STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN RE JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County; CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County; RIGHT TO LIFE OF MICHIGAN; and THE MICHIGAN CATHOLIC CONFERENCE,

Plaintiffs.

_____/

Case No.

***Planned Parenthood of Michigan v Attorney General*, Court of Claims Case No. 22-000044-MM**

A ruling is requested by May 27, 2022

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MOTION FOR IMMEDIATE CONSIDERATION
OF COMPLAINT FOR SUPERINTENDING CONTROL

Jerard M. Jarzynka, the Prosecuting Attorney for Jackson County; Christopher R. Becker, the Prosecuting Attorney for Kent County; Right to Life of Michigan; and the Michigan Catholic Conference ("Plaintiffs"), through counsel and pursuant to MCR 7.211(C)(6) and MCR 7.206, file this motion asking this Court to immediately hold the preliminary hearing called for by MCR 7.206(D)(4) and grant the peremptory relief of superintending control as requested in their Complaint on or before **May 27, 2022**. In support, Complainants state:

1. As described more fully in the Complaint for Superintending Control, the Court of Claims in its May 17, 2022 Opinion and Order in *Planned Parenthood of Mich v Attorney General*, Court of Claims No. 22-000044-MM, exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, and failed to proceed according to law in declining to dismiss Planned Parenthood's action and entering injunctive relief, as well as in not recusing itself. Given that the only party to the action who can appeal has vowed not to do so, the lower court's actions also leave Plaintiffs without an adequate legal remedy.

2. The lower court's ruling has enjoined enforcement of a decades-old, valid Michigan statute – by county prosecutors who are not even parties to the action – in a suit between non-adverse parties who agree on that improper remedy, issued by a judge with longstanding *and/or continuing* financial and other ties to one of them, and contrary to binding, published authority of this Court that the judge litigated and lost as a practicing attorney. Every day that order remains in place delivers another blow to the public confidence in the fair, impartial

adjudication of adversarial disputes that is the cornerstone of our justice system and the rule of law. "Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments." *Caperton v A T Massey Coal Co*, 556 US 868, 889; 129 S Ct 2252; 173 L Ed 2d 108 (2009) (citation omitted). The extraordinary circumstances under which the Court of Claims has declined to dismiss the action or recuse itself, and now entered injunctive relief, threaten to seriously erode public respect for all Michigan courts. Immediate consideration of the Complaint and entry of the peremptory relief it requests is therefore warranted.

3. Protection of this Court's precedential decisions also counsels strongly in favor of immediate consideration and a ruling by May 27. In *Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997), this Court stated unambiguously that "the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." *Id* at 339. In holding the opposite in this case, the Court of Claims distinguished *Mahaffey* as involving the right to privacy, due process, free speech and vagueness, and not the "right to bodily integrity" that according to the Court of Claims was not even recognized under the Michigan Constitution until *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018). 5/17/22 Opinion & Order, pp 15-16. The Court of Claims went on to define the parameters of that due-process right primarily as "the right to be let alone" articulated by Justice Cooley in Cooley, Torts, 29. *Id*, pp 17-18. Drawing from a

hodgepodge of foreign and federal cases from the last century – some of them overruled, or dissenting statements – the Court of Claims defined its newly found right as someone's "right to determine what shall be done with his own body," or "[t]he right of a person to control his own body," or "that each man is considered to be master of his own body…." *Id* (citations omitted).

4. But far from constituting a field left unplowed by this Court in *Mahaffey*, the Court of Claims' amorphous right was squarely put in issue by the 1994 complaint in that case – *which the Court of Claims judge filed as co-counsel for plaintiffs*. Though it was not labeled a "right to bodily integrity," the term that gained recognition with *Mays* in 2018, the gravamen of that claim was the same:

> COUNT II – DUE PROCESS
>
> 14. Article I, Section 17 of the Michigan Constitution provides in pertinent part that: "No person shall be…deprived of life, liberty or property, without due process of law."
>
> 15. 1993 PA 133 violates the Due Process Clause of the Michigan Constitution by placing substantial burdens and restrictions upon a woman's fundamental right to reproductive choice.
>
> 16. The mandatory counseling and certification provisions of 1993 PA 133 are designed to interfere with and influence the women's choice between abortion or childbirth, and to coerce the patient to reject abortion. The statute requires a litany of misleading, inaccurate, and potentially inappropriate information, and materials that the physician must impart to each woman regardless of whether, in the physician's judgment, the information is relevant. *These provisions impermissibly interfere with the constitutionally protected right of reproductive choice of women and their doctors, constitute unreasonable burdens and undue obstacles in the path of both doctors and abortion patients, and is [*sic*] therefore violative of Michigan's Due Process Clause.*

> 17. Section 17015(3) mandates a 24 hour delay between the time that a pregnancy is confirmed, the probable gestational age of the fetus is determined, and the biased counseling is provided, before an abortion may be performed. There is no legitimate or compelling state interest furthered by this arbitrary and inflexible waiting period. *This provision severely burdens and infringes the right of reproductive choice of both women and their doctors, and is therefore violative of Michigan's Due Process Clause.* [**Tab 1**, 3/10/94 Complaint for Injunctive and Declaratory Relief in *Mahaffey v Attorney General of Michigan*, Wayne Circuit Court No. 94-406793-AZ, pp 8-9 (emphasis added)].[1]

5. The Court of Claims in its injunction summarized its new right as "the right to make a medical decision to obtain treatment," and "the right to make autonomous medical decisions." Opinion & Order, p 22. That sounds very much like the right to reject certain information and to avoid the waiting period mandated by 1993 PA 133, both of which allegedly flowed from the "right of reproductive choice" put squarely in issue by the Complaint in *Mahaffey*. Indeed, the circuit court opinion in that case rested in part on those very grounds. Citing various provisions of Const 1963, art I, including the due-process clause, § 17, the lower court found them "broad enough to encompass an individual's right to choose what to do with his or her own body, including the right to choose whether to have an abortion." **Tab 2**, 6/15/94 Opinion in *Mahaffey v Attorney General*, Wayne Circuit No. 94-406793-AZ. This Court rejected that view, and reversed. *Mahaffey*, 222 Mich App at 333-339.

6. As a published decision post-dating Nov. 1, 1990, *Mahaffey* is binding authority until reversed or modified by the Supreme Court. MCR 7.215(J)(1). But

[1] Under the "one court of justice" doctrine, this Court may take judicial notice of circuit court records. *People v Snow*, 386 Mich 586, 591; 194 NW2d 314 (1972).

through their machinations, Planned Parenthood and the Attorney General have not only obtained a ruling that completely sidesteps that published decision, but one that presently is appeal-proof. The only party to the action who can appeal the Court of Claims' injunction, the Attorney General, immediately announced she would not. Like any Court, this Court must take care that lower courts obey its rulings. The deadline to seek leave to appeal the Court of Claims' injunction to this Court is June 7, 2022, and as noted, the Attorney General will not be doing so. Immediate consideration of the Complaint and a ruling will permit this Court to protect the continued vitality of its published *Mahaffey* decision.

7. Immediate consideration also is warranted because the Supreme Court, in Governor Whitmer's prong of the coordinated attack on *Mahaffey*, has expressed an interest in the effect (if any) the Court of Claims injunction will have on that case. **Tab 3**, Order in *In re Exec Message of the Governor*, Sup. Ct. No. 164256 (May 20, 2022) (directing Governor to file supplemental brief by June 3 addressing, among other things, "(1) whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination"). Thus, this Court's prompt attention and a ruling by **May 27** will benefit not only the litigants in this action and in *Planned Parenthood*, but will also be of interest to courts above and below this one.

8. Plaintiffs are filing and serving this motion, along with their Complaint and other papers, through the MiFILE e-service system, and thus they request a ruling in seven days. *See* IOP 7.211(C)(6)-1.

WHEREFORE, Plaintiffs Jerard M. Jarzynka, Christopher R. Becker, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to grant this Motion for Immediate Consideration, and immediately submit their Complaint for Superintending Control and peremptorily grant the relief it requests on or before **May 27, 2022**.

Respectfully submitted,

GREAT LAKES JUSTICE CENTER

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Tab 1

Bold — Some parts go off the page — It's the best copy I had Pamela

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To Pam	From Laura
Co.	Co.
Dept.	Phone #
Fax #	Fax #

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MARYANN MAHAFFEY; ETHELENE CROCKETT JONES, M.D.; MARK EVANS, M.D.; CHARLES VINCENT, M.D., and FEDERICO MARIONA, M.D.,

Plaintiffs,

v C.A. No.:

ATTORNEY-GENERAL OF MICHIGAN,

Defendant.

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

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COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

There is no other civil action between these parties arising out of the same transaction pending in this Court, nor has any such action been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this court.

NOW COME Maryann Mahaffey; Ethelene Crockett Jones, M.D.; Mark Evans, M.D.; Charles Vincent, M.D.; and Federico Mariona, M.D., by and through their attorneys Elizabeth Gleicher and Paul J. Denenfeld, and for their Complaint against the above-named Defendant, state:

JURISDICTION AND PRELIMINARY STATEMENT

1. This civil liberties action challenges the constitutionality of 1993 Public Act (MCLA §333.17014 et seq), which restricts and burdens a woman's ability to exercise her right to obtain an abortion. The statute requires, inter alia, that physicians provide and abortion patients receive state mandated information that is inaccurate, misleading, medically unnecessary and often contrary to sound medical practice. The physician may not omit the mandated information, even if it is his or her professional opinion that the information is not in the best medical interests of the patient or may cause harm. This state-mandated "counseling" must be provided at least 24 hours before a physician performs an abortion, necessitating that women seeking abortion services delay needed care and make at least two visits to a health care provider. Additionally, the statute imposes substantial financial burdens on local health departments, in the absence of any state funding for the newly created health department responsibilities.

2. This action is brought pursuant to MCR 2.605 and MCR 3.311. Plaintiffs seek Declaratory Judgment that Public Act 133 violates the Michigan Constitution. Plaintiffs also seek a preliminary and permanent injunction against the enforcement of 1993 PA 133 by the Attorney-General of Michigan.

PARTIES

3. Plaintiff Maryann Mahaffey is the duly elected President of the City Council for the City of Detroit, and is a resident and taxpayer of Michigan. The Detroit City Council monitors the activities of the Department of Health of the City of Detroit and approves the Health Department's annual budget.

4. Plaintiff Ethelene Crockett Jones, M.D., is the Medical Director of Obstetrics, Riverview Hospital, a physician licensed to practice medicine in the State of Michigan, and a resident and taxpayer of Michigan. She is a specialist in obstetrics and gynecology and provides abortion services to her patients. Plaintiff Jones is subject to the criminal, quasi-criminal and civil penalties contained in PA 133. She asserts her own rights and those of her patients.

5. Plaintiff Mark Evans, M.D., is Director of Reproductive Genetics, Hutzel Hospital. He is a physician licensed to practice medicine in the State of Michigan, and is a resident and taxpayer of Michigan. He is a specialist in obstetrics and gynecology and a nationally recognized sub-specialist in genetics. Dr. Evans routinely provides a full range of prenatal diagnostic services to pregnant women, and in the regular course of his practice diagnoses severe fetal anomalies, genetic defects, and other fetal disorders. At times, the fetal condition as determined by Dr. Evans is incompatible with life outside the womb. Because he is one of the few genetics specialists in the state, women travel great distances and from other states to receive his services. Many of Dr. Evans' patients seek abortion services, and he and his staff perform abortions. Dr. Evans asserts his own rights and those of his patients.

6. Plaintiff Charles Vincent, M.D., is Chief of the Department of Obstetrics and Gynecology, Riverview Hospital, is a physician licensed to practice medicine in the State of Michigan, and is a resident and taxpayer of Michigan. He is a specialist in obstetrics and gynecology who often provides obstetrical care to women with serious illnesses and other medical conditions. Many of his patients seek abortion services in order to protect their lives and health. A substantial number of these women live in poverty, and have extremely limited access to transportation. Mandated delays increase their health risks and pose substantial financial and personal burdens. Dr. Vincent asserts his own rights and those of his patients.

7. Plaintiff Federico Mariona, M.D., is Chief of Obstetrics and Gynecology, Providence Hospital, and is the immediate past president of the Michigan Chapter of the American College of Obstetricians and Gynecologists. He is a physician licensed to practice medicine in the State of Michigan, and is a resident and taxpayer of Michigan. He is a specialist in obstetrics and gynecology. Many of his patients seek abortion services. Dr. Mariona asserts his own rights and those of his patients.

8. Defendant Attorney General of Michigan is a constitutional officer of the State of Michigan. He is the chief law enforcement officer of the State, and is charged by law with representing the State in any cause in which the State is interested. He is charged by law with the enforcement of 1993 PA 133, including its penalties as provided in MCLA §§333.16221(1) and 333.16229.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

9. 1993 PA 133, MCLA §333.17014 et seq, was enacted by the Michigan

Legislature on July 28, 1993, and was subsequently signed into law by the Governor. It is scheduled to take effect on April 1, 1994.

10. 1993 PA 133 contains a variety of restrictions that severely burden and infringe the fundamental right of a woman to end her pregnancy. The act violates the constitutional rights of women exercising their right and of physicians providing abortion services. The specific provisions of the statutory scheme challenged in this action are the following:

a) The requirement that, absent a medical emergency, physicians or qualified persons assisting the physician provide each and every abortion patient with:

1) a governmentally created text that purports to describe the medical procedures used to perform abortion and the "physical complications" of abortion procedures, and that states that as a result of the abortion, the woman may suffer adverse psychological consequences. See MCLA §333.17015(3), (5) and (8);

2) a government-prepared depiction and description of a fetus at the gestational age nearest to the probable gestational age of the patient's fetus;

3) government-prepared text providing prenatal care and parenting information; and

4) information about adoption, foster care, and agencies to assis her should she carry to term.

These mandates require the doctor to disregard the best interests an

health of a patient. Indeed, the physician or qualified person assisting the physician must provide the mandated government script even if the pregnancy results from rape, severely compromises a woman's health, or will terminate with the delivery of a fatally impaired child.

b) The requirement that absent a medical emergency, each and every woman seeking abortion services certify, in writing, that she has received a depiction of a fetus at the probable gestational age of her pregnancy; a pamphlet addressing prenatal care and parenting; and information about available pregnancy-related service. See MCLA §333.17015(5),(8).

c) The requirement that, absent a medical emergency, each and every woman seeking abortion services wait at least 24 hours after receiving the mandated information referred to above before a physician may perform an abortion. See MCLA §333.17015(3). This provision mandates that women make a least two separate visits to a health care provider before being permitting to receive abortion services, and that he abortion be delayed, without regard to her health.

d) The definition of "medical emergency" as provided in §17015(2)(The statutory definition does not adequately protect a woman's constitutional right to protection of her health, and is unconstitutionally vague. By narrowly defining "medical emergency" exception to the 24 hour waiting period as encompassing only t situations that implicate a "serious risk of substantial and irreversible impairment major bodily function," the law forces an unconstitutional trade-off between a wo legitimate and important health interests and the state's purported interest in ma delay.

e) The requirement that local health departments provide pregnan tests, determine the probable gestational age of a patient's fetus, and provide certa governmentally mandated "counseling." MCLA §333.17015(8)(f),(15). This requireme violates the Headlee Amendment to the Michigan Constitution, Article 9, §29, as the have been no funding appropriations for these newly created local health departme responsibilities.

11. A physician's violation of the provisions of 1993 PA 133 subjects him or he to criminal, quasi-criminal and civil penalties, including but not limited to the revocatic of the physician's license to practice medicine in this State.

COUNT I - RIGHT TO PRIVACY

12. The right of a woman to choose to have an abortion is a fundamenta privacy right protected by the Michigan Constitution. Article I, Section 23 of the Michigan Constitution provides: "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

13. 1993 PA 133 impermissibly violates the exercise of fundamental privacy rights by deliberately attempting to influence a woman's choice whether to continue a pregnancy. The governmentally created information and certification that a physician must provide to each and every abortion patient, regardless of whether the information is relevant to the patient's personal decision, is designed to invade and manipulate the constitutionally protected sphere of privacy that surrounds a woman's decision whether to bear a child. In some circumstances, the governmentally mandated litany of information is medically and psychologically inappropriate, and may be harmful to the patient's health. In all cases, the dissemination of inaccurate and biased information serves no legitimate

and compelling state interest which overcomes a woman's fundamental privacy rights. Additionally, required delays serve no legitimate and compelling state interest and are unconstitutional.

COUNT II -- DUE PROCESS

14. Article I, Section 17 of the Michigan Constitution provides in pertinent part that: "No person shall be... deprived of life, liberty or property, without due process of law."

15. 1993 PA 133 violates the Due Process Clause of the Michigan Constitution by placing substantial burdens and restrictions upon a woman's fundamental right to reproductive choice.

16. The mandatory counseling and certification provisions of 1993 PA 133 are designed to interfere with and influence the woman's choice between abortion or childbirth, and to coerce the patient to reject abortion. The statute requires a litany of misleading, inaccurate, and potentially inappropriate information, and materials that the physician must impart to each woman regardless of whether, in the physician's judgment, the information is relevant. These provisions impermissibly interfere with the constitutionally protected right of reproductive choice of women and their doctors, constitute unreasonable burdens and undue obstacles in the path of both doctors and abortion patients, and is therefore violative of Michigan's Due Process Clause.

17. Section 17015(3) mandates a 24 hour delay between the time that a pregnancy is confirmed, the probable gestational age of the fetus is determined, and the biased counseling is provided, before an abortion may be performed. There is no legitimate or compelling state interest furthered by this arbitrary and inflexible waiting

period. This provision severely burdens and infringes the right of reproductive choice of both women and their doctors, and is therefore violative of Michigan's Due Process Clause.

COUNT III -- FREE SPEECH

18. Article I, §5 of the Michigan Constitution provides that every person may freely speak, write, express and publish his or her views on all subjects, and that no law shall be enacted to restrain or abridge the liberty of speech.

19. 1993 PA 133 compels physicians to provide their abortion patients with misleading, inaccurate, and biased information regarding abortion and the risks of the procedure. For some patients, the delivery of this information, including the probable gestational age of the fetus, is medically and psychologically contraindicated, and the provision of this information would be contrary to proper medical practice. In all cases 1993 PA 133 compels speech from physicians in contravention of the Michigan Constitution.

COUNT IV -- VAGUENESS

20. 1993 PA 133 provides in section 17015(2)(d) that a "medical emergency" defined as a condition which so complicates a woman's pregnancy as to necessitate immediate abortion to avert death, "or for which a delay will create serious risk substantial and irreversible impairment of a major bodily function."

21. This definition is so vague as to fail to provide adequate notice to physicians of the conditions under which an immediate abortion may be performed, and therefore is violative of the Due Process Clause, Mich Const 1963, Art 1, §17.

22. 1993 PA 133 provides in Section 17015(3) that a physician or a qualif

person assisting the physician shall, inter alia, determine the probable gestational age of the fetus [§17015(3)(a)]. In another portion of the statute, however, the term "probable gestational age of the fetus" is defined as the gestational age of the fetus at the time an abortion is to be performed, "as determined by the attending physician." [§17015(2)(f)].

23. It is therefore unclear as to whether a "qualified person assisting the physician" may legally determine the probable gestational age of the fetus. The statute is thereby so vague as to fail to provide adequate notice to physicians as to whether the task of determining gestational age may be delegated, and is thereby violative of the Due Process Clause, Mich Const 1963, Art 1, §17.

COUNT V -- THE HEADLEE AMENDMENT

24. Section 17015(15) of 1993 PA 133 provides that local health departments shall perform a number of tasks in order to implement the law, including but not limited to providing pregnancy tests, determining the probable gestational age of a confirmed pregnancy, and providing a completed certification form at the time that various other materials are provided to an abortion patient.

25. These mandates will require new and additional expenditures by local health departments. Both pregnancy testing and the determination of probable gestational age are services which require equipment, material, and personnel which have not been funded by the legislature.

26. Michigan Constitution 1963, Art 9 §29 provides in part that the state is prohibited from reducing the state financed proportion of the necessary costs of any existing activities or services required of local government units, and may not mandate new activities or services unless a state appropriation is made.

27. There has been no state appropriation to local health departments to pay the increased costs that will accrue due to the requirements of 1993 PA 133. This constitutes a violation of the Michigan Constitution as well as of MCLA §21.231 et seq.

RELIEF REQUESTED

28. An actual controversy exists between the parties, and it is necessary that there be a declaration of their rights with respect to the claimed constitutional invalidity of 1993 PA 133.

29. The enforcement of 1993 PA 133 by defendant Attorney-General of Michigan and other law enforcement officers of the State of Michigan, will violate rights guaranteed to the plaintiffs and the persons whose rights the plaintiffs are entitled to assert in the present litigation by the Michigan Constitution, and will cause irreparable injury to those rights. The plaintiffs have no plain, speedy, or adequate remedy at law, and the present suit is the only means of securing the relief requested.

WHEREFORE, plaintiffs respectfully pray for the following relief:

(1) That this Court enter a declaratory judgment to the effect that the provisions of 1993 PA 133 violate the requirements of Mich Const 1963, Art 1, §§5, 17, and 23, and the Generic Right to Privacy Guarantee of Mich Const 1963.

(2) That this Court enter a declaratory judgment to the effect that 1993 PA 133 violates the requirements of Mich Const 1963, Art 9, §29.

(3) That this Court enter a permanent injunction enjoining the defendant, Attorney-General of Michigan, and all other law enforcement officers of the State of Michigan, from enforcing in any way the provisions of 1993 PA 133.

(4) That pending the determination of plaintiffs' prayer for declaratory and permanent injunctive relief, this Court enter a preliminary injunction enjoining the defendant, Attorney-General of Michigan, and all other law enforcement officers of the State of Michigan, from enforcing in any way the provisions of 1993 PA 133, and that such preliminary

issued prior to April 1, 1994, when the provisions of 1993 PA 133, are to take full force and effect.

(5) That this Court award the plaintiffs their costs herein, including reasonable attorneys' fees.

(6) That this Court award the plaintiffs any other relief to which they, or any of them, may appear to be entitled.

ACLU FUND OF MICHIGAN

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DATED: March 10, 1994

Tab 2

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MARYANN MAHAFFEY; ETHELENE CROCKETT JONES, M.D.; MARK EVANS, M.D; and CHARLES VINCENT, M.D.,
Plaintiffs,

vs

Case No. 94-406793 AZ
HON: JOHN A. MURPHY

ATTORNEY GENERAL OF MICHIGAN,
Defendant.
_____/

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_____/

OPINION

This case was initiated in March 1994 upon Plaintiffs request for declaratory and injunctive relief. Plaintiffs and Defendant subsequently filed cross-motions for summary disposition which are the subject of this opinion.

The basis of the parties' dispute concerns the constitutionality of 1993 PA 133, MCL 333.17014-.17515, et seq (the "new law"). The new law was scheduled to take effect on April 1, 1994. However, temporary restraining orders were entered by this Court and the federal district court, so, enforcement has been temporarily postponed.

As is more fully discussed below, the new law requires physicians and health care officials to comply with certain formalities and conditions before performing an abortion on a woman who otherwise seeks to have one. Plaintiffs argue that enforcement of the new law will violate certain provisions of the Michigan Constitution, namely, article 9, § 29, the "Headlee Amendment," and article 1, §§ 17, 23, which allegedly affords a right of privacy.

Ultimately, this Court finds that the new law is unconstitutional under the Michigan Constitution, and, accordingly, grants Plaintiffs motion on both issues.

I.

We first address Plaintiffs argument that imposition of the new law will violate the "Headlee Amendment."[1] Plaintiffs contend that the new law requires local health departments to engage in a variety of "new activities or services,"[2] without apportioning

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1. Const 1963, art 9, § 29. The "Headlee Amendment" provides, in relevant part, that:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service . . . shall not be required by the legislature or any state agency of units of Local Government, unless a state apportion is made and disbursed to pay the unit of Local Government for any necessary increased costs. . . .

2. Defendant does not challenge Plaintiffs assertion that the new law imposes "new activities or services" on physicians and local health departments. As for Plaintiffs argument that the new law is mandatory, they cite sections .9161(1) and (2) which provide that the Department of Public Health,

funds to pay for the costs generated in providing for those new activities or services. They argue that this is in violation of the "Headlee Amendment," because, as they submit, "Headlee" requires the legislature to apportion funds to pay for increased costs necessitated by enforcement of the new law.[3]

> in consultation with appropriate professional organizations and other appropriate state departments and agencies, shall distribute a pamphlet that contains information regarding prenatal care and parenting. The department may use an existing pamphlet or pamphlets containing information regarding prenatal care or parenting, or both, to comply with the requirements of this subsection. . . . [T]he department shall print copies of the pamphlet in English, Spanish, and in other languages, as determined appropriate by the department, and shall assure that the pamphlet is written in easily understood, nontechnical terms. (Emphasis added.)
>
> The department shall distribute copies of the pamphlet . . . upon written request, at cost, and shall also distribute copies of the pamphlet upon request, free of charge, to physicians and to local health departments. [§ .9161(2) (Emphasis added.)

Plaintiffs say that given the legislature's requirement that local health departments and physicians "shall" comply with the provisions of the new law, there is no question that this new law requires mandatory compliance. This Court agrees. See, e.g., Joseph Kimble, Many Misuses of Shall, 3 Scribes J Periodical Legal Writing 61 (1992).

3. Plaintiffs rely on the affidavit testimony of Mark Bertz, Executive Director of the Michigan Association of Local Public Health (MALPH) who testified that:

> Based on an informal survey I have conducted of cross-section MALPH members, it is my opinion that most of Michigan's local health departments are not currently equipped to provide the information that they are supposed to provide under P.A. 133. Of the 19 local departments I surveyed, 11 have no physician who is qualified to confirm pregnancy and asses gestational age. Five local health departments have physicians who provide those services, but those services are only available one day per week or less. Two of the other three health departments I surveyed have physicians on staff to do

Although Defendant admits that no funds were apportioned, it maintains that enforcement of the new law will, nonetheless, not violate "Headlee". Defendant relies on a letter from the department of public health indicating that the department is "committed" to providing the funding necessary to pay for increased costs required by the new law.[4] Defendant contends that "Headlee" does not require the legislature to enact an appropriation section

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> pregnancy testing and fetal age assessment, but the waiting time for an appointment at one department varies from 2 weeks to one month, an at the other department is about 2 weeks. Based on this survey and my knowledge of the capacities and obligations of the Michigan's local health departments, in my opinion, the majority of those departments currently lack the capacity to comply with the Act.
>
> . . . .
>
> For local health departments, fulfilling the requirements of P.A. 133 would be expensive, and to date, the State Legislature has not appropriated any funds for this purpose. This puts the local health departments, which are already severely underfunded for their important work, in an impossible situation. . . .

Bertz Affidavit, para 5 and 7.

4. Defendant relies on a letter dated April 27, 1994, from Ms. Vernice Davis Anthony, Director of the Department of Health, to Ms. Patricia A. Woodworth, Director of the Department of Management and Budget, which reads:

> This letter is a follow up to our recent conversation regarding local health department costs associated with implementation of the informed consent legislation. Specifically, the local health departments have raised the issue of compliance with the Headlee Amendment.
>
> The Department of Public Health commits that we will reimburse the local health departments for the incremental costs of implementing the new legislation. These expenditures will be found within our existing budget.

Id.

under the new law, rather, as long as there is, in fact, money set aside to pay for any increased costs, the amendment is satisfied. And since the department of public health has agreed to provide the needed funding, "Headlee" is not violated.

In this Court's view, Defendant's arguments defy the very essence of "Headlee". The amendment forbids the state legislature or any state governmental agency from creating a new activity or service beyond that required by existing law, unless a state appropriation is made and disbursed.[5] As the Michigan Supreme Court explained:

> By specifically enacting ["Headlee"], the voters sent two messages to the state Legislature, (1) if the state Legislature required local units of government to provide a certain activity or service and the state was financing a certain portion of the necessary costs of that activity or service, the state could not reduce its share of the necessary costs after § 29 became effective, and (2) if the state Legislature wanted to pass a new law provide an increased level in an existing required activity or service, the state was required to pay for any resulting costs which were necessary for the local unit of government to discharge its duty.[6] ... ..

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5. See Const 1963, art 9, § 29; see supra note 1 for a quoted version of the amendment.

6. Livingston County v Department of Management & Budget, 430 Mich 635, 641, 647 (1988)(quoting Durant v State Board of Educ., 424 Mich 364, 383 (1985)). The Court went on to observe that:

> [I]n ratifying Headlee the voters sought
>
> 'to gain more control over their own level of taxing and over the expenditures of the state. It is evident that while the voters were concerned about the general level of taxation, they were also concerned with ensuring control of local funding and taxation by the people most affected, the local taxpayers. The Headlee Amendment [was] the voters' effort to link funding, taxes, and

. . . .

> Section 29 then at least makes clear its intent to prohibit either the withdrawal of support where already given or the introduction of new obligations without accompanying appropriations, and, in both instances, art 9, § 29 applies only to services or activities required by state law.[7]

In light of our high court's interpretation of "Headlee", we think the law on this issue is pretty clear. When the legislature makes a law imposing new activities or services on a local governmental agency, it must also provide "accompanying appropriation". Here, there is no dispute that that was not done.

Defendant's argument that "Headlee" is not violated because the department of public health has agreed to provide the necessary funding is extremely flawed. Again, recognizing that Defendant admits that the legislature did not appropriate funding here, and

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control.'

. . . .

> The [Headlee] plan is quite obvious. Having placed a limit on state spending, it was necessary to keep the state from creating loopholes either by shifting more programs to units of local government without the funds to carry them out, or by reducing the state's proportion of spending for 'required' programs in effect at the time the Headlee Amendment was ratified. . . .

Id.

7. Id (emphasis added). In plain terms, the purpose of "Headlee" is to prevent the state from "robbing Peter, to pay Paul." This goes to the heart of Defendant's argument: Even though the legislature failed to make funding appropriations under the new law, not to fret, the department of public health has committed itself to using funds established for existing programs to pay for what hasn't been appropriated for under this new program. The "Headlee Amendment" was adopted to prevent Defendant's very argument from becoming a reality.

bearing in mind that the new law was scheduled to take effect April 1, 1994, this Court is not persuaded that the April 27, 1994 letter from the department of public health somehow cures the defect here. The fact of the matter remains: No appropriations have been set aside as a means of complying with the new law.

As such, this Court finds that 1933 PA 133 violates article 9, § 29 and is therefore unconstitutional. Accordingly, we grant Plaintiffs motion on this issue.

II.

We next address Plaintiffs' right of privacy claim. Plaintiffs argue that the Michigan Constitution embraces a right of privacy, viz., the right to an abortion. They contend that this right is fundamental and that, as such, the state cannot impose mandates, restrictions, or conditions which inhibit, impede, or infringe upon it. They say that enforcement of the new law will do just that.

Defendant argues that our state constitution does not embrace such a right. Rather, according to the Defendant, the only right where abortion is concerned is that right which derives exclusively from the federal constitution. Defendant essentially says that the Michigan Constitution does not stand on its own in this regard, and that, therefore, this Court is bound by federal precedence on the subject.

Since, as both parties concede, there is no binding state

authority on the issue,[8] as a threshold matter, this Court must determine whether such a right exists under the Michigan Constitution. In reaching this decision, as a backdrop, we first review the cases where our state courts have addressed the right of privacy and abortion issues in dicta. We then turn to the specifics of article 1 of our state constitution.

A.

Our supreme court recognized as early as 1881 that the right to privacy was a highly valued right. See, e.g, Advisory Opinion 1975 PA 227, 396 Mich 465, 504 (1976) (citing DeMay v Roberts, 46 Mich 160 (1881)). Almost one hundred years later, in People v Nixon, 42 Mich App 332, 340 n17 (1972), before the evolution of Roe v Wade, a panel of our court of appeals recognized that "There can be no question as to the right of a woman to possess and control her body as she sees fit, in the absence of an expressed compelling

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8. In the recent case of Doe v Department of Social Services, 439 Mich 650 (1992), our supreme court clearly declined resolution on the abortion issue, at least as it relates to disposition of the issues before this Court:

> [W]e pause to comment briefly on the assertion that our state constitution includes the right to an abortion. [Id at 668.]
>
> . . .
>
> [W]e find it unnecessary to decide that issue in this case, given our conclusion with regard to the funding question. . . . [E]ven if it is assumed arguendo that a state constitutional right coextensive with the federal right exists, we are able to conclude that § 109a does not violate the Michigan Constitution . . . . [Id at 670.]
>
> [W]e vacate, and direct that no precedential weight is to be accorded, the discussion and conclusion in the Court of Appeals opinion regarding the underlying issue of a state constitutional right to abortion. [Id at 670 n27.]

state interest . . . ."[9] In People v Bricker, 389 Mich 524, 530 (1973), our high court recognized that "the effectuation of the decision to abort is [] left to the physician's judgment."[10] The court went on to explain that its decision was "based [on] a construction of Michigan's statute guided by constitutional principles well recognized and applied in our state."[11] In a companion case, Larkin v Wayne Prosecutor, 389 Mich 524, 538 (1973), the court acknowledged that "Roe v Wade repeatedly asserts that the abortion decision is a medical decision, to be made by a physician in consultation with his patient." Subsequently, in Advisory Opinion 1975 PA 227, 396 Mich 465, 504-05 (1976), our high court explained that:

> No one has seriously challenged the existence of a right to privacy in the Michigan Constitution nor does anyone

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9. Id (citing Union Pacific R Co v Botsford, 141 US 250; 11 S Ct 1000; 35 L Ed 734 (1891)). Defendant argues that Nixon was overruled. This Court is not convinced of that. Nonetheless, we do not feel compelled to address the issue since we are not relying on the case for its precedential effect.

10. Although the court's statement was made in connection with an interpretation of the state's criminal abortion statute, it nonetheless, supports this Court's ultimate conclusion that abortion is a fundamentally protected right under our state constitution. See infra note 21 for a more thorough discussion of the criminal abortion statutes.

11. Id at 531. Defendant forcefully argues that the Bricker Court "made it absolutely clear that (1) a woman's right to an abortion in Michigan is derived exclusively from the federal Constitution, as construed by Wade, [and] (2) that the strong public policy of the State of Michigan at that time was to prohibit abortion . . . ." Defendant's Motion for Summary Disposition, p 4 (emphasis in original). This Court fails to glean that from the case. In fact, this Court cites the case as supporting its conclusion that Michigan courts have inferentially recognized a right of privacy under Michigan law.

suggest that right to be of any less breadth than the guarantees of the United States Constitution.

> The United States Supreme Court has recognized the presence of constitutionally protected 'zones of privacy'. Griswold v Connecticut, 381 US 479, 484; 85 S Ct 1678; 14 L Ed 2d 510 (1965); Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973). These zones have been described as being within 'penumbras' emanating from specific constitutional guarantees. Often mentioned as a basis of the right to privacy are the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution. The people of this state have adopted corresponding provisions in art 1 of our Constitution. (Emphasis added.)

Our court of appeals has made similar observations. See, e.g., State ex rel Macomb Co Prosecuting Attorney v Mesk, 123 Mich App 111, 118-19, lv den, 417 Mich 103 (1983);[12] see also Doe v

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12. The Court explained that:

> Although the right to privacy is not expressly provided for in the United States Constitution, such a right has been recognized as arising out of the Fourteenth Amendment's concept of personal liberty. Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973). Although the limits of this right have never been expressly defined, it is clear that the right extends to the rights of persons to make certain decisions concerning marriage, procreation and child rearing. Griswold v Connecticut, 381 US 479, 484; 85 S Ct 1678; 14 L Ed 2d 510 (1965); Loving v Virginia, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967); Eisenstadt v Baird, 405 US 438; 92 S Ct 869; 31 L Ed 349 (1972); Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973). In Whalen v Roe, 429 US 589, 598; 97 S Ct 869; 51 L Ed 2d 64 (1977), the Court described the privacy right as protecting two different kinds of interest in avoiding disclosure of personal matters. The other is the interest in independence in making certain kinds of decisions without governmental interference. (Footnote omitted.)
>
> The right of privacy with respect to decision making has been held to protect: (1) the right of marital privacy, Loving v Virginia, supra; (2) the right of privacy in the home, which encompasses both decisions concerning child rearing and decisions about family living arrangement, Wisconsin v Yoder, 406 US 205; 92 S

Department of Social Services, 439 Mich 650, 662 (1992).

In this Court's opinion, the courts' repeated reference with approval to Griswold and its progeny largely foreshadows the answer to any inquiry as to whether there is a right of privacy guaranteed by our state constitution, and moreover, whether such a right encompasses the right to an abortion.[13] Further, one cannot ignore our courts' recognition that various sections of article 1 of our state constitution either correspond with, or afford greater protection than, various guarantees under the federal constitution.[14] This is decisionally important because some of the

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Ct 1526; 32 L Ed 2d 15 (1972); and (3) the right to make decisions concerning the integrity of one's body. Roe v Wade, supra.

State ex rel Macomb Co Prosecuting Attorney v Mesk, 123 Mich App 111, 118-19 (1983).

13. Defendant does "readily acknowledge[] that the Michigan courts have recognized a generalized right of privacy under the Michigan Constitution." Defendant's Brief in Response to Plaintiffs Motion for Summary Disposition, p 8 (citing Doe v Department of Social Services, 439 Mich 650, 668 (1992)).

14. See, e.g., Sitz v Department of State Police, 443 Mich 744 (1993)(art 1, § 11, in view of automobile searches, is more protective than the 4th Amendment); Doe v Department of Social Services, 439 Mich 650 (1992)(art 1, § 2 is equally as broad as the Fifth Amendment); Delta Charter Twp v Dinilfo, 419 Mich 253 (1984)(art 1, § 17, in relation to zoning of single-family residences, is more expansive than the federal constitution); People v Perlos, 436 Mich 305, 313 n7 (1990)(art 1, § 11 of our state constitution is equally as protective as its federal counterpart); People v White, 390 Mich 234 (1973)(art 1, § 15 is substantially identical to the 5th Amendment); Advisory Opinion 1975 PA 227, 396 Mich 465, 504-05 (1976)(as to the right of privacy under the federal constitution, the people of this state have adopted corresponding provisions in art 1); People v Bullock, 440 Mich 15, 33-35 (1990)(art 1, § 16 is equally as protective as the Eighth Amendment); Socialist Workers Party v Secretary of State, 412 Mich 571 (1982)(art 1, § 2 is equally as protective as its federal counterpart).

very provisions which have been held to create a right of privacy under the federal constitution[15] are similarly found in scattered sections of article 1 of our state constitution. On that note, we turn to the language contained in our state constitution itself.

B.

Article 1 of the 1963 Michigan Constitution is entitled, "Declaration of Rights." Sections 2, 4, 5, 6, 8, 11, 15, and 17 explicitly mandate, and theoretically guarantee, that the government will not intrude or infringe upon an individual in the described manner: "No person shall be denied the equal protection of the law; nor shall any person be denied the enjoyment of his [or her] political rights . . . ." Const 1963, art 1 § 2 (emphasis added).[16] "Every person shall be at liberty to worship God according to the dictates of his [or her] own conscience. . . . The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his [or her] religious beliefs." Const 1963, art 1, § 4 (emphasis added). "Every person may freely speak, write, express and publish his views on all subjects . . . ." Const 1963, art 1, § 5 (emphasis added). "Every person has a right to keep and bear arms for

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15. The 1st, 3rd, 4th, 5th, 9th, and 14th Amendments of the United States Constitution have been held to have a penumbral effect creating zones of privacy, and hence, the right of privacy under the federal constitution. See Griswold v Connecticut, 381 US 479; 85 S Ct 1678; 14 L Ed 2d 510 (1965).

16. Our Supreme Court has acknowledged that § 2 is equally as broad as the 5th Amendment. See Doe v Department of Social Services, 439 Mich 650 (1992).

defense of himself and the state." Const 1963, art 1, § 6 (emphasis added). "No soldier shall, in time of peace, be quartered in any house without the consent of the owner or occupant . . . ." Const 1963, art 1, § 8 (emphasis added). "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. . . . Const 1963, art 1, § 11 (emphasis added).[17] "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15 (emphasis added).[18] "No person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17 (emphasis added).[19]

Further, sections 1, 3, and 23 authorize the following power in favor of the people: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. "The people have the right to peaceably assemble, [and] to consult for the common good

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17. Our supreme court has acknowledged that § 11 embraces an "expectation of privacy". See People v Beavers, 393 Mich 554, 564 (1975). The Court has also recognized that § 11 is more protective than the 4th Amendment, at least relation to automobile searches. See Sitz v Department of State Police, 443 Mich 744 (1993). Prior to Sitz, the Court agreed, at least, that § 11 was equally as protective as its federal counterpart. People v Perlos, 436 Mich 305, 313 n7 (1990).

18. The Michigan Supreme Court has recognized that § 15 is substantially identical to the Double Jeopardy Clause of the Fifth Amendment. See People v White, 390 Mich 234 (1973).

19. Again, our courts have recognized that art 1, § 17 is more expansive than the federal constitution, at least in relation to zoning of single-family residences. See Delta Charter Twp v Dinilfo, 419 Mich 253 (1984).

. . . ." Const 1963, art 1, § 3. "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people." Const 1963, art 1, § 23.

In this Court's view, one cannot seriously argue that the Michigan Constitution does not embrace within its protection a right of privacy. Such an argument is blatantly contrary to the interest of ordered liberty implicit within the meaning of our state constitution and inferentially gleaned from the opinions of this state's higher courts.

It can hardly be doubted that these rights were collectively enacted for the protection of the people of this state, in their capacity as both an individual and as part of a larger group, so that they, we, could be protected against unwarranted governmental intrusions.[20] In this Court's view, the spirit of sections 1, 2,

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20. Defendant vehemently argues that the only right to abortion in this state is that which has been defined under the federal constitution. See Defendant's Motion for Summary Disposition, p 3. Defendant argues, moreover, that the public policy of this state is to disfavor abortions. Defendant says that this is made clear by the fact that at the time 1963 Michigan Constitution was drafted, abortion was a felony in this state. We find no merit in this argument. In fact, in our view, for the following obvious reasons, Defendant's argument misses the point.

Although the criminal statutes did make it a felony for a person to willfully "kill" an unborn "quickened" child by injury to the mother, see, e.g., MCL 750.322; MSA 28.554, Defendant fails to observe that neither the woman nor her attending physician could be convicted under the statute. See People v Bricker, 389 mich 524, 530 (1973); In re Vickers, 371 Mich 114 (1963); People v Nixon, 42 Mich App 332 (1972).

As the court in Nixon observed: "[Q]uickening is at the point when the fetus indicates signs of life by way of fetal movements which can be felt by the mother. These movements are usually noted in the fourth or fifth month of pregnancy." Id at 335 n3. Thus, quickening under the criminal abortion statutes appears to be analogous to what we now call "viability". So, under

3, 4, 5, 6, 8, 11, 15, 17, and 23 clearly embrace a right to personal liberty equating to a right of privacy. Their span is broad enough to encompass an individual's right to choose what to do with his or her own body, including the right to choose whether to have an abortion.

As such, this Court is not the least bit persuaded by the Defendant's argument that the Michigan Constitution is incapable of standing on its own where the right of privacy, and consequently the right to an abortion are concerned.

C.

Having found that our state constitution encompasses the right to have an abortion,, we next consider how to characterize that right, and what standard of review should be applied in reviewing legislation affecting it.

Without hesitation, this Court is of the opinion that under

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the criminal abortion statute, an induced abortion was not punishable if the abortion occurred prior to viability. And again, in no event, even after viability, could the woman or her physician be punished.

Clearly then, Defendant's contention that this state has a longstanding policy prohibiting abortion is misplaced. Such a policy, if there were one, only applied to an induced abortion occurring after viability and at the hands of one other than the woman or her attending physician. Inferentially, the criminal abortion cases recognize that the state does not have an interest in an unviable, unquickened fetus, and further, that the woman and her physician have some protected right where abortion is concerned.

our state constitution the right of privacy is "fundamental".[21] To be sure, though, if the rights from which the right of privacy evolve are fundamental, then it follows, just as sure as the night follows the day that the right of privacy is, likewise, fundamental. Moreover, if the right is deemed fundamental at the federal level[22] and, again, if our courts have recognized that various sections of article 1 of our state constitution are parallel to, or greater than, the federal provisions, it follows, then, that a right of privacy under the Michigan Constitution should, likewise, be fundamental.

On the issue of what standard of review to apply, Plaintiffs assert that application of the strict scrutiny test is warranted under Michigan law, and that such a standard is consistent with the standard applied in right of privacy decisions in sister states.[23]

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21. As our supreme court stated with approval in People v Bennett (After Remand) 442 Mich 316, 327 n13 (1993):

> A fundamental right has been defined as that which the United States Supreme Court 'recognizes as having a value so essential to individual liberty in our society that [it justifies] the justices reviewing the acts of other branches of government . . . .'

Id (quoting 2 Rotunda & Nowak, Constitutional Law (2d ed), sec 15.7, p 427).

22. No matter what the state of affairs is with regard to the erosion of Roe's trimester framework, it is clear, at least for now, that the right to an abortion is still deemed fundamental. See, e.g., Planned Parenthood of Southwestern Pennsylvania v Casey, 505 US __; 112 S Ct 2791; 120 L Ed 2d 674, 710 (1992) where the Court reaffirmed what was described as the "core" holding of Roe; see also id at 698-99, 714.

23. Plaintiffs cite the following cases as support for their position that this view is consistent with other jurisdictions: State v Hartzog, 440 NW2d 852 (Iowa 1989)(right to privacy embraces

They urge that Michigan Courts should reject the "undue burden" test enunciated in Planned Parenthood of Southeastern Pennsylvania v Casey, 505 US ___; 112 S Ct 2791; 120 L Ed 2d 674 (1992). Defendant's general contention is that federal law controls, so presumably, Defendant's position is that this Court is bound by the Casey decision.[24]

This state has long recognized that strict scrutiny applies where the alleged violation is that which infringes upon the exercise of a fundamental right. As our supreme court explained

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freedom of choice to engage in certain activities); Jarvis v Levine, 418 NW2d 139 (MN 1988)(right to refuse antipsychotic medication); In re Brown, 478 So2d 1033 (Miss 1985)(right to refuse lifesaving blood transfusion); Opinion of the Justices, 465 A2d 484 (NH 1983)(right of the medically-ill to be free from compulsory medical treatment).

We would also add Moe v Secretary of Admin, 417 NE2d 387 (Mass) (state constitution recognizes right to choose whether to bear or beget a child); Committee to Defend Reprod. Rights v Myers, 625 P2d 779 (Cal 1981)(state law prohibiting funding for abortion held unconstitutional under state constitution); Right to Choose v Byrne, 450 A2d 925 (NJ 1982)(right to choose whether to have an abortion is fundamental right under state constitution).

24. In response to Defendant's argument, we direct attention to our Supreme Court's observations in People v Bricker, 389 Mich 524, 528 (1973):

> . . . We must recognize at the outset that the judicial opinions filed by the United States Supreme Court in Roe and Doe (footnote omitted) are binding on us under the Supremacy Clause. Those opinions do not, however, decide any case other than the cases of Roe and Doe. This is decisionally important in this case because Roe and Doe do not purport to construe the Michigan abortion statutes. . . .
>
> We are duty bound under the Michigan Constitution to preserve the laws of this state and to that end to construe them if we can so that they conform to Federal and state requirements.

almost twenty years ago:

> If the interest is 'fundamental' or the classification 'suspect', the court applies a 'strict scrutiny' test requiring the state to show a 'compelling' interest which justifies the classification. Rarely have courts sustained legislation subjected to this standard of review.[25]

This statement was made in relation to construing the constitutionality of a state statute under the state constitution. Thus, there appears to be binding state precedence on the issue, and, this Court, therefore, rejects any argument that the Casey decision controls. Strict scrutiny is the standard to be applied here.

III.

As part of Plaintiffs right of privacy claim, they challenge the validity of MCL § 333.17014(h)(i), the "private counseling" requirement, and MCL § 333.17014(h)(ii), the "24-hour waiting period" provisions of the new law.

A.

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25. Manistee Bank v McGowan, 394 Mich 655, 668 (1975) (citing Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv L Rev 1 (1972)); see also People v Bennet (After Remand), 442 Mich 316, 318 (1993)(In evaluating a parent's right to control his/her child's education, Court eluded that infringement on a fundamental right warrants review under strict scrutiny standard.); Doe v Department of Social Services, 439 Mich 650, 662 (1992) ("A statute reviewed under this strict standard will be upheld only if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling government interest."); El Souri v Department of Social Services, 429 Mich 203, 207 (1987)(Court recognized that if a statute impinges upon the exercise of a fundamental right, strict scrutiny applies.).

The so-called "private counseling"[26] provision provides, in part, that:

> [A] physician shall not perform an abortion otherwise permitted by law without the patient's informed written consent, given freely and without coercion. [§ .17015(1).]

To effectuate the mandates of these provisions, the "physician or a qualified person assisting the physician shall do all of the following not less than 24 hours before that physician performs an abortion upon a pregnant woman:

> Confirm that, according to the best medical judgment of [the] physician, the patient is pregnant, and determine the probable gestational age of the fetus. [§ .17015(3)(a).]
>
> . . . .
>
> Preceded by an explanation that the patient has the option to review or not review the written summary,

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26. Plaintiff refers to this section as the "biased counseling" provision. Defendant vigorously disputes that the information is "biased". However, somehow, this Court is not persuaded that the whole "bias" argument is even an issue; rather, it appears to this Court to be more of a distractor.

It is well settled that the legislature is under no obligation to remain neutral on the issue of abortion. See, e.g., Doe v Department of Social Services, 439 Mich 650, 680 (1992). If our state legislature wants to require that "biased" information be given before an abortion can be obtained, then so be it. The state does, after all, have an interest in protecting both the health of the mother and the life of the fetus. The state's only obligation in this regard is to not impose legislation which infringes, impedes, or inhibits a woman's access to obtain an abortion.

Thus, if the arguments were such that the "biased" counseling information infringed, impeded, or inhibited the woman's fundamental right, then the "biased" counseling argument dispute might have some validity. However, that is not the case. Rather, the parties' are merely disputing the form of section .17015(h)(i), not the substance.

present to the patient the written summary described in subsection (8)(b)[27] . . . . [§ .17015(3)(c).]

Preceded by an explanation that the patient has the option to review or not review the written summary, provide the patient with a copy of a medically accurate depiction and description of a fetus supplied by the department of public health pursuant to subsection (8)(a)[28] at the gestational age nearest the probable gestational age of the patient's fetus. [§ .17015(3)(d).]

. . . .

Subject to [the "medical emergency" exception[29]],

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27. Section (8)(b) requires the department of public health to:

Develop, draft, and print, in nontechnical english, arabic, and spanish, written standardized summaries, based upon various medical procedures used to abort pregnancies, that do each of the following:

. . . .

State that as the result of an abortion, some women may experience depression, feelings of guilt, sleep disturbance, loss of interest in work or sex, or anger, and that if these symptoms occur and intense or persist, professional help is recommended.

§ .17015(8)(b)-(iii) (emphasis added).

28. Subsection (8)(a) requires the department of public health to:

Produce medically accurate depictions of the development of a human fetus which reflect the actual size of the fetus at 4-week intervals from the fourth week through the twenty-eight week of gestation . . . . Each depiction shall be accompanied by a printed description . . . of the probable anatomical and physiological characteristics of the fetus at that particular state of gestational development.

29. "Medical emergency" means,

that condition which, on the basis of the physician's

> before performing an abortion, a physician shall do all of the following [§ .17015(5)]:
>
> Provide the patient with the physician's name and inform the patient of her right to withhold or withdraw her consent to the abortion at any time before performance of the abortion. [§ 17015(5)(a).]

Plaintiffs argue that there is no exemption permitting non-compliance with these provisions if the physician determines in his or her best judgment that the information would adversely affect the patient.[30] They rely on the affidavit of Mark I. Evans, M.D., Director of both the Division of Reproductive Genetics and the

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> good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

§ .17015(2)(d).

> If the attending physician, utilizing his or her experience, judgment, and professional competence, determines that a medical emergency exists and necessitates performance of an abortion before the requirements of subsections (1), (3), and (5) can be met, the physician is exempt from the requirements of [these subsections], [and] may perform the abortion, and shall maintain a written record identifying with specificity the medical factors upon which the determination of the medical emergency is based.

§ .17015(7).

30. Plaintiffs acknowledge that this section does contain a "medical emergency" exception. However, for now, Plaintiffs are not saying that the emergency exception is inadequate, although that is an issue raised in the parties' cross-motions. They are arguing that the "private counseling" provisions infringe upon the right to decide whether or not to have an abortion. This point is important, because, although Defendant addresses the alleged constitutional inadequacies of the emergency exception, Defendant fails to address the alleged constitutionality of the emergency provisions as it infringes upon the right of privacy.

Center for Fetal Diagnosis and Therapy at Wayne State/Hutzel Hospital, who testified that:

> As women age (commonly thought of as 35 or over), they face additional risks as a result of pregnancy. With older women, there are increased risks of chromosomal disorders due to defective ova, sperm, etc. resulting in congenitally defective offspring, e.g., Down's syndrome. In the age group of mothers over the age of 40, co-existent cancer is a more likely complication than for younger women.
>
> For women suffering from any of these complications of pregnancy, but whose condition is not so dire as to be a "medical emergency," the delay necessitated by the Act could cause serious physical and emotional harm, which is medically unjustifiable.
>
> In my professional opinion, for many women terminating pregnancies because of fetal abnormalities, the mandatory delay and information requirement will cause substantial mental and physical distress and will not help inform the women's choice whether to terminate the pregnancy.
>
> . . . .
>
> In addition, women terminating pregnancies because of fetal anomalies would find it extremely distressing to have to listen to the state-mandated information. Because this decision is so difficult, these women are in particular need of support from health care providers and counselors. Listening to and receiving biased mandated information, including pictures of a normal fetus, could cause extreme anguish and does not help inform the woman's decision whether to terminate a pregnancy because of fetal anomalies.[31]

Defendant fails to submit any evidence countering Plaintiffs' position in this regard. Rather, the Defendant spends the majority of its time defending that the private counseling provision is not

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31. Affidavit of Mark I. Evans, M.D., para 23, 24, 25, 31.

biased.[32] However, this is nonresponsive to Plaintiffs argument

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32. Defendant does, however, submit affidavits by Roger H. Hertz, M.D., Watson A. Bowes, Jr., M.D, which appear to be the only evidence submitted in response to Plaintiffs arguments on this issue.

Dr. Hertz testified that in his opinion:

> Plaintiffs fail to provide even a single example of a situation which they feel the statute would require providing information to a woman " . . . even where the information will adversely affect the physical or mental health of the patient." In my view, when (if ever) the provision of appropriate informed consent material would represent a serious risk as defined in MCL 333.17015(2)(d), the physician may document his or her rationale and instead obtain consent from who[m]ever the law requires. In my opinion, if a patient is not competent to receive all appropriate informed consent information, that patient is not competent to give informed consent in the first instance and consent must instead be obtained from the patient's "guardian" (as defined by law).

Affidavit of Roger H. Hertz, M.D., para 8 (emphasis added). Somehow, we find Dr. Hertz's testimony unresponsive. Just because a woman might experience adverse effects from the mandated information, which is what Plaintiffs are arguing, does not mean she is incompetent to give her consent. Such an argument is ludicrous, and is certainly unresponsive to the issues at hand.

In his affidavit, Dr. Bowes testified that in his opinion:

> The statute does not prevent a physician or other qualified person from exercising judgment in the counseling of patients or in providing advice about informed consent materials. For example, in cases of proposed abortion for fetal abnormalities, patients could be provided information about the specific fetal defects and how these would change the appearance of the fetus. The statute does not limit the amount of information nor prohibit using other materials for describing fetal status or development. Nor does the statute require that a patient look at the material. It requires only that the patient have the opportunity to do so if she wishes. In fact, in appropriate cases, a physician could exercise his or her judgment in advising the patient that it might be to the detriment of her mental health if she reviewed the information about fetal development. . . .

that the lack of an exemption could ultimately have an adverse effect on some women.

In light of all the evidence, this Court finds that the Defendant has failed show how the private counseling provision advances a compelling state interest. For that matter, we are not persuaded that Defendant has even shown that the law is rationally related to a legitimate state interest, muchless shown the existence of a genuine issue of material fact on this point.

Therefore, we find that the "private counseling" provision is unconstitutional in that the lack of exemptions infringes upon the exercise of the right to an abortion under the Michigan Constitution. As such, Plaintiffs motion on this issue is granted.

B.

As for the 24-hour waiting period provision, MCL § 333.17015(h)(ii) of the new law provides that there be:

> A 24-hour waiting period between a woman's receipt of that information provided to assist her in making an informed decision, and actual performance of an abortion, if she elects to undergo an abortion. A 24-hour waiting period affords a woman, in light of the information provided by the physician or a qualified person assisting the physician, an opportunity to reflect on her decision and to seek counsel of family and friends in making her decision.

Plaintiffs argue that a mandatory waiting period places an

Affidavit of Watson A. Bowes, Jr., M.D., para 9 (emphasis added). There is no support in the record for Dr. Watson's contention that the physician could advise his or her patient not to view the material. In fact, that's the very essence of Plaintiffs argument, i.e., there is no exemption permitting the physician to exercise his or her judgment in this regard. Thus, in our view, Dr. Watson's testimony, is likewise, unresponsive to the issues at hand.

"enormous" burden on women who seek to have an abortion because, as they submit, the mandatory delay will necessarily result in at least two trips before an abortion can be obtained. They contend that this delay will cause added expense for women, especially for those women who live in Northern Michigan or the Upper Peninsula.[33]

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33. See Affidavit of David Arrender Smith, para 6-11. Mr. Smith testified that:

> Of the 34,496 abortions performed [in 1992]:
>
> 3,729 were for residents of the 61 counties not providing [abortion] services at all. [These women] therefore had to have gone elsewhere.
>
> Others were for residents of the 12 counties where fewer abortions were performed (7,943) than there were women receiving them (14,565). This means an additional 6,622 [women] who had to have traveled out-of-county for an abortion.
>
> Adding the above two groups yields a net 10,351 abortions for which the statistics give prima facie evidence that travel was required. This represents 30% of all abortions in the stat, and is the minimum number for those that must have traveled out of county. . . .
>
> North of Saginaw lies two-thirds of the State of Michigan. In that entire area, abortions were provided in exactly six doctors' offices only. However, only one office in Marquette provided any significant number, averaging two abortions per week (105 for the year). The remaining five offices each performed an average of less than 10 per year. Reports of abortions by county of residence show that 1,989 women from the 48 counties north of Saginaw received abortions, but only 153 were performed in that whole territory. The remainder, 1,836 citizens, had to travel at least as far as Saginaw or Grand Rapids to find a free-standing or clinic facility to meet their needs.
>
> Gaining access was especially arduous for citizens from the Upper Peninsula or Michigan. The eight women from Ontonagen County, if they could not afford or could not get an appointment with the one doctor performing abortions with any frequency in the area, had to travel 938 miles, round-trip to Saginaw. For the 75 citizens

Further, this delay, they argue, will force some women into the second trimester of pregnancy.

Defendant responds that the Plaintiff is highly exaggerating the consequences of any 24-hour delay. Defendant argues that, in fact, because of scheduling problems, a 24-hour delay usually occurs anyway. As such, Defendant contends that this mandatory waiting period has "no impact whatsoever" upon the medical risks associated with an abortion, and in fact, it is "appropriate" in order to provide the woman with adequate time to reflect upon her decision.[34]

> from Sault St. Marie, the round trip distance was 390 miles. In all, a total of 121 citizens from the Upper Peninsula could not be accommodated there, and had to travel at least as far as Saginaw. . . .
>
> Travel from the northern end of the Lower Peninsula is almost as arduous. 221 citizens from the counties of Emmet, Cheboyan, Presque Isle, Charlevoix, Antrim, Ostego, Montgomery and Alpena had to travel an average of 317 miles, 6.5 hours round trip, to the closest free-standing facilities in Saginaw. Many have gone even further from access to more numerous or larger facilities in lower counties.
>
> In sum, while fully one-third of patients traveled from another county or from another state to obtain their abortions, the burden of extended travel and/or overnight stays would fall most heavily on two groups: women from Michigan's Upper Peninsula, and women from the northern end of the Lower Peninsula.

Id at 7, 8, 9, 10, and 11 (emphasis in original).

34. Again, Defendant relies on the affidavits of Dr. Bowes and Dr. Hertz. Dr. Bowes has testified that:

> The short-term and long-term risks of induced abortion do not increase substantively in a 24-hour period. Although there is data showing that there is an overall relationship between the duration of pregnancy and the incidence of complications of induced abortion,

Given the heightened standard of review in this case, this Court again finds that the Defendant has failed to meet its burden in showing how the 24-hour waiting period advances a compelling state interest. Defendant has merely produced evidence citing its experts' "opinions" as to why a 24-hour waiting period is "appropriate".

For purposes of inquiring into the constitutionality of the

> the increment of risk increase within a 24-hour period is clinically irrelevant. . . . To put it another way, regardless of the duration of pregnancy, a 24-hour delay will not change the method by which the abortion is performed and will not change the risk of the procedure for the patient.
>
> . . . .
>
> It is important that a patient who is considering an abortion be provided with adequate time to consider the information and options. . . .
>
> Waiting periods are regarded as prudent for individuals making any important decisions about reproductive health. . . .

Affidavit of Watson A. Bowes, M.D., para 4, 7, and 8. Dr. Hertz testified:

> I take issue with and dispute the statement that "the new law's 24-hour mandated delay before a woman can lawfully obtain an abortion will require all women to make at least two trips to a physician in order to secure an abortion." As a physician who has practiced and/or taught obstetrics and gynecology for over twenty-five years, it is my opinion that it is the accepted standard of care in the medical profession that a patient contemplating an abortion--or any other serious medical procedure for that matter--should have at least a day or so after her initial contact with the medical care system to think through her options and the risks involved in the procedure. . . .

Affidavit of Roger H. Hertz, para 3.

24-hour waiting period provision, Defendant's experts' opinions on the "appropriateness" of the waiting period are irrelevant. By enacting the mandatory 24-hour provision, our state legislature has taken a position on the appropriateness of such a period. As our supreme court recently observed:

> [T]here is no constitutional obligation on the state to remain neutral regarding the exercise of [] fundamental rights. The state has a legitimate interest in protecting potential life, and it has a legitimate interest in promoting childbirth.
>
> Our constitution does not require that we have a government without values; it requires only that, in the pursuit of certain values, our government will not improperly interfere with the exercise of fundamental rights.[35]

Therefore, the inquiry here is not whether the 24-hour waiting period is appropriate, good, useful, helpful, needed, or the like. Rather, the crux of the inquiry is whether the waiting period infringes upon the exercise of the right to have an abortion.

Here, the Plaintiffs have presented evidence indicating that the mandatory waiting period actually increases the costs associated with having an abortion. They show that it especially impedes access for women who live north of Saginaw, Michigan. Again, Defendant provides no factual evidence disputing these assertions.

Therefore, this Court finds that the 24-hour waiting period provision is unconstitutional. Based on the evidence presented, we find that enforcement of this provision would inhibit, impede, or infringe upon the exercise of a woman's fundamental right to have

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35. Doe v Department of Social Services, 439 Mich 650, 680-81 (1992).

an abortion, especially for women in Northern Michigan. Accordingly, Plaintiffs motion on this issue is granted.

IV.

Because we have disposed of the issues on the "Headlee Amendment" and right of privacy claims, we do not find it necessary to respond to the parties' remaining arguments.

In sum, this Court finds that 1993 PA 133 is unconstitutional. We find that the new law violates the "Headlee Amendment" in that there have been no funds apportioned to cover the costs necessitated by complying with the new law. We further find that our State Constitution encompasses a right of privacy, which in turn includes the right to an abortion, and that enforcement of the new law will infringe upon the exercise of this right.

As such, this Court grants Plaintiffs motion to the extent previously stated, and accordingly, denies Defendant's motion for the same reasons. Plaintiff shall submit an order consistent with this Opinion.

A TRUE COPY
TEOLA P. HUNTER
WAYNE COUNTY CLERK
BY: DEPUTY CLERK

JUL 15 1994

Dated: _____, 1994

JUDGE JOHN A. MURPHY
John A. Murphy
Circuit Court Judge

Tab 3

Order

Michigan Supreme Court
Lansing, Michigan

May 20, 2022

Bridget M. McCormack,
Chief Justice

164256 & (3)(7)(8)(9)(10)(15)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

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

(GRETCHEN WHITMER, Governor v JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, *et al.*)

SC: 164256

_____/

On order of the Court, the motions for immediate consideration and motions for leave to respond or reply are GRANTED. The Executive Message of the Governor pursuant to MCR 7.308(A)(1) was received on April 7, 2022, requesting that this Court direct the Oakland Circuit Court to certify certain questions for immediate determination by this Court. Having received responses from several county prosecutors, as well as amici briefs, we direct the Governor to file a brief with this Court within 14 days of the date of this order, providing a further and better statement of the questions and the facts. MCR 7.308(A)(1)(b). Specifically, the Governor shall address: (1) whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination; (2) whether there is an actual case and controversy requirement and, if so, whether it is met here; (3) given the infrequent application of the Executive Message process by current and former governors, what is required under MCR 7.308(A) and, specifically, whether the question is of "such public moment as to require an early determination"; (4) whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question; and (5) whether the questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here.

The county prosecutors may file responsive briefs. Amici who have filed briefs with the Court to date are invited to file supplemental briefs addressing the questions identified in this order. Other persons or groups interested in the determination of the

issues presented in this case may move the Court for permission to file briefs amicus curiae. All responsive and amicus curiae briefs shall be filed within 14 days of the Governor's brief.

The Executive Message, motion to intervene, and motion to dismiss remain pending.

BERNSTEIN, J. (*concurring*).

Given the gravity of the issues presented in this case, I believe we should strive to open the courtroom doors to as many voices as possible. In the interest of fairness, I strongly prefer to allow the county prosecutors, as well as any other persons or groups interested in these issues, the same two-week briefing period that we are giving the Governor. While I believe an expedited briefing schedule is warranted under the circumstances, the schedule we have set in our order balances our interest in timely considering these issues while giving everyone a full and fair opportunity to participate.

CAVANAGH, J. (*concurring in part and dissenting in part*).

I join the Court's order granting further briefing in this case on these important threshold procedural questions. I dissent only with regard to the briefing schedule. Given the potential urgency underlying the issues in this case, I would have ordered that the supplemental briefing be completed within two weeks. If the injunction issued by the Court of Claims gives the Governor the relief she seeks, the timing will not matter. If not, and if this Court believes we should grant the Governor's request to authorize the circuit court to certify the questions posed by the Governor in the pending lawsuit, the schedule the majority has set here may leave insufficient time to determine the merits of the case. Although I echo Justice BERNSTEIN's sentiment that we should strive to allow all interested persons the opportunity to have their voices heard, operating on an expedited basis—as we are often called on to do—in no way closes the courtroom doors to any interested voices. Because I believe the Court's order today fails to treat this case with the urgency it deserves, I respectfully dissent from the majority's refusal to expedite this supplemental briefing schedule.

MCCORMACK, C.J., and WELCH, J., join the statement of CAVANAGH, J.

SEAL OF THE MICHIGAN SUPREME COURT · DISCITE JUSTITIAM MONITI · LANSING ·

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 20, 2022

Clerk

p0519