Mandatory Disclosure Law. To be upheld under the doctrine of free speech, "the

government must establish that the law furthers a substantial government interest and is sufficiently tailored to further that interest." *Stenehjem*, 412 F. Supp.3d at 1149 (citing *NIFLA*, 138 S. Ct. at 2375).

Plaintiffs contend the Mandatory Disclosures are untruthful and misleading, do not advance the asserted interest, and are more extensive than necessary to serve the asserted interest. Thus, Plaintiffs contend that, under either of the standards of review advanced by the parties, the Mandatory Disclosures fail. Defendants summarily contend that Plaintiffs have failed to present evidence that the Mandatory Disclosures are untruthful, misleading, or irrelevant to the decision to have an abortion. They contend the "when medically accurate" clause ensures the information provided pursuant to the law is not untruthful or misleading.

In *Stenehjem*, the court applied intermediate scrutiny to conclude a mandatory disclosure law violated the First Amendment, but noted that the law also failed under the "untruthful, misleading, or irrelevant" standard in *Rounds*, 530 F.3d at 735 and *Beshear*, 920 F.3d at 424. 412 F. Supp. 3d at 1149. Doctors were required to describe an "abortion reversal" procedure to all patients regardless of the type of abortions they received (medical or surgical). *Id.* The law was not narrowly tailored because the procedure was "irrelevant to surgical abortion patients because a surgical abortion cannot be reversed." *Id.* Under *Rounds* and *Beshear*, that also made the statement untrue, misleading, and irrelevant. *Id.* at 1149–50. The law went beyond the one addressed in *Casey* because, rather than focusing on "relevant medical information designed to assist" a pregnant woman in making their choice, it expressed "ideological beliefs essentially designed to make it more difficult for women to choose an abortion."

The Court in *Casey* concluded that "requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice." 505 U.S. at 883. However, the Court in *Casey* was only asking whether the requirement could be "considered a substantial obstacle to obtaining an abortion," and here, the requirement must further a government interest and be tailored to that interest.

For the reasons explained in this court's analysis of the equal protection and privacy claims, Defendants have not established that the Mandatory Disclosures advance the stated government interests, nor that they are narrowly tailored to do so. Namely, both the content of the written materials and the discrepancies between verbal disclosures and written materials are confusing and misleading; the Mandatory Disclosures include information which is medically irrelevant, as in *Stenehjem*; and there is no evidence offered by Defendants that the disclosures actually advance their stated interest. Accordingly, the Mandatory Disclosures fail under intermediate scrutiny and Plaintiffs are entitled to judgment as a matter of law on their free speech claim on the Mandatory Disclosure Law.

Since the Mandatory Disclosure Law infringes on free speech and does not withstand intermediate scrutiny, it must be invalidated. *See Gomez*, 542 N.W.2d at 32.

VII. Physician Disclosure Law

The parties bring cross motions for summary judgment on the privacy claim under the Physician Disclosure Law. Defendants seek summary judgment on Plaintiffs' claims for equal protection and special legislation, as well. Plaintiffs are entitled to summary judgment on the privacy claim. Although summary judgment is denied on Defendants' motion for

summary judgment on the equal protection and special legislation claims, since this court has declared the Physician Disclosure Law unconstitutional and permanently enjoined its enforcement, this court does not need to resolve those claims.

The Physician Disclosure requires that certain Mandatory Disclosures must be made by the physician performing the abortion. *Id.* (a)(1). Those disclosures include (1) the "particular medical risks" associated with the abortion procedure, (2) the "probable gestational age of the unborn child," (3) the medical risks associated with continuing the pregnancy, and (4) the impact of pain relievers to the "unborn child" for abortions after 20 weeks. *Id.*

A. Privacy

Plaintiffs' privacy claim related to the Physician Disclosure survives only if the law infringes on the fundamental right to access abortion care. This court concludes that the Physician Disclosure Law infringes on that fundamental right.

i. Infringement on the Fundamental Right

Plaintiffs argue that the prohibition on delegating the disclosures to a non-physician causes the harm here. Plaintiffs contend the disclosure requirement increases costs, creates delays, and reduces access to abortion overall. Plaintiffs cite *Sundquist* as support, where the Tennessee Supreme Court struck down a physician disclosure law. 38 S.W.3d at 22. Defendants contend that there is no evidence that the Physician Disclosure Law actually infringes on the choice of whether to have an abortion. They also take issue with the testimony of Plaintiffs' experts, which Defendants contend is speculative and lacking foundation.

Since the Physician Disclosures are a subset of the Mandatory Disclosures, this court will incorporate its privacy analysis on the Mandatory Disclosure Law here. Similar to the Mandatory Disclosure Law, the provision of the required information in the Physician Disclosure Law from a physician to their patient could reasonably affect or change the choice whether to obtain an abortion. Like both the Two-Parent Notification Law and the Mandatory Disclosure Law, the Physician Disclosure Law requires an affirmative act by the pregnant woman; namely to consent or not after the Physician Disclosures are made by the physician. The Physician Disclosure Law, therefore, directly impacts a pregnant woman's choice of whether to have an abortion and therefore infringes on a pregnant woman's fundamental right. The law is therefore subject to strict scrutiny on Plaintiffs' privacy claim.

Although this court has addressed the factual record in the alternative in its analysis of Plaintiffs' privacy claims in relation to other Challenged Laws, it will address the factual record related to the privacy claim on the Physician Disclosure Law in the following section on strict scrutiny, rather than here.

ii. Strict Scrutiny

This court finds the *Sundquist* decision helpful and persuasive on the application of strict scrutiny to the Physician Disclosure Law. In *Sundquist*, the challenged law required that before a pregnant woman consented to an abortion, their attending physician provide oral information about the procedure and options. *Id.* at 21. The Tennessee Supreme Court applied strict scrutiny, as this court must, and reasoned that "[a]lthough it is important that a woman contemplating abortion be informed 'in accordance with the recognized standard of acceptable professional practice,' the physician-only counseling requirement is not narrowly

tailored to accomplish this requirement." *Id.* It ultimately concluded: "[b]ecause it is not necessary that the physician personally impart the required information to the woman in order for informed consent to occur, the physician-only counseling requirement is not narrowly tailored to further a compelling state interest and will not be upheld." *Id.* at 22.

Even assuming, for the sake of argument, that Defendants can establish a compelling state interest in requiring that a physician make some, but not all, of the Mandatory Disclosures, the Physician Disclosure Law is not narrowly tailored to meet that interest. The medical standard of care in Minnesota permits delegation the provision of information to other qualified personnel in non-abortion contexts. (ECF No. 285, Ex. 17, 138:4–139:2) It does not appear that there is disagreement in the record on this point. (ECF No. 285, Ex. 19, 45:21-48:9) In fact, recognition of this standard of care appears to be reflected in the Mandatory Disclosure itself, which allows some, but not all of the disclosures to be made by "an agent of [a] physician." Minn. Stat. § 145.4242(a)(2).

In addition, as Plaintiffs contend, the Physician Disclosure Law limits the amount of time physicians have to provide other services, which increases the cost of abortion care and impacts patients. (ECF No. 277, Ex. 6, ¶ 62; ECF No. 279, Ex. 12, 33:6–17; ECF No. 278, Ex. 8, 133:3–12) This evidence is uncontradicted. The Physician Disclosures also force the physician, as this court concluded in the Mandatory Disclosures analysis, to address information that is misleading, confusing, or medically-irrelevant, or spend time dispelling that information.

Because information and counseling regarding an abortion can be provided to a pregnant woman by another skilled health professional achieve the same result, this court

concludes, as did the *Sundquist* Court, "that the purpose or effect of the physician-only requirement is to 'place a substantial obstacle in the path of a woman seeking an abortion.'" *Sundquist*, 38 S.W.3d at 22 (quoting *Casey*, 505 U.S. at 878). *See also City of Akron*, 462 U.S. at 448 ("We are not convinced, however, that there is as vital a state need for insisting that the physician performing the abortion, or for that matter any physician, personally counsel the patient in the absence of a request. The State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it."). The prohibition on delegation of aspects of informed consent is therefore not narrowly tailored to meet a compelling state interest.

Since the Physician Disclosure Law infringes on a fundamental right and does not withstand strict scrutiny, it must be invalidated. *See Gomez*, 542 N.W.2d at 32.

B. Equal Protection

The first requirement for Plaintiffs to prevail on their equal protection claim related to the Physician Disclosure Law is to pass the similarly situated test. In light of this court's conclusion on Plaintiffs' privacy claim related to the Mandatory Disclosure Law, this court will address Defendants' motion for summary judgment on the equal protection claim here in the same manner as it has for other Challenged Laws. This court's determination, therefore, is whether Defendants have demonstrated entitlement to judgment as a matter of law on Plaintiffs' equal protection claim on the Mandatory Disclosure Law. This court concludes they have not. However, this court does not need to resolve that claim because of Plaintiffs' success on their privacy claim.

i. Similarly Situated Test

Plaintiffs contend that, like the Mandatory Disclosure Law, the Physician Disclosure Law draws classifications between abortion patients and providers on the one hand, and all other patients and healthcare providers on the other. They claim that the Physician Disclosure Law "singles out patients seeking abortion care for stricter regulation compared to patients seeking comparable medical interventions and makes it harder to obtain abortion care in Minnesota." Similarly, Plaintiffs argue that the Physician Disclosure Law singles out abortion providers, subjecting them to more onerous regulation than providers of other medical care of comparable, or higher, medical risk."

As with their other equal protection arguments, Defendants contend that the "patients and healthcare providers seeking and providing healthcare of comparable complexity and risk" is not a discrete and identifiable group. Defendants also contend, in addition to serving the same purpose as the broader Mandatory Disclosure Law, the Physician Disclosure Law "specifically furthers the state interest in ensuring the topics regarding substantive medical risks are handled by a physician who can readily answer any additional questions . . . ." However, as with the Mandatory Disclosure Law, it is not clear why this would be a state interest unique to abortion providers. Although the risks and impacts of all medical procedures of comparable risk should be addressed between a provider or physician and their patient, not all providers of such procedures are mandated by statute to make such disclosures or for patients to receive them, nor are physicians of such procedures prohibited from delegating the task of making disclosures to their patients. Accordingly, because the groups are similarly situated, but the groups at issue are subject to differential treatment under the

law, Plaintiffs have met their burden on the similarly situated test with respect to the Physician Disclosure Law for patients and providers.

ii. Infringement on the Fundamental Right

This court has already determined that the Physician Disclosure Law infringes on the fundamental right of a pregnant woman to access abortion care. As such, the equal protection claim related to the classification of pregnant women seeking abortion care and those seeking other reproductive healthcare is subject to strict scrutiny.

There is no fundamental right for providers to perform abortions. *Buchanan*, 830 N.W.2d at 901. Accordingly, Plaintiffs' equal protection claim related to the Physician Disclosure Law for providers is subject only to rational basis review.

iii. Strict Scrutiny

This court has already determined that the Physician Disclosure Law fails strict scrutiny on the privacy claim, so there is no need to revisit that determination for the equal protection claim for the classification of patients.

iv. Rational Basis Review

Plaintiffs contend that prohibiting delegation of the Mandatory Disclosures to other healthcare personnel increases costs for providers and decreases the time and resources they can devote to patient care. (ECF No. 277, Ex. 6, ¶¶ 60–62; ECF No. 279, Ex. 12, 33:6–17) Defendants contend the standard of care permits delegation of information to other healthcare personnel in other contexts, such that abortion is treated differently from other medical procedures. (ECF No. 285, Ex. 17, 138:4–139:2) This, in turn, increases the cost of abortion, making abortion less accessible. (ECF No. 278, Ex. 8, 133:3–12)

Defendants contend the Physician Disclosure Law furthers the state interest in ensuring the information about medical risks is provided "by a physician who can more readily answer any additional questions that may arise from the same." The problem with this stated interest is that the Physician Disclosure Law goes well beyond simply requiring an interactive informed consent with a physician. This court incorporates the same analysis and conclusion for the equal protection claim on the Physician Disclosure Law as it did with regard to the same claim under the Mandatory Disclosure Law. Under the rational basis standard of review, therefore, Defendants have not demonstrated their entitlement to summary judgment on Plaintiffs' equal protection claim. Plaintiffs' equal protection claim would ordinarily proceed to trial. However, because Plaintiffs are entitled to summary judgment on their privacy challenge to this law, this court does not need to resolve this claim.

C. Special Legislation

Plaintiffs' special legislation claim is subject to the same inquiry as their equal protection claim. *Tveten*, 402 N.W.2d at 559; *see also Sundquist*, 338 N.W.2d at 569 n. 11, 570 n.12 (equal protection is co-extensive with special legislation). Because they are subject to the same or similar analysis, it is appropriate to deny summary judgment to Defendants on the special legislation claim as well. *See Forge*, 262 N.W.2d at 348.

VIII. Mandatory Delay Law

The parties bring cross motions for summary judgment on the privacy claim under the Mandatory Delay Law. Defendants seek summary judgment on Plaintiffs' claims for equal protection and special legislation. Plaintiffs are entitled to summary judgment on their privacy claim. Although summary judgment is denied on Defendants' motion for summary

judgment on the equal protection and special legislation claims, since this court has declared the Mandatory Delay Law unconstitutional and permanently enjoined its enforcement, this court does not need to resolve those claims.

The Mandatory Delay Law refers to the requirement that the Mandatory Disclosures be made twenty-four hours before an abortion is performed. Minn. Stat. § 145.4242(a)(1-2). In other words, the law requires an abortion patient to wait twenty-four hours from the time they receive the information in the Mandatory Disclosures and the Physician Disclosures. Correspondingly, the Mandatory Delay Law requires a physician performing an abortion to wait twenty-four hours after the mandated informed consent is made.

A. Privacy

Plaintiffs' privacy claim related to the Mandatory Delay Law survives only if the law infringes on the fundamental right to access abortion. It does, so the law is subject to strict scrutiny.

i. Infringement on the Fundamental Right

The Supreme Court upheld a twenty-four-hour mandatory delay under the U.S. Constitution. *Casey*, 505 U.S. at 885. In doing so, however, the Court acknowledged that the delay could affect the decision whether to obtain an abortion: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." *Id.*

Plaintiffs cite two more mandatory delay cases which were decided under the respective state constitutions, like the case here, and after *Casey*. *Planned Parenthood of the*

Heartland v. Reynolds, 915 N.W.2d 206, 213 (Iowa 2018)(*Reynolds II*), *reversed* 2022 WL 2182983 (Iowa June 17, 2022)(*Reynolds III*); *Sundquist*, 38 S.W.2d at 5. In *Reynolds II*, the Iowa Supreme Court struck down a seventy-two-hour delay, after finding that the Iowa Constitution protected the fundamental right to decide whether to decide to continue or terminate a pregnancy under due process. 915 N.W.2d at 237, 244. The court considered the factual issue of "whether requiring all women to wait at least three days before the informational and procedural appointments will impact patient decision-making." *Id.* at 241. The court concluded the evidence did not demonstrate that the delay would "impact patient decision-making, nor [would] it result in a measurable number of women choosing to continue a pregnancy they otherwise would have terminated without the mandatory delay." *Id.* at 243; *see also Casey*, 505 U.S. at 878 (holding undue burden exists if the "purpose or effect" of the statute is to "place a substantial obstacle in the path of a woman seeking an abortion"). The *Reynolds II* Court held that the seventy-two hour waiting requirement did not further any compelling state interest and could not satisfy strict scrutiny. *Id.* at 243.

Less than four years later, after the composition of the court changed substantially, the Iowa Supreme Court reversed itself when considering the constitutionality of a twenty-four hour abortion waiting period which was enacted into law in the interim. The *Reynolds III* Court found that *Reynolds II* lacked "textual and historical support," was "one-sided," had "constitutional footing [that was] unsound," and "doctrinally inconsistent with prior Iowa jurisprudence." *Reynolds III*, 2022 WL 21822983, * 26. In the words of one dissenting justice, the majority opinion "'casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise

some control over her unique ability to bear children.'" *Reynolds III*, 2022 WL 21822983, * 74 (Appel, J. dissenting)(quoting *Webster v. Reproductive Health Services*, 492 U.S. 490, 557 (1989)(Blackmun, J. dissenting)).[32]

Likewise, in *Sundquist* the Tennessee Supreme Court struck down a two-day mandatory delay, citing evidence in the record which indicated (1) patient mortality rates for abortions increase as the length of pregnancy increases, (2) a large majority of women who have endured waiting periods prior to obtaining an abortion have suffered increased stress, nausea and physical discomfort, but very few reported any benefit in waiting, (3) the waiting period imposed financial and psychological burdens, and (4) that the delay imposed a particular burden on women who suffer from poverty or are in abusive relationships. 38 S.W.3d at 23–24. The Tennessee Supreme Court held that the mandatory delay was not narrowly-tailored to further the state's interest in maternal health: "This extremely long waiting period, the longest in the nation, suggests that the waiting period requirement is not intended as an opportunity for reflection, but is actually intended as an obstacle to abortion." *Id.* at 24.

Therefore, despite the fact that *Casey* was decided under the undue burden standard, all three cases suggest mandatory delays cause some adverse effect on the fundamental right, whether it is to impact the choice, or to impose a burden or barrier to making the choice.

[32] Though it may seem counter-intuitive for this court to rely on an Iowa Supreme Court decision which has been overruled, or a Tennessee Supreme Court decision which as been abrogated by a change in the state constitution; when there is no precedential authority from the Minnesota Supreme Court on a particular state constitutional issue, it is reasonable to look to the highest courts of other states, which have applied the law in a similar way as this court believes the Minnesota Supreme Court would decide. Further, this court's reliance on decisions which have been called into question in order to interpret laws under the Minnesota Constitution is not considerably different than the *Gomez* Court relying on Justice Brennan's dissent in *McCrae*.

The court finds this reasoning instructive. Without considering the evidentiary conclusions presented in those cases, or this one, it is self-evident that the delay requires abortion patients to come back for another visit—an affirmative act, as with the Two-Parent Notification Law, Mandatory Disclosure Law and Physician Disclosure Law. Abortion patients are not passive recipients of the law's impacts, but rather must make specific accommodations to abide by it. The potential burdens of a second visit are numerous, but may include cost of transportation and childcare and time off from work. Such burdens, if in fact they exist, weigh particularly on patients experiencing poverty. The Minnesota Supreme Court made it clear in *Gomez* that this state has an interest in protecting the rights of the indigent. 542 N.W.2d at 30–31. As in *Gomez*, the Mandatory Delay Law risks the practical effect of "tak[ing] the decision from the hands" of indigent patients. *Id.* at 32.

Moreover, the Mandatory Delay Law subjects all pregnant women to an unjustified delay in care, regardless of the woman's decisional certainty, income, distance from the clinic, or status as a domestic violence or rape victim. *See Reynolds II*, 915 N.W.2d at 243. The Mandatory Delay Law "takes no care to target patients who are uncertain when they present for their procedures but, instead, imposes blanket hardships on all women." *Id.*

In the end, the Mandatory Delay Law infringes on a pregnant woman's fundamental right. The law is subject to strict scrutiny on Plaintiffs' privacy claim.

The evidentiary record also supports this conclusion. The Mandatory Delay Law "singles out abortion patients for unique treatment" because while "[m]any healthcare interventions have potentially life-altering consequences…only pregnant individuals seeking abortion care are subject to a mandatory waiting period as a condition of obtaining care."

(ECF No. 277, Ex. 6, ¶ 64) In the opinion of Dr. Terrell, clinical experience and the medical literature demonstrate that the vast majority of patients are firm in their decision to have an abortion by the time they meet with an abortion provider, and that there is no medical reason to require patients who are firm in their decision to delay their care. (*Id.* ¶¶ 65-66) The Mandatory Delay Law "often delays patients' abortion care by more than twenty-four hours because of scheduling constraints that both patients and providers face." (*Id.* ¶ 67) Delays cause patients "to cope with the physical symptoms of pregnancy for a longer period of time, and those seeking to conceal their pregnancy from an abusive partner or family member must work harder to do so. Delays of more than a few days may also increase the medical risks that patients face from abortion." (*Id.* ¶ 68) Ultimately, Dr. Terrell is of the opinion that the Mandatory Delay Law does not enhance patient decision-making and that patients would be better off "if the State treated them as competent decision-makers and afforded them the same agency to direct the course of their medical treatment as all other competent patients are afforded." (*Id.* ¶ 69)

Dr. Wothe agrees that "there is a downside of potentially delaying an abortion to a later and more dangerous time," and that "[d]elay for abortion increases both the risk and the cost of the procedure." (ECF No. 287, Ex. 22, ¶¶ 35, 38-39)

The record evidence also results in the conclusion of this court that the Mandatory Delay Law infringes on a fundamental right.

ii. Strict Scrutiny

Defendants have identified that "ensuring that full and accurate information is being provided to all patients about the abortion procedure and the risks related to it and in reducing

the health impacts, including the mental health aspects of abortion" is the compelling state interest here. They also claim the delay serves the purpose of "allowing further consideration" in the context of standard abortions. Defendants rely heavily on the Court's statement in *Casey* that: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision." They also claim, "there is little else" the state could do to target the "intended period of reflection."

As with the Mandatory Disclosures, Plaintiffs do not dispute that Defendants' stated interest is compelling, but rather that the law does not serve that interest and the Mandatory Delay Law is not narrowly tailored. Plaintiffs argue the "period of reflection" the Supreme Court stated was "reasonable" in *Casey* is no longer appropriate. *See Reynolds II*, 915 N.W.2d at 245 ("as time has progressed, so too have our understandings of freedom and equality"). Plaintiffs contend their position is likewise supported by *Gomez*; namely, that disputes within Minnesota state borders are "resolved in accordance with this state's own concepts of justice," which are not consistent with the statements in *Casey*. 542 N.W.2d at 31. Finally, Plaintiffs argue that *City of Akron*, is better suited to address the Mandatory Delay Law under the *Gomez* framework, since it applied a standard of review akin to strict scrutiny to strike down a twenty-four hour delay law. 462 U.S. at 450-51 ("We find that Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence that the abortion procedure will be performed more safely. Nor

are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course.").

The parties also dispute whether the cases in Iowa and Tennessee which struck down mandatory delay laws are persuasive. *Reynolds II*, 915 N.W.2d at 244; *Sundquist*, 38 S.W.3d at 23–24. Defendants contend the length of the delays in those cases were longer than here. Plaintiffs maintain the length of the delay was not the primary basis for either decision, but the very fact of the delay and its effect on abortion patients was at their root. *See Reynolds II*, 915 N.W.2d at 241-243 (requiring patients, "regardless of decisional certainty," to endure the waiting period did not advance the state's interests in informed decision-making or potential life); *Sundquist*, 38 S.W.3d at 23 (adopting lower court's findings "that most women have seriously contemplated their decision before making their appointment" and "[t]o *mandate* that she wait even longer insults the intelligence and decision-making capabilities of a woman."). Even if the essential holding of *Reynolds II* or *Sundquist* was rooted in the duration of the delay, the record evidence in this case indicates that the practical effect of the twenty-four hour delay in the Mandatory Delay Law is to delay an abortion for days, not hours. This court agrees with Plaintiffs.

Defendants have not met their burden of demonstrating that the Mandatory Delay Law is narrowly tailored to meet a compelling state interest. Defendants have not demonstrated that the Mandatory Delay Law's compelled process of discernment is at all necessary to achieve its stated health concerns. In fact, on this record the Mandatory Delay Law increases, rather than reduces, maternal health risks. As this court has concluded with regard to other aspects of Section 145.4242, the Mandatory Delay Law does not advance the

practice of informed consent, which is already a requirement. Minn. Stat. § 147.091, subd. 1(k).

The Mandatory Delay Law is overly broad because it targets all abortion patients, regardless of their decisional certainty. Forcing abortion patients to go beyond informed consent, to require them to be *really*, *really* certain of their decision, insults their intelligence and decision-making capabilities. It can also have a detrimental and traumatic impact. The effect of the mandated waiting period was best described by one patient who testified in this case:

> …it was horrible. I felt like I was in limbo and I felt like I wasn't in control of my medical care. I was scared that something would happen to me. And I was grieving. We had just found out that our baby was not going to survive, and this was a very wanted pregnancy that I was halfway through. * * * I think the 24-hour waiting period…made the experience more traumatizing, and it made me feel like I wasn't undergoing – it made me feel like my surgery that was medically necessary was politicized. And that did not feel like it would be the case if I required a C-section or an arm surgery or something else. So the current laws deepened the trauma for me.

(ECF No. 282, Ex. 15, 34:7-14, 43:16-24) If an abortion patient needed additional time to consider their decision, there is no reason to believe that they would not take additional time to make it. They should not have an inflexible, compelled time for "one more chance to consider the decision" of whether to have an abortion. (ECF No. 267, Ex. A, ¶ 33)

The Mandatory Delay Law is therefore not narrowly tailored to meet a compelling state interest.

Since the Mandatory Delay Law infringes on a fundamental right and does not withstand strict scrutiny, it must be invalidated. *See Gomez*, 542 N.W.2d at 32.

B. Equal Protection

As with the equal protection claims under the Mandatory Disclosure Law and the Physician Disclosure Law, Defendants are not entitled to summary judgment.

i. Similarly Situated Test

Plaintiffs argue that the relevant groups for comparison are those "pregnant individuals seeking abortion care" and all others seeking healthcare interventions. They contend that only patients seeking abortion care are singled out for compelled delay. Defendants contend that the applicable groups for comparison are providers, since they are subject to the law, and even if patients should be compared, they are not a sufficiently ascertainable group to be compared.

The Mandatory Delay Law regulates abortion providers and affects their patients. The comparator groups, therefore, (1) are abortion patients, and those patients seeking medical procedures and interventions of comparable risk, and (2) abortion providers and "providers of comparable reproductive healthcare procedures."

This court has already concluded in its analysis of other Challenged Laws that abortion providers and their patients are treated differently from other healthcare providers and their patients, by being required to wait twenty-four hours to conduct an abortion. There is no statutorily-mandated waiting period for a scheduled induction, C-section or some other intrauterine procedure. That only abortion providers are under a statutory obligation make their patients wait for a defined period of time, indicates that they are treated differently from other, comparable providers. Abortion providers and their patients, therefore, are singled out by the Mandatory Delay Law and treated differently.

ii. Infringement on the Fundamental Right

This court has already determined that the Mandatory Delay Law infringes on the fundamental right of a pregnant woman to access abortion care. As such, the equal protection claim related to the classification of pregnant women seeking abortion care and those seeking other reproductive healthcare is subject to strict scrutiny.

For the reasons explained with regard to other Challenged Laws, the Mandatory Delay Law is subject to rational basis review for abortion providers. *Buchanan*, 830 N.W.2d at 901.

iii. Strict Scrutiny

This court has already determined that the Mandatory Delay Law fails strict scrutiny on the privacy claim, so there is no need to revisit that determination for the equal protection claim for the classification of patients.

iv. Rational Basis Review

Plaintiffs contend Defendants have failed to show the Mandatory Delay Law advances the purported state interests when applied to abortion providers, but not other providers. Defendants contend that the interests of the state pass rational basis review. The arguments in this regard, are quite similar to those made for the Mandatory Disclosure Law and Physician Disclosure Law.

All medical providers have a responsibility independent of the Mandatory Delay Law to provide their patients with an unpressured timeframe within which to make their decision. Since the state has an interest in all medical patients having sufficient time to consider whether to subject themselves to a course of treatment or its alternative, it is difficult to understand

the rational basis for the Mandatory Delay Law singling out women for special treatment by their providers.

At the very least, for all of the reasons discussed in relation to the claims made under Mandatory Disclosure Law and Physician Disclosure Law, Plaintiffs have demonstrated that there is a factual dispute about whether the "period of reflection" in the Mandatory Delay Law is rationally related to the state's articulated interest and whether this law violates the right of women to be equal participants in society. As Justice Ruth Bader Ginsburg once said, "in the balance is a woman's autonomous charge of her life's full course…her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen." Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. Rev. 375, 383 (1985).

This court cannot conclude Defendants are entitled to judgment as a matter of law on Plaintiffs' equal protection claim.

Therefore, under the rational basis standard of review, Defendants have not demonstrated their entitlement to summary judgment on Plaintiffs' equal protection claim for abortion providers. Plaintiffs' equal protection claim would ordinarily proceed to trial. However, because Plaintiffs are entitled to summary judgment on their privacy challenge to this law, this court does not need to resolve this claim.

C. Special Legislation

For the reasons stated with regard to Defendants' motions for summary judgment on Plaintiffs' special legislation claim under the Challenged Laws, the motion for summary judgment on the special legislation claim is denied. Given Plaintiffs' success on summary

judgment with respect to their privacy claim, this court does not need to resolve the special legislation claim.

CONCLUSION

In sum, Plaintiffs are entitled to summary judgment on Count I (privacy) for the Physician Only Law, Hospitalization Law, Felony Penalties, Two-Parent Notification Law, Mandatory Disclosure Law, Physician Disclosure Law, and Mandatory Delay Law. Plaintiffs are also entitled to summary judgment on Count II (equal protection) for the Two-Parent Notification Law and on Count IV (free speech) for the Mandatory Disclosure Law. Their motion for summary judgment on Count I (privacy) for the Reporting Laws is denied.

Defendants are entitled to summary judgment on Counts I, II and III (special legislation) for the Reporting Laws. Defendants are also entitled to summary judgment on Counts II and III for the Felony Penalties. Defendants' motions for summary judgment on Counts I, II and III for Physician Only Law, Hospitalization Law, Felony Penalties (Count I only), Mandatory Disclosure Law, Physician Disclosure Law, and Mandatory Delay Law are denied.

The Physician-Only Law, Hospitalization Law, Felony Penalties, Mandatory Disclosure Law, Physician Disclosure Law and Mandatory Delay Law are unconstitutional and their enforcement is permanently enjoined.

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