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. 361470

REPLY IN SUPPORT OF COMPLAINT FOR ORDER OF SUPERINTENDING CONTROL

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

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INTRODUCTION

This Court will issue an order of superintending control when "a lower court exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, or [otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*, 273 Mich App 594, 598; 733 NW2d 65, 68 (2007). This case is a paradigm for such an order and this Court's immediate intervention.

As explained in the Complaint for superintending control, the trial court enjoined MCL 750.14, a law that has protected innocent, unborn life in the State for more than 90 years, both before and after ratification of Michigan's 1963 Constitution. But that's not the extraordinary part. The trial court issued its order despite:

- The absence of jurisdiction where, immediately after the underlying lawsuit's filing, Defendant Attorney General Dana Nessel announced she would not defend the law, meaning there were no adverse parties.
- Plaintiffs' lack of standing where, given Defendant Attorney General Dana Nessel's promise that she would never enforce MCL 750.14 against Plaintiffs or anyone else, there was no actual controversy.
- A lack of ripeness, again where there was no threat of enforcement by Defendant Attorney General Dana Nessel against Plaintiffs.
- A case that was moot in every possible way, where this is a pretend controversy, and a judgment against Defendant Attorney General Dana Nessel will have no practical effect vis-à-vis Plaintiffs.
- The absence of any facts that would allow the trial court to fashion a legal ruling in the first instance.
- And the existence of this Court's binding decision in *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104, 108 (1997), which rejected any right to abortion in Michigan's Constitution based on bodily autonomy or integrity, the very ground the trial court used to enter its injunction order.

There's more. The trial court's order purports to bind the county prosecutors who bring this Complaint for superintending control, even though they are not parties to this lawsuit. And the trial-court judge declined to recuse herself even though she (1) litigated the *Mahaffey* case on behalf of Plaintiff Planned Parenthood while working for the ACLU, the same attorneys who represent Planned Parenthood in these proceedings, and (2) continues to make annual contributions to Planned Parenthood, indirectly subsidizing the very litigation she is deciding. The trial-court judge did not even file a response to the Complaint for superintending control on her own behalf but relied on her former law firm and former client to do so, despite this Court's order that "Defendant" file an answer. If these circumstances do not constitute a lower court that "exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, or [otherwise] failed to proceed according to law," *In re Credit Acceptance Corp*, 273 Mich App at 598, then this Court may as well abolish the writ of superintending control altogether.

Planned Parenthood's arguments in opposition to superintending control do not withstand scrutiny and will be addressed seriatim below. But there is one development that warrants early discussion. On the last possible day before the trial court's improper order became unappealable, the Michigan Senate and House were forced to seek intervention and reconsideration of that ruling. As explained in the Legislature's amici brief here, that development does not affect the propriety of this Court's superintending control because the trial court still acted without jurisdiction, and the Legislature has no desire to litigate a case by compulsion. Accordingly, the writ should be granted and the underlying case dismissed.

ARGUMENT

I. Plaintiffs' standing to file a complaint for order of superintending control is clear-cut and certain.

Planned Parenthood expends little energy defending the merits of the Court of Claims's actions and much time attacking Plaintiffs' standing. Answer, pp 3–9. Planned Parenthood's concerns are unfounded. Plaintiffs' standing is clear-cut and certain. As the complaint for order of superintending control explains, it is Planned Parenthood who lacked standing to file the underlying declaratory judgment action because there is no actual controversy, just a mock and hypothetical future one based on multiple contingencies. Compl, pp 27–30.

Planned Parenthood admits that Prosecutors Jarzynka and Becker are "arguably aggrieved by the underlying preliminary injunction, which enjoined them from enforcing MCL 750.14." Answer, p 5. Planned Parenthood does not meaningfully contest their standing. Nor could it. As they are apparently subject to the Court of Claims's unlawful preliminary injunction, Prosecutors Jarzynka and Becker have "'suffered a concrete and particularized injury'" that is caused by "'the actions of the trial court.'" *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 578; 957 NW2d 731 (2020) (*League of Women Voters II*) (quoting *Federated Ins Co v Oakland Cty Road Comm'n*, 475 Mich 286, 291–92; 715 NW2d 846 (2006)).[1]

[1] Planned Parenthood says the Prosecutors should have intervened as defendants in the Court of Claims. Answer, p 7 n5. But the only parties that can intervene as defendants in that court are "the state or any of its departments or officers," MCL 600.6419; *Council of Orgs & Others for Ed About Parochiaid v Michigan*, 321 Mich App 456, 467–470; 909 NW2d 449 (2017). No court has ever held that a county

Viewed through a slightly different lens, Prosecutors Jarzynka and Becker have "shown . . . facts whereby [they] were injured" because they are apparently subject to the Court of Claims's unlawful preliminary injunction. *Beer v City of Fraser Civil Ser Comm'n*, 127 Mich App 239, 243; 338 NW2d 197 (1983). And that gives them "standing to bring a complaint for superintending control." *Id.*

Because Prosecutors Jarzynka and Becker have standing, this Court has jurisdiction to rule on the complaint for order of superintending control. No need exists for Right to Life of Michigan and the Michigan Catholic Conference to show independent standing. That "at least one [Plaintiff] has standing" is enough. *Dodak v State Admin Bd*, 441 Mich 547, 551; 495 NW2d 539 (1993); accord *id.* at 561. This Court "need not consider whether [all Plaintiffs] have standing" to "challenge the lower court['s] decisions." *Horne* v *Flores*, 557 US 433, 446; 129 S Ct 2579 (2009).

Even in federal court, where stricter standing rules apply, only "one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester v Laroe Estates*, 137 S Ct 1645, 1651 (2017). Independent standing is only required when a co-plaintiff "seeks additional relief beyond that which the plaintiff requests." *Id.* And here, Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference all seek the same relief—dismissal of the case for lack of jurisdiction, or (at the least) vacating the preliminary injunction and ordering the trial-court judge's recusal. There is no need for Right to Life of

official is a "state" officer for purposes of Court of Claims jurisdiction. What's more, nothing compels the Prosecutors to seek intervention when a writ of superintending control is an appropriate remedy.

Michigan and the Michigan Catholic Conference to prove their independent standing. *Id.*; accord *Little Sisters of the Poor Saints Peter & Paul Home v Pennsylvania*, 140 S Ct 2367, 2379 n6 (2020).

Even so, Planned Parenthood is wrong to say that Right to Life of Michigan and the Michigan Catholic Conference "are not aggrieved by the preliminary injunction." Answer, p 3. They certainly are.

In fact, Right to Life of Michigan and the Michigan Catholic Conference are the *only* parties who have moved to intervene to defend MCL 750.14's constitutionality in the (actually adverse) actions Governor Whitmer filed against several county prosecutors. 5/4/2022 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Mot to Intervene, *Whitmer v Linderman*, Oakland Cnty Cir Ct No 22-193498-CZ; 4/22/22 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Mot to Intervene, *In re Executive Message*, Mich S Ct. No 164256.

So far, those motions have not been decided based—in large part—on the Court of Claims's preliminary injunction, which the Supreme Court has suggested may preempt the Governor's lawsuit altogether, which in turn led the Circuit Court to stay its case pending further Supreme Court action. 5/20/22 Mich S Ct Order, pp 1–2 (directing the Governor and other interested parties to address "whether the Court of Claims' grant of a preliminary injunction . . . resolves any need for [the] Court" to rule on the Governor's certification request and noting that Right to Life of Michigan and the Michigan Catholic Conference's "motion to intervene . . . remain[s] pending" without decision); 5/24/22 Oakland Cnty Cir Ct Order at 1

(adjourning "Proposed Intervenors' motion pending resolution of the Michigan Supreme Court's recent [briefing] directives").

If this Court vacates the Court of Claims's preliminary injunction—and it should—then Right to Life of Michigan and the Michigan Catholic Conference are substantially more likely to obtain intervention in Governor Whitmer's actions and with it, the ability to defend MCL 750.14's constitutionality in an adverse proceeding. That they have been unable to do so thus far—after months of litigation and filing two motions to intervene and a proposed answer to Governor Whitmer's complaint—is mainly due to the Court of Claims's injunction order. In short, the Court of Claims's actions have caused Right to Life of Michigan and the Michigan Catholic Conference to "'suffer[ ] a concrete and particularized injury.'" *League of Women Voters II*, 506 Mich at 578 (quoting *Federated Ins Co*, 475 Mich at 291). So they have standing in their own right.

Planned Parenthood also contends that Right to Life of Michigan and the Michigan Catholic Conference "lack any cognizable interest separate from that of the public at large, in the question of whether [MCL 750.14] can or cannot be enforced." Answer, p 3. But that goes to the merits of Right to Life of Michigan and the Michigan Catholic Conference's intervention motions and not the harm caused to them by the Court of Claims' improper injunction order, which is the Supreme Court and Court of Claims's refusal to even *consider* the merits of their motions to intervene.

Independently, Right to Life of Michigan and the Michigan Catholic Conference have a unique and cognizable interest in the validity and enforcement of

Michigan's pro-life laws, many of which they have shepherded into existence or defended in court. They have described those efforts in the Supreme Court reply supporting their motion to intervene and will not repeat them here. 5/10/22 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Reply in Supp of Mot to Intervene at 3–4, *In re Executive Message*, Mich S Ct No 164256, Exhibit A.

The state constitutional right to abortion that Planned Parenthood, the Attorney General, and the Court of Claims collectively conjured out of thin air in this non-adverse, non-justiciable case threatens not just MCL 750.14, but *all* of Michigan's pro-life laws, including those that Right to Life of Michigan and the Michigan Catholic Conference have worked diligently to enact and defend. *Id.* In fact, Planned Parenthood's complaint makes this threat plain: it seeks to permanently enjoin any prosecutor in the state "from enforcing or giving effect to MCL 750.14 *and any other Michigan statute or regulation* to the extent that it prohibits abortion." V Compl, p 35, *Planned Parenthood v Attorney General*, Ct of Claims No 22-000044-MM (emphasis added).

Right to Life of Michigan and the Michigan Catholic Conference's interests in upholding state laws that protect innocent, unborn life are second to none. Their unique interest in this action—and in nullifying the Court of Claims's unlawful order, which creates a state constitutional right to abortion—is clear. And the strength of that "interest in the outcome" ensures the "sincere and vigorous advocacy . . . [necessary] to confer standing." *Beer*, 127 Mich App at 243–44.

Because Planned Parenthood's standing arguments all lack merit, this Court should reach the merits of Plaintiffs' request for an order of superintending control and dismissal of the underlying action.

II. Planned Parenthood does not disprove the Court of Claims's clear duty to dismiss the case and violation of law in gainsaying *Mahaffey*.

A. The lack of adversity between the parties is undisputed.

Planned Parenthood admits there was no adversity *between the parties* and that there was no adversarial hearing or briefing *by the parties* regarding whether the Michigan Constitution creates a right to abortion before the Court of Claims found that a right exists and issued a preliminary injunction barring every prosecutor in the state from enforcing MCL 750.14. Answer, pp 2–4. Of course, Planned Parenthood has no choice but to concede a lack of adversity between the parties after admitting below that there had been no "adversarial briefing process where legal arguments on both sides of a constitutional issue are presented." 5/6/22 Pl's Reply to Def's Resp to Pls' Motion for Prelim Inj, p 9, *Planned Parenthood v Attorney General*, Court of Claims No 22-000044-MM. Yet Planned Parenthood urged the Court of Claims to move full speed ahead and issue a preliminary injunction anyway. *Id.* at 12.

Now that the parties' lack of adversity is before *this* Court, Planned Parenthood claims adverse briefing due to a seven-page amicus brief filed by two obstetricians-gynecologists, the substance of which the Court of Claims' order ignored altogether. Answer, pp 2–4 & Ex 1. Planned Parenthood does so even though the proceedings below were exemplified by the Court of Claims' sidelining of

amici and refusal to allow them to participate in any meaningful way, including by excluding anyone who opposed Planned Parenthood's legal arguments from an April 20, 2022, status conference and ejecting amici's counsel John Bursch.

At that status conference, Planned Parenthood now reveals that the non-adverse parties colluded not only to waive a public hearing on the merits of its preliminary-injunction motion, Compl, p 11, but also stipulated that the trial-court judge "should not be disqualified," Answer, p 14, presumably because Planned Parenthood and Attorney General Nessel both wanted a former Planned Parenthood attorney to decide whether to make up a right to abortion in Michigan's Constitution—28 years after the trial-court judge unsuccessfully tried to do so as an advocate in *Mahaffey*. This is the epitome of both a lack of adverse parties and the appearance of a lack of judicial impartiality. Amici, no matter how able, cannot make up for the deficit in adversity between the parties, especially when the trial court ignores and excludes them.

There is no serious argument that the two obstetricians-gynecologists' amicus brief, however valuable, can substitute for a lack of adversity *between the parties*, which would have naturally resulted in *the parties* offering adversarial briefing and argument on the merits. Importantly, the Court of Claims would have been obligated to consider and address arguments raised by a *party*, whereas it felt free to ignore and exclude *amici* Right to Life of Michigan, the Michigan Catholic Conference, and two obstetricians-gynecologists.

Notably, the Court of Claims did not appoint an amicus to brief and argue that there is no right to abortion in the Michigan Constitution, giving that amicus

party-like status. And the Attorney General admitted (correctly) that doing so would *still not solve* the lack of adversity or actual controversy at the outset of Planned Parenthood's case. 5/5/22 Def's Resp to Pls' Mot for Prelim Inj at 10 n5, *Planned Parenthood v Attorney General*, Ct. of Claims No 22-000044-MM (citing *League of Women Voters of Mich v Secretary of State*, 506 Mich 905; 948 NW2d 70 (2020) (*League of Women Voters I*) (VIVIANO, J., concurring)).

Nor is the lack of adverse briefing and argument by the parties below the only jurisdictional problem, as Planned Parenthood imagines. Answer, pp 2–4. If adversity had existed between the parties, the Court of Claims proceedings would have traveled an entirely different path. An adverse defendant would have:

- Filed a motion to dismiss, as opposed to agreeing with Planned Parenthood that "[t]he legal issues in this case are important." 5/5/22 Def's Resp to Pls' Mot for Prelim Inj, p 10, *Planned Parenthood v Attorney General*, Ct of Claims No 22-000044-MM.

- Refused to offer Planned Parenthood advice on how to create adversity and ensure a "defensible result" that was desired by both parties. *Id.*

- Demanded a public hearing on the preliminary-injunction motion, instead of stipulating with Planned Parenthood that no public hearing was necessary, even though neither party defended MCL 750.14's constitutionality on the merits. Compl, p 11.

- Filed a motion for recusal, rather than ignoring the objective appearance of impropriety caused by the trial-court judge presiding over this action and writing around the precedent she litigated and lost on behalf of the plaintiff (*Mahaffey*) and furtively stipulating with Planned Parenthood that she "should not be disqualified." Answer, p 14.

- And appealed the Court of Claims's preliminary injunction ruling in place of the defendant trumpeting her defeat, refusing to appeal, and seeking to insulate the Court of Claims' order from this Court's review. Compl, p 22.

Though Planned Parenthood cites *United States v Windsor*, 570 US 744; 133 S Ct 2675 (2013), and *League of Women Voters of Michigan v Secretary of State*, 333 Mich

App 1; 959 NW2d 1 (2020), in support of adversity (without explanation), neither of those cases is remotely similar to this one. Answer, p 10.

Planned Parenthood does not respond to Plaintiffs' detailed explanation that the non-adverse defendant in *Windsor* (*i.e.*, the United States) refused to give its legal agreement with the plaintiff (*i.e.*, Windsor) any practical effect and refused to refund the estate taxes both parties agreed should not have been paid. Compl, p 18. There was adversity and an actual controversy because the plaintiff was financially harmed, the defendant refused to remedy that harm in any real-world way, and intervenors (*i.e.*, the Bipartisan Legal Advisory Group of the House of Representatives) supplied the opposing legal arguments that the defendant refused to make. *Windsor*, 570 US at 754, 757–59, 761.

This case is nothing like *Windsor*. Planned Parenthood and its lead abortionist have suffered no actual harm. No one has threatened to prosecute them; quite the opposite, Defendant Attorney General Dana Nessel has given her legal agreement with Planned Parenthood that the Michigan Constitution creates a right to abortion and that MCL 750.14 is unconstitutional sweeping real-world effect: she refuses to enforce the statute in *any circumstance* against *anyone*.

Because the Court of Claims lacked jurisdiction, the Legislature did not move to intervene or present adverse legal arguments on the merits until *after* the Court of Claims issued its preliminary-injunction order. The Legislature did so "on the last day for seeking reconsideration—not because it wanted to inject itself into the lower court proceedings" but to prevent the order from becoming "appeal proof."

Amici Br. of Mich House of Representatives & Mich Senate, p 2. Not a single factor that created adversity or an actual controversy in *Windsor* is present here.

Even more inapposite is *League of Women Voters* because no one raised the lack of adversity between the parties, and this Court did not address it. But what this Court's opinion holds is singularly unhelpful to Planned Parenthood's efforts to insert a right to abortion in the Michigan Constitution in a non-adverse case. In no uncertain terms, this Court "reject[e]d the ability of an executive-branch official" to "effectively declare a properly enacted law to be void by simply conceding the point in litigation." *League of Women Voters*, 333 Mich App at 11–12. That is exactly what the Attorney General and Planned Parenthood have colluded to do here—with the Court of Claims's knowledge and participation. Yet there is one crucial difference: the Attorney General here *agreed* with Right to Life of Michigan and the Michigan Catholic Conference (as amici below) that adversity is lacking between the parties, and that the Court of Claims therefore lacked jurisdiction. Compl, pp 11–16. If that had been the case in *League of Women Voters*, this Court would likely have addressed the lack of adversity and dismissed the case for lack of jurisdiction.

What's more, in concurring in the Supreme Court's refusal to reconsider the denial of leave to appeal this Court's judgment in *League of Women Voters*, Justice Viviano noted the lack of adversity between the parties and explained that courts lack jurisdiction when "no honest dispute exists," "both sides seek the same result," and the litigation is merely "a friendly scrimmage brought to obtain a binding result that both sides desire." *League of Women Voters I*, 506 Mich at 70–72 (VIVIANO, J.,

concurring). His opinion *in the same case* Planned Parenthood cites succinctly explains why jurisdiction is lacking here. Answer, p 10.

Planned Parenthood's real argument is not that there was meaningful adversity between the parties below but that no adversity is needed. It contends that *any* "official-capacity suit" against the state that "challeng[es] the constitutionality of a duly enacted state law" is justiciable. Answer, p 10. But if that were true, the Supreme Court's explanation of why adversity and an actual controversy existed in *Windsor* would have been completely unnecessary. So it is not clear why Planned Parenthood cites *Windsor* at all.

What is clear is that if the defendant in *Windsor* (*i.e.*, the United States) had refused to enforce the Defense of Marriage Act against the plaintiff (*i.e.*, Windsor), as the Attorney General refuses to enforce MCL 750.14 against Planned Parenthood, the U.S. Supreme Court would have held there was no adversity between the parties and no jurisdiction. *Windsor*, 570 US at 759 (holding that "there is sufficient adverseness and an 'adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party'" (quoting *INS v Chadha*, 462 US 919, 940 n12; 103 S. Ct. 2764 (1983))).

Nor does Planned Parenthood provide any authority to support its argument that there is an official-capacity-suit exception to the settled rule that a justiciable declaratory-judgment action must include "an *adverse interest* necessitating a sharpening of the issues raised." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 546; 904 NW2d 192 (2017) (emphasis added and quotation omitted); accord *League of Women Voters I*, 606 Mich at 71 (VIVIANO, J., concurring)

(recognizing that it is "the parties' competing interests [that] lead to arguments that sharpen the issues"). But see Answer, p 10.

Planned Parenthood merely proposes a disagreement between the parties on the scope of relief, namely, an order enjoining future Attorney Generals, as well as current and future county prosecutors, from enforcing MCL 750.14. Answer, pp 10–11. That is irrelevant to the validity of the Court of Claims's jurisdiction and preliminary-injunction order. What matters is that "[o]n the central legal issue in this case, the parties are companions, not opponents" and "this cooperation deprives courts of the adversarial back-and-forth required to fully and fairly decide" even relatively "small" issues—let alone major questions of vital importance, such as whether the Michigan Constitution creates a right to abortion. *League of Women Voters I*, 506 Mich at 72 (VIVIANO, J., concurring).

At base, Planned Parenthood simply misreads *Windsor*. Answer, p 10. The U.S. Supreme Court's adversity holding was two-fold. It was not enough that an executive official refused "to provide the relief sought." *Windsor*, 570 US at 759. That same official also had to "continue[ ] to abide by the statute" and, even more specifically, "intend[ ] to enforce the challenged law against" the plaintiff for sufficient adversity to exist. *Id.* at 758–59 (quotation omitted).

In sharp contrast here, Defendant Attorney General refuses to abide by MCL 750.14 and declines to enforce the statute against Planned Parenthood or anyone else. Compl, pp 9–12, 15–16. So adversity between the parties is lacking and the only legitimate path for a court to take is dismissing Planned Parenthood's case for lack of jurisdiction. See generally *Anway v Grand Rapids Ry Co*, 211 Mich 592; 179

NW 350 (1920). Because the Court of Claims refused to do so, this Court's intervention is necessary.

B. Planned Parenthood's arguments merely confirm that an actual, ripe, and non-moot controversy is absent and that it lacks standing to file suit.

Planned Parenthood does not directly address standing, ripeness, or mootness—or contest any of Plaintiffs' detailed explanations of why no actual, ripe, and non-moot controversy exists. Compl; pp 27–35. And the trial-court judge, the defendant to this action, failed to respond to the complaint and this Court's May 25, 2022, order directing her to file an answer, relying instead on her former client, Planned Parenthood, to defend her. All this shows that (a) the Court of Claims's lack of jurisdiction is clear, (b) the trial court's failure to dismiss Planned Parenthood's lawsuit is indefensible, and (c) this Court should immediately issue an order directing the Court of Claims to dismiss the case.

"When considering whether courts may properly exercise judicial power to decide an issue, 'the most critical element' is the 'requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute.'" *LaFontaine Saline Inc v Chrysler Grp LLC*, 298 Mich App 576, 589; 828 NW2d 446 (2012), *vacated on other grounds*, 496 Mich 26; 852 NW2d 78 (2014). "[A] court may not decide moot questions in the guise of giving declaratory relief, because moot cases present only abstract questions of law that do not rest upon *existing facts or rights*." *PT Today, Inc v Comm'r of the Office of Fin and Ins Services*, 270 Mich App 110, 127; 715 NW2d 398 (2006) (emphasis added). "The existence of an 'actual controversy' is a condition precedent to the invocation of

declaratory relief." *Id.* "When there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 545; 904 NW2d 192 (2017). This entire case is based upon "abstract questions of law," and none of the rights asserted by Planned Parenthood were "existing" at the time it filed its complaint.

Rather than addressing why the action involves "a present legal controversy, not one that is merely hypothetical or anticipated in the future," *League of Women Voters II*, 506 Mich at 586 (quotation omitted), Planned Parenthood emphasizes its suit's speculative and contingent nature. Planned Parenthood argues that "[w]ithout [the Court of Claims's] injunction, [MCL 750.14] *could* become enforceable when the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization* (US Docket No. 19-1392) just *weeks or days* from now." Answer, p 1 (emphasis added).

That the U.S. Supreme Court *might* do something Planned Parenthood does not like *in the future* does not create an actual controversy now. And if the U.S. Supreme Court *does* do something, Michigan courts stand ready to address any constitutional issues in an actual dispute with adverse parties. Quite simply, "[t]here is no specific circumstance that [Planned Parenthood] claim[s] should be different," either when it filed suit or at present. *League of Women Voters II*, 506 Mich at 588. And that shows an actual controversy is missing here.

As a result, no declaratory judgment is "*needed* to guide [Planned Parenthood's] future conduct. [Planned Parenthood] only asks for a declaratory judgment because it *perhaps may be needed* in the future should" a series of hypothetical and

contingent future events occur. *Id.* at 586 (emphasis added); accord Compl, pp 28–32. Planned Parenthood therefore does "not meet the requirements of MCR 2.605, [and it does] not have standing." *League of Women Voters II*, 506 Mich at 587.

The Court of Claims action is also unripe for judicial decision and moot, jurisdictional factors that are also incorporated into MCR 2.605's declaratory-judgment requirements. *Id.* at 583 n31. No one knows (a) what the final *Dobbs* opinion will say, (b) how it will impact *Roe v Wade*, 410 US 113; 93 S Ct 705 (1973), (c) what limits it will contain, (d) what prosecutors will do in response, or (e) how Michigan courts will react. Compl, pp 28–33. Planned Parenthood's case rests on a chain of "hypothetical future events." *Oakland Co v Michigan*, 325 Mich App 247, 265 n 2; 926 NW2d 11 (2018), that "may not occur as anticipated, or may not occur at all," *Citizens Protecting Mich Const v Sec of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). And that is the definition of a case that "is not ripe." *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013).

In order for a case to not be moot, there must be an "actual controversy." "Whether a case is moot is a threshold question that we address before reaching the substantive issues of a case." *Gleason v Kincaid*, 323 Mich App 308, 314; 917 NW2d 685 (2018) (citation omitted). According to the Supreme Court, ""[i]t is universally understood by the bench and bar ... that a moot case is one which seeks to get a judgment on a *pretended controversy*, when in reality there is none, or a decision in advance about a right *before it has been actually asserted and contested*, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then *existing controversy*. *League of Women Voters of*

Mich v Sec'y of State, 506 Mich 561, 580; 957 NW2d 731 (2020) (citing *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920)) (emphasis added).

Planned Parenthood's case is moot because there is no real-life "controversy" regarding MCL 750.14's scope or enforceability, just a "pretend[ ]" one. *League of Women Voters II*, 506 Mich at 580 (quotations omitted); accord Compl, pp 32–35. The limiting constructions imposed by *In re Vickers*, 371 Mich 114; 123 NW2d 253 (1963); *People v Bricker*, 389 Mich 524; 208 NW 172 (1973); and *People v Higuera*, 244 Mich App 429; 625 NW2d 444 (2001), are unchanged. No one currently disputes them. So the Court of Claims's injunction has no "practical legal effect" and does no real-world work. *League of Women Voters II*, 506 Mich at 580 (quotation omitted). Experience proves this point: after the injunction, nothing in Michigan changed. All that Planned Parenthood obtained is "a decision in advance about [an asserted state constitutional] right" to abortion. *Id.* (quotation omitted).

It is also important to note that to avoid mootness, the "practical legal effect" is required to "*a then existing controversy*." *Id*. (emphasis added). It is impossible to have a "practical legal effect" on something that does not exist. In Planned Parenthood's case, since no controversy exists, it is impossible for this case to have a "practical legal effect" on anything. Arguing that a judgment of this Court may have a "practical legal effect" on some controversy in the future is insufficient. Justiciability required a controversy on the day the complaint was filed and no such controversy exists.

Planned Parenthood makes no allegations in its Court of Claims Complaint that a single woman has asserted a right to abortion, or that such an assertion has

been contested. Again, it is already established law that no woman in Michigan can be charged for having an abortion, or even assisting in her own abortion, under MCL 750.14. *In re Vickers*, *supra*. Even if *Roe* were overturned today, *In re Vickers* would still be the law of the land, and no woman in Michigan could be charged with a crime under MCL 750.14 for having an abortion.

Planned Parenthood tries to dodge the straightforward conclusion that jurisdiction is lacking with arguments about the *future potentiality* of harm to abortionists and women seeking them out. It speculates that (a) abortionists could be prosecuted six years down the road by a future Attorney General, (b) abortion could become unavailable to women statewide, and (c) county prosecutors might seek to enforce MCL 750.14 lawlessly. Answer, pp 1–2, 10–11.

Though courts may "reach[ ] issues before actual injuries or losses have occurred, there still must be a present legal controversy, not one that is merely *hypothetical or anticipated in the future*." *League of Women Voters II*, 506 Mich at 586 (emphasis added and quotations omitted). The rules do not change, as the Court of Claims seemed to presume, simply because advocates dream up a parade of horribles about future abortion access. "A controversy is justiciable, such that a declaratory judgment action may be maintained, when present legal rights are affected, not when a controversy is *merely anticipated*." *Id.* at 586 n33 (quoting 26 C.J.S., Declaratory Judgment, § 28, p. 66) (emphasis added and alteration omitted).

There's also good reason to doubt that any of Planned Parenthood's imagined harms are hypothetically possible or even relevant here. Certainly, none are

"imminent" and capable of establishing an "actual controversy." *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 293 Mich App 506, 516; 810 NW2d 95 (2011).

First, the Michigan Constitution forbids the *ex post facto* application of criminal laws. Const. 1963, Art. I, § 10; accord *People v Harvey*, 174 Mich App 58, 60–61; 435 NW2d 456 (1989); *People v Moon*, 125 Mich App 773, 777; 337 NW2d 293 (1983). And that is exactly what Planned Parenthood contends *might* happen to abortionists under *future* Attorney Generals who *might* enforce MCL 750.14 against abortionists for actions taken while abortion is legal. Answer, pp 1–2, 10–11. Such theoretical future harm is implausible and unpersuasive.

Second, the argument that MCL 750.14 *might someday* render abortions unavailable statewide—absent an injunction—is fantastic at best. Before the Court of Claims issued a preliminary injunction, the Attorney General and seven county prosecutors trumpeted their belief that MCL 750.14 violates the Michigan Constitution and pledged not to enforce the statute. Compl at 9–12, 15–16.[2] If this Court dissolves the injunction and orders the Court of Claims to dismiss the case, the Attorney General and these seven prosecutors' stance on MCL 750.14 would remain unchanged. So *even if* the U.S. Supreme Court overturns *Roe v Wade*, no abortionist prosecutions would be viable in several of the State's most populous counties, including Wayne, Oakland, Genesee, Washtenaw, and Ingham.

[2] Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose, news release issued April 7, 2022, available at https://bit.ly/3zHtFXg (accessed June 15, 2022).

Planned Parenthood offers no reason why it has standing to invoke women's interest in accessing abortion in the first place. Answer, p 2. No abortion-minded woman is a plaintiff. MCL 750.14 does not regulate women seeking abortions, it applies *only* to those who perform them. *In re Vickers*, 371 Mich at 117–18. Generally, a plaintiff's standing is limited to "assert[ing] his own legal rights and interests" and does not extend to "the legal rights or interests of third parties." *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) (quotations omitted). Normal standing rules would confine Planned Parenthood's interests to those of abortionists, not the women who procure them.

Allowing Planned Parenthood to exercise third-party standing would be particularly improper here. Planned Parenthood seeks to enshrine a right to abortion in the Michigan Constitution to protect abortionists, not the women who seek them out. What's more, not everyone who is capable of being an abortionist wants to end innocent, unborn lives—some healthcare entities and licensed medical providers have religious or moral objections to abortion. In fact, two obstetricians-gynecologists filed an amicus brief in the Court of Claims opposing Planned Parenthood's arguments because they believe "that all direct abortions performed with the object and intent to terminate a pregnancy are contrary to natural moral law, the wellbeing of women, and the good of society." Ex 1 to Answer, p iii.

If Planned Parenthood succeeds in establishing a state constitutional right to abortion grounded in bodily integrity—which the Court of Claims labeled "a right of complete immunity; to be let alone," 5/17/22 Op & Order at 17, *Planned Parenthood v Attorney General*, Ct of Claims No 22-000044-MM (quotation omitted)—healthcare

entities and licensed providers in Michigan could be *forced* to become abortionists (like Planned Parenthood) in violation of their religious or moral convictions.

Given these conflicts of interest, third-party standing is inappropriate. E.g., *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 15–17; 134 S Ct 1377 (2004), abrogated on other grounds by *Lexmark Int'l, Inc v Static Control Components, Inc*, 572 US 118, 127; 134 S Ct 1377 (2014). This Court should reject Planned Parenthood's covert attempt to invoke it. Answer, p 2.

Third, the Court of Claims's injunction against the Attorney General (the sole defendant) is incapable of "bind[ing] county prosecutors," though it purports to do so. Answer, p 11. Plaintiffs have already explained why, Compl, pp 21, 23, and Planned Parenthood (again) offers no response, Answer, p 11. Yet Michigan law is clear that prosecuting attorneys have "the right to exercise broad discretion" in deciding *whether* to prosecute and *what* criminal charges should be brought. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972); *accord People v Gillis* 474 Mich 105, 141 n19; 712 NW2d 419 (2006); *People v Williams*, 244 Mich App 249, 254; 625 NW2d 132 (2001). The Attorney General, admittedly, cannot supervise such decisions.[3] Compl, p 21.

The only way for an injunction against Attorney General Nessel to operate against *non-party* county prosecutors, under MCR 3.310(C)(4), is if they were acting

[3] To the extent a federal court suggests that Michigan law is to the contrary, Answer at 7 n5, federal courts' reading of state law is "obviously not binding on state authorities," *Broadrick v Oklahoma*, 413 US 601, 617 n16; 93 S Ct 2908 (1973). This Court and the Supreme Court are the "ultimate expositors of state law." *Mullaney v Wilbur*, 421 US 684, 691; 95 S Ct 1881(1975).

in concert or participation with the Attorney General. No one imagines such coordinated action here. What's more, if all prosecuting attorneys in Michigan were acting *in concert* with the Attorney General and refusing to enforce MCL 750.14 against abortionists, they would pose *no threat* to those performing abortions at Planned Parenthood or elsewhere. There is no basis for enjoining every prosecuting attorney in Michigan from enforcing the statute, as the Court of Claims has done. Compl, pp 21, 23; accord *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 1; 753 NW2d 595 (2008) (recognizing that "injunctive relief . . . issues only when . . . there exists a real and imminent danger of irreparable injury") (quotation and alteration omitted).

C. The Legislature's recent intervention does not solve the Court of Claims's lack of jurisdiction before or since.

On June 6, 2022, the Michigan House of Representatives and Michigan Senate ("the Legislature") filed a motion to intervene as a defendant in Planned Parenthood's Court of Claims action, along with a motion for reconsideration of the Court of Claims's preliminary-injunction order.

The Legislature agrees fully with Plaintiffs here that Planned Parenthood's underlying lawsuit is nonjusticiable because there is no adversity or actual controversy, Planned Parenthood lacks standing, its constitutional claims are not ripe, and, consequently, this Court should order Planned Parenthood's case dismissed. 6/13/22 Amicus Br of the Mich House of Representatives & Mich Senate, pp 1–12, *In re Jerard M. Jarzynka*, Mich Ct. App No 361470. Indeed, the Legislature did not "want[ ] to inject itself into the lower court proceedings, but [concluded]

it had no choice" because the Court of Claims refused to dismiss the suit for lack of jurisdiction and would otherwise "ent[er] . . . an unlawful permanent injunction that Planned Parenthood *and* the Attorney General would support" and try to make "appeal proof." *Id.* at 2.

On June 15, 2022, the Court of Claims granted the Legislature's motion to intervene. That same day, the Court of Claims denied the Legislature's motion for reconsideration, holding its "justiciability arguments . . . moot, given the [newly minted] presence in this litigation of the intervening defendants, whose interests are demonstrably adverse to those of the plaintiff." 6/15/22 Order Den Intervening Defs Mot for Recons, p 2, *Planned Parenthood v Attorney General*, Ct of Claims No 22-000044-MM.

"Planned Parenthood, the Attorney General, and Judge Elizabeth Gleicher's shared goal of creating a [state constitutional] right to abortion," all "without a single adversarial proceeding," eventually forced the Legislature to intervene. 6/13/22 Amicus Br of the Mich House of Representatives & Mich Senate, p 2, *In re Jerard M. Jarzynka*, Mich Ct. App No 361470. But that intervention does not solve any jurisdictional problems.

The Legislature was forced to make a last-ditch effort to stop the collusion *after* the Court of Claims acted without jurisdiction and fabricated a right to abortion and issued an injunction, and the Attorney General then refused to appeal. That does not change the fact that there was no adversity between the parties at the *outset* of Planned Parenthood's case. And nothing had changed by the time the Court of Claims issued a preliminary injunction. *Id.* at 11.

Importantly, jurisdictional matters like adversity and standing are assessed "at the time the complaint is filed." *League of Women Voters II*, 506 Mich at 595 n54. Both requisites were obviously lacking when Planned Parenthood filed its complaint in the Court of Claims. Nothing that happened later—including the Legislature's intervention to prevent a miscarriage of justice and a permanent injunction order against the State—can retroactively create adverse parties or an actual controversy *two months before* when Planned Parenthood chose to sue only the Attorney General—a defendant it knew was not adverse.

Just as "joinder properly arises only when jurisdiction otherwise exists" and cannot be leveraged to "vest a court with jurisdiction," *Bowes v Int'l Pharmakon Labs, Inc*, 111 Mich App 410, 415; 314 NW2d 642 (1981), intervention is proper only when a court *already* has jurisdiction and cannot create it. The Sixth Circuit has made this restriction crystal clear, explaining that:

> Intervention cannot, as a general rule, create jurisdiction where none exists. Intervention "presuppose[s] an action duly brought"; it cannot "cure [the] vice in the original suit" and must "abide the fate of that suit." *United States ex rel. Tex. Portland Cement Co. v. McCord,* 233 U.S. 157, 163–64, 34 S.Ct. 550, 58 L.Ed. 893 (1914). As such, a court requires an already-existing suit within its jurisdiction as a prerequisite to the "ancillary proceeding" of intervention. *Horn v. Eltra Corp.,* 686 F.2d 439, 440 (6th Cir.1982); *see also Kelly v. Carr,* 691 F.2d 800, 806 (6th Cir.1980) ("[I]ntervention presumes a valid lawsuit in a court of competent jurisdiction."). *See generally* 7C Wright, Miller & Kane, Federal Practice and Procedure § 1917 (3d ed.1998). In the absence of jurisdiction over the existing suit, a district court simply has no power to decide a motion to intervene; its only option is to dismiss. [*Vill of Oakwood v State Bank & Trust Co*, 481 F3d 364, 367 (CA 6, 2007)]

The Legislature's intervention plays no role in the jurisdictional inquiry. The trial court's issuance of an unlawful order to pressure legislative intervention "cannot

cure the vice in the original suit and must abide the fate of that suit." *Id.* (quotations and alteration omitted). Thus, Planned Parenthood cannot rely on the Legislature's subsequent intervention as a party in the Court of Claims litigation to retroactively establish adversity, standing, or any other element of justiciability in the first place.

Additionally, the merits of Plaintiffs' standing, ripeness, and mootness arguments are unaffected by the Legislature's intervention. The hypothetical and contingent nature of the controversy, the suit's prematurity, and lack of any real-world impact remains the same. The Legislature agrees on these points and joins Plaintiffs' call for this Court to "remedy the lower court's errors, grant [their request] for superintending control, vacate the [preliminary-injunction] Order, and dismiss the Planned Parenthood action for lack of jurisdiction." 6/13/22 Amicus Br of the Mich House of Representatives & Mich Senate at 12, *In re Jerard M. Jarzynka*, Mich Ct. App No 361470.

In sum, the Legislature's intervention has no impact on the Court of Claims's jurisdiction and supports the merits of Plaintiffs' request for an order of super-intending control.

D. Planned Parenthood cannot sidestep this Court's published and binding *Mahaffey* decision.

This Court resolved the constitutional question Planned Parenthood posed below in its published and binding (post-1990) decision in *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104 (1997). Plaintiffs' complaint

explains that point in detail, Compl, pp 35–39, but Planned Parenthood fails to engage their arguments once again.

Instead, Planned Parenthood claims—without citing authority—that *Mahaffey* is limited to its facts; specifically, that *Mahaffey* addressed a state constitutional right to abortion rooted in privacy and nothing else. Answer, p 12. But, until now, that is not how *anyone*—including Planned Parenthood and the trial-court judge—understood *Mahaffey*. Compl, p 6. No impartial adjudicator would deem *everyone else* wrong and Planned Parenthood—who pushed a right to abortion in *Mahaffey*, lost, and now seeks a "do over"—correct. Yet that is what the Court of Claims did.

Reaching that unprecedented conclusion required the Court of Claims (and Planned Parenthood) to ignore:

- *Mahaffey*'s broad language holding that (a) "the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right," 222 Mich App at 339, and (b) "neither application of traditional rules of constitutional interpretation nor examination of Supreme Court precedent supports the conclusion that there is a right to abortion under the Michigan Constitution," *id.* at 334. Compl, pp 36–37.

- *Mahaffey*'s analysis of (a) the Michigan Constitution and the associated ratification debates as a whole, (b) the history of Michigan abortion law, (c) essentially the same electorate that ratified the Constitution rejecting abortion advocates' bid to amend MCL 750.14, and (d) Michigan's strong public policy opposing abortion. 222 Mich App at 335–37; Compl, pp37–38

- This Court's recognition two years later that *Mahaffey* "held that the Michigan Constitution does not provide a right to end a pregnancy," *Taylor v Kurapati*, 236 Mich App 315, 347; 600 NW2d 670 (1999), and the acknowledgment by a Justice from a sister state that *Mahaffey* "found no right to an abortion at all in [Michigan's] constitution, *Planned Parenthood of the Heartland v Reynolds ex rel State*, 915 NW2d 206, 254 n10 (Iowa 2018) (Mansfield, J., dissenting). Compl, p 6.

Planned Parenthood is wrong in saying that "[t]he right to bodily integrity was not before the Court of Appeals in *Mahaffey*." Answer, p 12. Throughout their filings and argument in the trial court in that case—made by their co-counsel who now sits as judge on the underlying action here—the *Mahaffey* plaintiffs grounded their position not just on an asserted privacy-based right to abortion but on broader notions of substantive due process. E.g., Exhibit B, 3/10/94 Complaint, ¶¶ 12-13 (Count I – Right to Privacy), *Id*, ¶¶ 14-17 (Count II – Due Process) (referencing "a woman's fundamental right to reproductive choice" and "constitutionally protected right of reproductive choice"); Exhibit C, 3/18/94 Motion for Preliminary Injunction & Brief in support; Motion, ¶¶ 3-4 (Count I alleges violation of "the health care professional plaintiffs' patients' generic privacy rights under the Michigan Constitution," while Count II alleges violation of their "substantive due process rights under Mich Const 1963, Art 1, § 17"), brief, p 6 ("[t]he statute at issue involves constitutionally protected rights of women and their doctors to obtain medical care and exercise the right of reproductive choice…."); Exhibit D, 5/11/94 Plaintiffs' Brief in support of MSD, pp 14-15 ("The Michigan Constitution independently protects these *rights* of privacy *and reproductive choice* as fundamental") (emphasis added); *Id.* at 19 ("*The Michigan 'Informed Consent' Law Violates the Michigan Constitution's* ***Rights*** *to Privacy* ***and Due Process***" (italics in original; boldface added).

Indeed, at oral argument on the *Mahaffey* plaintiffs' motion for summary disposition, counsel portrayed as coextensive the privacy and due-process bases for their claimed "right to abortion":

> THE COURT: Excuse me. Does it make a difference whether or not we conclude that abortion would be a fundamental right stating it directly that way as opposed to the right to privacy being a fundamental right?
>
> MS. GLEICHER: I believe it makes absolutely no difference, Your Honor. That, in fact, is our argument as it derives from the Michigan Constitution.
>
> I think there can be no serious dispute here but that the Michigan Constitution encompasses a fundamental right to privacy amongst our citizenry, and abortion rights are similar to many, many other privacy rights that must derive from that guarantee. The other rights are the obvious ones, the right to make contraceptive choices, the right to make choices involving intimate decisions among married people [*sic*] as to who one will marry, the whole constellation of rights that the Courts have described. I believe that's correct.
>
> If there is a fundamental right to privacy, there is a fundamental right by definition to abortion in this State.
>
> Let me go to undue burden. Does that answer your question?
>
> THE COURT: Yes. [Exhibit E, TR 6/10/94, pp 13-14.]

In its ruling, the *Mahaffey* trial court surveyed numerous provisions of the Michigan Constitution's Declaration of Rights, concluding that a constitutional right to privacy, coterminous with a "right to personal liberty," existed and "encompass[es] 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." Exhibit F, 7/15/94 Opinion, pp 14-15.

In their brief to this Court, the *Mahaffey* plaintiffs defended the trial court's ruling as establishing a direct and fundamental right to abortion. Exhibit G, 4/14/95 Brief in Docket No. 177765, p 17 ("…it is beyond dispute that Michigan's constitution will recognize a woman's fundamental right to abortion"). And of

course, this Court flatly rejected that view. *Mahaffey*, 222 Mich App at 339 ("the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right").

Nothing about *Mahaffey*'s sweeping constitutional analysis suggests that its holding is limited to an abortion right grounded in privacy. That is certainly not how this Court—or seemingly any other—has understood it. Nor is it how the Mahaffey plaintiffs and their counsel framed and argued their case. Given the clear breadth of *Mahaffey*'s holding, the Court of Claims judge here—who was intimately familiar with how she had argued and lost *Mahaffey*—was obliged to apply *Mahaffey* and reject Planned Parenthood's constitutional claims without further analysis. That the Court of Claims judge did the opposite by fabricating a right to abortion and enjoining MCL 750.14's enforcement violates MCR 7.215(C)(2) and foundational principles of *stare decisis*. Compl, p 38. That ruling presents an independent basis to grant Plaintiffs' request for an order of superintending control.

Even if the Court of Claims identified a slight difference between the arguments Planned Parenthood advanced in *Mahaffey* and those it presses here (there are none that matter), it makes no difference. *Stare decisis* applies equally to a lawsuit "that presents the same *or substantially similar issues* as a case that a[ ] panel of this Court has decided." *Enbridge Energy, LP v State*, 332 Mich App 540, 554; 957 NW2d 53 (2020) (emphasis added). As an inferior court, the Court of Claims was duty-bound to follow *Mahaffey*. But it did not.

This Court should step in, exercise superintending control, and dismiss the underlying case. Compl, pp 5–7, 35–39. Even Governor Whitmer—who not only

shares Planned Parenthood's beliefs and goals, but also sued to overturn *Mahaffey*—has admitted that *Mahaffey*'s holding covers the entire Michigan Constitution and is binding on this Court and the Court of Claims. Compl, p 7; 4/7/22 Br in Supp of Gov's Exec Message, p 11, *In re Executive Message*, Mich S Ct No 164256. Advocates on both sides of the debate accept this reality. The only holdouts seem to be Planned Parenthood and the trial-court judge who litigated *Mahaffey* on Planned Parenthood's behalf and lost.

III. Plaintiffs lack an adequate legal remedy and Planned Parenthood's bids to invent one fall flat.

Planned Parenthood substitutes this Court's straightforward test for determining whether an "adequate legal remedy" is available for hoops that have no basis in MCR 3.302 or any Michigan precedent. Answer, pp 3–9.

To obtain an order of superintending control, the plaintiff must show "the absence of an adequate legal remedy." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 246; 776 NW2d 145 (2009) (quotation omitted); accord MCR 3.302(B) ("If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed.").

Michigan Courts consider a remedy adequate if it is "plain, speedy, [and] adequate," *Chrysler Corp v WCAB*, 174 Mich App 277, 279; 435 NW2d 450 (1988), "practical, efficient or commonsense," *Matter of Hague*, 412 Mich 532, 547; 315 NW2d 524 (1982), or "just as quick as an order for superintending control," *Chrysler Corp v Dep't of Civil Rights*, 117 Mich App 95, 103; 323 NW2d 608 (1982).

Courts generally begin by asking whether the plaintiff has "the available remedy of an appeal," *Fort v City of Detroit*, 146 Mich App 499, 503; 381 NW2d 754, 756 (1985), or the "right to appeal," *Beer*, 127 Mich App at 243. If the answer is "no," courts usually conclude, without much further ado, that the plaintiff lacks an adequate legal remedy. MCR 3.302(D)(2) ("When an appeal in the Supreme Court, the Court of Appeals, or the circuit court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.").

Because Plaintiffs are not parties to the Court of Claims action, it could not be plainer that they lack (a) the ability to appeal and (b) access to any other adequate remedy. Indeed, with regard to Right to Life of Michigan and the Michigan Catholic Conference, Planned Parenthood agrees they could not intervene in the Court of Claims, so as to appeal its ruling. Answer, p 7 n5. Plaintiffs are uniquely harmed by the Court of Claims's lawless actions and have standing. *Supra* Part I. Yet they are not parties to the litigation. Plaintiffs *only* plain and speedy remedy was to file a complaint for order of superintending control in this Court, which is exactly what they did.

Planned Parenthood finds fault with Plaintiffs taking the only commonsense avenue for review available to them. Answer, pp 3–9. But that is just because this path subjects Planned Parenthood's collusive lawsuit to this Court's scrutiny, introduces real adversity, and removes from the driver's seat the trial-court judge—Planned Parenthood's current donor and former attorney on the very issue presented in the underlying litigation.

None of Planned Parenthood's invented obstacles to this Court's review hold water. Planned Parenthood's chief complaint is that Prosecutors Jarzynka and Becker did not try to intervene as defendants in the Court of Claims. Answer, pp 3–4, 6–9. But that objection is meritless.

First, any attempt by Prosecutors Jarzynka and Becker to intervene in the Court of Claims would not have cured the lack of adversity in Planned Parenthood's suit. Answer, p 3. A case must have truly adverse parties at the outset for jurisdiction to exist. If the original parties are not adverse, an intervenor cannot retroactively fix it later. *Supra* Part II.C. Planned Parenthood is blaming Plaintiffs for a problem that *it* created and that only *it* could solve.

Second, Planned Parenthood's theory that county prosecutors could intervene as defendants in the Court of Claims—where only suits against the State and its officials are allowed—is entirely novel. Answer, p 7 n5. Planned Parenthood cites no case in which a local official has intervened in the Court of Claims.[4] Even if such a maneuver were theoretically possible (which is unlikely), that remedy would not be plain, efficient, or speedy. It would be obscure, doubtful, and could result in years of litigation, which shows that Planned Parenthood's suggested remedy is inadequate.

Planned Parenthood's laundry list of cases from other jurisdictions comes up short. Answer, pp 7–8. It does offer examples where courts denied mandamus or

[4] Planned Parenthood does cite *Meda v City of Howell*, 110 Mich App 179, 183; 312 NW2d 202 (1981), but it is not clear why. The proper defendants in *Meda* were state court employees sued in their official capacities and MCL 600.6419(1)(a) & (7) plainly grant the Court of Claims jurisdiction to hear claims against the employees of judicial bodies. The same cannot be said for county prosecutors.

other relief because the petitioner could have moved to intervene. But none of those examples involved a specialized court of limited jurisdiction like the Court of Claims where non-parties' ability to intervene is limited in unusual and harsh ways.

Third, Planned Parenthood demands that Prosecutors Jarzynka and Becker "challenge any enforcement of the injunction against them directly in the Court of Claims." Answer, p 9. But that would require Prosecutors Jarzynka and Becker—county officials and officers of the court—opening themselves up to contempt sanctions. That is not a remedy but a kamikaze mission. Such a purported "remedy" is plainly inadequate.

Planned Parenthood, not Plaintiffs, filed a lawsuit designed to "withhold . . . adversity" and "circumvent the normal judicial process." Answer, p 3. After all, it is Planned Parenthood who filed a non-adverse lawsuit to insert a right to abortion in the state constitution without opposition. Plaintiffs merely took the only path available to stand up for the rule of law. They are some of the victims harmed by the Court of Claims proceeding. It is wrong for Planned Parenthood to blame *them* for a lack of adversity *it* collusively designed. Yet that is the best argument Planned Parenthood could come up with, which proves how far off the rails the Court of Claims proceedings have traveled. This Court should halt them immediately and order the dismissal of Planned Parenthood's suit.

IV. If this Court declines to dismiss the underlying case in its entirety, then it should at minimum order the trial-court judge to recuse.

Planned Parenthood misunderstands the objective appearance-of-impropriety standard's nature and importance. It is not some paltry rule that non-adverse parties can dispense with on a whim. Answer, p 14. The trial-court judge refused to recuse based on her *subjective* belief that she could "sit on [Planned Parenthood's] case with requisite impartiality and objectivity." 4/14/22 Letter of Clerk Jerome W. Zimmer, Jr., p 1, Ex 19 to Complaint. But "[t]he failure to consider *objective* standards requiring recusal is not consistent with the imperatives of due process." *Caperton v AT Massey Coal Co*, 556 US 868, 886; 129 S Ct 2252 (2009) (emphasis added).

Michigan's appearance-of-impropriety standard under Canon 2 of the Michigan Code of Judicial Conduct establishes an "*objective standard*" for "whether an appearance of impropriety exists" that "requires consideration of whether the conduct would create *in reasonable minds* a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." *Okrie v State*, 306 Mich App 445, 472; 857 NW2d 254 (2014) (quotations omitted and emphasis added).

Here, reasonable minds would recognize the appearance of impropriety of the trial-court judge presiding over Planned Parenthood's lawsuit. That is true for all the reasons listed in the complaint, Compl, pp 42–47, and a few more that have only recently come to light as a result of Planned Parenthood's Answer.

For example, Plaintiffs have now learned that the trial-court judge allowed the non-adverse parties to "agree[ ] through their counsel that the judge should not be disqualified," Answer, p 14, at a status hearing to which Right to Life of Michigan and the Michigan Catholic Conference's counsel (John Bursch) was invited and then abruptly ejected by the trial-court judge. Compl, pp 10, 46.

What's more, even though the trial-court judge is the defendant to this action, and this Court's briefing order directed her to file an "answer to the complaint . . . on or before June13, 2022," 5/24/22 Order, p 1, she did not respond but instead allowed her former client, Planned Parenthood, to step in to defend the Court of Claims proceedings and the preliminary-injunction order for her. Needless to say, it is a serious and objective problem when a party to a lawsuit is effectively representing the presiding trial judge in an appellate court. This only adds to the objective appearance of impropriety articulated in the complaint. Compl, pp 44–45.

This is not merely a matter of the trial-court judge's charitable donations. Contra Answer, p 13. Her personal connections to Planned Parenthood are objectively numerous, strong, and deep. Compl, pp 44–45. The trial-court judge's failure to require or promote adversity in the proceedings below and outright refusal to follow *Mahaffey*—the case she litigated and lost on Planned Parenthood's behalf—would also trouble reasonable minds. Compl, pp 46–47.

Planned Parenthood argues that none of these recusal concerns are cognizable because Plaintiffs are not parties and cannot invoke MCR 2.003. Answer, pp 13–14. But Planned Parenthood's own cited case proves that is false. It relies on *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 123–26; 420 NW2d 141 (1988),

which accepts that—in extraordinary circumstances—a non-party may seek a judge's recusal via a complaint for order of superintending control. Answer, p 14.

Czuprynski holds only that claims of a judge's actual "bias or prejudice," not the objective appearance of impropriety, involve "disputed facts" that require development and resolution under "the procedures set out in MCR 2.003." 116 Mich App at 126. Otherwise, *Czuprynski* recognizes that "[w]hether an order of super-intending control should issue depends upon the circumstances in the specific case." *Id.* at 123 (quotation omitted).

Here, the objective appearance of impropriety of the trial-court judge presiding over her former client's action, which is indirectly funded by the judge's ongoing annual financial contributions to the organization, and which asks her to locate and declare the same constitutional right to abortion she unsuccessfully sought 28 years earlier, is unmistakable. Nonparties should have been able to rely on the trial-court judge complying with Canon 2's objective recusal standard without the necessity to file an action for superintending control. Plaintiffs lack the ability to invoke MCR 2.003's disqualification procedures because they are not parties and could not intervene in the Court of Claims action with any certainty. Nor did anyone else adverse to Planned Parenthood have access to MCR 2.003's processes during the relevant 14-day period for filing such a motion. The Legislature intervened as a defendant only because it became absolutely necessary to prevent an unopposed injunction order and, by that point, the 14-day period was long past. Answer, p 14.

In sum, if this Court declines to order the Court of Claims action's wholesale dismissal, the circumstances warrant an order of superintending control vacating the injunction and reassigning this case to another Court of Claims judge.

CONCLUSION

The trial court failed to perform its clear legal duty to dismiss Planned Parenthood's non-adverse, non-justiciable, unripe, and moot case. Plaintiffs' only adequate legal remedy is an order of superintending control from this Court. And the lack of justiciability at this case's outset is not impacted by the fact that the trial-court injunction effectively held the Legislature hostage and forced that body to intervene to prevent the injunction from becoming unappealable.

Accordingly, Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference respectfully ask this Court to issue an order of superintending control, vacate the injunction, and dismiss the underlying case for lack of jurisdiction. At a bare minimum, the Court should vacate the injunction and order that this case be reassigned to a different Court of Claims judge for consideration of the threshold jurisdictional issues that prevent the action from being heard in the first instance.

Respectfully submitted,

GREAT LAKES JUSTICE CENTER

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EXHIBIT A

STATE OF MICHIGAN
IN THE SUPREME COURT

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, DAVID S. LEYTON, Prosecuting Attorney of Genesee County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants.

Supreme Court Case No. 164256

PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF MOTION TO INTERVENE PURSUANT TO MCR 2.209 AND MCR 7.311

This case involves a claim that state governmental action is invalid

Oakland Circuit Court No. 22-193498-CZ

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PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF MOTION TO INTERVENE PURSUANT TO MCR 2.209 AND MCR 7.311

Right to Life of Michigan and the Michigan Catholic Conference move for leave to file a reply in support of their motion to intervene under MCR 7.311. In support of their motion, proposed intervenors state the following:

1. Right to Life of Michigan and the Michigan Catholic Conference filed a motion to intervene in this matter on April 22, 2022.

2. On May 4, 2022, Governor Whitmer filed a response in opposition to Right to Life of Michigan and the Michigan Catholic Conference's motion to intervene.

3. Right to Life of Michigan and the Michigan Catholic Conference request leave to file the attached proposed reply brief in support of their motion to intervene. **Ex. 1**, Proposed Reply Brief. That reply corrects and answers points raised in the Governor's brief.

4. First, the Governor's response contends that Right to Life of Michigan and the Michigan Catholic Conference have not yet moved to intervene in the Oakland County Circuit Court. But that is incorrect. Proposed intervenors filed a motion to intervene and proposed answer in the Oakland County Circuit Court, as promised in their motion to intervene, on May 4, 2022. Both documents are relevant to the Court's disposition of Right to Life of Michigan and the Michigan Catholic Conference's intervention motion and are attached as exhibits to the reply.

5. Second, the Governor contends that Right to Life of Michigan and the Michigan Catholic Conference have no greater interest in this matter than anyone

with a policy preference regarding abortion. Yet the reply demonstrates proposed intervenors' unique efforts to enact pro-life legislation, sponsor and support pro-life ballot initiatives, and defend pro-life laws in court.

6. Third, the reply demonstrates proposed intervenors' strong and unique interest in the outcome of this matter by giving specific examples of pro-life laws that Right to Life of Michigan and the Michigan Catholic Conference have shepherd into existence. Many of these pro-life laws—including the ban on delivering a substantial portion of a living child outside her mother's body and then killing her by crushing her skull or removing her brain by suction, a procedure known as partial birth abortion—would not exist without proposed intervenors' efforts.

7. Fourth, the Governor maintains that Right to Life of Michigan and the Michigan Catholic Conference have only a preference as to this litigation's outcome. But, as the reply explains, proposed intervenors have striven for decades to pass pro-life legislation, sponsor and see pro-life citizens initiatives succeed, and defend pro-life laws in court. Their interest in this litigation is unique because Governor Whitmer's lawsuit threatens to undo all their work.

8. Fifth, the Governor contends that allowing Right to Life of Michigan and the Michigan Catholic Conference to intervene will lead to a flood of intervention motions. The reply points out that even though this matter is of intense public interest and well publicized, *no one else* has sought to intervene. That demonstrates proposed intervenors' uniquely strong interest in how this case is resolved.

9. Sixth, the Governor advocates a high standard for intervention. Yet, as the reply explains, her proposed standard conflicts with MCR 2.209(A) and judicial decisions clarifying that rule. Instead of requiring a certainty of inadequate representation, intervention is proper where the intervenor's interests *may be* inadequately represented. And where a concern of inadequate representation exists, such as here, MCR 2.209(A) must be construed liberally in favor of intervention.

10. Seventh, the reply clarifies that intervention is proper under MCR 2.209(B) because Right to Life of Michigan and the Michigan Catholic Conference's proposed answer raises defenses that have a question of law or fact in common with the Governor's claims. Proposed intervenors have pleaded not only that the Michigan Constitution does not protect a right to abortion, but also that granting the Governor's requested relief would violate the U.S. Constitution because (1) the Fourteenth Amendment protects human life from the moment of conception and (2) a state court ruling that the Michigan Constitution protects abortion would violate article IV, section 2 of the U.S. Constitution by depriving Michiganders of a Republican form of government.

11. Eighth, the Governor proposes allowing Right to Life of Michigan and the Michigan Catholic Conference to participate as an amicus curia instead of as an intervenor. But, as the reply explains, allowing Right to Life of Michigan and the Michigan Catholic Conference to participate as amicus curiae would not adequately protect their interests because, in that posture, this Court would be unlikely to consider their federal constitutional arguments.

For these reasons, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to grant them leave to file the attached reply in support of their motion to intervene in Case No. 164256.

Respectfully submitted,

Dated: May 10, 2022

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EXHIBIT B

Bold — Same page go out 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 assist 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 her 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" is defined as a condition which so complicates a woman's pregnancy as to necessitate the immediate abortion to avert death, "or for which a delay will create serious risk of 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

BY:_____

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DATED: March 10, 1994

EXHIBIT C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiffs,

v

ATTORNEY-GENERAL OF MICHIGAN,

Defendant.

94-406793 AZ 3/10/94
JDG: JOHN A. MURPHY
MAHAFFEY MARYANN
VS
ATTORNEY GENERAL OF MI

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

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MOTION FEE PAID

FILED
TEOLA P. HUNTER
WAYNE COUNTY CLERK
MAR 18 1994
BY Veronica Murphy

MOTION FOR PRELIMINARY INJUNCTION

NOW COME the plaintiffs, by and through their attorneys, and respectfully move this Court, pursuant to MCR 3.310(A), that it grant a preliminary injunction, enjoining the defendant Attorney General of Michigan and others with notice from enforcing in any way the provisions of 1993 PA 133, specifically MCL § 333.17014, et seq during the pendency of this litigation. In support of this Motion, plaintiffs respectfully show unto this Court as

follows:

1. This is a suit for declaratory and injunctive relief, challenging the constitutionality of 1993 PA 133, MCL § 333.17015, a statute involving abortion and providing for civil, criminal, and quasi-criminal penalties.

2. Plaintiffs are the President of Detroit City Council, and four health care professionals. Their First Amended Complaint alleges five counts, which are the basis for this Motion.

3. Count I alleges that the enactment of MCL § 333.17015 violates the health care professional plaintiffs' patients' generic privacy rights under the Michigan Constitution.

4. Count II alleges that the enactment of MCL § 333.17015 violates the health care professional plaintiffs' patients' substantive due process rights under Mich Const 1963, Art 1, § 17.

5. Count III alleges that the enactment of MCL § 333.17015 violates the health care professional plaintiffs' free speech rights under Mich Const 1963, Art 1, § 5.

6. Count IV alleges that the provisions of MCL § 333.17015 are vague, indefinite, and lacking in fair notice of the conduct proscribed, in violation of the Due Process Clause of Mich Const 1963, Art 1, § 17.

7. Count V alleges that certain provisions of MCL § 333.17015 violate the "Headlee Amendment," Mich Const 1963, Art 9, § 29, by placing unfunded mandates on local health departments which will force local governments to expend monies.

8. The provisions of MCL § 333.17015 are scheduled to take effect on April 1, 1994, and will be immediately enforced by defendant and his agents. As a result of

these provisions, the health care professional plaintiffs and their patients will be prevented from exercising their constitutional rights for fear of criminal, quasi-criminal, and civil penalties. City Council President Mahaffey's local governmental body and others will be improperly forced to expend local monies on the unfunded mandates from the state to local health departments. Plaintiffs will thus suffer irreparable injury to constitutionally protected rights between April 1, 1994, and the time when this Court rules on the plaintiffs claim for a permanent injunction.

9. There is a strong likelihood that the plaintiffs will prevail on the merits, and the plaintiffs otherwise have satisfied the criteria for the granting of a preliminary injunction.

10. A brief in support of this Motion is filed herewith.

WHEREFORE, plaintiffs respectfully pray that this Court enter a preliminary injunction enjoining the defendant and all others with notice from enforcing in any way the provisions of MCL § 333.17015 during the pendency of this litigation.

Respectfully submitted,

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DATED: March 18, 1994

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiffs,

v

ATTORNEY-GENERAL OF MICHIGAN,

Defendant.

94-406793 AZ 3/10/94
JDG: JOHN A. MURPHY
MAHAFFEY MARYANN
VS
ATTORNEY GENERAL OF MI

AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This case presents a challenge to 1993 PA 133 (MCL §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 information that is inaccurate, misleading, medically unnecessary and often contrary to sound medical practice. This state mandated "counseling" must be provided at least 24-hours before a physician performs an abortion, necessitating that women seeking abortions 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. The statute does this despite the absence of any state appropriations or disbursements of funding for the newly created health department responsibilities.

Plaintiffs in this action are the President of the Detroit City Council, and four health care professionals who treat women seeking abortions. The medical professionals are compelled to refrain from practicing their professions in a manner they believe to be most in keeping with their patients' needs and with the standards of professional care. Threatened enforcement of the law denies their patients an opportunity to exercise their constitutionally protected right of reproductive choice without a significant infringement of that right by the State.

Detroit Council President Mahaffey, along with the medical professionals, challenges the new law as a violation of Michigan's "Headlee Amendment," Mich Const 1963 Article 9, § 29. 1993 PA 133 requires local health departments to engage in a variety of new activities and services, though the State has not appropriated or disbursed monies to pay

for those services. All plaintiffs bring this Headlee Amendment claim as taxpayers of this State, pursuant to Mich Const 1963 Art 9, § 32.

As is discussed in detail herein, 1993 PA 133 violates several provisions of our State Constitution, and therefore must be struck down and its enforcement permanently enjoined.

FACTS

On February 11, 1993, SB 384 was introduced in the Michigan Senate, with Sen. Welborn as its chief sponsor. That bill, patterned after the Pennsylvania law largely upheld in Casey, mandated, inter alia, a 24 hour waiting period, and women seeking an abortion to view depictions and descriptions of fetuses at various stages of development. The physician who would be performing the abortion or qualified person assisting the physician was required to carry out these mandates, though providing the materials to the woman could take place at a facility different from the one where the abortion would be performed. SB 384, as introduced, passed the Michigan Senate on April 21, 1993.

When taken up by the Michigan House, however, the bill met with significantly more opposition. A substitute bill (H-12), was reported out of the House Committee on Public Health on June 15, 1993. That substitute bill made several changes to the original Senate Bill, the most substantive adding the provision that upon presenting the woman with the written summary and depictions, she was to be informed that she had the option to either review or not review those materials.

On the floor of the House, major amendments were introduced. It was at this

stage of the legislative process that all of the local health department provisions were added by amendment. See Legislative Status, and excerpts from the House Journal, attached as Exhibit A. In an effort to ease the burden on women seeking abortions, Reps. Wetters and McNutt offered an amendment that specifically authorized the physician or his or her qualified assistant to refer the patient to a local health department to receive the mandated materials. Additionally, that amendment also mandated local health departments to provide pregnancy tests and determine the gestational stage of fetuses in an effort to ease the burden on physicians who would otherwise have to perform those tests. Concluding an obvious political deal struck between Republicans and Democrats, these amendments (as well as others) passed the House 97-3 on July 7, 1993. Six days later, the Senate concurred in amended House Substitute H-12.

On August 3, 1993, Michigan's Governor approved 1993 PA 133 (hereinafter: the "new law"). This "informed consent" law goes into full force and effect on April 1, 1994.

The medical professional plaintiffs are physicians who sue on behalf of themselves and their patients, and who are affected by the provisions of this new law. The physicians allege that the provisions of 1993 PA 133 violate their patients' right to privacy and fundamental liberty interests. They further allege that the new law impermissibly compels them to provide their abortion patients with misleading, inaccurate, and biased information regarding abortion and the risks of the procedure. They also allege the provisions of the new law are vague, and that they are threatened with criminal, quasi-criminal and civil penalties for practicing medicine in a manner consistent with the standard of care and their professional obligations to their patients.

Ms. Mahaffey, joined by the other plaintiffs, alleges that the new law mandates new and additional expenditures by local health departments, and that there has been no state appropriation to local health departments to pay these increased costs that will accrue due to the requirements of the new law.

ARGUMENT

I. PLAINTIFFS' ALLEGATIONS SATISFY THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION

The Michigan Supreme Court has enunciated a four-factor analysis to determine whether a preliminary injunction should be issued:

> 1) the likelihood that the party seeking injunction will prevail on the merits;
>
> 2) the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued;
>
> 3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of relief; and
>
> 4) the harm to the public interest if the injunction is issued.

Michigan State Employees Ass'n v Department of Mental Health, 421 Mich 152, 157-158; 365 NW2d 93 (1984). Each factor will be addressed individually herein.

A. Likelihood of Success on The Merits

Plaintiffs will demonstrate in this Brief that MCL §333.17015 violates the Headlee Amendment of the Michigan Constitution, found at Article 9, § 29. A plain reading of

that constitutional amendment and its implementing legislation at MCL §21.231 et seq, as well as the case law, establish that there is a substantial likelihood of success on the merits of the "Headlee Amendment" issue.

Additionally, plaintiffs will show in this Brief that MCL § 333.17015 impermissibly infringes upon the fundamental rights of physicians and their patients who seek to exercise reproductive choice. The State has no legitimate or compelling interest to justify these infringements.

These arguments, infra, establish a substantial likelihood of success on the merits.

B. Irreparable Injury

The statute at issue involves constitutionally protected rights of women and their doctors to obtain medical care and exercise the right of reproductive choice without unjustified infringement by the State. Each and every day that the rights of these plaintiffs are abridged compounds the irreparable injury that they will suffer. Plaintiffs have no recourse other than injunctive relief.

C. Risk of Harm

The preliminary injunction in this matter will simply preserve the status quo. There is absolutely no harm to defendant in eliminating the effect of 1993 PA 133. For plaintiffs, the risks are unconstitutional criminal and civil penalties, the inability to fully exercise the right of reproductive choice, and the illegal obligation of local health departments to expend significant monies as a result of the state's unfunded mandates.

D. The Public Interest

The public interest would be served by the issuance of a preliminary injunction in this case.

II. THE STATE'S UNFUNDED REQUIREMENTS THAT LOCAL HEALTH DEPARTMENTS PERFORM PREGNANCY TESTS; DETERMINE THE PROBABLE GESTATIONAL STAGE OF FETUSES; DISTRIBUTE COUNSELING MATERIALS; AND CERTIFY THAT THE MATERIALS WERE RECEIVED AT A DATE AND TIME CERTAIN, ARE "NEW ACTIVIT[IES] OR SERVICE[S]" IN VIOLATION OF THE HEADLEE AMENDMENT

A. *The costs of performing pregnancy tests, determining the probable gestational stage of fetuses, distributing counseling materials, and certifying that the materials were received by the patient will be borne by local health departments.*

As part of the new law, MCL 333.17015 provides in relevant part[1]:

> (15) Upon an individual's request, each local health department *shall*:
>
> (a) Provide a pregnancy test for that individual and determine the probable gestational stage of a confirmed pregnancy.
>
> (b) Preceded by an explanation that the individual has the option to review or not the written summaries, provide the summaries described in subsection 8(b) that are recognized by the department as applicable to the individual's gestational stage of pregnancy.
>
> (c) Preceded by an explanation that the individual has the option to review or not review the depiction and description, provide the individual with a copy of a medically accurate depiction and description of a fetus described in subsection 8(a) at the gestational age nearest the probable gestational age of the patient's fetus.

[1]Subsection (15), which is the subsection that sets out the state's mandated requirements on local health departments, is set forth first for context. As discussed further in Plaintiffs' Brief in Support of Motion for a Preliminary Injunction, the statute is virtually incomprehensible in its organization and self-contradictions.

(d) Ensure that the individual is provided with a completed certification form described in subsection (8)(f) at the time the information is provided.

(8) The department of public health shall do each of the following:

(f) Develop, draft, and print a certification form to be signed by a local health department representative at the time and place a patient is provided the information described in subsection (3), as requested by the patient, verifying the date and time the information is provided to the patient.[2] (emphasis added)

These new state mandates will require new and additional expenditures by local health departments. Pregnancy tests cost money for both equipment *and* staffing. To accurately determine the probable gestational stage of a fetus requires a physician and expensive equipment, each of which will require extensive resources by local health departments. Additional staff will be necessary to distribute the written summaries and depictions, and to fulfill the new law's requirement that a local health department representative certify on a form that the patient received the information on a date and at a time certain. See Affidavit of Mark Bertler, attached as Exhibit B.

There is no question that the additional costs of complying with the new law's mandates on local health departments will be borne by local health departments.[3] The

[2]"Local health department representative" is defined as "a person employed by, or contracted to provide services on behalf of, a local health department...." MCL 333.17015(2)(c).

[3]The legislation implementing Mich Const 1963, Art 9, §29, MCL §21.231 et seq defines "local unit of government" as "a political subdivision of this state,... if the political subdivision has as its primary purpose the providing of local governmental services for residents in a geographically limited area of this state and has the power to act primarily on behalf of that area." Pursuant to MCL §333.2421, the Detroit Health Department "shall have the powers and duties of a local health department," powers and duties described in MCL §§333.2433 and 333.2435. Clearly, then, the Headlee Amendment at Art 9, §29 applies to *all* local health departments, whether county, city, or health district departments.

only statutory state funding to local health departments is found at MCL §333.2475, which provides that the state department of public health "shall reimburse local governing entities for the reasonable and allowable costs of required and allowable health services delivered by the local governing entity...." Those reimbursements are explicitly made "[s]ubject to the availability of funds actually appropriated" by the Legislature, but should currently be 50% of the costs. MCL §333.2475(1)(a). The state department is currently funding significantly less than that share of those costs. See 1993 PA 174, the appropriations act for the Department of Public Health for Fiscal Year 1993-94, at 871 (which appropriates $17,079,200 for "state/local cost-sharing.")[4], attached as Exhibit C.

Thus, it cannot be seriously disputed that the costs of the law's new requirements on local health departments will be borne by those local health departments or those departments' funding entities (i.e., counties).

B. *1993 PA 133 requires a "new activity or service" in violation of the "Headlee Amendment."*

Mich Const 1963, Art 9 §29 provides in part:

> 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 beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs....

[4]The only other state monies received by local health departments are categorical grants that are, of course, earmarked for specific categories of expenditures. See Exhibit C, 1993 PA 174, the appropriations act for the Department of Public Health for Fiscal Year 1993-94, at 871, which designates 9 other categories of funding for local health systems.

In the subsequent legislation to implement this constitutional section, MCL 21.231 et seq, the Legislature defined certain key phrases contained in §29:

> "Activity" means a specific and identifiable administrative action of a local unit of government.... [MCL §21.232(1)]
>
> "Service" means a specific and identifiable program of a local unit of government which is available to the general public or is provided for the citizens of the local unit of government... [MCL §21.234(1)]
>
> "Existing law" means a public or local act enacted prior to December 23, 1978.... [MCL §21.234(4)]
>
> "State requirement" means a state law which requires a new activity or service or an increased level of activity or service beyond that required of a local unit of government by an existing law... [MCL §21.234(5)]

A plain reading of 1993 PA 133 leads to the obvious conclusion that this new law requires local health departments to carry out new "activit[ies] or "service[s]." The requirement that health departments perform pregnancy tests and determine the gestational stage of fetuses forces a "specific and identifiable administrative action." See MCL §21.232(1). Moreover, these required services are to be "available to the general public or [ ] provided for the citizens of the local unit of government." MCL §21.234(1). These unfunded state mandates on local governments are precisely what "Headlee" is intended to prevent.

In construing the purpose of Mich Const 1963, Art 9, §29, the Michigan Supreme Court has stated:

> "[These first two] sentences clearly reflect an effort on the part of the voters to forestall any attempt by the Legislature to shift responsibility for services to the local government, once

> its revenues were limited by the Headlee Amendment, in order to save the money it would have had to use to provide the services itself.
>
> "Because they were aimed at alleviation of two possible manifestations of the same voter concern, we conclude that the language "required by the legislature or any state agency" in the second sentence of §29 must be read together with the phrase "state law" in the first sentence. This interpretation is consistent with the voters' intent that *any* service or activity required by the Legislature or a state agency, whether now or in the future, be funded at an adequate level by the state and not by local taxpayers." (original emphasis)

Durant v State Board of Education, 424 Mich 364, 379-80; 381 NW2d 662 (1986).

Finally, the new law is plainly *mandatory*, and not permissive, in its terms. In Delta County v Michigan Dept. of Natural Resources, 118 Mich App 458; 325 NW2d 455 (1982), the Michigan Court of Appeals struck down the Solid Waste Management Act as violative of the Headlee Amendment. That Act provided in part:

> A municipality or county shall assure that all solid waste is removed from the site of generation, frequently enough to protect the public health, and are delivered to licensed solid waste disposal areas,... MCL 299.424; MSA 13.29(24).

In analyzing whether the term "shall assure" required "new or increased" activities under the Headlee Amendment, the Court of Appeals stated:

> The general rule when interpreting the language of a statute is to construe it according to its plain meaning. Uniformly, this Court has held that the word 'shall' is mandatory. See St. Highway Commission v Vanderkloot, 392 Mich 159, 220 NW2d 416 (1974).
>
> [Upon] review of the entire Act, we are convinced that the words 'shall assure' are the equivalent to a command to localities to dispose of solid waste products....

118 Mich App at 462. See, also, City of Ann Arbor v State of Michigan, 132 Mich App 132; 347 NW2d 10 (1984)(distinguishing between permissive and mandatory statutes, and holding the local fire protection statutes to be permissive and thus not subject to "Headlee.")

Likewise, in the instant case, 1993 PA 133's mandatory language ("Upon an individual's request, each local health department *shall*...) is "the equivalent to a command to localities...." Id. In Delta County, the Court of Appeals had no trouble concluding that the law in question imposed "new and increased" duties on municipalities, and occasioned "necessary increased costs" within the meaning of the Headlee Amendment. In the case at bar, it is equally clear that 1990 PA 133 imposes increased costs on local health departments.[5]

C. *There has been no appropriation or disbursement by the state to local health departments to pay for these new state mandates.*

1993 PA 174 is the appropriations act for the Department of Public Health for Fiscal Year 1993-94. There is no appropriation made to local health departments to pay for the new or increased costs to local health departments that will be incurred due to the state requirements in 1993 PA 133. See 1993 PA 174, at 871.

Additionally, local health departments have received no disbursements of state monies to pay for these new or increased costs despite the statutory requirement that

[5]Many local health departments already perform pregnancy tests; upon information and belief, no local health department determines the probable gestational age of fetuses now, nor do any distribute the abortion counseling materials and certify that the patient has received those materials. The new law clearly requires them to do so; thus, whether or not these activities were previously required, Mich Const 1963, Art 9, §29 is violated. See Livingston County v Department of Management and Budget, 430 Mich 635; 425 NW2d 635 (1988).

initial advance disbursements be made at least 30 days prior to the effective date. See Bertler Affidavit. MCL §21.235(1), the "Headlee Amendment" implementing legislation, requires the Legislature to "annually appropriate an amount sufficient to make disbursement to each local unit of government for the necessary cost of each state requirement...." "[An] initial advance disbursement [shall] be made at least 30 days prior to the effective date of the state requirement," with annual disbursements thereafter. MCL §21.235(2).

No appropriations or disbursements by the state to local health departments have been made. 1993 PA 133 must be enjoined, as it is in clear violation of Michigan constitutional and statutory law.

III. THE "INFORMED CONSENT" LAW IS AN UNCONSTITUTIONAL INFRINGEMENT ON THE RIGHTS OF PHYSICIANS AND THEIR PATIENTS WHO SEEK MERELY TO EXERCISE THEIR RIGHT OF REPRODUCTIVE CHOICE

A. *This Court has the Responsibility to Interpret the Michigan Constitution Separately from how the United States Supreme Court Interprets the Federal Constitution.*

The drafters of the 1963 Michigan Constitution intended that every section of that document have meaning, importance and enforcement. Our Michigan Supreme Court has recognized this, and has rejected "the notion that state constitutional provisions were adopted to mirror the Bill of Rights...." Brennan, State Constitutions and the Protection of Individual Rights, 90 Har L Rev 489, 501 (1977). Six months ago, the Michigan Supreme Court explained the relationship between the federal and Michigan Constitutions

in Sitz v Department of State Police, 443 Mich 744, 762; 506 NW2d 209 (1993):

> As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same. (footnote omitted)

The Sitz court concluded at 763:

> What is to be gleaned from our former cases is that the courts of this state should reject unprincipled creation of state constitutional rights that exceed their federal counterparts. On the other hand, our courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United State Supreme Court has chosen to do so. *We are obligated to interpret our own organic instrument of government.* (emphasis added)[6]

Sitz is but the latest of a long line of cases where our Michigan courts have interpreted the Michigan Constitution differently than the U.S. Supreme Court interpreted the federal Constitution on an identical or similar issue. See, e.g., People v Bullock, 440 Mich 15; 485 NW2d 866 (1990)[7]; Socialist Workers Party v Secretary of State, 412 Mich 571; 317 NW2d 1 (1982);[8] People v Cooper, 398 Mich 450; 247 NW2d 866 (1976)[9];

[6]In Sitz, our state Supreme Court did just that, interpreting Mich Const 1963, Art 1, §11 differently than the U.S. Supreme Court interpreted the federal Fourth Amendment, and reached an opposite result than the U.S. Supreme Court in striking down highway sobriety checklanes. Cf Michigan Dept of State Police v Sitz, 496 US 444 (1990).

[7]Cf Harmelin v Michigan, ___US___; 111 SCt 2680 (1991)(whether nonparoleable life sentence for cocaine possession is cruel and unusual punishment)

[8]Cf Hudler v Austin, *aff'd sub nom* Allen v Austin, 430 US 924 (1977)(proper analysis, and standard of review, of ballot access claims)

[9]Cf Bartkus v Illinois, 359 US 121 (1959)(whether double jeopardy bars subsequent prosecution in another jurisdiction for an offense arising out of same criminal act)

People v Garcia, 398 Mich 250; 247 NW2d 547 (1976)[10]; People v Beavers, 393 Mich 554; 227 NW2d 511 (1975), cert den 423 US 878 (1975)[11]; People v Jackson, 391 Mich 323; 217 NW2d 22 (1974)[12]; People v White, 390 Mich 245; 212 NW2d 222 (1973)[13]; Detroit Branch, NAACP v City of Dearborn, 173 Mich App 602; 434 NW2d 444 (1989), lv den __ Mich ____; 447 NW2d 751 (1989)[14]; Michigan Organization for Human Rights v Attorney General, No. 88-815820 CZ (Wayne Circuit Court, 7-9-90), attached as Exhibit D.[15]

Even where the Michigan Supreme Court applies the same standard of review and method of analysis as the United States Supreme Court, it does not "hesitate to reach a conclusion different from that reached by the United States Supreme Court when it is warranted." Delta Charter Township v Dinolfo, 419 Mich 253, 276-277, n 7; 351 NW2d 831 (1984). In that case, the Michigan Supreme Court held that the due process clause

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[10]Cf Strickland v Washington, 466 US 668 (1984)(standard for ineffective assistance of counsel) But see People v Tommolino, 187 Mich App 14; 466 NW2d 315 (1991), lv den 439 Mich 902 (1991)(conflict-settling decision holding state and federal tests are the same)

[11]Cf US v White, 401 US 745 (1971)(whether warrant is required for participant monitoring) But see People v Collins, 438 Mich 8; 475 NW2d 684 (1992)(overruling Beavers and adopting the reasoning of US v White)

[12]Cf US v Ash, 413 US 300 (1973)(whether there is a right to counsel at pre-trial photographic identifications)

[13]Cf Ashe v Swenson, 397 US 436 (1970)(whether double jeopardy prohibition requires joinder of charges arising out of same transaction)

[14]Cf Washington v Davis, 426 US 229 (1976) and Arlington Heights v Metropolitan Housing Development Corp, 429 US 252 (1977)(whether showing of disparate impact constitutes racial discrimination in violation of equal protection, or whether purposeful discrimination must be shown)

[15]Cf Bowers v Hardwick, 487 US 86 (1986)(whether there is a fundamental right of adults to engage in consensual sodomy in private)

of Mich Const 1963, Art 1, §17, protects the right of unrelated individuals to live together, and struck down a zoning ordinance which narrowly defined "single family." This result was opposite to that previously reached by the United States Supreme Court in a case presenting a federal due process challenge to a virtually identical ordinance. Village of Belle Terre v Boraas, 416 US 1 (1974).

Thus, Michigan courts not only can -- but *must* -- interpret the state Constitution separately from how the United States Supreme Court has interpreted the federal Constitution.

B. *The Michigan Constitution Guarantees Reproductive Freedom and Autonomy*

1. The right to privacy is a fundamental right under the Michigan Constitution.

In Roe v Wade, 410 US 113 (1973), the United States Supreme Court held that the constitutional right to privacy, recognized in a number of prior cases, encompasses a woman's decision whether or not to terminate her pregnancy. Until the end of the first trimester of pregnancy, a patient and her physician are "free to determine, without regulation by the state," that a pregnancy should be terminated. 410 US at 163. From the end of the first trimester of pregnancy until the point of fetal viability, a state may regulate abortion "to the extent that the regulation reasonably relates to *the preservation and protection of maternal health.*" Id. (emphasis supplied).

Because a woman's health interests are paramount until the point of fetal viability, only a compelling interest can justify state regulation impinging upon that right. 410 US at 155-156.

Although the Michigan Constitution contains no *explicit* right to individual privacy, it cannot seriously be doubted that our constitution confers protection of these extremely important rights:

> "This court has long recognized privacy to be a highly valued right. DeMay v Roberts, 46 Mich 160, 9 NW 146 (1881). No one has seriously challenged the existence of a right to privacy in the Michigan Constitution nor does anyone suggest that right to be of any less breadth than the guarantees of the United States Constitution."

Advisory Opinion 1975 PA 227, 396 Mich 465, 504; 242 NW2d 3 (1976).

In Advisory Opinion 1975 PA 227, the Michigan Supreme Court specifically cited both Roe v Wade, supra, and Griswold v Connecticut, 381 US 479 (1965), as support for the presence of constitutionally protected "zones of privacy." These zones, the Court noted, derive from the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution. "The people of this state," the Court continued, "have adopted corresponding provisions in art. 1 of our Constitution." Id. at 505.

And, four years ago, this Court recognized our state constitutional right of privacy, holding that adult citizens have a fundamental right to engage in consensual sexual activities in the privacy of their homes. MOHR v Attorney General, supra. This Court stated: "The Michigan Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of the government." Id at 9 (citations omitted).

2. Strict scrutiny is the standard to be applied in reviewing the Act

Since the Michigan Supreme Court has recognized that a woman's decision whether

to conceive or bear a child implicates privacy rights found in our state constitution, a strict scrutiny standard of review is appropriate:

> The right to privacy includes certain activities which are fundamental to our concept of ordered liberty. *Rights of this magnitude can only be abridged by governmental action where there exists a "compelling state interest."* Roe, supra, 410 US 152, 155; 93 SCt 705. Kropf v Sterling Heights, 391 Mich 139, 157-158; 215 NW2d 179 (1974). (emphasis supplied)

Advisory Opinion, supra, at 505.

This standard is consistent with that used to review every other fundamental right protected by the Michigan Constitution. See, e.g., Doe v Department of Social Services, 439 Mich 650, 661-2; 487 NW2d 166 (1992)(Art 1, § 2 equal protection review of classification that impinges upon the exercise of a fundamental right); People v DeJonge, 442 Mich 266, 279-280; 501 NW2d 127 (1993)(Art 1, § 4 free exercise of religion review, at least where in conjunction with right of parents to direct children's education); Advisory Opinion 1975 PA 227, 396 Mich 465; 242 NW2d 3,8 (1976)(Art 1, § 5 free expression review of restrictions on speech and the media).

3. The new "undue burden" test adopted by the United States Supreme Court in interpreting the federal constitution is badly flawed and unworkable, and should be rejected by Michigan courts.

In 1992, the United States Supreme Court decided Planned Parenthood of Southeastern Pennsylvania v Casey, _____ US _____; 112 S Ct 2791 (1992). Casey relaxed the strict scrutiny standard of Roe v Wade established 19 years earlier with a less protective "undue burden" test. In contrast to virtually every other fundamental right, restrictions on a woman's right to terminate a pregnancy will be upheld under the federal

constitution unless they have "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Id at 2820.[16]

This undue burden test is inconsistent with Michigan's traditional mode of analysis of fundamental rights, and directly at odds with the strict scrutiny standard for abortion regulations announced by the Michigan Supreme Court in Advisory Opinion, supra. Michigan courts have never utilized an undue burden standard when reviewing laws that impinge on fundamental rights, and there is no persuasive reason why such a standard should be adopted now.[17]

In fact, even dissenting Justices Scalia and Rehnquist decried the inherent vagueness and lack of standards in the newly-announced test. Protesting the amount of subjective determination required of trial courts, Chief Justice Rehnquist believed the new

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[16]Applying this new standard, announced in a joint opinion by Justices O'Connor, Souter, and Kennedy, the Court upheld four provisions of the Pennsylvania law, including a counseling requirement, a 24-hour mandated waiting period, a parental consent requirement, and reporting requirements.

[17]To the contrary, the well-known circumstances that led to the decision in Casey strongly dictate *against* the Michigan courts reflexively adopting the new standard in Casey. As recently as 1986, a majority of the Justices utilized a strict scrutiny standard in reviewing abortion restrictions. Thornburgh v American College of Obstetricians and Gynecologists, 492 US 490 (1986). The law was invalid unless the state demonstrated that the regulation was narrowly tailored to promote the state's compelling interests in the health of the woman or the protection of a viable fetus. The six statutes at issue in Thornburgh (many virtually identical to those upheld in Casey six years later) were struck down 5-4. The four dissenters, Justices White, Rehnquist, and O'Connor and Chief Justice Burger, largely attacked the Roe v Wade conclusion that women had a fundamental right to have an abortion.

Three years later, during which time Justices Scalia and Kennedy joined the Court, the Court decided Webster v Reproductive Health Services, 492 US 490 (1989). For the first time since Roe, a majority no longer used strict scrutiny in analyzing abortion restrictions. The plurality (Chief Justice Rehnquist and Justices Scalia, White, and Kennedy) would no longer apply strict scrutiny; Justice O'Connor in concurrence set forth her proposed undue burden standard, adopted three years later in Casey.

The only thing that had changed since Thornburgh was the make-up of the Court: Justice Kennedy had replaced Justice Powell; Justice Souter had replaced Justice Brennan; and Justice Thomas had replaced Justice Marshall. *Compelling legal reasoning, not political appointments, should be the basis for the interpretation of the Michigan constitution by the Michigan courts.*

standard to be "based even more on a judge's subjective determinations than was the trimester framework...." 112 S Ct at 2866 (Rehnquist, CJ, concurring in the judgment in part and dissenting in part). Justice Scalia concluded the new test "is inherently manipulable and will prove hopelessly unworkable in practice." 112 S Ct at 2877 (Scalia, J., concurring in the judgment in part and dissenting in part).

Additionally, unlike the usual strict scrutiny test which essentially puts the burden of production on the state once an infringement on a fundamental right is shown, the undue burden test places the production requirement squarely on the individual despite the state's overwhelming advantage of resources. This flies in the face of accepted constitutional analysis in this state. See cases cited supra, at 18.

C. *The Michigan "Informed Consent" Law Violates the Michigan Constitution's Rights to Privacy and Due Process*

Where the United States Supreme Court ignores precedent, logic, and an appropriate regard for individual rights, "our [Michigan] courts are not obligated to accept what we deem to be a major contraction of citizen protections under our [Michigan] constitution simply because the United States Supreme Court has chosen to do so." Sitz, supra, 443 Mich at 763. Where our Michigan Supreme Court has chosen *not* to accept what the United States Supreme Court has done, it has frequently relied on prior federal cases or dissenting opinions to establish more protective standards. For example, in People v Bullock, supra, the majority opinion extensively discussed Solem v Helm, 463 US 277 (1983), and essentially adopted Justice White's dissenting opinion in Harmelin v

Michigan, ___ US ___; 111 S Ct 2680 (1991). In People v Cooper, supra, the opinion extensively discussed both prior and recent federal decisions. In People v Turner, 390 Mich 7; 210 NW2d 336 (1973), in adopting the *objective* test for entrapment on public policy grounds, the majority essentially adopted the dissenting views of several U.S. Supreme Court Justices. See, e.g., US v Russell, 411 US 423 (1973)(Stewart, J, dissenting). And, in People v Beavers, supra, the Court analyzed the issue under federal Fourth Amendment jurisprudence, but reached a contrary result to the United States Supreme Court's holding on the issue.

Thus, since it has already been established that the appropriate standard under the Michigan constitution is strict scrutiny as articulated in Roe v Wade, the analysis in cases applying Roe to laws similar to Michigan's new law is instructive.

1. Mandated delay

MCL 333.17015(3) requires all women to delay *at least* 24 hours before obtaining an abortion after the pregnancy is confirmed and the probable gestational age of the fetus is determined, *and* after receiving the biased counseling described in MCL §§333.17015(8)(a),(b).

Additionally, the mandatory delay will require *all* women to make at least two trips to an abortion provider.[18] See First Amended Complaint, ¶ 10(c). This provision will

[18]While the statute purports to provide alternatives to women by mandating local health departments to provide pregnancy tests and gestational stage determinations, MCL §333.17015(15), and by permitting the biased counseling to occur either at the local health department or at another location, MCL §333.17015(4), those alternatives are fraught with problems. First, the local health departments are having a new activity mandated by the state without state appropriation and disbursement in clear violation of Mich Const 1963, Art 9, §29 (a/k/a the "Headlee Amendment"). See Plaintiffs' Motion for Summary Disposition. Second, some local health departments have publicly vowed to refuse to perform these state mandates because of

cause the many women who have long distances to travel to pay additional costs of child care, food and lodging, transportation and lost wages. These burdens will be particularly acute for rural, low-income women who live great distances from an abortion provider, and women who must explain or justify their absences, such as battered women, young women, and those who have no sick leave from their jobs.

Delays will also force some women into the second trimester of pregnancy, increasing both the cost and the medical risks. See First Amended Complaint, ¶¶ 10(c); 15; 16; 17. There are numerous medical conditions which seriously threaten a woman's health and require termination of a pregnancy without these delays, but which do not meet the statute's definition of "medical emergency.[19] In some of these situations, delay in performing an abortion will seriously threaten a woman's health -- but may not necessarily pose a threat of "death... [or] create serious risk of substantial and irreversible impairment of a major bodily function." MCL §333.17015(2)(d). In other cases, delaying abortion decreases the woman's chance for eventual cure. Requiring delay in all these cases departs from accepted medical practice. Id.

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the state's lack of funding. See District Health Dept. No. 3 letter to Sen. George McManus, attached to Bertler Affidavit. Third, in those areas of Michigan where a local health department or district serves a large geographic area, the distance a woman has to travel to the health department can be significant. See August 1993 map of local health departments, attached as Exhibit E. Fourth, while the statute provides that a "qualified person assisting the physician" can perform some of the mandated tasks, it is simply not the case that a physician can allow a nonphysician working under him or her to, for example, determine the probable gestational stage of the patient's fetus without violating the applicable standard of care. Moreover, the statute is hopelessly vague and self-contradictory as to what a physician must do, MCL §333.17015(5),(a), and what a "qualified person assisting the physician" can do. Compare MCL § 333.17015(2)(f) and MCL §333.17015(3),(4),(15). These issues are more fully discussed infra.

[19]This definition of "medical emergency" at MCL §333.17015(2)(d) does not pass constitutional muster, as more fully discussed infra.

In City of Akron v Akron Center for Reproductive Health, Inc., 462 US 416 (1983), the United States Supreme Court, applying strict scrutiny, recognized these burdens on women's right of procreational autonomy and invalidated a 24-hour waiting period. Justice Powell's opinion for the Court in Akron found that no

> legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor [is] . . . the State's legitimate concern that the women's decision be informed . . . reasonably served by requiring a 24-hour delay as a matter of course. . . . [I]f a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision.

Akron, 462 US at 450-51.

Additionally, Mich Const 1963, Art 4, §51 provides:

> The public health and general welfare of the people of the State are hereby declared to be matters of primary concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

This was a new addition to the 1963 Constitution, and has no federal counterpart. In construing it, the Michigan Supreme Court wrote in City of Gaylord v City Clerk, 378 Mich 273, 295; 144 NW2d 460 (1966):

> This new section, together with the traditional public policy of the State, must be held to limit the powers of the legislature and of government generally to such legislative acts and such governmental powers as exhibit a public purpose.

The Michigan 24-hour waiting period does not further any legitimate state interest, places an unconstitutional obstacle on women seeking abortions, and unconstitutionally threatens their health and welfare. The provision violates the Michigan constitution.

2. Biased counseling and certification form

MCL 333.17015(3),(5) require the physician or qualified person assisting the physician to present each and every patient seeking an abortion a litany of state-mandated materials, and to obtain the patient's signature on a certification form acknowledging that she received this information.[20] In so requiring, the state injects itself in an intrusive and biased manner into the physician-patient relationship, effectively requiring the health care providers to become mouthpieces of the state's ideology. This is true despite the fact that accepted medical standards reflect the notion that true informed consent remains viewpoint-neutral and is intended to facilitate the patient's own decision, not to influence a particular outcome. See First Amended Complaint, ¶¶ 10(a); 13; 16.

In this regard, the United States Supreme Court has twice invalidated biased counseling requirements. Akron, supra, 462 US at 442-445; Thornburgh v American College of Obstetricians and Gynecologists, 476 US 747 (1986). Like the statutes struck down under strict scrutiny in Akron and Thornburgh, "much of the information required [by the Michigan law] is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." Akron, 462 US at 444. The Michigan statute's requirement that patients be warned of possible "depression, feelings of guilt, sleep disturbance, loss of interest in work or sex, or anger..." as the result of an abortion, which

[20]A description of the written summary that must be presented to the patient is described at MCL §333.17015(8)(b). The summary, to be developed by the department of public health, is required to describe potential negative psychological side effects *despite the absence of any accepted medical evidence supporting the existence of such symptoms*. Additionally, the summary is designed to encourage the patient to carry the pregnancy to term by identifying public services available to new mothers.

is unsupported and calculated to frighten the patient, is nothing less than a "parade of horribles intended to suggest that abortion is a particularly dangerous procedure." Akron, 462 US at 445. The written summary's listing of agencies available to assist the patient during the pregnancy and after birth is a similar attempt to change the woman's mind once she has decided that an abortion is in her best interests.

Additionally, requiring the summary to describe abortion procedures, and to identify physical complications with each such procedure, as well as with live birth, renders the summary irrelevant to the particular patient, and conflicts with the accepted medical practice of providing information to patients which is specifically tailored to the patient's individual needs.

In short, the biased counseling provisions are unconstitutional under the Michigan constitution.

D. *The Mandated "Counseling" Violates the Free Speech Provision of the Michigan Constitution*

The Michigan law at issue compels speech by several different people: the physician; a "qualified person assisting the physician," as defined; and local health department staff members. Physicians or qualified persons assisting physicians are required to present the written summary and the depiction and description of a fetus before the abortion is performed. MCL §333.17015(3)(c),(d). Alternatively, this compelled information can be required of local health department staff. MCL §333.17015(4),(15). Additionally, physicians are required to describe "[t]he specific risk" of both the abortion procedure and childbirth, MCL §333.17015(5)(b)(i, ii), *regardless of*

the circumstances and whether or not the physician believes such descriptions are appropriate.

See First Amended Complaint, ¶ 19.

This kind of compelled speech is a clear violation of the free speech provision of our state constitution, Art 1, §5, which provides:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

On its face, Art 1, §5 provides greater protection than the federal First Amendment. In any event, it is axiomatic that "the state constitution may afford greater protections than the federal constitution," Woodland v Michigan Citizens Lobby, 423 Mich 188; 378 NW2d 337, 343 (1985), and that the U.S. Constitution provides minimum protections of individual rights. People v Neumayer, 405 Mich 341; 275 NW2d 230 (1979). Accordingly, while the federal case law interpreting the First Amendment may be helpful, this Court is free to construe the state constitution differently, and in a manner more protective of plaintiffs' rights.

Michigan courts have not decided a compelled speech case under Mich Const 1963, Art 1, §5. A series of United States Supreme Court cases construing the First Amendment, however, has established that protections against content-based regulation of speech are broadly available to those who wish to *not* speak. In Wooley v Maynard, 430 US 705 (1976), the Court declared that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right

to refrain from speaking at all." Id at 714 (emphasis added).[21]

In Riley v National Federation of the Blind of NC, 487 US 781 (1988), the Court held that the state could not require professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually turned over to the charity. The Court declared that "in the context of protected speech, the difference... between compelled speech and compelled silence... is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." Id. at 796-797. The Court applied strict scrutiny to this content-based regulation, noting that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." Id. at 795.

Our Michigan Supreme Court, in discussing Art 1, §5, has explained that "when the state seeks to restrict [freedom of speech], its efforts must be strictly scrutinized." Advisory Opinion, supra, 242 NW2d at 8. Applying strict scrutiny to the compelled speech mandated by the new law, the law cannot survive: there are simply no compelling -- even *legitimate* -- state interests to justify this content-based regulation.[22]

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[21]In Wooley, the Court held that the state of New Hampshire could not require plaintiff to display the words "Live Free or Die" on his license plate, as such a requirement forced plaintiff "to be an instrument for fostering public adherence to an ideological point of view which he finds unacceptable." Id.

[22]The Casey joint opinion's rejection of a similar argument made in that case is particularly weak and unpersuasive. "To be sure," explained the three Justices, "the physician's First Amendment rights not to speak are implicated, see Wooley v Maynard, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. Cf. Whalen v. Roe, 429 US 589, 603, 97 S Ct 869, 878, 51 L Ed 2d 64 (1977)." Casey, 112 S Ct at 2824 (citation omitted). This simplistic analysis is unpersuasive for several reasons.

First, the Court cited no cases in support of the rather remarkable proposition that licensed

definition of "medical emergency" is unduly vague; and second, the statute is self-contradictory and ambiguous as to what acts are required of physicians (as opposed to those acts that can be performed by a qualified person assisting the physician). See First Amended Complaint, ¶¶ 21-23.

The Michigan Constitution, like the United States Constitution, guarantees all persons due process of law. Mich Const 1963, art 1, §17. The due process requirements of definiteness and fair notice in criminal statutes[23] have long been set forth in decisions of the U.S. Supreme Court and the Michigan appellate courts: the statute must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v Lawson, 461 US 352, 357 (1983). See also United States v Harriss, 347 US 612, 617 (1954).

The rationale for the vagueness doctrine has been explained as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc . . . basis, with the attendant dangers of arbitrary and discriminatory application.

[23]A violation of the Act by a physician may not only result in an administrative investigation, and administrative penalties, MCL §333.16221, but also constitutes a misdemeanor. MCL §333.16299.

People v Howell, 396 Mich 16, 20 n 4; 238 NW2d 148 (1976)(quoting Grayned v City of Rockford, 408 US 104, 108-09 (1972)). See also People v Goulding, 275 Mich 353, 358-59; 266 NW 378 (1936).[24]

Courts have also held that where, as with the new law, an act threatens to inhibit the exercise of constitutionally protected rights, "a more stringent vagueness test should apply." Hoffman Estates v Flipside, Hoffman Estates, 455 US 489, 499 (1982). See also Grayned, 408 US at 109; Smith v Goguen, 415 US 566, 573 (1974); Colautti v Franklin, 439 US 379, 392 (1979)(holding void for vagueness an abortion regulation requiring a physician to make a determination of viability prior to performing an abortion).

1. The law fails to provide an adequate exception for emergencies.

The new law defines "[m]edical emergency" as "that condition which, on the basis of the physician's 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." MCL §333.17015(2)(d). Only where a physician determines that this definition is met is the law's requirements of a 24-hour delay and biased counseling exempted before an abortion can be performed. MCL §333.17015(7). Plaintiffs believe that this definition of "medical emergency" is unconstitutionally vague, as

[24]Michigan courts applying this test have held unconstitutional a law which defined disorderly conduct as "acting in manner that causes a public disturbance," People v. Gagnon, 129 Mich App 678; 341 NW2d 867 (1983), and a law denying a license to an establishment operated "in a manner generally reputed in the immediate vicinity to be immoral and a menace to the good citizenship of the community," People v. Buff Corp, 94 Mich App 179; 288 NW2d 619 (1979).

it fails to provide clear and unambiguous criteria to the physician, and forces the physician to choose between a woman's health and the risk of criminal prosecution. See First Amended Complaint, ¶ 21.

When a physician is acting in an emergency situation, he or she cannot waste time determining whether the best medical treatment for the patient is also one which comports with these vague legal standards. Any delay can severely compromise the patient's health. Because the statute requires a trade-off between the woman's health and her receipt of biased materials and a mandated delay, "the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." Colautti, 439 US at 400-01.

The statute's vagueness is particularly troubling as it chills the exercise of constitutional rights. The ambiguity in the statutory definition of "emergency" makes it impossible for physicians to determine whether their actions will violate the law. Consequently, they will hesitate to perform abortions on women without the 24-hour delay and biased counseling requirements even where they believe that an immediate abortion is necessary to protect the woman's health. Such a chilling effect is constitutionally impermissible. Colautti, 439 US at 395-6.

Because the statutory definition of "emergency" is so uncertain and ambiguous, the act becomes "little more than 'a trap for those who act in good faith'" and must be enjoined as unconstitutional. Colautti, 439 US at 395 (quoting United States v Ragen, 314 US 513, 524 (1942)).

The new law's definition of "medical emergency" is plainly modeled after language

upheld by the United States Supreme Court in Casey, supra. Casey, however, actually supports plaintiffs' position. The federal district court in Casey held this identical language unconstitutional because it did not cover conditions such as inevitable abortion and preeclampsia. In such instances, the district court said, "delay might cause a risk of an impairment to a bodily function, but not a 'serious risk of substantial and irreversible impairment to a major bodily function."' 744 F Supp 1323, 1378 (ED Pa 1990). As an example, the court cited testimony by physicians, similar to that which will be adduced in this case, that while a patient suffering from inevitable abortion who did not receive an immediate pregnancy termination could suffer increased risk to her health, including shock and the need for a blood transfusion as well as continued pain and discomfort, her condition was not life threatening or likely to cause permanent physical impairment. Id at 1346. The court concluded, "The Act's definition of medical emergency would hinder a physician's ability to respond rapidly to emergency circumstances and cause delay which could jeopardize a woman's health." Id at 1378. "A pregnant woman or any other person for that matter should not be required to bear that risk." Id. A pregnant woman should not have to bear the risk that she will become sick and need a blood transfusion because her physician fears criminal prosection.

The United States Supreme Court's decision on appeal does not change this conclusion, but supports it. The Court agreed with plaintiffs' position that if the emergency provision foreclosed the possibility of an immediate abortion "despite significant health risks" it would be unconstitutional because a state may not interfere with a woman's choice to undergo an abortion "if continuing her pregnancy would constitute a

threat to her health." Planned Parenthood v Casey, 112 S Ct at 2822. The Court, however, deferred to the holding of the Federal Court of Appeals for the Third Circuit, which applied Pennsylvania law to place a saving construction on the statutory language, reasoning that the lower courts are "better schooled in and more able to interpret the laws of their respective states." Id, citing Frisby v Schultz, 487 US 474, 482 (1988).

This Court is therefore not bound by the construction placed on the statutory language by the federal courts applying Pennsylvania law. Rather, it is "better schooled in" and must apply Michigan law to determine what the statute means. That law dictates that this court reject the strained interpretation placed on the statutory language by the Third Circuit and strike the law as unconstitutional for failing to adequately protect the health of women.

The Third Circuit construed the term "serious risk" in the Pennsylvania statute to include the remote possibilities of death or permanent impairment if intervening complications go untreated. Planned Parenthood of Southeastern Pennsylvania v Casey, 947 F2d 682, 701 (3d Cir 1991). The Michigan Constitution's special protection for health prohibits this court from engaging in such strained interpretations when urgent medical care is involved.

Mich Const 1963, Art 4, §51 establishes without equivocation the public policy of this state, imposing a very high value on public health. The Michigan Constitution's special protection for health demands that a statute defining medical emergency be drawn with sufficient breadth and precision to give physicians clear warning of what conduct is

expected and that that conduct be in keeping with accepted medical practice.[25] A statute that fails to do so causes physicians to withhold care that is in their patient's best interests for fear of criminal liability.

Therefore, the new law's definition of "medical emergency" is unconstitutional under the State Constitution.

2. The law's requirements on physicians are impermissibly vague

The law is also impermissibly vague regarding which of the requirements can be performed by qualified persons assisting physicians, and which of the requirements must be performed by the physician. In the absence of clear and unambiguous requirements, physicians are impermissibly forced to guess as to their legal obligations, despite the risk of criminal prosecution and losing their license to practice medicine. Colautti, 439 US at 395-6.

MCL §333.17015(3)(a) provides that a physician *or a qualified person assisting the physician* shall, inter alia, determine the probable gestational age of the fetus. Another portion of the statute, however, defines the gestational age of the fetus at the time the abortion is to be performed, "*as determined by the attending physician.*" MCL §333.17015(2)(f). This statutory self-contradiction creates ambiguity which violates the essence of the vagueness doctrine: a lack of fair notice as to what conduct is required and proscribed, and the possibility of arbitrary enforcement of the law. People v Howell,

[25]Michigan law already contains a definition of medical emergency which probably meets this standard. The Emergency Medical Services Act defines an "[e]mergency patient" as "an individual whose physical or mental condition is such that the individual is, or may reasonably be suspected or known to be, in imminent danger of loss of life *or of significant health impairment.*" MCL §333.20704(8)(emphasis added).

supra. See First Amended Complaint, ¶ 22-23.

CONCLUSION

For all the foregoing reasons, plaintiffs have shown that they meet the requirements for the issuance of a preliminary injunction. Plaintiffs respectfully request that such an Order be entered enjoining the enforcement of 1993 PA 133.

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DATED: March 18, 1994

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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

Plaintiffs,

v

ATTORNEY-GENERAL OF MICHIGAN,

Defendant.

94-406793 AZ 3/10/94
JDG: JOHN A. MURPHY
MAHAFFEY MARYANN
VS
ATTORNEY GENERAL OF MI

AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

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PLAINTIFFS' MOTION FOR SUMMARY DISPOSITION

NOW COME plaintiffs, by and through their attorneys, and submit this Motion for Summary Disposition pursuant to MCR 2.116(c)(10). There is no genuine issue as to any materials facts; plaintiffs are therefore entitled to Judgment. In support of this Motion, plaintiffs respectfully state:

1. Plaintiffs seek declaratory and injunctive relief against the enforcement of 1993 PA 133, MCL §333.17015, the so-called "informed consent for an abortion" law (hereinafter: "1993 PA 133" or the "new law").

2. The facts relating to the process by which 1993 PA 133 was enacted, set forth in plaintiffs' Brief in support of this Motion, are not in dispute.

3. That the new law, at §15, requires new activities or services by local health departments including provision of pregnancy tests, determination of the probable gestational age of fetuses, distribution of mandated materials, and certification of the receipt of materials by women, is not in dispute. That the state has failed to appropriate or disburse funds to local health departments (or their funding agency), or even to send out claim forms to the local health departments, is not in dispute.

4. As a result, the new law is in clear violation of the "Headlee Amendment," Mich Const 1963, Art 9, §29, and its implementing legislation, MCL §21.231 et seq. Plaintiffs are entitled to judgment, and the new law's enforcement should be permanently enjoined on this ground alone.

5. There is no dispute 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. There is no dispute that this will cause the many women to incur additional expenses of child care, food and lodging, transportation, and lost wages, burdens particularly acute for poor women and those who do not wish to disclose their pregnancy or decision to obtain an abortion.

6. There is no dispute that many women will have to forego their choice to end their pregnancies because of the burdens of the mandatory delay. Many women will be unable to arrange for and negotiate the second trip. Even those who do will likely do so at expense to their health and privacy.

7. There is no dispute that the mandatory delay will force some women into the second trimester of pregnancy, increasing both the cost and the medical risk of abortion. There is no dispute that the delay will increase the risk for all women and that will present a particular risk for women with medical conditions whose pregnancies compromise their health, because of conditions preexisting to or triggered by the pregnancy. In many instances, the harm will not fall within the new law's definition of "medical emergency." Nor is there any dispute that requiring delay in these cases departs from accepted medical practice.

8. There is no dispute that the of oral and written descriptions of the "risks" of abortion and childbirth required by the new law is misleading and not completely truthful.

9. There is no dispute that the new law requires physicians to comply with a variety of "informed consent" counseling provisions in all circumstances except those that qualify as a "medical emergency" *even where the information will adversely affect the physical or mental health of the patient.*

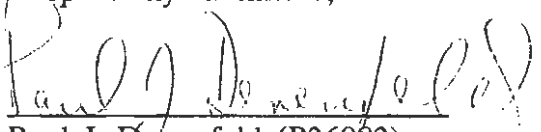
10. There is no dispute that the "information" the law requires to be given to women seeking abortions is biased and intended to discourage women from exercising their fundamental right to terminate a pregnancy.

11. There is no dispute that the new law does not clearly specify who may satisfy its obligations.

12. Under the "strict scrutiny" standard of review applicable under the Michigan Constitution, plaintiffs are entitled to judgment as a matter of law.

WHEREFORE, plaintiffs respectfully pray that this Court grant summary disposition in their favor, and enter a judgment permanently enjoining the enforcement of 1993 PA 133 in its entirety.

Respectfully submitted,



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DATED: May 11, 1994

EXHIBIT D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

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94-406793 AZ 3/10/94
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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

This case presents a challenge to portions of 1993 PA 133, attached as Exhibit A, which restrict and infringe upon a woman's ability to exercise her right to obtain an abortion. The statute requires, inter alia, that physicians provide and abortion patients receive information that is inaccurate, misleading, medically unnecessary and often contrary to sound medical practice. 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. The statute does this despite the absence of any state appropriations or disbursements of funding for the newly created health department responsibilities.

Plaintiffs in this action are the President of the Detroit City Council, and three health care professionals who treat women seeking abortions. The statute compels the medical professionals to refrain from practicing their professions in a manner consistent with their patients' needs and with the standards of professional care. Threatened enforcement of the law denies their patients an opportunity to exercise their constitutionally protected right of reproductive choice without a significant infringement of that right by the State. On their behalf and that of their patients, these medical providers challenge 1993 PA 133 as violative of the Michigan Constitution's protections of privacy, due process, free speech, and its proscription against vagueness in our laws.

Detroit Council President Mahaffey, along with the medical professionals, challenges the new law as a violation of Michigan's "Headlee Amendment," Mich Const 1963 Article

9, § 29. 1993 PA 133 requires local health departments to engage in a variety of new activities and services, though the State has not appropriated or disbursed monies to pay for those services. All plaintiffs bring this Headlee Amendment claim as taxpayers of this State, pursuant to Mich Const 1963 Art 9, § 32.

As is discussed in detail herein, 1993 PA 133 violates several provisions of our State Constitution, and therefore must be struck down and its enforcement permanently enjoined.

FACTS

The new law requires that a woman be provided with certain information by the physician who is to perform the abortion or a "qualified person assisting the physician "at least 24 hours before the abortion. That information includes, inter alia, a written summary of the abortion procedure the patient will undergo, including identifying the "physical complications" associated with the procedure and with live birth, and stating that the woman may experience adverse psychological effects as the result of an abortion; a copy of a medically accurate depiction and description of a fetus at the gestational age that corresponds with the patient's fetus; a copy of prenatal care and parenting pamphlets; and identifying available public agency services regarding prenatal care, adoption, and counseling for adverse psychological effects of abortion. MCL §§333.17015(3)(c-e),(8)(b)(ii-vi).

In addition, before performing an abortion the physician, and only the physician, must provide additional information, including inter alia: the name of the physician; the specific risks of complications of both the abortion and carrying the pregnancy to term;

and an executed acknowledgement and consent form. MCL §333.17015(5)(a),(b)(i-ii),(d).

The only exception to these mandates is a "medical emergency." MCL §333.17015(7). No exception is provided when receiving the information would be contrary to the woman's best interests or cause her psychological harm. *Regardless of the individual circumstances* -- the pregnancy resulting from rape or incest, or diagnosis of fetal abnormality, or the closest abortion provider being hundreds of miles away -- the 24-hour waiting period and provision of the mandated information must be complied with.

Violation of the statute is both a misdemeanor and grounds for denial, revocation, suspension, or limitation of the physician's license to practice medicine, as well as probation, reprimand, or fine. MCL §§333.16221 and 333.16299; MSA §§14.15(16221) and 14.15(16299). The statute imposes strict liability; there is no requirement of criminal intent in order to be convicted or disciplined for violating its terms.[1]

ARGUMENT

I. PLAINTIFFS SATISFY THE REQUIREMENTS FOR SUMMARY DISPOSITION

A. *Standards for Summary Disposition*

MCR 2.116(C) provides that a Motion for Summary Disposition "may be based on one or more of these grounds:

> (10) Except as to the amount of damages, there is no genuine issue of any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

[1]The sole exception is that the determination that an emergency exists may be based on the physician's "experience, judgment, and professional competence...."

B. *Issues of Fact Not in Dispute*

The numerous issues of fact that are not in dispute, and which allows this Court to enter judgment for plaintiffs, are set forth in plaintiffs' Motion. See MCR 2.116(G)(4).

II. THE STATE'S UNFUNDED REQUIREMENTS THAT LOCAL HEALTH DEPARTMENTS PERFORM PREGNANCY TESTS; DETERMINE THE PROBABLE GESTATIONAL STAGE OF FETUSES; DISTRIBUTE COUNSELING MATERIALS; AND CERTIFY THAT THE MATERIALS WERE RECEIVED AT A DATE AND TIME CERTAIN, ARE "NEW ACTIVIT[IES] OR SERVICE[S]" IN VIOLATION OF THE HEADLEE AMENDMENT

A. *The Costs of Performing Pregnancy Tests, Determining the Probable Gestational Stage of Fetuses, Distributing Counseling Materials, and Certifying that the Materials were Received by the Patient will be Borne by Local Health Departments.*

As part of the new law, MCL 333.17015 provides in relevant part[2]:

> (15) Upon an individual's request, each local health department *shall*:
>
> (a) Provide a pregnancy test for that individual and determine the probable gestational stage of a confirmed pregnancy.
>
> (b) Preceded by an explanation that the individual has the option to review or not the written summaries, provide the summaries described in subsection 8(b) that are recognized by the department as applicable to the individual's gestational stage of pregnancy.
>
> (c) Preceded by an explanation that the individual has the option to review or not review the depiction and description, provide the individual with a copy of a medically accurate depiction and description of a fetus described in subsection 8(a) at the

[2]Subsection (15), which is the subsection that sets out the state's mandated requirements on local health departments, is set forth first for context. As discussed further infra, the statute is virtually incomprehensible in its organization and self-contradictions. For example, it is unclear what local health departments are authorized to do: the new law requires the local health department to provide a woman with "a completed certification form... at the time the information is provided," MCL §333.17015(15)(d), but also limits the scope of the information the local department may provide. MCL §333.17015(4),(15)(a-c).

gestational age nearest the probable gestational age of the patient's fetus.

(d) Ensure that the individual is provided with a completed certification form described in subsection (8)(f) at the time the information is provided. (emphasis added)

(8) The department of public health shall do each of the following:

(f) Develop, draft, and print a certification form to be signed by a local health department representative at the time and place a patient is provided the information described in subsection (3), as requested by the patient, verifying the date and time the information is provided to the patient.[3]

These new state mandates will require new or additional expenditures by local health departments. By definition, a physician must determine the probable gestational stage of a fetus. The determination will thus require a physician, and in some instances expensive equipment, each of which will require extensive resources by local health departments. Evans Aff. at ¶33-35; Bertler Aff. at ¶5, attached as Exhibits B and C. In addition, these departments are now required to provide women mandated information and provide a certification, all of which will require staff time and resources.

There is no question that the local health department will bear additional costs of complying with the new law's mandates.[4] The only statutory state funding to local health

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[3]"Local health department representative" is defined as "a person employed by, or contracted to provide services on behalf of, a local health department...." MCL 333.17015(2)(c).

[4]The legislation implementing Mich Const 1963, Art 9, §29, MCL §21.231; MSA §5.3194 (601) et seq defines "local unit of government" as "a political subdivision of this state,... if the political subdivision has as its primary purpose the providing of local governmental services for residents in a geographically limited area of this state and has the power to act primarily on behalf of that area." Pursuant to MCL §333.2421; MSA §14.15 (2421), the Detroit Health Department "shall have the powers and duties of a local health department," powers and duties described in MCL §§333.2433 and 333.2435; MSA §§14.15 (2433) and 14.15 (2435). Clearly, then, the Headlee Amendment at Art 9, §29 applies to *all* local health departments, whether organized as county, city, or district departments.

departments is found at MCL §333.2475; MSA §14.15 (2475), which provides that the state department of public health "shall reimburse local governing entities for the reasonable and allowable costs of required and allowable health services delivered by the local governing entity...." Those reimbursements are explicitly made "[s]ubject to the availability of funds actually appropriated" by the Legislature, but should currently be 50% of the costs. MCL §333.2475(1)(a); MSA §14.15 (2475). The state department is currently funding significantly less than that share of those costs. See 1993 PA 174, the appropriations act for the Department of Public Health for Fiscal Year 1993-94, at 871 (which appropriates $17,079,200 for "state/local cost-sharing.")[5], attached as Exhibit D.

Thus, the costs of the law's new requirements on local health departments will be borne by those local health departments or those departments' funding entities (i.e., counties).

B. *1993 PA 133 Requires a "New Activity or Service" in Violation of the "Headlee Amendment."*

Mich Const 1963, Art 9 §29 provides in part:

> 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 beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs....

[5]The only other state monies received by local health departments are categorical grants that are, of course, earmarked for specific categories of expenditures. See Exhibit D, 1993 PA 174, the appropriations act for the Department of Public Health for Fiscal Year 1993-94, at 871, which designates 9 other categories of funding for local health systems.

In the subsequent legislation to implement this constitutional section, MCL §21.231; MSA §5.3194(601) et seq, the Legislature defined certain key phrases contained in §29:

> "Activity" means a specific and identifiable administrative action of a local unit of government.... [MCL §21.232(1); MSA §5.3194(602)]
>
> "Service" means a specific and identifiable program of a local unit of government which is available to the general public or is provided for the citizens of the local unit of government... [MCL §21.234(1); MSA §5.3194(604)]
>
> "Existing law" means a public or local act enacted prior to December 23, 1978.... [MCL §21.234(4); MSA §5.3194(604)]
>
> "State requirement" means a state law which requires a new activity or service or an increased level of activity or service beyond that required of a local unit of government by an existing law... [MCL §21.234(5); MSA §5.3194(604)]

A plain reading of 1993 PA 133 leads to the obvious conclusion that this new law requires local health departments to carry out new "activit[ies]" or "service[s]." The requirements that health departments perform pregnancy tests and determine the gestational stage of fetuses, provide certain of the information mandated by the statute, and ensure that a woman receive a completed certification form, force a "specific and identifiable administrative action." See MCL §21.232(1); MSA §5.3194(602). Moreover, these required services are to be "available to the general public or [ ] provided for the citizens of the local unit of government." MCL §21.234(1); MSA §5.3194(604). These unfunded state mandates on local governments are precisely what "Headlee" is intended to prevent.

While virtually all local health departments already perform pregnancy tests, upon information and belief, no local health department determines the probable gestational age of fetuses now, nor do any distribute the abortion counseling materials and certify that the patient has received those materials. The new law clearly requires them to do so; thus, whether or not these activities were previously required, Mich Const 1963, Art 9, §29 is violated. See Livingston County v Department of Management and Budget, 430 Mich 635; 425 NW2d 635 (1988).

In construing Mich Const 1963, Art 9, §29, the Michigan Supreme Court has stated:

> "[These first two] sentences clearly reflect an effort on the part of the voters to forestall any attempt by the Legislature to shift responsibility for services to the local government, once its revenues were limited by the Headlee Amendment, in order to save the money it would have had to use to provide the services itself.
>
> "Because they were aimed at alleviation of two possible manifestations of the same voter concern, we conclude that the language "required by the legislature or any state agency" in the second sentence of §29 must be read together with the phrase "state law" in the first sentence. This interpretation is consistent with the voters' intent that *any* service or activity required by the Legislature or a state agency, whether now or in the future, be funded at an adequate level by the state and not by local taxpayers." [Durant v State Board of Education, 424 Mich 364, 379-80; 381 NW2d 662 (1986)] (original emphasis)

Finally, the new law is plainly *mandatory*, and not permissive, in its terms. In Delta County v Michigan Dept. of Natural Resources, 118 Mich App 458; 325 NW2d 455 (1982), the Michigan Court of Appeals struck down the Solid Waste Management Act as violative of the Headlee Amendment. That Act provided in part:

> A municipality or county shall assure that all solid waste is removed from the site of generation, frequently enough to protect the public health, and are delivered to licensed solid waste disposal areas,... [MCL 299.424; MSA 13.29(24)]

In analyzing whether the term "shall assure" required "new or increased" activities under the Headlee Amendment, the Court of Appeals stated:

> The general rule when interpreting the language of a statute is to construe it according to its plain meaning. Uniformly, this Court has held that the word 'shall' is mandatory. See St. Highway Commission v Vanderkloot, 392 Mich 159, 220 NW2d 416 (1974).
>
> [Upon] review of the entire Act, we are convinced that the words 'shall assure' are the equivalent to a command to localities to dispose of solid waste products....[Delta County, supra at 462]

See also City of Ann Arbor v State of Michigan, 132 Mich App 132; 347 NW2d 10 (1984)(distinguishing between permissive and mandatory statutes, and holding the local fire protection statutes to be permissive and thus not subject to "Headlee.")

Likewise, in the instant case, 1993 PA 133's mandatory language ("Upon an individual's request, each local health department *shall*...) is "the equivalent to a command to localities...." Id. In Delta County, the Court of Appeals had no trouble concluding that the law in question imposed "new and increased" duties on municipalities, and occasioned "necessary increased costs" within the meaning of the Headlee Amendment. In the case at bar, it is equally clear that 1990 PA 133 imposes increased costs on local health departments.

Moreover, "[d]efendant admits that at least some of the services required by 1993 PA 133, §17015(15) may require new and additional expenditures for at least some local

health departments...." Defendant's Answer to First Amended Complaint, at ¶24. Thus, defendant admits that Headlee's funding requirements are triggered.

C. *There has been No Appropriation or Disbursement by the State to Local Health Departments to Pay for these New State Mandates.*

1993 PA 174 is the appropriations act for the Department of Public Health for Fiscal Year 1993-94. It includes no appropriation made to local health departments to pay for the new or increased costs to local health departments that will be incurred due to the state requirements in 1993 PA 133. See 1993 PA 174, at 871; Defendant's Answer to First Amended Complaint, at ¶26 ("[d]efendant admits that, as of the date of this Answer, the Michigan Legislature has not enacted a state appropriation for the specific purpose of paying increased costs that may be incurred by local health departments as a result of the requirements of 1993 PA 133.")

Additionally, local health departments have received no disbursements of state monies to pay for these new or increased costs despite the statutory requirement that initial advance disbursements be made at least 30 days prior to the effective date. See Bertler Affidavit at ¶7. MCL §21.235(1); MSA §5.3194(605), the "Headlee Amendment" implementing legislation, requires the Legislature to "annually appropriate an amount sufficient to make disbursement to each local unit of government for the necessary cost of each state requirement...." "[An] initial advance disbursement [shall] be made at least 30 days prior to the effective date of the state requirement," with annual disbursements

thereafter. MCL §21.235(2); MSA §5.3194(605).[6]

No appropriations or disbursements by the state to local health departments have been made. 1993 PA 133 must be enjoined, as it is in clear violation of Michigan constitutional and statutory law.

The new law *in its entirety* must be enjoined, because to only enjoin those portions requiring local health department services would defeat the legislative intent. The local health department provisions were added as amendments to the bill on the House floor. See Legislative Status, and excerpts of the House Journal, attached as Exhibit E. Concluding an obvious political deal, the bill *with those amendments* passed the House 97-3 on July 7, 1993. Six days later, the Senate concurred in amended House Substitute H-12.

Thus, the clear legislative intent was to have an "informed consent" law that included the local health department requirements. The only way *not* to defeat the legislative intent is to enjoin the entire law.

III. THE "INFORMED CONSENT" LAW UNCONSTITUTIONALLY INFRINGES ON THE RIGHTS OF PHYSICIANS AND THEIR PATIENTS WHO SEEK TO EXERCISE THEIR RIGHT OF REPRODUCTIVE CHOICE GUARANTEED BY THE STATE CONSTITUTION

A. *This Court has the Responsibility to Interpret the Michigan Constitution Separately from how the United States Supreme Court Interprets the Federal Constitution.*

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[6]Any argument that local health departments have failed to properly submit claims to the state Department of Management and Budget for disbursement is erroneous; the statute clearly dictates that the Department "shall notify each local unit to which the state requirement applies not less than 180 days before the effective date of the state requirement. The notice shall include a preliminary claim form...." MCL §21.238(2)(a); MSA §5.3194(608). *None* of these requirements has been complied with.

The drafters of the 1963 Michigan Constitution intended that every section of that document have meaning, importance and enforcement. Our Michigan Supreme Court has recognized this, and has rejected "the notion that state constitutional provisions were adopted to mirror the Bill of Rights...." Brennan, State Constitutions and the Protection of Individual Rights, 90 Har L Rev 489, 501 (1977). See also Woodland v Michigan Citizens Lobby, 423 Mich 188, 202; 378 NW2d 337 (1985). Six months ago, the Michigan Supreme Court explained the relationship between the federal and Michigan Constitutions in Sitz v Department of State Police, 443 Mich 744; 506 NW2d 209 (1993):

> [O]ur courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United State Supreme Court has chosen to do so. *We are obligated to interpret our own organic instrument of government.* [Id. at 763.] (emphasis added)[7]

Sitz is but the latest of a long line of cases where the Michigan courts have afforded the Michigan Constitution construction independent of and more protective than the federal Constitution on an identical or similar issue. See, e.g., People v Bullock, 440 Mich 15; 485 NW2d 866 (1990)[8]; Socialist Workers Party v Secretary of State, 412 Mich 571; 317 NW2d 1 (1982);[9] People v Cooper, 398 Mich 450; 247 NW2d 866 (1976)[10];

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[7]In Sitz, our state Supreme Court interpreted Mich Const 1963, Art 1, §11 differently from the U.S. Supreme Court's interpretation of the federal Fourth Amendment, and reached an opposite result than the U.S. Supreme Court in striking down highway sobriety checklanes. Cf Michigan Dept of State Police v Sitz, 496 US 444; 110 S Ct 2481 (1990).

[8]Cf Harmelin v Michigan, ___US___; 111 SCt 2680 (1991)(whether nonparoleable life sentence for cocaine possession is cruel and unusual punishment).

[9]Cf Hudler v Austin, *aff'd sub nom* Allen v Austin, 430 US 924; 97 S Ct 1541 (1977)(proper analysis, and standard of review, of ballot access claims).

People v Garcia, 398 Mich 250; 247 NW2d 547 (1976)[11]; People v Beavers, 393 Mich 554; 227 NW2d 511 (1975), cert den 423 US 878 (1975)[12]; People v Jackson, 391 Mich 323; 217 NW2d 22 (1974)[13]; People v White, 390 Mich 245; 212 NW2d 222 (1973)[14]; Detroit Branch, NAACP v City of Dearborn, 173 Mich App 602; 434 NW2d 444 (1988), lv den 433 Mich 906 (1989)[15]; Michigan Organization for Human Rights v Attorney General, No. 88-815820 CZ (Wayne Circuit Court, 7-9-90), attached as Exhibit F.[16]

Even where the Michigan Supreme Court applies the same standard of review and method of analysis as the United States Supreme Court, it does not "hesitate to reach a conclusion different from that reached by the United States Supreme Court when it is warranted." Delta Charter Township v Dinolfo, 419 Mich 253, 276-277, n 7; 351 NW2d 831 (1984). In that case, the Michigan Supreme Court held that the due process clause

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[10]Cf Bartkus v Illinois, 359 US 121; 79 S Ct 676 (1959)(whether double jeopardy bars subsequent prosecution in another jurisdiction for an offense arising out of same criminal act).

[11]Cf Strickland v Washington, 466 US 668; 104 S Ct 2052 (1984)(standard for ineffective assistance of counsel). But see People v Tommolino, 187 Mich App 14; 466 NW2d 315 (1991), lv den 439 Mich 902 (1991)(conflict-settling decision holding state and federal tests are the same).

[12]Cf US v White, 401 US 745; 91 S Ct 1122 (1971)(whether warrant is required for participant monitoring). But see People v Collins, 438 Mich 8; 475 NW2d 684 (1992)(overruling Beavers and adopting the reasoning of US v White).

[13]Cf US v Ash, 413 US 300; 93 S Ct 2568 (1973)(whether there is a right to counsel at pre-trial photographic identifications).

[14]Cf Ashe v Swenson, 397 US 436; 90 S Ct 1189 (1970)(whether double jeopardy prohibition requires joinder of charges arising out of same transaction).

[15]Cf Washington v Davis, 426 US 229; 96 S Ct 2040 (1976) and Arlington Heights v Metropolitan Housing Development Corp, 429 US 252 (1977)(whether showing of disparate impact constitutes racial discrimination in violation of equal protection, or whether purposeful discrimination must be shown).

[16]Cf Bowers v Hardwick, 487 US 86; 106 S Ct 2841 (1986)(whether there is a fundamental right of adults to engage in consensual sodomy in private).

of Mich Const 1963, Art 1, §17, protects the right of unrelated individuals to live together, and struck down a zoning ordinance which narrowly defined "single family." This result was opposite to that previously reached by the United States Supreme Court in a case presenting a federal due process challenge to a virtually identical ordinance. Village of Belle Terre v Boraas, 416 US 1 (1974).

Thus, Michigan courts not only can -- but *must* -- interpret the state Constitution independent of the federal Constitution.

B. *The Michigan Constitution Guarantees Reproductive Freedom and Autonomy*

1. The right to privacy is a fundamental right under the Michigan Constitution.

In Roe v Wade, 410 US 113; 93 S Ct 705 (1973), the United States Supreme Court held that the constitutional right to privacy, recognized in a number of prior cases, encompasses a woman's decision whether or not to terminate her pregnancy. Until the end of the first trimester of pregnancy, a patient and her physician are "free to determine, without regulation by the state," that a pregnancy should be terminated. 410 US at 163. From the end of the first trimester of pregnancy until the point of fetal viability, a state may regulate abortion "to the extent that the regulation reasonably relates to *the preservation and protection of maternal health.*" Id. (emphasis supplied).

Because a woman's health interests are paramount until the point of fetal viability, only a compelling interest can justify state regulation impinging upon that right. 410 US at 155-156.

The Michigan Constitution independently protects these rights of privacy and

reproductive choice as fundamental. In Advisory Opinion 1975 PA 227, 396 Mich 465; 242 NW2d 3 (1976), our Michigan Supreme Court stated:

> "This court has long recognized privacy to be a highly valued right. DeMay v Roberts, 46 Mich 160, 9 NW 146 (1881). No one has seriously challenged the existence of a right to privacy in the Michigan Constitution nor does anyone suggest that right to be of any less breadth than the guarantees of the United States Constitution." [Id. at 504.]

In Advisory Opinion 1975 PA 227, the Court specifically cited both Roe v Wade, supra, and Griswold v Connecticut, 381 US 479; 85 S Ct 1678 (1965), as support for the presence of constitutionally protected "zones of privacy." These zones, the Court noted, derive from the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution. "The people of this state," the Court continued, "have adopted corresponding provisions in art. 1 of our Constitution." Id. at 505.

And, four years ago, this Court recognized our state constitutional right of privacy, holding that adult citizens have a fundamental right to engage in consensual sexual activities in the privacy of their homes. MOHR v Attorney General, supra. This Court stated: "The Michigan Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of the government." Id at 9. (citations omitted).

These Michigan decisions are consistent with a number of states that, looking to explicit or implicit protections,[17] have found reproductive choice a fundamental right

[17]Resting on their state constitutional protection for inalienable rights, the courts of Kentucky, California and New Jersey, for example, have found privacy a fundamental right protected by their constitutions. See, e.g., Commonwealth v Wasson, 842 SW2d 487, 491 (Ky 1992)(privacy and sodomy protected); Right to Choose v Byrne, 450 A2d 925, 933 (NJ 1982)(reproductive rights fundamental);

protected by their constitutions. See, e.g., Roe v Harris, No. 96977, slip op (Idaho D Ct 2-1-94), attached as Exhibit G. Davis v Davis, 842 SW2d 588, 598-600 (Tenn 1992); In re TW, 551 So2d 1186, 1192-93 (Fla 1989); Doe v Maher, 515 A2d 134, 150 (Conn Super Ct 1986); Right to Choose v Byrne, 450 A2d 925, 933 (NJ 1982); Committee to Defend Reprod Rights v Myers, 625 P2d 779, 784 (Cal 1981); Moe v Sec'y of Admin & Fin, 417 NE2d 387, 397-99 (Mass 1981).

2. Strict scrutiny is the standard to be applied in reviewing the Act

Since the Michigan Supreme Court has recognized that a woman's decision whether to conceive or bear a child implicates privacy rights found in our state constitution, a strict scrutiny standard of review is appropriate:

> The right to privacy includes certain activities which are fundamental to our concept of ordered liberty. *Rights of this magnitude can only be abridged by governmental action where there exists a "compelling state interest."* Roe, supra, 410 US 152, 155; 93 SCt 705. Kropf v Sterling Heights, 391 Mich 139, 157-158; 215 NW2d 179 (1974). (emphasis supplied)[Advisory Opinion, supra, at 505.]

This standard is consistent with that used to review every other fundamental right protected by the Michigan Constitution. See, e.g., Doe v Department of Social Services,

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Committee to Defend Reprod Rights v Myers, 625 P2d 779, 784 (Cal 1981)(detailing court's recognition of privacy and reproductive choice as protected by inalienable rights clause prior to constitutional amendment to include privacy among inalienable rights); see also Doe v Celani, No. 581-84 CnC, slip op at 5-7 (Vt Super Ct May 26, 1986)(right to personal safety and reproductive choice).

Other states too have found a fundamental right to privacy implicit in their state constitutions. See, e.g., 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 A.2d 484 (N.H. 1983)(right of the medically ill to be free from compulsory medical treatment); see also State v Hartog, 440 NW2d 852 (Iowa)(right to privacy embraces freedom of choice to engage in certain activities), cert. denied, 492 US 1005 (1989).

439 Mich 650, 661-2; 487 NW2d 166 (1992)(Art 1, § 2 equal protection review of classification that impinges upon the exercise of a fundamental right); People v DeJonge, 442 Mich 266, 279-280; 501 NW2d 127 (1993)(Art 1, § 4 free exercise of religion review, at least where in conjunction with right of parents to direct children's education); Advisory Opinion 1975 PA 227, 396 Mich 465, 505; 242 NW2d 3 (1976)(Art 1, § 5 free expression review of restrictions on speech and the media).

The strict scrutiny standard is also the standard adopted by numerous other state courts construing their liberty and privacy rights under their state constitutions. See, e.g., Roe v Harris, No. 96977, slip op at 5 (Idaho D Ct 2-1-94)(privacy cannot be abridged absent a compelling state interest); Committee to Defend Reprod Rights v Myers, 625 P2d 779, 793 (Cal 1981); Moe v Sec'y of Admin & Fin, 417 NE2d 387, 402-3 (Mass 1981); Murphy v Pocatello School District, 94 Idaho 32; 480 P2d 878, 884 (1971)(state bears a "substantial burden of justification").

3. The new "undue burden" test adopted by the United States Supreme Court in interpreting the federal constitution is badly flawed and unworkable, and should be rejected by Michigan courts.

In 1992, the United States Supreme Court decided Planned Parenthood of Southeastern Pennsylvania v Casey, 505 US ____; 112 S Ct 2791 (1992). Casey relaxed the strict scrutiny standard of Roe v Wade established 19 years earlier with a less protective "undue burden" test. In contrast to virtually every other fundamental right, restrictions on a woman's right to terminate a pregnancy will be upheld under the federal constitution unless they have "the purpose or effect of placing a substantial obstacle in

the path of a woman seeking an abortion of a nonviable fetus." Id at 2820.[18]

This undue burden test is inconsistent with Michigan's traditional mode of analysis of fundamental rights, and directly at odds with the strict scrutiny standard for abortion regulations announced by the Michigan Supreme Court in Advisory Opinion 1975 PA 227, supra. Michigan courts have never utilized an undue burden standard when reviewing laws that impinge on fundamental rights, and there is no persuasive reason why such a standard should be adopted now.[19]

In fact, even dissenting Justices Scalia and Rehnquist decried the inherent vagueness and lack of standards in the newly-announced test. Protesting the amount of subjective determination required of trial courts, Chief Justice Rehnquist believed the new

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[18]Applying this new standard, announced in a joint opinion by Justices O'Connor, Souter, and Kennedy, the Court upheld four provisions of the Pennsylvania law, including an informed consent requirement, a 24-hour mandated waiting period, a parental consent requirement, and reporting requirements.

[19]To the contrary, the well-known circumstances that led to the decision in Casey strongly dictate *against* the Michigan courts reflexively adopting the new standard in Casey. As recently as 1986, a majority of the Justices utilized a strict scrutiny standard in reviewing abortion restrictions. Thornburgh v American College of Obstetricians and Gynecologists, 492 US 490; 106 S Ct 2169 (1986). The law was invalid unless the state demonstrated that the regulation was narrowly tailored to promote the state's compelling interests in the health of the woman or the protection of a viable fetus. The six statutes at issue in Thornburgh (many virtually identical to those upheld in Casey six years later) were struck down 5-4. The four dissenters, Justices White, Rehnquist, and O'Connor and Chief Justice Burger, largely attacked the Roe v Wade conclusion that women had a fundamental right to have an abortion.

Three years later, during which time Justices Scalia and Kennedy joined the Court, the Court decided Webster v Reproductive Health Services, 492 US 490; 109 S Ct 3040 (1989). For the first time since Roe, a majority no longer used strict scrutiny in analyzing abortion restrictions. The plurality (Chief Justice Rehnquist and Justices Scalia, White, and Kennedy) would no longer apply strict scrutiny; Justice O'Connor in concurrence set forth her proposed undue burden standard, adopted three years later in Casey.

The only thing that had changed since Thornburgh was the make-up of the Court: Justice Scalia had replaced Chief Justice Burger's vacancy; Justice Kennedy had replaced Justice Powell; Justice Souter had replaced Justice Brennan; and Justice Thomas had replaced Justice Marshall. *Compelling legal reasoning, not political appointments, should be the basis for the interpretation of the Michigan constitution by the Michigan courts.*

standard to be "based even more on a judge's subjective determinations than was the trimester framework...." 112 S Ct at 2866 (Rehnquist, CJ, concurring in the judgment in part and dissenting in part). Justice Scalia concluded the new test "is inherently manipulable and will prove hopelessly unworkable in practice." 112 S Ct at 2877 (Scalia, J., concurring in the judgment in part and dissenting in part).

Additionally, unlike the usual strict scrutiny test which essentially puts the burden of production on the state once an infringement on a fundamental right is shown, the undue burden test places the production requirement squarely on the individual despite the state's overwhelming advantage of resources. This flies in the face of accepted constitutional analysis in this state.

C. *The Michigan "Informed Consent" Law Violates the Michigan Constitution's Rights to Privacy and Due Process*

Where the United States Supreme Court ignores precedent, logic, and an appropriate regard for individual rights, "our [Michigan] courts are not obligated to accept what we deem to be a major contraction of citizen protections under our [Michigan] constitution simply because the United States Supreme Court has chosen to do so." Sitz, supra, at 763. Where our Michigan Supreme Court has chosen *not* to accept what the United States Supreme Court has done, it has frequently relied on prior federal cases or dissenting opinions to establish more protective standards. For example, in People v Bullock, supra, the majority opinion extensively discussed Solem v Helm, 463 US 277; 103 S Ct 3001 (1983), and essentially adopted Justice White's dissenting opinion in Harmelin v Michigan, ___ US ___; 111 S Ct 2680 (1991). In People v Cooper, supra, the opinion

extensively discussed both prior and recent federal decisions. In People v Turner, 390 Mich 7; 210 NW2d 336 (1973), in adopting the *objective* test for entrapment on public policy grounds, the majority essentially adopted the dissenting views of several U.S. Supreme Court Justices. See, e.g., US v Russell, 411 US 423; 93 S Ct 1637 (1973)(Stewart, J, dissenting). And, in People v Beavers, supra, the Court analyzed the issue under federal Fourth Amendment jurisprudence, but reached a contrary result to the United States Supreme Court's holding on the issue.

Thus, since it has already been established that the appropriate standard under the Michigan constitution is strict scrutiny as articulated in Roe v Wade, the analysis in cases applying Roe to laws similar to Michigan's new law is instructive.

1. Mandated delay

MCL §333.17015(3) requires a delay of *at least* 24 hours before obtaining an abortion after the pregnancy is confirmed and the probable gestational age of the fetus is determined, *and* after receiving the written descriptions, fetal depictions and descriptions, biased counseling, and prenatal care and parenting information pamphlet. MCL §333.17015(3)(c-e).

Additionally, the mandatory delay will require *all* women to make at least two trips to obtain an abortion: at least one to an abortion provider and the other either to the provider or a health department. Any requirement that will result in an additional trip to the abortion provider will constitute an enormous burden on women who live in Northern Michigan or the Upper Peninsula. Abortion-providing facilities are located overwhelmingly in the southern one-third of the state. Smith Aff. at ¶5, attached as

Exhibit H. None are located north of Saginaw, and women traveling from the upper crescent of the lower peninsula must travel over 600 miles round trip to Saginaw, approximately 12 1/2 hours of driving time. Smith Aff. at ¶9. Travel from the Upper Peninsula is nearly as burdensome. Smith Aff. at ¶10.

In any event, as written, the statute clearly requires *at least two trips* before a woman can obtain an abortion, and *at least a 24-hour delay*.

The requirement of a second trip will cause the many women who have long distances to travel to pay additional costs of child care, food and lodging, transportation, and lost wages. Evans Affidavit at ¶13. These burdens will be particularly acute for rural, low-income women who live great distances from an abortion provider. For some, the additional requirement will delay the abortion as women struggle to raise the funds to travel and make the arrangements -- yet a second time -- for child care, or leave from work or school. The requirement of a second trip will also compromise confidentiality of many women, who explain or justify their absences. For many, such as battered women and young women, any disclosure of their plan may be jeopardized, as their husbands, partners or parents will obstruct the abortion.

Delays will also force some women into the second trimester of pregnancy, increasing both the cost and the medical risks of abortion. Evans Affidavit at ¶¶ 6, 11. Dr. Evans describes in great detail the adverse medical impact of delayed abortion in general, and the "special risks for women seeking abortions who are more than 12 weeks past their last menstrual period," Evans Aff. at ¶12, a group twice as likely to be teenagers than older women. Evans Aff. at ¶14. With respect to women who require a

two-day abortion procedure, Dr. Evans explains:

> These women will have to endure even greater expense, time away from family and work, nights spent in a hotel, hours driving to and from a clinic, and additional risk that they will have to disclose the pregnancy because it is too hard to explain *three* days absence from work or home. I also fear that when scheduling difficulties and costs are so multiplied, the physician will be pressured to eliminate this extra safeguard, to the detriment of patient care. [Evans Aff. at ¶13](emphasis added).[20]

Additionally, Dr. Evans describes the numerous medical conditions confronted by many pregnant women. Evans Aff. at ¶¶16-20. He then explains that "[f]or 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." Evans Aff. at ¶23.[21]

With respect to women carrying abnormal fetuses, Dr. Evans explains that after such a woman has decided to terminate the pregnancy, "it is traumatic to continue being pregnant.... " Evans Affidavit at ¶29. And, "[b]ecause fetal abnormalities are usually not discovered until the second trimester of pregnancy, women deciding to terminate because of fetal abnormalities do so later in pregnancy when delayed abortion adds to the health risks of the procedure." Evans Affidavit at ¶30. In other cases, delaying abortion

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[20]Dr. Evans refers to a *three*-day delay because, as he explains, for women more than 12 weeks past their last period, it is medically advisable to utilize a two-day procedure to terminate the pregnancy. Evans Aff. at ¶12. Thus, a 24-hour delay becomes a 72-hour delay for this "large fraction" of the cases to which the mandated delay is relevant. See Casey, supra, at 2830, holding that even where applying the "undue burden" test, the focus should be whether the law "in a large fraction of the cases in which [it] is relevant, [ ] will operate as a substantial obstacle to a woman's choice to undergo an abortion."

[21]This obvious undue burden relating to the adverse effects of the new law on the health of women also renders the new law's definition of "medical emergency" unconstitutionally vague, as discussed in more detail supra.

decreases the woman's chance for eventual cure. Such delay in all these cases departs from accepted medical practice. Evans Affidavit at ¶ 23.

While the statute purports to provide alternatives to women by mandating local health departments to provide pregnancy tests and gestational stage determinations, MCL §333.17015(15), and by permitting the biased materials to be distributed either at the local health department or at another location, MCL §333.17015(4), those alternatives are fraught with problems. First, the local health departments are having a new activity mandated by the state without state appropriation and disbursement in clear violation of Mich Const 1963, Art 9, §29 (a/k/a the "Headlee Amendment"), supra. Some local health departments have publicly vowed to refuse to perform these state mandates because of the state's lack of funding. See District Health Dept. No. 3 letter to Sen. George McManus, attached to Bertler Affidavit. Second, in those areas of Michigan where a local health department or district serves a large geographic area, the distance a woman has to travel to the health department can be significant. See August 1993 map of local health departments, attached as Exhibit I. Third, while the statute provides that a "qualified person assisting the physician" can perform some of the mandated tasks, it is simply not the case that a physician can allow a nonphysician working under him or her to, for example, determine the probable gestational stage of the patient's fetus without violating the applicable standard of care. See Evans Affidavit, at ¶34. Fourth, the statute does not permit the referring physician to perform the mandated tasks, effectively requiring *two* additional trips.

In City of Akron v Akron Center for Reproductive Health, Inc., 462 US 416; 103

S Ct 2481 (1983), overruled in part, Planned Parenthood v Casey, 505 US___; 112 S Ct 2791, 2823 (1992), the United States Supreme Court, applying strict scrutiny, recognized these burdens on women's right of procreational autonomy and invalidated a 24-hour waiting period. Justice Powell's opinion for the Court in Akron found that no

> legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor [is] . . . the State's legitimate concern that the women's decision be informed . . . reasonably served by requiring a 24-hour delay as a matter of course. . . . [I]f a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision. [Akron, 462 US at 450-51.]

More recently, a Tennessee circuit court found the state's mandatory waiting period to violate the state constitution. The court reasoned that the rigid time frame demanded by the statute was "a burden in too many probable medical and psychological profiles of women who have no need to wait and who do not want to wait. A rigid time period is an affront to the patient-physician autonomous relationship and a woman's right not to procreate." Planned Parenthood v McWherter, No. 92 C-1672, slip op at 19 (Tenn Cir Ct, Nov 19, 1992), attached as Exhibit J.

Additionally, Mich Const 1963, Art 4, §51 provides:

> The public health and general welfare of the people of the State are hereby declared to be matters of primary concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

This was a new addition to the 1963 Constitution, and has no federal counterpart. In construing it, the Michigan Supreme Court wrote in City of Gaylord v City Clerk, 378

Mich 273; 144 NW2d 460 (1966):

> This new section, together with the traditional public policy of the State, must be held to limit the powers of the legislature and of government generally to such legislative acts and such governmental powers as exhibit a public purpose. [Id. at 295.]

The Michigan 24-hour waiting period does not further any legitimate state interest, places an unconstitutional obstacle on women seeking abortions, and unconstitutionally threatens their health and welfare. The provision violates the Michigan constitution.

2. Biased counseling

MCL §333.17015(3),(5) require the physician or qualified person assisting the physician to present each and every patient seeking an abortion a litany of state-mandated materials, and to obtain the patient's signature on a certification form acknowledging that she received this information.[22] For example, every woman must be shown a depiction of a fetus at the gestational age closest to that of her pregnancy; every woman must be told of services available for adoption, foster care, and parenting; and every woman must be told of counseling services should she suffer adverse psychological consequences for an abortion. The physician must provide this information to women seeking to end a pregnancy because the fetus is fatally impaired; because the pregnancy results from rape; or because the pregnancy seriously threatens her health.

MCL §333.17015(3) mandates that the physician actually "*present to the patient*" the

[22]A description of the written summary that must be presented to the patient is described at MCL §333.17015(8)(b). The summary, to be developed by the department of public health, is required to describe potential negative psychological side effects *despite the absence of any accepted medical evidence supporting the existence of such symptoms*. Evans Affidavit at ¶ 11. Additionally, the summary is obviously designed to encourage the patient to carry the pregnancy to term by identifying public services available to new mothers.

written summary of the abortion procedure, and the fetal depictions and descriptions, and "*[p]rovide the patient* with a copy of the prenatal care and parenting information pamphlet...." (emphasis added) 1993 PA 133 has no exemption permitting the physician not to comply if he or she believes provision of the information would adversely affect the patient.[23]

Dr. Evans' testimony shows the importance of having such an exemption. He explains that "for many women terminating pregnancies because of fetal anomalies, the mandatory delay and information requirement will cause substantial mental and physical distress...." Evans Aff. at ¶24. "Listening to and receiving the biased mandated information, including pictures of a normal fetus, could cause extreme anguish...." Evans Aff. at §31. Thus, unlike the Pennsylvania law reviewed in Casey under an undue burden standard, 1993 PA 133 *does* "prevent the physician from exercising his or her medical judgment." Casey, 112 S Ct at 2824. In so requiring, the state injects itself in an intrusive and biased manner into the physician-patient relationship, effectively requiring the health care providers to become mouthpieces of the state's ideology. This is true despite the fact that the required oral and written description of the "risks" of abortion and childbirth is misleading and not completely truthful. Evans Aff. at ¶ 10.

The written summary that must be presented to the woman shall "[s]tate that as the result of an abortion, some women may experience depression, feelings of guilt, sleep

[23]The only circumstances under which the informed consent requirements need not be followed are where the attending physician "determines that a medical emergency exists...." MCL §333.17015(7).

disturbance, loss of interest in work or sex, or anger,...." MCL §333.17015(8)(b)(iii).[24] Yet, *there is no medical justification* for this statement. As Dr. Evans points out, all of the data and literature on the subject concludes that an early abortion is an extremely safe procedure -- "safer than a shot of penicillin." Evans Aff. at ¶4, 11.

Additionally, with respect to those risks that must be orally described by the physician in the written summary, MCL §333.17015(5)(b)(i-ii), and included in the written summary, MCL §333.17015(8)(b)(ii), Dr. Evans states that such information "provides women with incomplete and misleading information. If women are to be told the possible complication of abortion and childbirth, they must be told of the likelihood that any of these complications may occur. If such information is not provided, a woman could be seriously misled into misunderstanding the risks of the medical choice she is making." Evans Aff. at ¶ 10. (original emphasis)

In this regard, the United States Supreme Court has twice invalidated biased counseling requirements. Akron, supra, 462 US at 442-445; Thornburgh v American College of Obstetricians and Gynecologists, 476 US 747; 106 S Ct 2169 (1986), overruled in part, Planned Parenthood v Casey, 505 US___; 112 S Ct 2791, 2823 (1992). Like the statutes struck down under strict scrutiny in Akron and Thornburgh, "much of the information required [by the Michigan law] is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." Akron, supra, at 444. The Michigan statute's requirement that patients be warned of possible "depression, feelings

[24]The Pennsylvania statute in Casey contained no such requirement.

of guilt, sleep disturbance, loss of interest in work or sex, or anger..." as the result of an abortion, which is unsupported and calculated to frighten the patient, is nothing less than a "parade of horribles intended to suggest that abortion is a particularly dangerous procedure." Akron, supra, at 445; Evans Affidavit at ¶11. The written summary's listing of agencies available to assist the patient during the pregnancy and after birth is a similar attempt to change the woman's mind although she has decided that an abortion is in her best interests.

Additionally, requiring the summary to describe abortion procedures, and to identify physical complications with each such procedure, as well as with live birth, renders the summary irrelevant to the particular patient, and conflicts with the accepted medical practice of providing truthful and accurate information specifically tailored to the patient's individual needs.

In short, the biased counseling provisions are unconstitutional under the Michigan constitution.

D. *The Mandated "Counseling" Violates the Free Speech Provision of the Michigan Constitution*

The Michigan law at issue compels speech by several different people: the physician; a "qualified person assisting the physician," as defined; and local health department staff members. Physicians or qualified persons assisting physicians are required to present the written summary and the depiction and description of a fetus before the abortion is performed. MCL §333.17015(3)(c),(d). Alternatively, this compelled information can be required of local health department staff. MCL

§333.17015(4),(15). Additionally, physicians are required to describe "[t]he specific risk" of both the abortion procedure and childbirth, MCL §333.17015(5)(b)(i, ii), *regardless of the circumstances and whether or not the physician believes such descriptions are appropriate.* Evans Affidavit at ¶ 10.

This kind of compelled speech is a clear violation of the free speech provision of our state constitution, Art 1, §5, which provides:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

On its face, Art 1, §5 provides greater protection than the federal First Amendment. In any event, it is axiomatic that "the state constitution may afford greater protections than the federal constitution," Woodland v Michigan Citizens Lobby, 423 Mich 188, 202; 378 NW2d 337 (1985), and that the U.S. Constitution provides minimum protections of individual rights. People v Neumayer, 405 Mich 341, 355; 275 NW2d 230 (1979). Accordingly, while the federal case law interpreting the First Amendment may be helpful, this Court is free to construe the state constitution differently, and in a manner more protective of plaintiffs' rights.

Michigan courts have not decided a compelled speech case under Mich Const 1963, Art 1, §5. A series of United States Supreme Court cases construing the First Amendment, however, has established that protections against content-based regulation of speech are broadly available to those who wish to *not* speak. In Wooley v Maynard, 430 US 705; 97 S Ct 1428 (1976), the Court declared that "the right of freedom of thought

protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." Id at 714 (emphasis added).[25]

In Riley v National Federation of the Blind of NC, 487 US 781; 108 S Ct 2667 (1988), the Court held that the state could not require professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually turned over to the charity. The Court declared that "in the context of protected speech, the difference... between compelled speech and compelled silence... is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." Id. at 796-797. The Court applied strict scrutiny to this content-based regulation, noting that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." Id. at 795.

Our Michigan Supreme Court, in discussing Art 1, §5, has explained that "when the state seeks to restrict [freedom of speech], its efforts must be strictly scrutinized." Advisory Opinion 1975 PA 227, supra, at 481. Applying strict scrutiny to the compelled speech mandated by the new law, the law cannot survive: there are simply no compelling -- even *legitimate* -- state interests to justify this content-based regulation.[26]

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[25]In Wooley, the Court held that the state of New Hampshire could not require plaintiff to display the words "Live Free or Die" on his license plate, as such a requirement forced plaintiff "to be an instrument for fostering public adherence to an ideological point of view which he finds unacceptable." Id.

[26]The Casey joint opinion's rejection of a similar argument made in that case is particularly weak and unpersuasive. "To be sure," explained the three Justices, "the physician's First Amendment rights not to speak are implicated, see Wooley v Maynard, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. Cf. Whalen v. Roe, 429 US 589, 603, 97 S Ct 869, 878, 51 L Ed 2d 64 (1977)." Casey, 112 S Ct at 2824 (citation omitted). This simplistic analysis is unpersuasive.

Compelling physicians to say certain things violates a central premise of free speech: "[t]hat we presume that speakers, not the government, know best both what they want to say and how to say it." Riley, supra, at 791. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's [free speech] right to avoid becoming the courier for such message." Wooley, supra, at 717.

The compelled speech mandates of the new law violate Mich Const 1963, Art 1, § 5.

E. *The Act is Unconstitutionally Vague*

The new law is unconstitutionally vague. The statute is self-contradictory and ambiguous as to what acts are required of physicians (as opposed to those acts that can be performed by a qualified person assisting the physician), and what local health departments are required to do and authorized to do.

The Michigan Constitution, like the United States Constitution, guarantees all persons due process of law. Mich Const 1963, art 1, §17. The due process requirements

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The Court cited no cases in support of the rather remarkable proposition that licensed professionals give up their First Amendment rights as a condition of practicing their professions. To the contrary, the Court has consistently upheld the free speech rights of licensed professionals against attempted state regulation of those rights. See, e.g., Gentile v State Bar of Nevada, 501 US 1030; 111 S Ct 2720 (1991)(reversing a reprimand of an attorney by a bar association, and requiring the state to show a "substantial likelihood of material prejudice" before restricting the speech of an attorney representing a client in a pending case); In re Primus, 436 US 412; 98 S Ct 1893 (1978)(nonprofit lawyer solicitation); Bates v State Bar, 433 US 350; 97 S Ct 2691 (1977)(lawyer advertising).

of definiteness and fair notice in criminal statutes[27] have long been set forth in decisions of the U.S. Supreme Court and the Michigan appellate courts: the statute must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v Lawson, 461 US 352, 357; 103 S Ct 1855 (1983). See also United States v Harriss, 347 US 612, 617; 74 S Ct 808 (1954).

The rationale for the vagueness doctrine has been explained as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc . . . basis, with the attendant dangers of arbitrary and discriminatory application. [People v Howell, 396 Mich 16, 20 n 4; 238 NW2d 148 (1976)(quoting Grayned v City of Rockford, 408 US 104, 108-09 (1972)).]

See also People v Goulding, 275 Mich 353, 358-59; 266 NW 378 (1936).[28]

Courts have also held that where, as with the new law, an act threatens to inhibit the exercise of constitutionally protected rights, "a more stringent vagueness test should

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[27]A violation of the Act by a physician may not only result in an administrative investigation, and administrative penalties, MCL §333.16221; MSA §14.15(16221), but also constitutes a misdemeanor. MCL §333.16299; MSA §14.15(16299).

[28]Michigan courts applying this test have held unconstitutional a law which defined disorderly conduct as "acting in manner that causes a public disturbance," People v. Gagnon, 129 Mich App 678; 341 NW2d 867 (1983), and a law denying a license to an establishment operated "in a manner generally reputed in the immediate vicinity to be immoral and a menace to the good citizenship of the community," People v. Buff Corp, 94 Mich App 179; 288 NW2d 619 (1979).

apply." Hoffman Estates v Flipside, Hoffman Estates, 455 US 489, 499; 102 S Ct 1186 (1982). See also Grayned, supra, at 109; Smith v Goguen, 415 US 566, 573; 94 S Ct 1242 (1974); Colautti v Franklin, 439 US 379, 392; 99 S Ct 675 (1979)(holding void for vagueness an abortion regulation requiring a physician to make a determination of viability prior to performing an abortion).

1. The new law's requirements on physicians are impermissibly vague

The law is also impermissibly vague regarding which of the requirements can be performed by qualified persons assisting physicians, and which of the requirements must be performed by the physician. In the absence of clear and unambiguous requirements, physicians are impermissibly forced to guess as to their legal obligations, despite the risk of criminal prosecution and losing their license to practice medicine. Colautti, supra, at 395-6.

MCL §333.17015(3) provides that a 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...." Those mandated tasks include "determin[ing] the probable gestational age of the fetus." MCL §333.17015(3)(c). Another portion of the statute, however, defines the gestational age of the fetus at the time the abortion is to be performed, "*as determined by the attending physician.*" MCL §333.17015(2)(f). (emphasis added) Thus, it is not at all clear that the "qualified person assisting the physician" can, in fact, "do all of the following..." described in §3.

This statutory self-contradiction creates ambiguity which violates the essence of the vagueness doctrine: a lack of fair notice as to what conduct is required and proscribed,

and the possibility of arbitrary enforcement of the law. People v Howell, supra.

2. The new law's requirements on, and authorization to, local health departments are impermissibly vague.

The new law also suggests that the local health department may provide the information required prior to an abortion. MCL §333.17015(4),(15). One subsection even requires the local health department to provide a woman with "a completed certification form... at the time the information is provided." MCL §333.17015(15(d). But the new law also limits the scope of the information the local department may provide.

The local health department is authorized *only* to confirm the pregnancy and determine the gestational age of the fetus; to provide the summary describing the abortion procedure; and to provide the depiction and description of the fetus. MCL §§333.17015(4),(15)(a-c). The law does *not* authorize the local departments to provide the patient the prenatal care and parenting pamphlet, or to describe for the woman the probable gestational age of the fetus she is carrying, the possible medical complications of the abortion, or the availability of pregnancy information from the state department of public health. Id. This information must, however, be provided at least 24 hours before the abortion (and must be provided for a certification form to be completed). MCL §§333.17015(3)(8)(c).[29]

[29]It is also not clear who at the local health department may provide the information that the department is authorized to give. The subsections addressing counseling at the local agency specify only that "the local health department" shall provide the required information. It is thus not clear that the person at the local health department who provides information must satisfy the definition of the "[l]ocal health representative." MCL §333.17015(2)(c). Moreover, at the local health department, as at a clinic or physician's office, it would appear that only a physician can determine the probable gestational age of the fetus. MCL §333.17015(2)(f).

A person of common intelligence must surely guess what conduct the new law permits. In particular, a physician is left to guess, at risk of his or her license, whether her or she can accept a completed certification form from the local health department, or whether she can delegate to a qualified person assisting her the task of providing all information required 24 hours in advance of the procedure. See MCL §§333.16221 and 333.16299; MSA §§14.15(16221) and 14.15(16299)(providing for disciplinary sanctions, and criminal penalties, for a violation of the law). Likewise, local health department officials can only guess whether the legislation requires or prohibits them from providing all mandated information. Where the penalties for noncompliance are so severe, individuals should -- cannot -- be left to guess what conduct is permissible.

F. *The New Law is Invalid Because it Fails to Provide an Adequate Emergency Exception as Required by the Michigan Constitution*

The new law defines "[m]edical emergency" as "that condition which, on the basis of the physician's 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." MCL §333.17015(2)(d). Only where a physician determines that this definition is met is the law's requirements of a 24-hour delay and biased counseling exempted before an abortion can be performed. MCL §333.17015(7). Plaintiffs believe that this definition of "medical emergency" is constitutionally infirm, because it does not provide an adequate exception from the statutory restraints in order to protect a woman's life or health.

While the Michigan Constitution provides stronger protection to individual rights than the federal constitution, the new law's failure to provide adequately for emergencies renders it invalid under either constitution.[30]

In Planned Parenthood of Southeastern Pennsylvania v Casey, 112 S Ct 2791, 2822 (1992), the Supreme Court ruled that in order to pass constitutional muster, abortion statutes must provide an adequate exception for medical emergencies where compliance with the statute's requirements would risk either the woman's life *or* her health. Plaintiffs in that case argued that the statute's emergency exception foreclosed the possibility of an immediate abortion in situations which posed a significant risk to health.

The Supreme Court ruled that if plaintiffs' contention were true, the statute would be unconstitutional, "for the essential holding of Roe forbids a state from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." Id. at 2822. The Court upheld the emergency exception in Casey because it believed the lower court correctly interpreted the statutory language, "serious risk of substantial and irreversible impairment of a major bodily function," to include any significant risk to a woman's health. Id.

This Court is not bound by the construction placed on the statutory language by the federal courts applying the Pennsylvania law. Rather, it is "better schooled in" and must apply Michigan law to determine what the statute means. That law dictates that this

[30]While this issue has never been addressed under the Michigan constitution, the federal cases applying the minimum protections of the federal constitution dictate a finding that the inadequate emergency exception is violative of the state constitution.

court reject the strained interpretation placed on the statutory language by the Third Circuit and strike the law as unconstitutional for failing to adequately protect the health of women.

The Third Circuit construed the term "serious risk" in the Pennsylvania statute to include the remote possibilities of death or permanent impairment if intervening complications go untreated. Planned Parenthood of Southeastern Pennsylvania v Casey, 947 F2d 682, 701 (CA 3, 1991). The Michigan Constitution's special protection for health prohibits this court from engaging in such strained interpretation when urgent medical care is involved.

Mich Const 1963, Art 4, §51 establishes without equivocation the public policy of this state, imposing a very high value on public health. The Michigan Constitution's special protection for health demands that a statute defining medical emergency be drawn with sufficient breadth and precision to give physicians clear warning of what conduct is expected and that that conduct be in keeping with accepted medical practice. A statute that fails to do so causes physicians to withhold care that is in their patient's best interests for fear of criminal liability.

Therefore, the new law's definition of "medical emergency" is unconstitutional under the State Constitution.

G. *The Strict Liability Aspects of the New Law Violate Women's Right to Reproductive Choice, and Violate Physicians' Due Process Rights*

1. The strict liability provisions create an undue burden.

1993 PA 133 imposes strict liability, both civil and criminal, upon physicians who

perform abortions in violation of the new law's requirements, *regardless of whether or not the physician acts in good faith, and is simply exercising his or her professional judgment.*[31]

While the Michigan courts have not decided an issue such as this under our state Constitution, the federal courts have provided helpful authority under the federal Constitution.

The U.S. Supreme Court has long recognized that the criminal and civil penalties placed on a physician who performs abortions directly affect his or her patients' constitutional right to receive those services. Doe v Bolton, 410 US 179, 188; 93 S Ct 739 (1973). Without her physician's ability to operate without undue fear of prosecution or civil action, a woman's right to obtain an abortion is a nullity.

The Supreme Court has held that strict civil and criminal liability has an especially egregious deterrent effect on a physician's willingness to provide abortion services. In Colautti v Franklin, 439 US 379; 99 S Ct 675 (1979), the Court struck down a statute that subjected physicians to criminal and civil liability without fault for performing an abortion on a fetus that is or may be viable. The Court ruled that the phrase "may be viable" was vague and that the vagueness was compounded by the lack of a scienter requirement, making the statute "little more than 'a trap for those who act in good faith.'" Id at 395

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[31]MCL §333.17015(1) provides: "Subject to subsection (7) [the medical emergency exception], a physician shall not perform an abortion otherwise permitted by law without the patient's informed written consent, given freely and without coercion."

A violation of the new law subjects the physician to civil administrative disciplinary sanctions, MCL § 333.16221(1); MSA §14.15(16221), which may include medical license "[d]enial or revocation, restitution, probation, suspension, limitation, reprimand, or fine." MCL §333.16226; MSA §14.15(16226).

Additionally, a violation also constitutes a misdemeanor. MCL §333.16299; MSA §14.15(16299).

(quoting United States v Ragen, 314 US 513, 524; 62 S Ct 374 (1924).

Like 1993 PA 133's requirements that specific medical risks be described (orally and in writing) to the patient, the Colautti statute operated in an area where professional judgments differ. "The prospect of such disagreement, in conjunction with a statute imposing strict civil and criminal liability for an erroneous determination of viability, could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment." Id at 396.

Every court that has considered the issue has held a scienter requirement to be an indispensable element in abortion legislation. See Fargo Women's Health Org'n v Schafer, No. 93-1579, slip op at 18 (holding that scienter requirement saved statute from unconstitutional vagueness), attached as Exhibit K. Planned Parenthood Ass'n of Kansas City v Ashcroft, 655 F2d 848, 861 (CA 8, 1981)(without a culpability requirement even a non-vague statute criminalizing abortion of a viable fetus would have a profound chilling effect on the willingness of physicians to perform abortions, and id at 863-4 (culpability requirement saves a statute that otherwise would involve second-guessing physicians' medical judgments); Schulte v Douglas, 567 F.Supp 522 (D Ne 1981), *aff'd sub nom* Women's Services PC v Douglas, 710 F2d 465 (CA 8, 1983)(invalidating abortion restrictions for lack of a scienter requirement). See, also, Harris v McRae, 448 US 297, 311 n 17; 100 S Ct 2671 (1980).

Michigan's new law requires the provision of specific information, including the risks of the abortion procedure and of carrying the pregnancy to term. The new law does not allow the physician to exercise good faith clinical judgment in providing this

information. Thus, a physician is subject to the State's "second guessing" of his or her professional judgment in providing this information, and the statute becomes little more than a trap for those who acted in good faith. Colautti, 439 US at 395.

Physicians will be hard pressed to rely on the provision of the new law allowing local health departments to provide the mandated written material, because the physician is responsible for any failure to give all the mandated information at least 24 hours prior to the abortion; in fact, the physician is even strictly liable if the certification form is fraudulently filled out.

The threat of severe civil and criminal penalties, based on strict liability, will severely curtail physicians' abortion practice, and force them to implement the statute in the most restrictive way possible in order to guard against liability. It is this profound chilling effect and its devastating consequences for women seeking abortions that makes statutes with strict penalties unconstitutional. Moreover, the strict liability provisions clearly constitute an undue burden, since physicians will either forego providing abortions, or will provide them in an extremely restrictive manner, exacerbating the burdens already present in the new law.

2. The strict liability provisions violate the physicians' due process rights.

Strict liability crimes are generally disfavored in the law. See, e.g., United States v United States Gypsum Co., 438 US 422, 437-38; 98 S Ct 2864 (1978); People v Quinn, 440 Mich 178, 185; 487 NW2d 194 (1992)(footnote omitted).

does gravely besmirch when it deprives a person of the right to possess a gun and to sit on a jury).

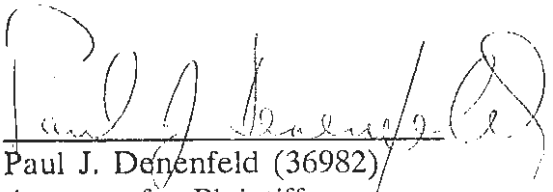
Michigan courts are prone to focus "not on the constitutionality of the enactment, but rather on whether the intent of the Legislature was actually to require some fault as a predicate to finding guilt, irrespective of the failure to expressly so state." People v Quinn, 440 Mich at 185.[34] Nevertheless, where, as here, an offense with such great potential to gravely besmirch physicians totally dispenses with the need for mens rea, and renders a physician virtually unable to prevent his or her violation of the offense, Art 1, § 17 of our Michigan Constitution cannot permit such an offense to stand.

[34]In Quinn, the Michigan Supreme Court held that knowledge that a firearm is loaded is not an element of the statute prohibiting transporting or possessing a loaded firearm in a vehicle, MCL § 750.227c; MSA § 28.424(3). Knowledge that a firearm is present in the vehicle, however, *is* an element of the crime, id. at 184. Thus, unlike 1993 PA 133, a violation of which is a misdemeanor despite the lack of knowledge requirement, the statute in Quinn was not a strict liability crime at all. See People v DeClerk, 400 Mich 10, 20 n 4; 252 NW2d 782)(1977)(distinguishing between strict and vicarious criminal liability; strict liability "dispenses with the need for mens rea altogether... ")

CONCLUSION

For all the foregoing reasons, plaintiffs have shown that they meet the requirements for summary disposition. Plaintiffs respectfully request that such an Order and Judgment be entered, permanently enjoining the enforcement of 1993 PA 133.

ACLU FUND OF MICHIGAN

BY: 

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DATED: May 11, 1994

EXHIBIT E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

ORIGINAL

MAHAFFEY, ET AL,

Plaintiff,

vs. Case No. 94-406 793 AZ

ATTORNEY GENERAL,

Defendant.

MOTION

PROCEEDINGS HAD and testimony taken before the HONORABLE JOHN A. MURPHY, Circuit Judge, Room 1611 City-County Building, Detroit, Michigan on Friday, June 10, 1994.

APPEARANCES:

ELIZABETH GLEICHER

Appearing on behalf of the Plaintiff.

PAUL DENNENFELD

Appearing on behalf of the Plaintiff.

JOHN WERNET

Appearing on behalf of the Defendant.

Reporter: Kathleen L. Maxwell, CSR-0010

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Attorney General
Case No. 94-406 793 AZ
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Detroit, Michigan

Friday, June 10, 1994

Mahaffey, Et Al vs. Attorney General

Case No. 94-406 793 AZ

P R O C E E D I N G S

MRS. GLEICHER: Your Honor, I will try to keep my remarks tailored and narrowed to suit your purpose assisting rather than going farther with an elucidation of the law. I know that this Court will read and study the cases cited in all of the legal issues, so I am going to try and focus on a couple of things when I speak.

If the Court would like further elucidation, I would be happy to provide it.

What I want to discuss with the Court this morning are the issues which I believe to be undisputed in this case, and the issues which I believe would provide the Court with the firmest basis for this Court, were the Court to grant Petitioner's Motion.

As I isolate them, they are the following:

The Headlee Amendment Claim, the Emergency Exception Claim, the Compelled Speech Argument, and the Vagueness Argument regarding the

Termination of Gestational Age, and what I intend to do here is to briefly discuss those four issues, and then to get into the Constitutional and due process arguments.

I think the Petitioners are entitled to summary disposition on the due process argument. They are a part of those issues that may be in dispute. We will start with the Headlee Claim.

The State has admitted that this statute imposes on local health departments a new activity of service that's admitted in this case, and that new activity of service can be simply defined as the provision of pregnancy test, and the determination of gestational age.

There can be no dispute, and there is no dispute in any of the pleadings about further consequences about those new services. First of all, that equipment is necessary in order to fulfill that State mandate in order to perform a pregnancy test and determine gestational age, equipment is necessary. Dr. Evans' affidavit which is uncontested states that for pregnancies beyond a few weeks, ultrasound is the standard of care for determination of gestational age.

Ultrasound equipment is expensive and

requires a physician for interpretation.

There is no dispute about the fact that determination of gestational age and the provision of pregnancy test requires the expenditure of funds, both in terms of equipment and in personnel.

The law is equally clear, and the law says, this is the Headlee Amendment that a new activity or service is not permissible without a specific appropriation from the Legislature.

The meaning of the Headlee Law is that the Legislature may not shift responsibility for policy decisions that the Legislature makes onto the back of local government.

The implementing statute for the Headlee Amendment states very specifically, and I am quoting from MCLA 21.235, "the Legislature shall annually appropriate an amount sufficient to make disbursements to local unit of government for the necessary costs of each State requirement. The Legislature shall appropriate."

The State responds to this argument in only one fashion, and that is to point to a letter from Denise Davis Anthony from the Department of Health which states -- and this is virtually a direct quote.

"We will find the money within our extreme budget to pay for the costs of this law."

We submit to the Court that this is precisely the form of legislative ledger domain, slight of hands, that the Headlee Amendment is designed to prevent.

What Ms. Anthony is saying essentially is that we will find a way to rob Peter in order to pay Paul so that the mandate of this legislation can be fulfilled by the local health department.

This Court is perfectly within its right to question Ms. Anthony. What current responsibilities and programs in the Department of Health would be sacrificed in order to pay the cost of this legislation.

Will it be the cost of pre-natal care for poor women? Will it be nutrition programs for inner city school children?

This is the reason the Headlee Amendment was enacted to prevent departments, Departments of Health from making individual decisions as to which programs will be slighted for the benefit of others, and we submit that there is no rational way in which the State of Michigan can say that an internal memorandum from the head of

the Department of Public Health fulfills the mandate that the Legislature appropriate the funds to comply with the law.

Enough on Headlee. I think that is perhaps the strongest argument that the Plaintiff had because I think there have been no rational response to it.

Let me move on to the emergency exception which, again, I feel is largely undisputed in this case.

The language that this statute uses regarding the emergency exception is as follows:

Serious risks of substantial and irreversible impairment to a major bodily function.

The question before this that confronts this Court is whether the average citizen who reads that report can understand and can be expected to understand what those words mean and how to avoid them.

I would like to analogize that emergency exception to language in the law with which I am sure this Court is intimately familiar, because I am sure this Court has had to implement it repeatedly, and that is the no-fault language. It's similar language.

It talks about impairment to bodily functions, and we know, I know as a practicing lawyer that we have had now probably 15 years of juris prudence on those words, and still no real fundamental understanding within the Bar as to how to definitively apply those words in any given situation.

We have a decade of at least conflicting decisions on what's a major bodily function or an important bodily function.

I think that to require physicians to figure out what is serious, what's a substantial impairment, and what's a major bodily function is calling upon them to take on a task which they can fail at a detriment, at a significant detriment to their license. They cannot be expected to understand what those words mean.

Now, the Federal District Court indicates --

THE COURT: In light of a risk, why would a physician take the chance?

MS. GLEICHER: That's correct. A physician would not take the chance and the result would be that many women would lose or would suffer impairments to bodily functions rather than the

physician trying to determine what is a bodily function and what is not a bodily function.

For example, is the ability to bear children a major bodily function?

Well, it doesn't go towards life and death. Someone can live their whole life without that ability, and yet we know that many complications of pregnancy which arise in emergency situations can result in the loss of fertility. I don't know how physicians would analyze that. I would have horrible problems.

Were I a physician, I would have horrible problems.

In Casey in the Federal Court, they said this language to be Constitutional. We have to eliminate words. We have to eliminate the word serious, substantial, and irreversible.

We submit that if the State of Michigan wants a physician to have an emergency exception, and an emergency exception is required under Federal Law, under Federal Constitutional Law, and the Court will admit that it has to provide physicians with an emergency exception that makes sense and is comprehensible. This Court needs no further facts to make a determination in that

regard.

Let me go on to compelled speech.

The State admits that in its Answer to Plaintiff's Motion. The State argues that it is acceptable to compel speech of licensed professionals. Plaintiff submits that that argument is absolutely absurd. The State would never take the position that it would compel physicians to tell patients abortion is murder and you shouldn't have one. The State of Michigan believes you are a murderer if you have an abortion.

Let's analogize to lawyers.

The State of Michigan could not compel an attorney representing a criminal defendant to tell the defendant the State of Michigan and the judge will look most disfavorably upon your exercise of the Fifth Amendment Right to remain silent. It may be that within the context or helping a client make an informed decision as to whether or not to exercise a Fifth Amendment Right, this is something that a lawyer might want to say, but the fact remains that the State of Michigan cannot tell lawyers what they must say or what they must say to their clients.

In this case, the lawyer tells

physicians that you must give patient information which is potentially misleading, inaccurate, and certainly biased, and there can be no dispute about the fact that this information is biased. That was the purpose of the Statute as stated in its preamble, and because it is compelled speech, it doesn't make who the State is, it is compelled.

Finally, in terms of what I view as the easier argument, let me move onto vagueness in the determination of gestational age.

As we have pointed out in our brief, the Statute is contradictory as to who might make or may make the gestational age assessment. A gestational age assessment is imperative, it is mandatory, it must be done in every situation, and yet in one place the statute says a physician or a qualified physician, qualified person assisting the physician may determine gestational age and another place the statute says that that determination must be made only by a physician.

This is important on a practical level of course as clinics and providers must know whether or not they themselves have to make the gestational age assessment, or may have a qualified person provide that information, and, there is an

inherent contradiction that is obvious in the Statute that I feel needs no further elucidation.

Now, I want to move onto the area of Constitutional due process.

There is a dispute in this case, a legal dispute about which standard applies.

The Court is quite familiar I know with the fundamental right constellation of arguments; the fact that if this Court decides that the right to abortion is fundamental in the State under the Michigan Constitution, then it must apply strict scrutiny. If strict scrutiny is applied, the Court has models of how strict scrutiny would apply.

The models are the Thornburg and the Action cases which are cited in our brief. They require the statute to be struck down.

It is the Plaintiff's view that strict scrutiny applies here because abortion is a fundamental right under the Michigan Constitution.

That its issue I think has been adequately briefed, and I am not going to spend any more time on it unless the Court would want me to do so. Instead, I am going to move onto the undue burden argument, because it is our position that even if this Court chooses to apply a less rigorous

standard of review and accepts the United States Supreme Court's current standard of review which is undue burden, this Statute must fall.

THE COURT: Excuse me. Does it make a difference whether or not we conclude that abortion would be a fundamental right stating it directly that way as opposed to the right to privacy being a fundamental right?

MS. GLEICHER: I believe it makes absolutely no difference, Your Honor. That, in fact, is our argument as it derives from the Michigan Constitution.

I think there can be no serious dispute here but that the Michigan Constitution encompasses a fundamental right to privacy amongst our citizenry, and abortion rights are similar to many, many other privacy rights that must derive from that guarantee. The other rights are the obvious ones, the right to make contraceptive choices, the right to make choices involving intimate decisions among married people as to who one will marry, the whole constellation of rights that the Courts have described. I believe that's correct.

If there is a fundamental right to privacy, there is a fundamental right by definition

to abortion in this State.

Let me go to undue burden. Does that answer the question?

THE COURT: Yes.

MS. GLEICHER: And with this, I am going to end my remarks.

Casey tells us that when a Court applies an undue burden standard, the first job is to focus on the groups for whom the law poses a restriction which would be the group of women in this case seeking abortion services.

The test that Casey then tells the Court to apply is, in a large fraction of cases, does the law operate as a substantial obstacle to a woman's choice to undergo abortion.

The Casey Court itself determined that one percent of women seeking abortion who are affected by the law may in fact be a substantial fraction or a large fraction, and that is the spousal notification provision of the Pennsylvania Law was struck down by the Casey Court. The Case Court recognized that only one percent of all women seeking abortion would be affected and they concluded that that was a large fraction of cases for purposes of the application of the undue burden

standard.

In this case, I think the only undue burden standard is met in two different ways alone that I am going to talk about.

Again, I am trying to focus on areas for which there can be no dispute. This is what I am going to call geographic burden.

The law requires two visits to an abortion provider. That's undisputed.

Dr. Evans in his affidavit stated that for certain women, the law requires three visits, and that is for women who have obtained, I think he said, 12 weeks gestation age in order to protect the women's health. A procedure has to be started a day in advance of the abortion to dilate the cervix.

In his view, in order to comply with the law, three days delay would in some circumstances be necessary.

We know that there have been -- last year -- excuse me.

In 1992, there were 3,700 abortions in Michigan for women who lived in counties with no abortion services. We know, and this data has all been supplied to the Court, and this is data from

the State of Michigan, so this is not subject to dispute.

Thirty-seven percent of all women who obtained abortions in 1992 in the State had to travel outside of their own counties in order to obtain abortions.

We know that there are no abortion clinics north of Saginaw.

We know that two-thirds of the State's land mass is north of the City of Saginaw.

There are only six doctors north of Saginaw who provide abortion services, and as I have said, there are no clinics.

We know that in 1992, roughly 2,000 women who lived north of Saginaw obtained abortions and over 153 of them obtained abortions in the county in which they live.

The rest of those women had to travel substantial distances. For example, a woman in Ontenagon (phonetic) traveling to Saginaw had a round trip of 938 miles.

The average distance that a woman in the Upper Peninsula would have to travel to a down State abortion clinic was 620 miles.

For those women, the burden, not

counting just the travel, pre-existed this law of having to stay overnight an additional night and incur costs for lodging, child care, lost wages, and other incidentals, and is certainly a substantial one, and it is particularly acute for low income women.

What this Statute has done is create an arbitrary and inflexible waiting period which does nothing to enhance a woman's health, and instead merely creates additional burdens.

If this Court were to find that even ten percent of the women of this State seeking abortions would be unduly burdened by the existence of this law which requires them to spend substantial additional sums in order to carry out the mandated delay, that is enough to strike down the Statute.

THE COURT: Let me ask a question here relating to another fundamental right.

Now there are all kinds of descriptions on one's right to vote, time descriptions and so forth, you just can't go up and vote. You have to register, you have to -- and you have to do that at a certain time before the actual election day, and if you don't take that action before the election

day within that prescribed time period, you can't vote.

How do we make a distinction between that situation and the situation that we have here?

MS. GLEICHER: Several distinctions.

First of all, most of us can vote in our own backyard, practically. The distance we have to travel to exercise the right is small. The costs associated with exercising the right to vote are non-existent. It is usually a very easy process for us to undertake.

Second, there is a large time frame that's available for us to register in order to cast a ballot. For example, if one was to vote in the November election, one has many, many months preceding November in which to register in order to cast that vote, and once one registers, that's all that need be done. One can register in this State merely by obtaining a driver's license. Efforts have been made to make that process as simple as possible.

When we are confronted with a woman, a pregnant woman who seeks to vindicate her right to abortion, we are talking about an extremely time limited situation to start with. We are talking

about a situation which someone's potential health is very much at stake and at risk both physically and emotionally and we are talking about burdens that fall on that woman in order to exercise her right that simply are not-- the level of burden is tremendously different, the burdens if they be burdens that the State puts on the right to vote and essentially designed to be merely reasonable regulation to assure that only qualified voters exercise the right.

The burdens on the woman by the statute are designed to thwart, delay, impede and impair the exercise of the right.

There are contrary purposes suffered by the burdens.

THE COURT: In regard to that issue, what would be the State's interest with regard to the unborn --

MS. GLEICHER: The state's interest with regard to the fetal life is that which was described in the Roe versus Wade case and that is the State has no interest in the first trimester other than maternal health,, in the second

trimester, the State has interest only when the fetus becomes viable and there is no dispute about that, we would adopt the standards set forth in Roe versus Wade which remains, as far as I know, controlling law even in the federal court, that is, the interest in the state, the state now has additional interests which I think, the federal interest don't apply here but those interests are not yet in fetal life.

MR. WERNET: They are described in the caselaw.

Let me just finish with the additional burdens that the law places which is a strict liability provision of the law.

Physicians who violate this act can't defend themselves as the act is written by arguing a good faith or professional judgment reason because of which they fail to comply with the Act's mandates.

For example, a physican cannot demonstrate to the court — the way the act is written is that he or she did not furnish the information that the State requires because he or she he or she felt it would have a severely adverse effect on a patient. That is not an

appropriate defense, the lack of a good faith defense makes this statute constitutionally infirm.

The state's only response to that argument is that there is a good faith exception for emergencies, while there may be a good faith exception for emergencies, that is not enough and I would point as an example example the evidence supplied again by Dr. Evans regarding a situation in which a woman carries a fetus with serious anomalies, genetic anomalies.

As Dr. Evans points out, such womens' desire to be pregnant, they want to carry to term and it's not until the second trimester, late, particularly in the pregnancy that they determine that they are carrying a fetus with severe anomalies which will either prevent life if the fetus is born, carried to term or it will have severe or significant handicaps.

Those women are virtually uniformally devestated to learn they are carrying a fetus with serious anomalies, they have already reached the state of the pregnancy where they look pregnant, where they have felt fetal life inside of them.

Doctor Evans said in his affidavit that to inform those persons as the State mandates that they should carry to term, to force a physician to provide them with information about normal fetuses; about the risk of abortins is cruel and unnecessary.

Those were women needed emotional support not by speaches or biased information written by the State which tells them they should carry a hopelessly anomalous fetus to term.

If those physicians such as Dr. Evans in counseling and caring for a severely distressed woman were to make a decision that he should not provide that information to her because of the adverse affects it would have on her mental health, he would nevertheless be guilty of a violation of the statute.

THE COURT: With regard to the other areas of medicine, are there any other areas of medicine where the state mandates specific instructions to be given by a practicing physician that is -- I know in the area that we deal with here in the area of medical malpractice, in product's liability cases as it's

relates to drugs.

MS. GLEICHER: I think the only statutory provision is as Mr.Wernet has pointed out a couple of them. Let me talk about that, for example, the breast cancer informed consent statute which requires physicians to tell patients of the fact that there are various options for the treatment of their breast cancer. That is a different situation for a couple of reasons. First of all a fundamental right is not indicated.

Second of all, the information that the physicians physicians are reporting is not biased. In fact, it is all inclusive.

It is designed to tell patients of every possible options that is available to them.

Third, and I think most importantly, physicians have no reason as yet to challenge that provision of that speech. In other words, although the state speech may be compelled in a technical sense physicians do not dispense information.

So I feel that if a physician were to come to this court and argue that the information the state was compelling with regard to breast

cancer was inaccurate, misleading and biased, the court should strike down the statute just as the courts do in this case, but I think they are nonanomalous or nonanalagous situations because the content is so different and designed to be so to different.

THE COURT: All right.

MS. GLEICHER: And with that, I would simply like to respond to Mr. Wernet's argument, Mr. Wernet's responses.

MR. WERNET: Your Honor, sometimes I have to wonder if we are reading the same statute.

When Ms. Gleicher describes the statute, for example he says requires a physician to advise a woman that she must carry a child to term, I am sort of left at a loss because I see nothing, I personally see nothing in the statute that imposes any such requirement.

In point of fact, at at vary outset, inception, in a preliminary Section of the statute, I would like to "...M. C. L. 333.17014, expressly stated that this statute is "designed to provide objective truthful information and further that "...it is not intended to be

persuasive."

Your Honor, this statute,in fact, it's not a statute designed intended or designed to interfere with a woman's right to abortion, it's not a statute that is designed to discourage women from obtaining abortions, at least that is not the declared intent of the legislature here and that's not the fashion in which this statute can or should be construed.

The purpose of this statute is simply to assure that first, women are given adequate unbiased truthful information necessary to the formation of their informed consent necessary to the exercise of their right of choice and secondly, that there be some assurance that the woman has had at least a minimal of opportunity to reflect upon that information and make her choice.

Nothing in this statute, Your Honor, is intended to unduly influence that choice other than to assure the choice was made in a knowing fashion. That is in essence what that statute is about. I think the best way for me to approach that is to respond seri atum to the position asserted by the plaintiff here.

THE COURT: Okay, counsel.

Let me stop you there. We've been going for a good while. We will take a ten minute break.

(Court stands recessed)

(Court in session)

MR. WERNET: All right, prior to the recess Your Honor, I believe I begun to address the arguments advanced by counsel for beliefs with respect to the Headlee amendment. Counsel characterizes the letter from the Department of Public Health as some sort of vague representation that she would try find the money somewhere. Your Honor, I submit that the letter makes a much more precise commitment than that. In fact, she describes it as a comittment to providing the money out of her existing budget appropriations.

The money will be provided, the money, the department has made that committment. There simply is no basis to suggest or imply as counsel has done that this money is going to be in effect stolen from other statutorily mandated programs. The defendant is not about to take

money that is appropriated and mandated by the legislature to be spent on WIC programs and move it over to this program.

I can assure the court that the money that is used will in fact be money from the department's existing budget and it will come from line items that may be appropriately used for these types of expenses,

Should that not be the case, I am sure there is plenty of opportunity for Plaintiffs to determine that and challenge it but the commitment is there, the money will, in fact, be provided.

To bolster this argument, I think counsel has suggested that there is an extraordinary amount of money necessary here.

As I understand it, the principle basis for that assertion is that in order to comply, for some reason, all 50 or so local health departments are going to have to run out and buy very expensive ultrasound machines.

I submit from the testimony of Dr. Evans, there is no basis for that assertion.

The determination of gestation age as being described by Dr. Evans in his affidavit is

a determination made by a physician generally immediately prior to an abortion procedure for medical purposes. The purpose of that determination is to enable the doctor to proceed with some degree of medical assurance that he or she is utilizing the correct abortion proceedure and the safest procedure available for that particular patient given the stage of pregnancy given as factors.

Your Honor that is not the determination that the statute is calling for here and I think that is clear from reading the requirement in context. What the statute is designed to do is to provide a woman with certain basic information regarding the particular abortion procedure that she is liable to go through with the risk of that procedure and other information pertinent to her decision.

The only purpose of the gestational age determination at the earlier stage, 24 hours or more in advance is to make a reasonable approximation sufficient to reasonably identify the particular package of materials that should be provided to the woman so that they can begin to reflect upon that material and decide whether

she wants to go forward with the procedure.

In fact, Your Honor, if this case goes to trial, we will demonstrate that the majority of clinics in this state already make determination of this sort every day simply to schedule patients.

If a patient needs a two-day procedure, a clinic needs to schedule a patient for a slot where that can be done and this kind of determination is done. It's done every day, it's done by telephone and it's based on last menstrual period.

I submit to the court that the affidavits of Doctors Hertz and Boes (sic) which are attached to our motion, response to the Plaintiff's motion, adequately demonstrates how much of this information can be determined and provided by telephone.

Which, incidentally, Your Honor, raises another assertion by plaintiff that the statute requires two visits in every instance and,in fact, that assertion forms a major basis for many of the allegations that plaintiffs have raised.

I submit to the court there is

nothing in the statute that expressly requires two visits to the clinic, in fact, the legislature has gone to some length on the statute to try to assure that the necessity of two visits will be minimized to the extent possible.

The statute expressly provides that the materials and information can be provided at locations other than the abortion clinics and also that desire forms the basis for Sections 15 which requires local Departments of Public Health to provide these services. So it's simply not the fact that every woman is going to have to travel from Iron Mountain Michigan all the way down to Midland or something to get an abortion. That is simply not the case. There are many, many alternatives.

If physicians performing abortions desire to comply with this act, they may do so, there are ways to comply.

Much of this information can be provided by telephone. Materials can be provided through mail, materials can be made available through any physician any local health department, literally any person in this state.

There is no impediment to making these written materials available throughout the state and to make that as convenient as possible for the mass majority of the women.

THE COURT: Could you just give me an example of how this would take place over the telephone.

MR. WERNET: Your Honor as I understand it, and this was based on deposition from companion case where we have had a chance to depose the doctors of some clinics.

Typically in basically every instance, contact was made with clinics by telephone before the patient comes in. Walk-ins are extremely aware.

Typically the clinic will determine whether the woman is pregnant. Some clinics require some evidence that the woman is,in fact, pregnant. They want her to have had a pregnancy test or some form of pregnancy confirmation prior to the time she calls. A physician or qualified person assisting the physician who is handling the telephone calls is properly trained and can discuss this, can determine whether she has taken a pregnancy test.

The determination of gestational age in about 80 percent of the cases Your Honor is based on last menstral period, that information can be provided over the phone, the determination [may!May] attorney out to be some what inaccurate but Your Honor, the statute only requires a determination of probable gestational age, we are not talking about a precise scientific determination here that is going to form the basis of a decision about the particular procedure to be employed. We are talking about an approximation sufficient to try to make a reasonable effort to try to get the proper selection of materials to the woman. If the physician or the qualified person handling this conversation has some doubt as to which set of materials was appropriate, for example, if the woman's description of the last menstural period was somewhat uncertain or it placed her right on the cusp between two particular procedures, there is nothing in this statute that would preclude the clinic from providing both sets of materials to the woman and, counseling counseling her right over the phone that based on what you have told us, we cannot tell you for sure whether we need

to perform procedure-a or procedure-b but it will be one of those two and we are going to send you some materials that you may review to chose. You are not required to review these materials but if you chose, you may do so and these will describe both of those procedures so you will be prepared for what is going to happen when you get here.

I might submit Your Honor there is nothing in the statute that precludes that much of the information from being conveyed by telephone and I think the affidavit particularly of Dr. Hertz so indicates and Dr. Hertz is a member of the board that will be involved and in physician discipline should the occasion to discipline a physician ever arise. So, in point of fact Your Honor there simply is no absolute requirement that every woman make two visits to the clinic.

That is not required by the statute.

I would like to turn next to Plaintiff's constitutional arguments and I would simply start Your Honor by observing that the basic underlying Plaintiff's argument here that is that Michigan's own constitution guarantees the right of abortion and the right that the

right guaranteed by the Michigan constitution is different than and greater than the right of abortion guaranteed by the United States Constitution.

It's obvious Your Honor, why this claim is made. It's made because the United States Supreme Court in Planned Parenthood vs. Casey passed on the statute based very similar to this one and and except for certain provisions not included in the statute relating to spousal consent which this statute does not require, said, upheld that Pennsylvania of an statute is heeding that federal standard.

For that reason, I submit that plaintiffs have chosen to predicate this entire case on alleged state rights, rights arising under the state constitution. They have not asserted any federal right. As Your Honor is aware, the validity of the statute under the federal constitution has, in fact, been challenged albeit not in this case. It's being challenged in a separate federal lawsuit that is now pending in the in the United States district court for the Eastern District and, in fact, there will be a preliminary injunction hearing in

that case a week from Monday, June 20, as I believe Your Honor is aware.

But in any event, in this case all that has been raised is issues of rights under the state constitute.

I might add too Your Honor that a careful reading of the existing precedent under Michigan case law rather clearly indicates that while Michigan clearly recognizes a generalized right of privacy right of privacy, the right of abortion is not specifically encompassed within that right and I submit Your Honor that the Supreme Court has rather clearly indicated that and the cases cited in my brief and particularly the Bricker case and the and the Larkin decision.

I think the state Supreme Court has made it very clear that the public policy in this state at the time of Roe versus Wade to proscribe a portion and in light of Roe versus Wade and the federal right recognized by this case, the court indicates that it was constrained to apply Michigan law in a manner that was consistent with Roe versus Wade, but it also was very clear in it's indication of the public policy in this state.

Now plaintiff's attempt to counter that by citing two Court of Appeals opinions and Your Honor, I guess that puzzles me because I don't quite understand how Court of Appeals opinions can trump Supreme Court opinions.

The first of those opinions relied upon the principle opinion relied upon by plaintiff is the Nixon case. In fact, Nixon was remanded, it was appealed to the Supreme Court and it was remanded for reconsideration in light of the decisions in Bricker and Larkin and I submit, Your Honor, that that short statement, that remand for reconsideration in light of the principles enunciated in those two Supreme Court cases make it very clear that however the court may have felt about the result it clearly was rejected. The analysis advanced by the Court of Appeals in the Nixon case.

Your Honor, the next time the Court of Appeals attempted to find there was a state guaranteed right of abortion separate and distinct from the federal right was in a case entitled Doe versus Department of Social Service which is again discussed in my brief and once again, Your Honor, the Supreme Court promptly

reversed. In doing so, it specifically, I admit specifically declined to address the issue of whether a state right of abortion existed but I would submit Your Honor that the effect of that was to leave in place the prior anouncement made in both Bricker and Larkin.

That is the law in this state, in my view, Your Honor, and I believe it's binding on this court.

Now does this mean there is no right of abortion in Michigan?

No, it certainly doesn't, there is a right of abortion and the right of abortion is that right which annoounced and declared by the United States Supreme Court?

In it's most recent form, that right has been enunciated in the Casey decision, and I submit, Your Honor, that is the right that is in this case and that right has not been asserted by plaintiff in their case and for this reason, for that reason only, the counter of asserting constitutional rights of abortion, especially one and two, I submit shall fail if a claim upon which relief should be granted and should be dismissed can be granted.

MR. WERNET: If I may turn to the free speech count in the Plaintiff's complaint which they describe as compelled speech.

First Your Honor, I would submit that this specific issue in this context of a substantially identical statute was directly addressed United States Supreme Court in Casey. What is particularly interesting is that Plaintiff's in their brief acknowledge there has been this compelled speech case decided by Michigan courts and therefore they turned immediately to federal state precedents.

Well what is the controlling federal precedent? I submit the compelling federal precedent in this incident is the Casey decision.

Casey considered a statute substantially identical to this in light of the claim it compelled speech and the United States Supreme Court United States Supreme Court dismissed that claim rather quickly finding that in the context of the practice of medicine the state clearly has the right to regulate. Your Honor that is consistent with all of the established principles of commercial speech and essentially we are talking about commercial

speech here. The right to commercial speech is,in fact, subject to reasonable regulation by the state, the real tenor of Plaintiff's argument with respect to compelled speech I submit really in spite of their assertion really does not go to whether the state may compel a physician or any other professional or nonprofessional for that matter to engage in certain speech. It goes to the context of the speech, the realobjections are to the content, Your Honor.

This court has a number of contents. We have discused many of the speechs during the course of Plaintiff's argument. We have one dealing with breast cancer, one dealing with my HIV testing, we have informed consent speech, according to the testing of and treating of my minors; venereal disease.

This is not at all uncommon for the legislature to deal with. The legislature clearly has the authority to set minimum standards for the practice of medicine and minimum standards that are necessary to assure informed consents on the part of patients.

That is all the legislature has done here and then the question becomes "Are those

regulations reasonable?"

Well, the first allegation made is that these regulations are biased. I submit Your Honor, there has been no convention showing that is the case. The written information materials in this case were not even available in draft form at the time Dr. Evans prepared his affidavit. The assertions of bias were made in essence in a vacuum. Those materials have been submited as an attachment to our own motion for summary disposition and I submit Your Honor as a matter of law these materials are biased and on balance.

To the very least that Plaintiffs have asserted contrary opinions, I think we have clearly demonstrated that there is at least a disputed question of fact with respect to whether those materials are biased based on the affidavits that we have submited.

I don't think that that dispute as to fact need preclude the court from entering judgment on the compelled speech count in favor of the state and I say that for a couple of reasons. The principal reason being that, Your Honor, this challenge brought against the

statute is in essence the partial challenge, this statute has not yet been implemented by virtue of the temporary restraining orders entered by this court and the federal court. The statute has not yet been implemented.

Once the statute is implemented, once the written materials are final, if, in fact, there is some basis for challenging them on the grounds that they are biased, Plaintiffs may have some cause to complain but their complaints at this point I submit, is clearly premature. I further submit should this case go to trial, we can clearly demonstrate that the materials, the written materials requirment by Section 8 of the Act, which have been prepared and will be finalized by the Department of Public Health are substantially similar to materials used by many clinics in this state already; that, in fact, they are not biased, they represent a sound, balanced, unbiased description of unbiased description of the information pertinent to the decision a woman is making.

As to the count on vaugeness, I know counsel did not spend a great deal of time on that. There were three particular sections of

the statute that I understand have been questioned. I address all of those in my brief. I submit Your Honor that what Plaintiffs are doing here is a little ironic in a sense. The individuals that are going to be subject to the statute are trying to find the most extreme, the most outrageous, the most repressive possible construction that can be given to the words and are advancing that as the meaning of the words of the legislature and I submit there is some irony in that situation. In point of fact the state has never advanced such radical construction of this language and is not about to. We think in interpreting this statute. This court is compelled to be guided by the language used by the legislature in Section 17014 where the legislature said that the statute is intended to be unbiased and balanced, it's intended to give women information they truly need in making this kind of decision in life, it's not intended to be persuasive.

Those reasons, I submit, must guide this court in determining the various aspects of the act. The statute must be interpreted in a manner consistent with that intent. I submit

that the interpretations advanced by plaintiff simply don't meet that standard. To the extent that the court may find there is ambiguity in the Act, I believe the court should be guided by the legislatures statement of intent and I think the court is compelled if at all possible to find an appropriate constitutional construction which preserves the statute.

THE COURT: With regard to the other areas where there is compelled situations or certain types of medical treatment, how do the penalty provisions compare?

MR. WERNET: They are identical Your Honor, and that is an interesting point because this statute does not in and of itself impose any criminal liability.

There is no section in the statute that impose east criminal penalty for a violation, rather, and that brings us to the strike liability argument.

The section of the Public Health Code that creates the criminal liability is MCL 333.16229, I believe.

That is a general provision of the Public Health Code which makes it a misdemeanor

to violate a section of the code.

That language applies across the board to the health code and I think it's arguable that if the court were to find that this statute falls because that language is innappropriate, vast sections of the Public Health Code would become unenforceable because in Section 16229 which does not expressly declair an element of intent.

Now I have made a number of arguments in my brief Your Honor.

Contrary to plaintiff's assertion I have not fallen back on one position. As a matter of fact I think I have advanced three alternative positions to the court. As a matter of fact I think I have advanced three alternative positions to the court,. The first one I believe the strongest being that this is not a strict liability offense because, in fact, doctors are not only permitted but required to exercise clinical judgment in deciding whether to waive the requirements of the Act and I think in describing the medical emergency exemption Plaintiffs omitted that language.

Yes, it's true that the exception

applies only in situations where there is a serious risk of impairment of a major body function but in determining whether that risk exists, the statute expressly requires the physician to exercise his own or her business clinical judgment so there is a requirement that clinical judgment be exercised.

Plaintiff's quarrel here, Your Honor, I submit is not so much in the nature of whether strict liability or whether intent is required. What they are unhappy with is that fairly high standard. It's the standard that they object to.

It's not whether clinical judgment is or must be used.

It clearly must be used but it's applied against a a very strict standard and unquestionably as our affidavits demonstrate that that standard is medically appropriate.

That standard will not result in medical harm to women based on the affidavits we have submitted to the court.

I think that primarily concludes the remarks I have in response to Ms. Gleicher's arguments, if the court has any questions whatever, I will be happy to address those.

MS. GLEICHER: I will limit my remarks as much as possible.

MS. GLEICHER: Mr. Wernet alleges that I told this court that Ms. Anthony's letter is a vague representation.

I just want the court record to reflect that I think the contrary. I think it's very certain and definite representation.

It's tells this court that the money to pay for the statute will be taken out of the existing budget. There is no doubt about that and it is that fact alone which is violative of the Headlee Amendment. We don't know, despite Mr. Wernet's reassurances where in the existing money and the existing budget Ms. Anthony is getting that money.

Ms. Anthony may not even know where she is getting that money.

It would be nice to think it's coming from nonessential services.

I hope that it is, but that is precisely the situation that Headlee is designed to prevent.

The constitutional provision, Article 9, Section 29 requires that new services be

serviced by a state appropriation made and disbursed to pay the unit of local government.

That is the language in the constitution of our state, that is the language in the enabling statute and that is absolutely contrary to Ms. Anthony's letter.

There is no doubt about it.

Someone in the Department of Health is going to make a decision as to where the money comes from to fund this.

Thelaw says the legislature was supposed to make that decision.

Mr. Wernet goes on to tell us that although the legislature said clearly that the physician not less than 24 4 hours before performing an abortion, the physician performing the abortion must determine the probable gestational age of the fetus. That is what the statute says. That is language that Mr. Wernet would like to run away from when he tells this court that nothing in this statute requires two visits.

I challenge Mr. Wernet to think of a scenario whereby the physician can determine gestational age, probable gestational age 24

hours before an abortion procedure without physically touching the patient 24 hours before the procedure.

Determination for probable gestational age requires, according to the affidavits and according to their affidavit, some element of physical examination of the patient, the patient can't call up a doctor and say my last menstrual period was eight weeks ago and the physician can't rest assured that the probable gestational age for that fetus is seven weeks.

That is contrary to proper medical practice and that doesn't allow the physician to certify the probable gestational age of the fetus.

All of the physicians who have submitted affidavits in this case admit there must be some element of the physical examination of the woman, Dr. Evan's affidavit states there are times when there is not consistency between the woman's last menstural period date and the examination and in those situations an ultrasound is required and beyond eightween weeks regardless of the last menstural period, if the last menstrual period was eighteen weeks previously,

the woman has to have an ultrasound in order to determine probable gestational age.

The statute doesn't permit the doctor to come up with a possible gestational age or an approximate gestational age or a speculative gestational age or a gestational age based on what the woman thinks when the woman thinks her last menstural period is. The statute requires a certification as to a probable gestational age. The statute requires that 24 hours before the abortion the doctor must not only determine the probable gestational age but then uses the following words:

" The doctor must present to the patient the written summary described below and must provide the patient with a copy of a medically accurate depiction and description of the fetus.

It would be wonderful to think that the legislature meant that somehow the physician could present papers to a patient over the phone. That construction of this statute would be improper and is clearly contrary to the stated meaning of the words the legislature chose.

What Mr. Wernet is really telling

this court is that he recognizes two visits. A legislative mandate of two visits is burdensome. He recognizes that and that is why he is telling this court, why don't you construe this statute so that only one visit is required?

We submit if this court were to construe the that way, this would have rewritten the statute in the manner that the legislature clearly did not intend it to be interpreted.

I don't think the Plaintiffs have gone out of their way to find the most extreme and outrageous and repressive examples possible in order to challenge this.

I think we can all be guided at a minimum if we are talking about a minimum standard here by Casey. Casey has a one percent rule.

If one percent of the time the statute says an undue burden, that is enough to find it unconstitutional.

I think there are many, many areas of the statute that has been demonstrated to be constitutionally infirm and yes, they may not infirm to every woman seeking an abortion in every county but there has been a demonstration

here that there are geographical burdens, emergency exception burdens, there are a variety of burdens that make this an oppressive assault violative of both the Casey standard and certainly of the strict scrutiny standard and for that reason we think that our motion should be granted.

MR. WERNET: Your Honor,

THE COURT: Let me ask this.

Assuming that we conclude that there was a fundamental right here and we are in a fundamental mental right situation, could you just state for the record the interest of the state with regard to that?

MR. WERNET: Your Honor, the position of the state with regard to whether that's the standard or the interest of the state as add advance by the standard

THE COURT: The latter.

MR. WERNET: Your Honor, I don't need to the speculate on the interesid of the state. The legislature has specifically declared its purpose and intent in Section 17014 of the statute and for me to paraphrase that or to put

it in any different words would serve no useful purpose.

I did summarize it earlier by indicating that the purpose of the statute according to the declaration of the legislature is to protect women's health by assuring that they have at least minimum information necessary to make this important decision and at least a minimal opportunity to reflect upon that information and for all the reasons set forth by the legislature in section 17014. That is the interest that the state is attempting to advance by their legislation.

Your Honor, further, I would certainly concede that those interests are not advanced by requiring women to be handed biased materials.

If that is the concession, I am very happy to make that concession, but I submit to Your Honor that based on the affidavit, based on the materials that have been submitted to the court, there clearly is no bias in these materials. They are clearly informational and to be informed.

Ms. Gleicher issued me a challenge

Your Honor. If you would indulge me a few more minutes I would like to rise to that challenge. She has asserted that the physician must determine gestational age and she challenged me to find a section of the statute which suggests otherwise and I would refer the court to Section 17015 subsection 4 which says:

"... That the requirements of subsection 3 may be fulfilled by the physician or a qualified person assisting the physician at a location other than the health facility where the abortion is to be performed."

Your Honor, the legislature has expressly authorized the physician to delegate that to a trained and qualified individual.

Even if the statute had not done that, that is a separate section of the Public Health Code, that being MCR 33.16215 provides that a licensee who holds a license other than a health procession sub-field license may delegate bait to a licensed or unlicensed individual who is otherwise qualified by education training or experience the performance of selective acts tasks or functions where the acts tasks or functions fall within the scope of practice of

the licensee's profession and it will be performed under the licensee's supervision."

Your Honor that is the standard of delegation that has been adhered to by physicians in this state for many years, it has caused no problems whatsoever.

Under that Act, the physician remains responsible for the acts of the person to whom the function has been delegated but the function may be delegated provided that the physician is confident that the individual carrying out the responsibility is qualified capable and is obtaining reliable information, but the physician remains responsible for the determination.

Your Honor, it is simply not true that all three of the physicians who have submitted affidavits in this case take the position that gestational age cannot be determined by telephone and I would refer the court to Dr. Hertz affidavit paragraph 3 where he indicates that two visits are not required and explains in some detail how much of this can be handled in part by phone and by mail and I would certainly represent to the court that it is Dr. Hertz's position as a physician who has sat on

the Standards Committee for the American College of Obstetrics and Gynecology that in making this determination, it is indeed appropriate provided accurate information can be obtained from the woman to the satisfaction of the physician.

This determination can be made by telephone,

I am not submitting to the court that that determination is sufficient to decide which procedure will be used the following day at the clinic.

Yes, when you get to the point of performing a medical procedure, there must be a medical examination and as I understand it, and in at least twenty percent of the cases, there may be a need for ultrasound examination where even the physical examnation is not sufficient to provided accurate information.

Hertz's affidavit indicates that even with ultrasound, the accuracy of the determination is plus or minus even with that, there is some degree of uncertainty from the outset. I would submit to the court that the purpose of the the determination required required by this statute is simply to determine

which of the appropriate sets of material should be made available to the woman so that she can have the necessary information to make a choice.

THE COURT: One final question of Mrs. Gleicher. With regard to the objectives of the Act, the general welfare type position here in terms of the health of the patient. Is that sufficient? Assuming that we conclude that it is a fundamental right.

MS. GLEICHER: First of all this court is not bound by the legislature's statements of the purpose of the Act.

This court may look beyond the legislature's characterization of its purposes here and determine the true objective of this legislation. The legistlation was clearly designed to make it more it more difficult for women to obtain abortion. There is no other reason for a mandatory 24-hour delay in the performance of a procedure if as Mr. Wernet says all of the information necessary can be provided to the patient in a very short, easy encounter.

THE COURT: Was making the assumption that this was,in fact, the objective of the Act in the interest of the state to seek to be

protected, would that in and of itself be sufficient of the interest, the compelling type interest to regulate that fundamental right.

MS. GLEICHER: It would be— the state has compelling interest in the woman's health but that does not end the inquiry. The inquiry is, do these regulations further establish that interest. That is, does a mandatory delay in the performance of an abortion procedure further a woman's health or does it under certain circumstances impair a woman's ability to exercise her constitutional right and impair her health potentially due to difficulties and further delays that may endanger her health.

This court should not, should not accept merely a representation by the legislature or Mr. Wernet that the statute is designed to protect women's health.

This Court must look beyond this statement and ask itself: "Do these requirements, these onerous requirements for some reason really protect a woman's health and further her knowledge or are they designed to make it as difficult and burdensome as possible for her to exercise a fundamental constitutional

right.

And I think there is nothing in this statute that is objectively designed to provide women with truthful nonbiased information. When we look at the first sentence of the statute, it tells us that basically the legislature felt it was all right for this to be a perfect persuasive statute and if you look at the statute in it's totality, it's designed to cut down on abortions, not to encourage women's exercises of that right.

THE COURT: Okay, the argument of counsel has been very helpful and instructive to the court and we'll see what we can do in terms of expediting this.

STATE OF MICHIGAN

COUNTY OF WAYNE

C E R T I F I C A T E

I, Kathleen L. Maxwell, Official Court Reporter of the Third Judicial Circuit, State of Michigan, do hereby certify that the foregoing pages 1 through 59 inclusive, comprise a true and correct transcript of the proceedings in the matter of Mahaffey vs. Attorney General, 94 406793 AZ heard June 10, 1994.

Kathleen L. Maxwell

KATHLEEN L. MAXWELL
1611 City-County Building
Detroit, Michigan 48226

EXHIBIT F

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.
_____/

R. John Wernet, Jr.
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Elizabeth L. Gleicher
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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, [illegible] 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

Dated: JUL 15 1994, 1994

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

EXHIBIT G

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellees,

v

ATTORNEY-GENERAL OF MICHIGAN,

Defendant-Appellant.

Court of Appeals
No.: 177765

Lower Court
No. 94-406793-AZ

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Plaintiffs-Appellees answer, "Yes"

II. **EVEN IF THE STATE CONSTITUTIONAL RIGHT IS PRECISELY COEXTENSIVE WITH THE FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY, DOES THE "INFORMED CONSENT" LAW STILL IMPOSE AN UNCONSTITUTIONAL BURDEN ON THAT RIGHT?**

Plaintiffs-Appellees answer, "Yes"

III. **DID THE TRIAL COURT CORRECTLY RULE THAT 1993 PA 133 VIOLATES THE HEADLEE AMENDMENT?**

Plaintiffs-Appellees answer, "Yes"

IV. **DO PLAINTIFFS SATISFY THE REQUIREMENTS FOR SUMMARY DISPOSITION?**

Plaintiffs-Appellees answer, "Yes"

INTRODUCTION

The new restrictions on abortion that the plaintiffs challenge in this action -- a counseling requirement and a mandated 24-hour delay -- undoubtedly make it more difficult for Michigan women to exercise their well established right to choose abortion. That concern pales, however, in comparison with the far more troubling reality of these restrictions: that they introduce new medical risks and complications into a procedure whose safety and effectiveness depends upon timing and upon physicians' ability to render individualized care. Some of these risks will be slight. Others will not. It is beyond question, however, that the new law's requirements will be, to varying degrees, detrimental to the good health of a significant number of pregnant women, most notably those carrying fetal abnormalities or suffering other complications of pregnancy. If something goes wrong, if such a risk arises, a physician is constrained from circumventing the law's commands to respond accordingly except where continued compliance with the law would cause the woman's death or would "create a serious risk of substantial and irreversible impairment of a major bodily function." MCL § 333.17015(2)(d); MSA §14.15 (17015). By fitting physicians with this "undesired and uncomfortable straightjacket," Akron v Akron Ctr for Reproductive Health,[1] Michigan's new abortion restrictions transform radically the normal dynamic between patient and physician and virtually dictate the terms of that relationship in several very critical respects. Whatever health-related value there may be in demanding reflection and a measure of informed consent that is unique to abortion vanishes when the

[1] 462 US 416, 443; 103 S Ct 2481 (1983), overruled in part, Planned Parenthood of Southeastern Pennsylvania v Casey, 112 S Ct 2791, 2823 (1992).

delay and the coercion that those requirements entail come to be inimical to a woman's well being. The burden this law places upon women's reproductive autonomy is significant and unconstitutional in its own right. The burden it places upon women's health is indefensible.

COUNTER-STATEMENT OF FACTS

The plaintiffs accept, for the most part, the state's description of the terms of the new "informed consent" law as well as the summary of the procedural history of this action. The following discussion elaborates upon and clarifies the facts underlying this constitutional challenge to the abortion restrictions enacted by the Michigan legislature.

Affidavits that the plaintiffs submitted to the trial court, which are attached at Appendices 1, 2, and 4 of this brief, help to illustrate the obstacles that these restrictions lay before women in Michigan who attempt to obtain abortions. These include the affidavit of Dr. Mark I. Evans, who is the director of both the Division of Reproductive Genetics and the Center for Fetal Diagnosis and Therapy at Wayne State University/Hutzel Hospital, where he is also a Professor and the Vice-Chief of Obstetrics and Gynecology as well as a Professor of Molecular Biology and Genetics, and Pathology.[2] As part of his practice, Dr. Evans counsels women who have been diagnosed as carrying abnormal fetuses about whether to continue or terminate a pregnancy. Evans Affidavit ¶ 27 (attached at Appendix 1).

Dr. Evans explains that an early legal abortion is the safest surgical procedure that doctors perform, generally much safer than childbirth. Evans Affidavit ¶ 4. For instance,

[2] Dr. Evans' extensive experience and qualifications are set forth completely in his affidavit.

the maternal mortality ratio in this country between 1979 and 1986 was 9.1 deaths per 100,000 live births, while the legal abortion mortality rate between 1975 and 1985 was 0.6 deaths per 100,000 abortions. Evans Affidavit ¶¶ 8-9. Abortion is safer the earlier it is performed: the mortality risk increases 50 percent with each week after the eighth week of pregnancy, and the risk of major complications increases about 30 percent per week. Evans Affidavit ¶¶ 6, 12.

Dr. Evans states that both the counseling requirement and the mandated delay of the new law will have tangible adverse effects on many women seeking to obtain abortions. Women carrying fetal abnormalities, who Dr. Evans regularly counsels, shoulder a considerable burden under the new restrictions. According to Dr. Evans, there are thousands of fetal anomalies, ranging from mild to lethal, that affect physical function, intelligence, or both. Evans Affidavit ¶ 26. For some of these abnormalities, there is no known treatment or cure. Evans Affidavit ¶ 26. Because such problems are typically discovered in the second trimester of pregnancy, delayed abortion exacerbates the health risks to the pregnant woman. Evans Affidavit ¶ 30. Moreover, although most of these women want to have a child, once a woman makes the difficult decision to have an abortion, "it is traumatic to continue being pregnant" knowing that she will not give birth. Evans Affidavit ¶ 29. The state-mandated counseling information also aggravates the health risk, as listening to information that encourages childbirth and viewing pictures of a normal fetus "could cause extreme anguish" to a woman carrying a fetus that is assuredly *not* normal. Evans Affidavit ¶ 31.

The burden imposed by the mandatory delay is also especially onerous for women

who require a two-day abortion procedure, which includes many women who are seeking abortions more than 12 weeks past their last menstrual period, a group twice as likely to include teenagers. Evans Affidavit ¶¶ 13-15. "These women will have to endure even greater expense, time away from family and work, nights spent in a hotel, hours driving to and from a clinic, and additional risks that they will have to disclose the pregnancy because it is too hard to explain *three* days absence from work or home." Evans Affidavit ¶ 14. Because of the higher costs and scheduling difficulties, physicians may feel pressure to forgo the safeguard of the two-day procedure. Evans Affidavit ¶ 14. Women who are suffering from one of various illnesses who seek an abortion for medical reasons that may not be sufficiently dire to constitute a "medical emergency" within the statute face unique problems as a result of the mandated delay, as that delay may aggravate an existing illness. Evans Affidavit ¶ 3.

In another affidavit, David A. Smith, a former senior research associate at the Center for Policy Research in New York,[3] explains that facilities providing abortions in Michigan are located almost entirely in the southern third of the state, with only a handful of doctors' offices -- and absolutely no free-standing or hospital-based facilities -- in all of the region north of Saginaw. Smith Affidavit ¶¶ 5, 8 (attached at Appendix 2). In fact, of the six doctor's offices north of Saginaw that provided abortions, only one office in Marquette provided a significant number, an average of two abortions per week, while the remaining five offices each performed an average of fewer than ten abortions per year. Smith

[3] At the Center for Policy Research, Mr. Smith developed and studied statistics regarding state health and welfare services. Smith Affidavit ¶ 1. His qualifications are set forth more fully in the curriculum vitae included in his affidavit.

Affidavit ¶ 8. In 61 Michigan counties, abortions were not available at all. Smith Affidavit ¶ 7. According to the Smith affidavit, women living in the northernmost regions of Michigan must travel up to 938 miles round trip to reach the nearest free-standing clinic in Saginaw. Smith Affidavit ¶ 9.

Significantly, the state has never quarreled with any of the data or statements set forth in Mr. Smith's affidavits. In addition, what perfunctory disaccord there is between the state's assertions and those of Dr. Evans stems only from the varying levels of detail or from purely legal disputes about the proper scope and interpretation of the new statute's language. See infra Part IV.[4] The trial court credited Dr. Evans' assertion that the the statute's requirements could have an adverse effect on some women, finding the state's attempts to counter this position "nonresponsive." Mahaffey v Attorney General, 94-406793 AZ (Wayne County Cir Ct, July 15, 1994), slip op at 23-24 (attached at Appendix 3). The court also specifically found that the mandatory waiting period increases the costs associated with having an abortion and especially impedes access for those women who live north of Saginaw. Id., slip op at 28 (stating that "Defendant provides no *factual* evidence disputing

[4] For example, the figures of the state's affiant, Dr. Watson A. Bowes, pertaining to the comparative death rates of abortion and live birth are the same as Dr. Evans'. Dr. Bowes merely elaborates upon that data by opining that to characterize the difference as sixteen-fold is "to overdramatize" the data, because mortality rates should be assessed in comparable groups of patients "with the similar status of preexisting health and involved in equivalent levels of medical care." Bowes Affidavit ¶ 5 (attached at Defendants-Appellants' Brief at Appendix E). Dr. Bowes' assertion is by no means contrary to Dr. Evans'; it merely analyzes the data at a higher level of detail. Similarly, although Dr. Bowes offers his opinion that the risks of abortion do not increase substantively in a 24-hour period, he nonetheless concedes Dr. Evans' point that data shows "an overall relationship between the duration of pregnancy and the incidence of complications of induced abortion." Bowes Affidavit ¶ 4.

these assertions.").

SUMMARY OF ARGUMENT

The trial court's holding that the state constitution protects a fundamental right to privacy that, in turn, encompasses the right to have an abortion is relatively uncontroversial. The pivotal issue in this case is not whether the right exists, but whether the governmental conduct that is challenged for infringing upon that right warrants review under the strict scrutiny standard that applies to all other alleged infringements of fundamental rights in the State of Michigan.

Michigan's courts have never veered from the stance that strict scrutiny is the standard of review when fundamental rights are at stake. The allure of following the newly divergent federal course of Planned Parenthood of Southeastern Pennsylvania v Casey, 112 S Ct 2791 (1992), by applying a reduced level of scrutiny to abortion restrictions is far outweighed by the need to give effect to Michigan's special constitutional regard for the health of its people, including its pregnant women. See Mich Const 1963, art 4, § 51. For this and other reasons, Michigan's courts face a legal landscape that is entirely different from that which the Supreme Court confronted in Casey.

Applying strict scrutiny, the trial court was correct in determining that the state's abortion restrictions violate the right to privacy under the Michigan constitution. The legislation's coercive counseling provision also violates Michigan's constitutional right to free speech by requiring physicians to communicate information, much of it rooted in ideology, with which they may not agree and that they believe to be false. Finally, the informed consent law is unconstitutional because it fails to provide an adequate exception for medical

emergencies.

Even if this Court determines, contrary to the trial court's conclusion, that the fundamental right at issue here is somehow less fundamental than other fundamental rights the Michigan Constitution protects and therefore subject to a diminished level of review -- and it should not -- the "informed consent" legislation is still unconstitutional under the "undue burden" standard set forth in Planned Parenthood of Southeastern Pennsylvania v Casey. The outward similarities between the provisions of the Pennsylvania law upheld in Casey and Michigan's "informed consent" statute evaporate when viewed in light of the idiosyncrasies of this law's enforcement in Michigan. The most notable of these singularities are the state's recognition of public health as a constitutional value, the exceptional hardship created by Michigan's irregular geography and by the utter absence of abortion providers throughout the vast expanse of the Upper Peninsula and much of the northern lower part of the state, and the clear inadequacy of the law's unambiguously narrow exception for medical emergencies.

Michigan's abortion legislation also is in clear violation of the Headlee Amendment, Mich Const 1963, art 9, § 29, because the State has failed to appropriate funds to pay for the various new activities and services the law requires of local health departments. The state's rejoinder that funding can be found somewhere in previously appropriated general revenues contravenes the dictates of the Headlee Amendment, the legislation implementing the Headlee Amendment, and common sense. In the absence of funds specifically appropriated to pay for the mandates imposed upon local health departments by 1993 PA 133, the trial court properly enjoined the Act in its entirety.

Finally, the trial court's determination that summary disposition was appropriate in this case is unassailable. The principal disputes that the state highlights in its brief, such as the question whether the terms of the medical emergency exception will allow a physician to refuse to comply with the statutory requirements in certain circumstances, are purely legal disputes over statutory construction. Any tension at the margins over the exact nature of the impact of the restrictions is not material to the ultimate determination of this legislation's constitutional validity.

ARGUMENT

I. THE "INFORMED CONSENT" LAW UNCONSTITUTIONALLY INFRINGES UPON THE RIGHTS OF PHYSICIANS AND THEIR PATIENTS WHO SEEK TO EXERCISE THEIR RIGHT OF REPRODUCTIVE CHOICE GUARANTEED BY THE MICHIGAN CONSTITUTION.

As the trial court recognized, enforcement of 1993 PA 133 would infringe upon the exercise of the fundamental right to privacy protected by the Michigan Constitution. Although the court characterized the underlying constitutional inquiry as an open question, its careful analysis ultimately confirmed that this state's constitutional jurisprudence would countenance no other result.

At the heart of the state's law in this matter is the unique and unmistakable value Michigan places upon the protection of the health of the public and, consequently, the health of pregnant women. Indeed, this vital interest enjoys constitutional stature. Article 4, section 51 of the 1963 Michigan Constitution provides that "[t]he public health and general welfare of the people of the State are hereby declared to be matters of primary concern" and that "[t]he legislature shall pass suitable laws for the protection and promotion

of the public health." This extraordinary constitutional protection, coupled with the state courts' unambiguous recognition of a *state* constitutional right of privacy that must include the right to abortion, compels the conclusion that Michigan's so-called "informed consent" law cannot withstand the strict scrutiny imposed upon governmental conduct that may impede the exercise of that fundamental right. In light of this constitutional foundation, the trial court's decision to strike 1993 PA 133 and enjoin its enforcement is quite unremarkable. To the extent that federal law disregards these core constitutional values, Michigan's protection necessarily must transcend the protection afforded by the federal Constitution, even recognizing that Michigan's courts deviate from the federal interpretation of analogous constitutional provisions sparingly. See, e.g., Sitz v Department of State Police, 443 Mich 744, 758-759; 506 NW2d 209 (1993); People v Nash, 418 Mich 196, 214; 341 NW2d 439 (1983).

A. *The Right to Privacy is a Fundamental Right Under the Michigan Constitution, and Any Act Implicating that Right is Subject to Strict Scrutiny.*

The trial court's conclusion that the right to privacy is a fundamental right subject to strict scrutiny is well supported in the law of this state. Though the right has often been viewed in terms of emerging federal law, it is firmly and independently rooted in state constitutional law. In Advisory Opinion on Constitutionality 1975 PA 227, 396 Mich 465; 242 NW2d 3 (1976), the Michigan Supreme Court stated:

> This court has long recognized privacy to be a highly valued right. DeMay v Roberts, 46 Mich 160, 9 NW 146 (1881). No one has seriously challenged the existence of a right to privacy in the Michigan Constitution nor does anyone suggest that right to be of any less breadth than the guarantees of the United States Constitution. [396 Mich at 504.]

The state does not dispute that a right of privacy exists under Michigan's constitution. See Defendant-Appellant's Brief at 10. Viewing this right as a mere "generalized" right, however, the state takes issue with the proposition that the right to *abortion* is within the scope of the constitution's protection in this state. The state suggests, among other things, that the Michigan constitution's privacy protection mirrors the federal protection only in the abstract, and that the actual content of that right affords less protection in Michigan.

Aside from the illogic of this position, it is also contradicted by the case law. First, the specific rights protected by the Michigan constitution are invariably at least coextensive with the analogous federal constitutional protections. See, e.g., Sitz v Department of State Police, 443 Mich 744 (1993); Doe v Department of Social Services, 439 Mich 650, 661-662; 487 NW2d 166 (1992). Because federal law largely defines the minimal level of protection, the United States Supreme Court's decision in Roe v Wade, 410 US 113; 93 S Ct 705 (1973), provides the baseline for this constitutional analysis. In Roe v Wade, the Supreme Court held that the constitutional right to privacy encompasses a woman's decision whether or not to terminate her pregnancy. Until the end of the first trimester of pregnancy, a patient and her physician are "free to determine, without regulation by the state," that a pregnancy should be terminated. 410 US at 163. From the end of the first trimester to the point of fetal viability, a state may regulate abortion "to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Id. Because a woman's health interests are paramount until the point of fetal viability, only a compelling interest justifies state regulation inhibiting the right to an abortion. 410 US at 155-156. Even Planned Parenthood of Southeastern Pennsylvania v Casey, supra, which undeniably

bridles the holding in Roe, is clear in affirming Roe's central holding that women have a fundamental right to choose whether to have an abortion prior to fetal viability. 112 S Ct 2791, 2804, 2808-2812 (1992).

The Michigan Supreme Court has explicitly recognized that the state constitution incorporates that federal decisional law recognizing a woman's right to decide whether to conceive or bear a child. The Court's opinion in Advisory Opinion 1975 PA 227, 396 Mich 465 (1976), for example, specifically cited cases involving abortion, e.g., Roe v Wade, supra, and contraception, e.g., Griswold v Connecticut, 381 US 479; 85 S Ct 1678 (1965), to confirm the presence of constitutionally protected "zones of privacy" deriving from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. 396 Mich at 505. The Court emphasized that "[t]he people of this state have adopted corresponding provisions in art 1 of our Constitution." Id. Against this backdrop, it is beyond question that the fundamental right to privacy under the Michigan constitution includes a woman's right to decide to terminate her pregnancy.

The state's argument that Michigan law cannot support such a conclusion is unconvincing and misplaced. Its reliance, for example, upon the original intent of the framers of the Michigan constitution and abortion's historically disfavored status, see Defendant-Appellant's Brief at 15, fails to acknowledge that abortion rights on the federal level emerged from a comparable quandary. Whatever position abortion occupied years ago in the State of Michigan was not a local phenomenon confined within the state's borders. See People v Bricker, 389 Mich 524, 528 n 5; 208 NW2d 172 (1973). The state's inflexible premise would imperil many of the constitutional principles that have evolved in the state

and federal courts alike.[5] See, e.g., Department of Civil Rights v Waterford Township Dep't of Parks and Recreation, 425 Mich 173; 387 NW2d 821 (1986) (construing Mich Const 1963, art 1, § 2 to require heightened scrutiny of gender-based classifications, though such a rule had not existed until the U.S. Supreme Court adopted it in Craig v Boren, 429 US 190; 97 S Ct 451 (1976)).

The case law that the state relies upon actually undermines its position. This state's courts have made clear that to the extent abortion was ever fairly characterized as disfavored, the basis for that status has vanished. In People v Nixon, 42 Mich App 332; 201 NW2d 635 (1972), remanded 389 Mich 809 (1973), on remand, 50 Mich App 38; 212 NW2d 797 (1973), this Court held, amid a thorough examination of the law, that the "obvious purpose" of the state's criminal abortion statute, MCL § 750.14; MSA § 28.204, was not "to protect the 'rights' of the unquickened fetus," but rather "to protect the pregnant woman." 42 Mich App at 337. This Court determined that because "tremendous strides" in medicine had drastically reduced the danger of abortion to the point that it is generally safer than giving birth, the blanket denial of a woman's right to secure an abortion was no longer justified. Id. at 339. This Court went on to conclude that the purpose of the statute criminalizing abortion "is no longer existent as it applies to licensed physicians in a proper medical setting." Id.

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[5] Significantly, several states have found reproductive choice to be a fundamental right protected by their state constitutions. See, e.g., Davis v Davis, 842 SW2d 588, 598-600 (Tenn 1992); In re TW, 551 So2d 1186, 1192-93 (Fla 1989); Doe v Maher, 515 A2d 134, 150 (Conn Super Ct 1986); Right to Choose v Byrne, 450 A2d 925, 933 (NJ 1982); Committee to Defend Reprod Rights v Myers, 625 P2d 779, 784 (Cal 1981); Moe v Sec'y of Admin & Fin, 417 NE2d 387, 397-99 (Mass 1981).

The state's argument that the Michigan Supreme Court has rejected this Court's opinion in Nixon is completely unfounded. On the contrary, the Supreme Court's remand of the case clearly did not vacate the decision,[6] and ultimately led to a decision on remand that broadened rather than constrained this Court's initial characterization of the right to obtain an abortion. People v Nixon (On Remand) 50 Mich App 38, 39-40 (1973).[7] Whatever the technical status of Nixon, however, there is no reason to question its premise. The Michigan Supreme Court's decision in People v Bricker, 389 Mich 524 (1973), upon which the Nixon remand order was based, echoed this Court's view in Nixon that the health and safety of the pregnant woman is central to the appraisal of the state interest justifying the criminal abortion statute. Id. at 527, 529. In that vein, the Court stated that

> [w]hen the Legislature adopted the statutes prohibiting most abortions there was little or no reason to question their

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[6] When the Michigan Supreme Court wishes to vacate a Court of Appeals decision, it does so explicitly. See, e.g., Smeesler v Pub-N-Grub, 442 Mich 404, 408; 500 NW2d 742 (1993) ("we *vacate* the judgment of the Court of Appeals *and remand* to that Court . . .") (emphasis added); Doe v Department of Social Services, 439 Mich 650, 670 n 27 (1992).

[7] This Court's initial decision in Nixon affirmed a conviction under the abortion statute because the defendant did not meet the requirement of being a licensed physician who performed the abortion in an appropriate medical setting. 42 Mich App at 341. The Supreme Court remanded the case to this Court "for disposition not inconsistent with the dispositions ordered" by that Court in People v Bricker, 389 Mich 524 (1973), and a companion case that the Court considered in the wake of Roe v Wade. People v Nixon, 389 Mich 809, 810 (1973). On remand, this Court held that in light of Bricker, the conviction should be reversed because the defendant performed the abortion within the first trimester of pregnancy. 50 Mich App at 40. In no way did the Supreme Court's order repudiate this Court's determinations regarding the purpose underlying the abortion statute and the effect of then-recent strides in medicine on the safety of the procedure. The Court's remand order, which is plainly concerned only with ensuring compliance with Roe v Wade, makes clear that the only vulnerable facet of this Court's decision was its affirmance of a conviction under the statute. If anything, then, the remand order bolstered this Court's language supporting substantial restrictions on criminal liability.

> constitutionality. The medical and other developments which influenced the United States Supreme Court to decide Roe and [its companion case, Doe v Bolton, 410 US 179; 93 S Ct 739; 35 L Ed 2d 201 (1973)] as it did were far ahead. [389 Mich at 529.]

Even in Doe v Department of Social Services, 439 Mich 650 (1992), where the Michigan Supreme Court assumed without deciding that there is a state constitutional abortion right coextensive with the federal right, the Court declined an ideal opportunity to elucidate its alleged rejection of this Court's decision in Nixon. The clarity of the state courts' view of this issue, and the utter absence of any reasonable countervailing interpretation,[8] confirm the fallacy in the state's insistence that abortion in itself is contrary to the state's public policy. In sum, the state's reliance upon public policy and original intent does nothing to undermine the conclusion that the Michigan constitution recognizes a fundamental right to privacy that includes the right to abortion.

It is axiomatic that where governmental action is alleged to infringe upon a fundamental right, a strict scrutiny standard of review has been required. See People v Bennett (After Remand), 442 Mich 316, 319, 336; 501 NW2d 106 (1993); Manistee Bank v McGowan, 394 Mich 655, 668; 232 NW2d 636 (1975). As this state's supreme court made

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[8] Any argument that abortion was contrary to Michigan's law and public policy based on a theory of fetal rights disregards the clear weight of authority. See, e.g., Roe v Wade, 410 US at 158 (holding that the term "person" in the Fourteenth Amendment does not include the unborn) and 162 ("the unborn have never been recognized in the law as persons in the whole sense") and 161 (fetuses have not been afforded legal rights "except in narrowly defined situations and except when the rights are contingent upon live birth"); see also Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection,* 95 Yale L.J. 599, 600-602 (1986). In addition, as the trial court pointed out, the pregnant woman could not be convicted under the criminal abortion statute, Mahaffey v Attorney General, slip op at 14-15 n 20, supporting the view that women's health, not fetal rights, was the core of the statutory purpose.

clear in Advisory Opinion 1975 PA 227, 396 Mich 465 (1976), the right to privacy is no exception:

> The right to privacy includes certain activities which are fundamental to our concept of ordered liberty. Rights of this magnitude can only be abridged by governmental action where there exists a 'compelling state interest.' Roe, supra, 410 US 152, 155; 93 S Ct 705. Kropf v Sterling Heights, 391 Mich 139, 157-158; 215 NW2d 179 (1974). [396 Mich at 505.]

As the trial court recognized, see Mahaffey v Attorney General, 94-406793 AZ (Wayne County Cir Ct, July 15, 1994), slip op at 17-18 (attached at Appendix 3), strict scrutiny is the standard used to review every other fundamental right that the Michigan Constitution protects.[9] The overwhelming weight of federal authority over the years reinforces this view, see e.g., Plyler v Doe, 457 US 202, 216-217; 102 S Ct 2382 (1982); Harper v Virginia Board, 383 US 663, 667, 670; 83 S Ct 1079 (1966), including in the specific context of the right to abortion. See Roe v Wade, 410 US at 154-156; City of Akron v Akron Center for Reproductive Health, Inc., 462 US 416; 103 S Ct 2481 (1983), overruled in part, Casey, 112 S Ct 2791, 2823 (1992); Thornburgh v American College of Obstetricians and Gynecologists, 476 US 747; 106 S Ct 2169 (1986), overruled in part, Casey, 112 S Ct at 2823. Other states' courts have likewise held that alleged infringement of fundamental rights warrants the most searching review. See, e.g., In re TW, 551 So 2d 1186, 1192-1193 (Fla 1989) (holding

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[9] See, e.g., Doe v Department of Social Services, 439 Mich 650, 661-662 (1992)(Art 1, § 2 equal protection review of classification that impinges upon the exercise of a fundamental right); People v DeJonge, 442 Mich 266, 279-280; 501 NW2d 127 (1993)(Art 1, § 4 free exercise of religion review, at least where in conjunction with right of parents to direct children's education); Advisory Opinion 1975 PA 227, 396 Mich 465, 505 (1976)(Art 1, § 5 free expression review of restrictions on speech and the media). See also People v Bennett (After Remand), 442 Mich 316 (1993); Manistee Bank v McGowan, 394 Mich 665 (1975).

Florida's interest not compelling enough to justify parental consent requirement's infringement upon the constitutional right to terminate pregnancy). These cases make abundantly clear that where a state's regulation threatens the ability to exercise a fundamental right, courts must examine that conduct with the highest level of scrutiny.

The state argues, however, that even accepting that Michigan's constitution encompassed a distinct right to choose abortion, the appropriate standard of review would the "undue burden" test set forth in Planned Parenthood of Southeastern Pennsylvania v Casey, 112 S Ct 2791 (1992), rather than the well-established strict scrutiny standard that has been consistently applied in cases implicating fundamental rights. Though Casey generated five separate opinions and virtually no agreement on reasoning, a majority of the Court explicitly and repeatedly reaffirmed the essential holding of Roe v Wade. 112 S Ct at 2804, 2808-2812, 2816, 2821. The Court struck as unconstitutional Pennsylvania's statutory provisions requiring reporting of a woman's failure to provide spousal notice of the intended abortion, but upheld provisions imposing a 24-hour waiting period and requiring that a woman give her informed consent prior to the abortion. Id. at 2826-2831, 2822-2826. Perhaps more significantly for the purposes of the present inquiry, the joint opinion of Justices O'Connor, Kennedy, and Souter recharacterized the appropriate standard of review for abortion restrictions, employing a new "undue burden" standard in place of the strict scrutiny standard and thereby deviating from the traditional means of examining the infringement of fundamental rights. Id. at 2819-2821. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable

fetus." Id. at 2820.

Thus, the central inquiry in this case is not the threshold question that the state focuses upon; it is beyond dispute that Michigan's constitution will recognize a woman's fundamental right to abortion. Rather, this case turns largely upon the level of scrutiny, and, in particular, whether Michigan's Constitution requires its state courts to continue to strictly scrutinize alleged infringements of fundamental rights.

The answer could not be more clear. Michigan courts have never utilized a diminished standard of review when considering laws that impede fundamental rights, and their decisions are unambiguous in holding that limitations upon fundamental rights warrant the highest level of scrutiny. See supra note 4. In this regard, Casey represents a dramatic shift that is intolerable to Michigan's constitutional jurisprudence. With fundamental rights at stake, Michigan courts "are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so." Sitz v Department of State Police, 443 Mich 744, 763 (1993). This state's courts will recognize broader protection than the federal Constitution only for compelling reasons. Id. at 758; People v Nash, supra, 418 Mich at 196, 214 (1983). But they will do so willingly when the state constitution so demands. See e.g., People v Bullock, 440 Mich 15; 485 NW2d 866 (1990); Delta Charter Township v Dinolfo, 419 Mich 253, 276-277 n 7; 351 NW2d 831 (1984); Socialist Workers Party v Secretary of State, 412 Mich 571; 317 NW2d 1 (1982); People v Cooper, 398 Mich 450; 247 NW2d 866 (1976); People v Jackson, 391 Mich 323; 217 NW2d 22 (1974); People v White, 390 Mich 245; 212 NW2d 222 (1973); Detroit Branch, NAACP v City of Dearborn, 173 Mich App 602; 434

NW2d 444 (1988), lv den 433 Mich 906 (1989). As the Michigan Supreme Court has stated, "[w]e 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." People v Bricker, 389 Mich 524, 528 (1973); see also Sitz, 443 Mich at 763 ("We are obligated to interpret our own organic instrument of government.").

Here, that duty is manifest, yet also unexceptional. To begin, the duty is more fairly characterized as a preservation of longstanding state values rather than an affirmative deviation from the parameters of federal law. In that respect, this matter is akin to that which the Michigan Supreme Court confronted in Sitz. There, the Court ultimately concluded that article 1, §11 of Michigan's constitution must be interpreted more broadly than the U.S. Supreme Court's construction of the Fourth Amendment in order to preserve the well established principle in state and, until recently, federal law prohibiting warrantless and suspicionless searches and seizures in the context of criminal law enforcement. 443 Mich at 747, 778-779. As in Sitz, a departure from the strictures of Casey in the present case would be a reaffirmation, rather than a rejection, of more than 20 years of constitutional law that has evolved in the U.S. Supreme Court.[10]

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[10] The Michigan Supreme Court has frequently relied on prior federal cases or dissenting opinions to establish more protective standards than the U.S. Supreme Court would employ. For example, in People v Bullock, supra, the majority opinion extensively discussed Solem v Helm, 463 US 277; 103 S Ct 3001 (1983), and essentially adopted Justice White's dissenting opinion in Harmelin v Michigan, 501 US 957; 111 S Ct 2680 (1991). In People v Cooper, supra, the opinion extensively discussed both prior and recent federal decisions. In People v Turner, 390 Mich 7; 210 NW2d 336 (1973), the majority, in adopting the objective test for entrapment on public policy grounds, essentially followed the dissenting views of several U.S. Supreme Court Justices. See, e.g., US v Russell, 411 US 423; 93 S Ct 1637 (1973)(Stewart, J, dissenting). Likewise, in this case, it is appropriate to rely upon principles of federal law set forth in Roe v Wade and its progeny establishing that

Second and more fundamentally, the path diverging from Casey is especially well marked for Michigan's courts because of the intolerable conflict between the underlying reasoning of that decision and Michigan's constitutional protection of the health and the privacy of its people. Casey set forth a strained and essentially unintelligible federal directive that fails to accord the required deference to the constitutional principles that are uniquely respected in this state.[11] Other states have employed a higher level of scrutiny under their own constitutions even in the absence of a direct conflict with yet another constitutional protection separate from the right to privacy. See, e.g., In re TW, 551 So 2d 1186, 1192-1193 (Fla 1989). Even if it were ever acceptable to reduce the standard of review for actions infringing the fundamental right to privacy, a diminished standard can never be condoned where the fundamental right at issue is so firmly rooted in state case law and so closely intertwined with the state constitution's explicitly guaranteed protection of

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the right to abortion is a fundamental right and that any conduct infringing upon that right is subject to strict scrutiny.

[11] Casey halted a logical progression of decisions clarifying the fundamental right to abortion, and its newfangled approach coincided more with the changing membership of the Court than with a coherent evolving jurisprudence. As recently as 1986, a majority of the Justices had applied strict scrutiny in reviewing abortion restrictions in Thornburgh v American Colleges of Obstetricians and Gynecologists, 476 US 747; 106 S Ct 2169 (1986), overruled in part, Casey, 112 S Ct 2823. By a vote of 5-4, the Thornburgh Court struck as unconstitutional the six statutes at issue, some of which were virtually identical to those upheld six years later in Casey.

The Casey decision, which repeatedly saluted the "central holding" of Roe v Wade while concomitantly defying it in its consideration of the Pennsylvania restrictions at issue, failed to furnish any meaningful explanation as to how these seemingly incompatible positions could be reconciled. As a result, the right to abortion that the Court emphasized was clearly protected by the U.S. Constitution never crystallized into a freedom with practical consequences. Michigan's courts, by contrast, are surely capable of giving unhampered effect to the rights their state constitution guarantees.

its people's health.

B. *1993 PA 133 Violates the Right to Privacy Protected by the Michigan Constitution.*

The new abortion restrictions that the trial court enjoined cannot survive the strict scrutiny applicable to governmental conduct of this nature. The mandated 24-hour delay and the required receipt of coercive materials make it significantly more difficult for women to exercise their right to terminate a pregnancy. The restrictions do not merely increase the costs and exacerbate the personal dilemmas and difficulties involved in obtaining an abortion, they also increase the medical risks for a significant minority of the women seeking abortions.[12] Despite the immense obstacles it erects, the new law's underlying justification is not even rational, no less compelling. Indeed, it is antithetical to the good health of Michigan's women. It is unimaginable that doctors would deem it wise or necessary to show already anxious patients detailed and graphic depictions of the heart operation or neurosurgery or even root canal that they are about to undergo. Applying the new law to the context of an amputation, for example, a physician would be required to show the patient pictures of a well-muscled leg, describe exactly how and where it will be severed, and detail the depression, stress, and anger that the patient might feel as a result of the procedure. Those patients who received such explicit oral and visual portrayals certainly

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[12] As the Supreme Court stated in Casey, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." 112 S Ct at 2829. If the restriction operates as a substantial obstacle to a woman's choice to have an abortion "in a large fraction of the cases in which [the restriction] is relevant," it is an undue burden "and therefore invalid." 112 S Ct at 2830. In Casey, that meant that where only *one percent* of women seeking abortions would not otherwise tell their husbands about the abortion, the spousal notification provision was an undue burden. Id.

would not feel better prepared and most likely would feel completely unprepared to submit to the procedure. That is, of course, the goal of Michigan's abortion restriction -- to stop the abortion altogether -- but its irrationality and the conspicuous level of interference are startling, particularly given the relative safety of the procedure under normal conditions.

The statute does not actually seek informed consent; rather, it seeks to alarm and unnerve women and to raise, not lower, their apprehensions. Even accepting that states may enact measures favoring childbirth over abortion, that principle must give way when the severity of the coercion far exceeds what is required to further the provisions' aims within rational bounds. The law imposes too high a burden on women's right to control their reproduction. Accordingly, the trial court correctly held that the law violates the constitutional right to privacy guaranteed by the Michigan constitution, and that decision should be affirmed.

1. Mandated Delay

MCL § 333.17015(3) requires a woman to wait at least 24 hours before obtaining an abortion after the pregnancy is confirmed and the probable gestational age of the fetus is determined, *and* after receiving the various written descriptions, the descriptions and depictions of the fetus, the official "counseling," and the pamphlet on prenatal care and parenting. MCL § 333.17015(3)(c-e). The mandatory delay also requires all women to make at least two trips to obtain an abortion -- at least one to an abortion provider and the other to the provider or a health department.

Abortion-providing facilities are located overwhelmingly in the southern third of the state. Smith Affidavit at ¶ 5 (attached at Appendix 2). Moreover, there are no such

licensed outpatient surgical facilities that can act as free standing or hospital-based providers north of Saginaw, and in the entire region that lies north of Saginaw -- fully two-thirds of the state -- only one doctor's office provides a significant number of abortions. Smith Affidavit ¶¶ 5, 8. Any requirement of an additional trip to the abortion provider will constitute an enormous burden on women who live in northern lower Michigan or the Upper Peninsula. Women traveling from the upper crescent of the Upper Peninsula must travel over 600 miles round trip to Saginaw, roughly twelve and a half hours of driving time. Smith Affidavit ¶ 9. Travel from the upper portions of the Lower Peninsula is also arduous. Smith Affidavit ¶ 10. But wherever a woman lives, the statute clearly requires at least two trips before she can obtain an abortion, and at least a 24-hour delay.

The second trip will require many women who have long distances to travel to pay additional costs of child care, food and lodging, transportation, and lost wages. Evans Affidavit at ¶ 13 (attached at Appendix 1). The greatest burden will be on those rural, low-income women who live great distances from an abortion provider. For some, the additional requirement will delay the abortion itself as the women struggle to raise the money to travel and to make the arrangements -- not once but twice -- for child care or for an absence from work or school. The necessary second trip will also jeopardize the confidentiality of those women who must justify their absences. For many women, particularly young women and those in abusive relationships, any disclosure of their plan risks obstruction of the abortion by husbands, partners, or parents.

Delays will undoubtedly also force some women into the second trimester of pregnancy, increasing both the cost and the medical risk of an abortion. Evans Affidavit

at ¶¶ 6, 11. Dr. Evans describes in great detail the adverse medical impact of delayed abortion in general, and the "special risks for women seeking abortions who are more than 12 weeks past their last menstrual period," Evans Affidavit at ¶ 12 -- a group that is twice as likely to include teenagers than older women. Evans Affidavit at ¶ 14. In Dr. Evans' view, women who require a two-day abortion procedure[13]

> will have to endure even greater expense, time away from family and work, nights spent in a hotel, hours driving to and from a clinic, and additional risk that they will have to disclose the pregnancy because it is too hard to explain three days absence from work or home. [Evans Affidavit at ¶ 13.]

Faced with mounting costs and scheduling difficulties, some physicians may "be pressured to eliminate this extra safeguard, to the detriment of patient care." Evans Affidavit at ¶ 13.

The mandated delay would impose unique difficulties upon pregnant women suffering from various complications of pregnancy. For those whose condition is not so dire as to constitute a "medical emergency," "the delay necessitated by the Act could cause serious physical and emotional harm, which is medically unjustifiable." Evans Affidavit at ¶ 23. Perhaps the greatest burden is upon women carrying abnormal fetuses. When such a woman must terminate her pregnancy, it is obviously traumatic to continue being pregnant once the abortion is planned. Evans Affidavit at ¶ 29. Further, because most fetal abnormalities are not discovered until the second trimester, the mandated delay exacerbates

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[13] For women more than 12 weeks past their last period, it is medically advisable to utilize a two-day procedure to terminate the pregnancy. Evans Affidavit at ¶ 12. Thus, a 24-hour delay becomes a 72-hour delay for this "large fraction" of the cases to which the mandated delay is relevant. See Casey, supra, at 2830 (holding that even under the "undue burden" test, the focus should be whether the law "in a large fraction of the cases in which [it] is relevant, [ ] will operate as a substantial obstacle to a woman's choice to undergo an abortion").

the health risks of the procedure. Evans Affidavit at ¶ 30.

The alternatives the statute provides in a purported attempt to alleviate some of the statute's burdens are ineffective and fraught with problems. These alternatives include mandating local health departments to provide pregnancy tests and gestational stage determinations, MCL § 333.17015(15), and permitting the counseling materials to be distributed at the local health department or at another location. MCL § 333.17015(4). To begin with, these provisions are themselves unconstitutional because they impose a new mandate upon local health departments without state appropriation and disbursement, see Mich 1963 Const, Art 9, § 29 (also known as the "Headlee Amendment," discussed in detail infra Part III), and as a result, some local health departments may refuse to comply with the mandates. See District Health Dept. No. 3 Letter to Sen. George McManus (attached to Bertler Affidavit, Appendix 4).

In addition to the funding problem, a woman still may have to travel a significant distance in those areas of Michigan where a local health department or district serves a large geographic area. See Map of Local Health Departments (August 1993) (attached at Appendix 5). Moreover, while the statute provides that a "qualified person assisting the physician" can perform some of the required tasks, any physician allowing a nonphysician working under him to perform acts such as determining the probable gestational stage of the fetus would violate the applicable standard of care. See Evans Affidavit at ¶ 34. In any event, because the statute does not permit the referring physician to perform the mandated tasks, see infra Part I.D, it effectively requires *two* additional trips.

These are not abstract barriers. Michigan's required 24-hour waiting period will

introduce very real challenges into the lives of women who live and work and go to school in Michigan. In some cases, these obstacles will jeopardize women's health, their safety, their confidentiality, and their relationships. Even where the mandated delay does not cause serious harm in women's lives, it is nonetheless a burden, and one that furthers no legitimate interest of the state.

Other courts have reached the same conclusion. A Tennessee circuit court, for example, found the state's mandatory two-day waiting period violated that state's constitution, reasoning that the rigid time frame was both "a burden in too many probable medical and psychological profiles of women who have no need to wait and who do not want to wait" and "an affront to the patient-physician autonomous relationship and a woman's right not to procreate." Planned Parenthood v McWherter, No. 92 C-1672, slip op at 19 (Tenn Cir Ct, Nov 19, 1992) (attached at Appendix 6).

The U.S. Supreme Court used similar reasoning when it applied strict scrutiny to invalidate a 24-hour waiting period in City of Akron v Akron Center for Reproductive Health, Inc., 462 US 416; 103 S Ct 2481 (1983), overruled in part, Planned Parenthood v Casey, 112 S Ct 2791, 2823 (1992). Justice Powell's opinion for the Court found that no

> legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor [is] . . . the State's legitimate concern that the women's decision be informed . . . reasonably served by requiring a 24-hour delay as a matter of course. . . . [I]f a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision. [462 US at 450-451.]

Though Akron was prior to Casey, Justice Powell's words are as compelling as ever in the

present context of the right of *Michigan* women to reproductive autonomy, particularly in view of the "primary concern" Michigan's constitution demonstrates for the "public health and general welfare" of its people, Const 1963, art 4, § 51, a provision that has no federal counterpart. The mandated waiting period clearly violates the Michigan constitution.

2. Coercive Counseling

Under Michigan's "informed consent" law, every woman seeking an abortion must be shown a depiction of a fetus at the gestational age closest to that of her pregnancy. Every woman must be told about available adoption, foster care, and parenting services. Every woman must be told of counseling services should she suffer adverse psychological consequences from an abortion. Whether rape caused the pregnancy, whether the fetus is fatally impaired, or whether the pregnancy seriously threatens the woman's health, the new legislation requires the physician or qualified person assisting the physician to present to *each and every patient* seeking an abortion a litany of state-mandated materials clearly designed to encourage the patient to carry the pregnancy to term. MCL § 333.17015(3), (5)[14]

The new law does not tolerate noncompliance if, for example, the physician believes the information would adversely affect the patient.[15] As a result, "for many women

[14] For example, the written summary that must be presented to the patient, which is described at MCL § 333.17015(8)(b), identifies public services available to new mothers. It also requires physicians to describe the potential negative psychological side effects of the abortion despite the absence of any accepted medical evidence supporting the existence of such symptoms. Evans Affidavit at ¶ 11.

[15] A physician may refuse to comply with the statutory requirements only when he or she "determines that a medical emergency exists." MCL § 333.17015(7).

terminating pregnancies because of fetal anomalies, the mandatory delay and information requirement will cause substantial mental and physical distress." Evans Affidavit at ¶ 24. Besides being cruel, the mandated counseling "could cause extreme anguish" by forcing women who are carrying fetal anomalies to receive pictures of normal fetuses along with other coercive and one-sided information intended to discourage an abortion that, for most of these women, is already the unwanted result of an agonizing decision. See Evans Affidavit at ¶ 31. This differs vastly from the Pennsylvania law at issue in Casey, which the Court upheld in part because it did *not* "prevent the physician from exercising his or her medical judgment." Casey, 112 S Ct at 2824. The detailed requirements render the summary irrelevant to the particular patient, and conflict with the accepted medical practice of providing patients with truthful information tailored to their individual needs. For these women, the statute's aims are patently irrational. There is no reason at all, no less a compelling reason, to go to great pains to attempt to convince these women that they should give birth rather than have an abortion. They are already convinced, and but for a terrible misfortune, they would be carrying the fetus to term. The coercive counseling provision does nothing to help inform these women's decision, but merely complicates and inhibits that choice.

Prior to Casey, the U.S. Supreme Court twice invalidated counseling requirements similar to Michigan's. Akron, supra, 462 US at 442-445; Thornburgh, supra. Akron and Thornburgh applied strict scrutiny to strike statutes which, like Michigan's law, required doctors to provide information "designed not to inform the woman's consent but rather to persuade her to withhold it altogether." Akron, 462 US at 444. Michigan's requirement

that patients be warned of possible "depression, feelings of guilt, sleep disturbance, loss of interest in work or sex, or anger" is akin to the Ohio requirements the Akron Court deemed a "parade of horribles intended to suggest that abortion is a particularly dangerous procedure." Akron, supra at 445. Pre-Casey decisions such as Akron and Thornburgh better represent Michigan's jurisprudential history, cf. Sitz, supra, and are best suited to demarcate the bounds for infringements upon the right to privacy in this state. The coercive counseling provisions violate the Michigan constitution.

C. *Mandated "Counseling" Violates the Free Speech Provision of the Michigan Constitution.*

The Michigan law at issue compels speech by the physician, by a "qualified person assisting the physician," and by local health department staff members. Specifically, the law requires physicians or qualified assistants to present the written summary and the depiction and description of a fetus to the woman before performing the abortion. MCL § 333.17015(3)(c),(d). Alternatively, local health department staff may be compelled to impart this information. MCL § 333.17015(4),(15). Physicians are also required to describe "[t]he specific risk" of both the abortion procedure and childbirth, MCL § 333.17015(5)(b)(i, ii), regardless of the circumstances and regardless of whether the physician believes such descriptions are appropriate. Evans Affidavit at ¶ 10.

This compulsion of speech violates the free speech provision of our state constitution. Article 1, § 5 provides:

> Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

Although Michigan courts have not decided a compelled speech case under art 1, § 5 of the state constitution, and the trial court did not reach the question, this provision on its face affords greater protection than the First Amendment of the U.S. Constitution. Having said that, the federal case law interpreting the First Amendment in this context provides a helpful foundation for an examination of the compelled speech issue.

A series of U.S. Supreme Court cases construing the First Amendment has established that protections against content-based regulation of speech are broadly available to those who wish *not* to speak. In Wooley v Maynard, 430 US 705; 97 S Ct 1428 (1976), the Court declared that the First Amendment protected "both the right to speak freely and the right to refrain from speaking at all." Id. at 714.[16] In Riley v National Federation of the Blind, 487 US 781; 108 S Ct 2667 (1988), the Court held that the state could not require professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually turned over to the charity:

> [I]n the context of protected speech, the difference . . . between compelled speech and compelled silence . . . is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say. [Id. at 796-797.]

The Court has accordingly emphasized that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's

[16] In Wooley, the Court held that the state of New Hampshire could not require plaintiff to display the words "Live Free or Die" on his license plate, as such a requirement forced plaintiff "to be an instrument for fostering public adherence to an ideological point of view which he finds unacceptable." Id.

First Amendment right to avoid becoming the courier for such message." Wooley, 430 US at 717; see also Davis v Dow Corning Corp., ___ Mich App ___; ___ NW2d ___, No. 165650 (March 7, 1995), slip op at 4 (finding no federal constitutional free speech violation in part because "plaintiffs' counsel is not being forced to subscribe to a political or ideological belief to which he objects"). Compelling physicians to communicate certain information -- particularly information so tied to political and ideological matters pertaining to reproductive rights -- violates a central premise of free speech: "[t]hat we presume that speakers, not the government, know best both what they want to say and how to say it." Riley, supra at 791. Notably, the Riley Court applied strict scrutiny to the content-based regulation at issue there, holding that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." Id. at 795.

The Michigan Supreme Court has likewise explained that "when the state seeks to restrict [the freedom of speech], its efforts must be strictly scrutinized." Advisory Opinion 1975 PA 227, 396 Mich at 481 (discussing Const 1963, art 1, § 5). The new law mandating compelled speech cannot survive this strict scrutiny: no compelling -- even *legitimate* -- state interest can justify this content-based regulation.

The joint opinion in Casey rejected a similar argument. That conclusion resulted from the following cursory analysis: "To be sure, the physician's First Amendment rights not to speak are implicated, see Wooley v Maynard, 430 U.S. 705, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. Cf. Whalen v. Roe, 429 US 589, 603; 97 S Ct 869, 878, 51 L Ed 2d 64 (1977)." Casey, 112 S Ct at 2824. This ill-considered and offhand

disposition of an enormously complex and significant issue cannot form the basis for the Michigan courts' first foray into this particular constitutional arena.

First, the Court's rather remarkable proposition that licensed professionals give up their First Amendment rights as a condition of practicing their professions collides headlong with its history of consistently upholding the free speech rights of licensed professionals against attempted state regulation of those rights.[17] Not surprisingly, the joint opinion cited no cases to support its point directly, and the cite to Whalen v Roe confounds rather than clarifies. In Whalen, the Court upheld New York's triplicate prescription law, rejecting a privacy challenge based on concerns over the state's data collection and storage. The specific page in Whalen that the Casey opinion cited has nothing to do with a state's authority to violate physicians' fundamental rights, but merely discusses the state's right to regulate, and even prohibit, the use of controlled substances. Unless the Court would compare physicians' constitutional right not to have the government compel the content of their speech to some heretofore unrecognized right to ingest drugs, the relevance of this discussion is elusive.

Moreover, while the Casey joint opinion seems to suggest that state-compelled speech is permissible where the conduct in question relates to the licensing and regulation by the

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[17] See, e.g., Ibanez v Florida Dept of Business and Profession Regulation, 114 S Ct 2084, 2089-2092 (1994) (holding that the Florida Board of Accountancy's censure of an attorney for holding herself out as a Certified Public Accountant and Certified Financial Planner violated the First Amendment); Gentile v State Bar of Nevada, 501 US 1030; 111 S Ct 2720 (1991) (reversing a bar association's reprimand of an attorney and requiring the state to show a "substantial likelihood of material prejudice" before restricting the speech of an attorney representing a client in a pending case); In re Primus, 436 US 412; 98 S Ct 1893 (1978) (nonprofit lawyer solicitation); Bates v State Bar, 433 US 350; 97 S Ct 2691 (1977) (lawyer advertising).

State, it is important to note that driving on the public highways (Wooley) and fundraising (Riley) are *also* licensed and regulated by the state, a fact the Court deemed insignificant in those cases. That cases since Casey have upheld the free speech rights of licensed professionals without mentioning Casey, see, e.g., Ibanez v Florida Dept of Business and Profession Regulation, 114 S Ct 2084, 2089-2092 (1994), suggests that Casey's holding on this issue is more aberrational than groundbreaking. Finally, the Casey opinion completely declines to grapple with the concern that the information the State required its physicians to speak and to present is, in some cases, information a physician believes to be incorrect, misleading, or inappropriate in some circumstances. See Evans Affidavit at ¶ 10.

In sum, Michigan courts should not chart the course of the state constitution's free speech guarantee by so crude a guide as Casey. To the extent that Casey unacceptably glosses the venerable right against compelled speech as established by cases both preceding it and following it, "the state constitution may afford greater protections than the federal constitution," Woodland v Michigan Citizens Lobby, 423 Mich 188, 202; 378 NW2d 337, 343 (1985). See also People v Neumayer, 405 Mich 341, 355; 275 NW2d 230, 233 (1979) (the U.S. Constitution provides minimum protections of individual rights). The compelled speech mandates of the new law violate Mich Const 1963, Art 1, § 5.

D. *The "Informed Consent" Legislation is Unconstitutional Because It Fails to Provide an Adequate Medical Emergency Exception.*

Michigan's new abortion restrictions unconstitutionally infringe upon women's right to abortion by failing to provide an adequate exception for medical emergencies. The statute exempts physicians from compliance if she determines that a medical emergency exists, MCL § 333.17015(7), defining "medical emergency" as "that condition which, on the

basis of the physician's 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." MCL § 333.17015(2)(d).[18] The mandated counseling and 24-hour delay will be exempted, therefore, only where a physician determines that this strict definition of an emergency is met.

In Casey, the Supreme Court ruled that to pass constitutional muster, abortion statutes must provide an adequate exception for medical emergencies where compliance with the statute's requirements would risk either the woman's life *or* her health. 112 S Ct at 2822 (stating that states are forbidden "from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her *health*" (emphasis added)). The Court concluded that the Pennsylvania statute itself would be unconstitutional if the plaintiffs were correct in arguing that that statute's emergency exception foreclosed the possibility of an immediate abortion when the woman faced a significant health risk: "for the essential holding of Roe forbids a state from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." Id. at 2822.

The Court ultimately upheld the Pennsylvania statute's emergency exception because it accepted the lower court's interpretation of the statutory language referring to "serious risk of substantial and irreversible impairment of a major bodily function" as encompassing

[18] If the attending physician decides to invoke the medical emergency exception, she must "maintain a written record identifying with specificity the medical factors upon which the determination of the medical emergency is based." MCL § 333.17015(7).

any significant risk to a woman's health. Id. Michigan courts are not, however, bound by federal courts' construction of a Pennsylvania law. Rather, this Court must consider its own state's laws in the first instance and set forth its own interpretation in light of the particularities that make Michigan law distinctive.[19] First and foremost, these include the Michigan Constitution's exceptional protection for the public health and the limited access to abortion providers as a result of the state's demographic and geographic peculiarities.

The public policy of this state, as evidence by Mich Const 1963, art 4, § 51, places a high value on public health. This value demands, at the very least, that an exception for medical emergency be sufficiently broad and precise to give physicians clear warning of what conduct is expected and to allow physicians to provide the care that is in their patient's best interests, without fear of criminal liability. Recognizing an exemption only to "avert death" or to prevent "*serious* risk of *substantial* and *irreversible* impairment of a *major* bodily function," rather than, for example, only some risk of substantial and irreversible impairment of a major bodily function, or a serious risk of a substantial but *reversible* impairment of a major bodily function, is perverse. Moreover, it severely undermines the physicians' ability to provide even the most basic level of care to their patients. This law cannot survive constitutional review.[20]

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[19] As the Michigan Supreme Court acknowledged about the U.S. Supreme Court's decisions in Roe v Wade, supra, and its companion case, Doe v Bolton, 410 US 179; 93 S Ct 739 (1973), "[t]hose opinions do not . . . *decide* any case other than the cases of Roe and Doe" and "Roe and Doe do not purport to construe the Michigan abortion statutes." Bricker, 389 Mich at 528.

[20] Although the trial court did not reach this question, the new informed consent law is also unconstitutionally vague under Const 1963, art 1, § 17, both with respect to its requirements on physicians and its authorization to local health departments. See Kolender

II. EVEN IF THE STATE CONSTITUTIONAL RIGHT IS PRECISELY COEXTENSIVE WITH THE FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY, THE "INFORMED CONSENT" LAW STILL IMPOSES AN UNCONSTITUTIONAL BURDEN ON THAT RIGHT.

The state's argument that the Michigan Constitution guarantees no right to abortion is as puzzling as it is fallacious. Although it is essentially an open question whether the

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v Lawson, 461 US 352, 357; 103 S Ct 1855 (1983); People v Howell, 396 Mich 16, 20 n 4; 238 NW2d 148 (1976).

As to physicians, MCL § 333.17015(3) provides that a physician *or qualified person assisting the physician* "shall do all of the following" mandated tasks -- including determining the fetus's probable gestational age -- "not less than 24 hours before that physician performs an abortion." However, another provision of the statute that refers to gestational age "as determined by the attending physician," MCL § 333.17015(2)(f), contradicts subsection (3)'s suggestion that the "qualified person assisting the physician" can "do all of the following" after all.

As to local health departments, the law suggests that local health departments may provide the information required prior to an abortion, MCL § 333.17015(4), (15), and even requires the local health department to provide women with a completed certification form when the information is provided. MCL § 333.17015(15)(d). On the other hand, local health departments are authorized *only* to confirm pregnancies and determine fetuses' gestational age, to provide the required summary describing the abortion procedure, and to provide depictions and descriptions of fetuses. MCL §§ 333.17015(4), (15)(a-c). They are not authorized to provide the prenatal care and parenting pamphlet, or to discuss possible medical complications, the probable gestational age of the fetus, or the availability of pregnancy information from the state public health department. Yet this information must somehow be provided at least 24 hours before the abortion, and also before a certification form can be completed. MCL §§ 333.17015(3), (8)(c); MSA §14.15 (17015).

What conduct is permitted and forbidden remains a mystery under the terms of this statute. The law does not clarify, for example, whether a physician can accept a completed certification form from the local health department, or whether she can delegate to a qualified assistant the task of providing all the mandated information 24 hours prior to the procedure. See MCL § 333.16221; MSA § 14.15 (16221) and MCL § 333.16299. Similarly, local health department officials have no way of ascertaining whether the legislation requires them to provide the mandated information or instead *prohibits* them from doing so. As violation of the law is punishable by disciplinary sanctions as well as criminal penalties, this considerable ambiguity is sufficient to render this statute unconstitutional under the state constitution.

state's constitution provides broader protection of the right to privacy than the U.S. Constitution, see Doe v Department of Social Services, 439 Mich 650, 670 (1992) (finding it "unnecessary to decide that issue" in considering the state's prohibition on funding of Medicaid abortions), it is beyond question that the safeguards on the state level are at least as protective as those on the federal level. Moreover, although Casey undoubtedly lowered the level of *federal* scrutiny applicable to abortion restrictions, it also explicitly reaffirmed Roe v Wade, and review remains searching, though assuredly less so. For example, a Tennessee court that employed Casey's "undue burden" language in its evaluation of a mandated waiting period still found that restriction to be unduly burdensome under the Tennessee constitution. McWherter, supra, slip op at 20.

Despite facial similarities between Michigan's so-called informed consent law and its Pennsylvania counterpart that was partly upheld in Casey, the Michigan law is different in key respects that render it unconstitutional even if the parameters of this state's constitutional protection are delineated by federal law.

First, Michigan courts are obligated to give effect to Mich Const 1963, art 4, § 51, which transformed the protection of public health into a constitutional priority. Casey involved a delicate factbound balancing, and the Court was careful to confine its decision to the case before it, repeatedly stating, for example, that "there is no evidence *on this record*" that counseling was an obstacle, 112 S Ct at 2824 (emphasis added), and that "on the record before us," the waiting period was not an undue burden. Id. at 2826. On *this* record, however, the calculus is altered considerably by the state constitution's explicit recognition of the "primary concern" for the health of the people of Michigan -- a weighty

consideration that easily tilts the balance against the constitutionality of these abortion restrictions. As discussed supra, the required delay and coercive counseling individually and together have a tangible negative impact upon the health of pregnant women in Michigan. They create special risks for women carrying fetal anomalies and for the large number of Michigan women who must travel far to obtain abortion services. Given this state's constant and steady focus upon the health of its people, these provisions unduly burden a Michigan woman's exercise of her fundamental constitutional rights.

Second, the inquiry regarding the extent of the burden is considerably different in Michigan because of Michigan's distinctive geographic and demographic characteristics and the sparse distribution -- indeed, virtual absence -- of abortion providers throughout most of the state. As discussed in Part I.B.1, women who reside north of Saginaw, including all women in the Upper Peninsula, must travel a significant distance to reach the nearest abortion provider. Smith Affidavit ¶¶ 5, 10. With its vast expanses of sparsely populated regions virtually uninterrupted by urban areas, Michigan is unique among states, including Pennsylvania, as far as the ease of access to health care services such as abortion that are available primarily in cities. The Casey joint opinion found "troubling" the allegations that women must travel to reach an abortion provider, but emphasized that "the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles." 112 S Ct at 2825. The Casey Court likewise found it important, for example, that "the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it." Id. at 2825-2826. Thus, "on the record before us," the Court was not convinced that the waiting period was an undue burden for women

in Pennsylvania. Id. at 2826. Similarly, "[s]ince there is no evidence on this record" that the Pennsylvania law's counseling requirement "would amount in practical terms to a substantial obstacle to a woman seeking an abortion," that provision also could be upheld. 112 S Ct at 2824.

Here, of course, the contrary is true. The trial court has specifically held that the new law places intolerable restrictions upon women seeking to obtain an abortion,[21] slip op at 24, 28-29, and the geographical obstacles alone in this state create burdens of a completely different scale than those in Casey. Coupled with the extensive evidence of considerably increased health risks for a significant number of women subject to the restrictions, these facets peculiar to Michigan illustrate the even greater obstacles that women in Michigan must confront. Under the strictures of Casey, Michigan's informed consent requirements create an undue burden upon women seeking abortions in violation of Michigan's constitutional right to privacy.

Third, as discussed supra at Part I.D, the new law is invalid even under Casey because it fails to provide an adequate emergency exception. The Casey decision expressly required abortion statutes to provide an adequate exception for medical emergencies if the statute's requirements might risk a woman's life *or* her health, and presumed that the Pennsylvania statute would be unconstitutional if that statute's emergency exception failed to permit noncompliance in the event of a significant health risk. 112 S Ct at 2822. Particularly in Michigan, where the value of the public health is constitutionally recognized, it is simply not sufficient to allow physicians to circumvent the statute's requirements only

[21] These determinations can only be set aside if clearly erroneous. MCR 2.613(C).

where the pregnant woman faces death or where "delay will create serious risk of substantial and irreversible impairment of a major bodily function." MCL § 333.17015(2)(d). Thus, although Michigan's constitution almost certainly contains broader protection of the right to privacy than that recognized in Casey, the new abortion restrictions are repugnant to this state's constitutional values and jurisprudential history under either a strict scrutiny or undue burden type of review.

III. THE TRIAL COURT CORRECTLY RULED THAT 1993 PA 133 VIOLATES THE HEADLEE AMENDMENT

Article 9, Section 29, of the Michigan Constitution ("section 29") sets forth a clear and precise proscription of unfunded state mandates:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

Const 1963, art 9, § 29. This language, which is contained in a collection of constitutional provisions commonly known as the Headlee Amendment, see Durant v Board of Education, 424 Mich 364, 378; 381 NW2d 662 (1985), "reflect[s] an effort on the part of the voters to forestall any attempt by the Legislature to shift responsibility for services to the local government[.]" Id. at 379. By its terms, section 29 applies to "services and activities" established under state statutes and state agency rules. Id. at 378-79, 387. The impact of section 29 is straightforward: "the state must appropriate funds for any necessary increased costs associated with 'an increase in the level of any activity or service beyond that required by existing law . . . .'" Livingston County v. Department of Mgmt. and Budget, 430 Mich. 635, 638; 425 NW2d 65 (1988). "[T]he introduction of new obligations without

accompanying appropriations" is impermissible under section 29. Id. at 644.

As the trial court correctly ruled, 1993 PA 133 imposes costs upon local governments for new activities or services without appropriating the funds necessary to satisfy the mandates contained in the Act. Mahaffey v Attorney General, 94-406793 AZ (Wayne County Cir Ct, July 15, 1994), slip op at 2-7 (attached as Appendix 3). Thus, 1993 PA 133 runs afoul of the express proscription set forth in section 29.

A. *1993 PA 133 Mandates New Activities or Services That Will Result in Increased Costs That Must Be Borne by Local Health Departments.*

Contained in 1993 PA 133 are directives to local governments that necessarily will require the expenditure of funds by the local governments. For example, MCL § 333.17015 provides in relevant part:

> (15) Upon an individual's request, each local health department *shall*:
>
> (a) Provide a pregnancy test for that individual and determine the probable gestational stage of a confirmed pregnancy.
>
> (b) Preceded by an explanation that the individual has the option to review or not the written summaries, provide the summaries described in subsection 8(b) that are recognized by the department as applicable to the individual's gestational stage of pregnancy.
>
> (c) Preceded by an explanation that the individual has the option to review or not review the depiction and description, provide the individual with a copy of a medically accurate depiction and description of a fetus described in subsection 8(a) at the gestational age nearest the probable gestational age of the patient's fetus.
>
> (d) Ensure that the individual is provided with a completed certification form described in subsection (8)(f) at the time the information is provided. (emphasis added).

These blunt directives are augmented by a mandate concerning certification forms:

> (8) The department of public health shall do each of the following:
>
> * * * *
>
> (f) Develop, draft, and print a certification form to be signed by a local health department representative at the time and place a patient is provided the information described in subsection (3), as requested by the patient, verifying the date and time the information is provided to the patient.[22]

MCL § 333.17015(8)(f). As the trial court correctly ruled, these new mandates will require new and additional expenditures by local health departments. Pregnancy tests cost money for equipment and staffing. In order to accurately determine the probable gestational stage of a fetus, local health departments must provide significant funding for physicians and expensive equipment. Evans Affidavit ¶¶ 33-35; Bertler Affidavit ¶ 5 (attached as Appendices 1 and 4). There is no question that the additional costs of complying with these mandates contained in 1993 PA 133 will be borne by local health departments.[23] Indeed, the state has effectively conceded that 1993 PA 133 will impose "necessary increased costs" for "new activit[ies] or service[s]" upon "units of Local Government" within the

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[22]"Local health department representative" is defined as "a person employed by, or contracted to provide services on behalf of, a local health department." MCL §333.17015(2)(c).

[23]The legislation implementing section 29, MCL § 21.231; MSA 5.3194(601) *et seq.*, defines a "local unit of government" as "a political subdivision of this state, . . . if the political subdivision has as its primary purpose the providing of local governmental services for residents in a geographically limited area of this state and has the power to act primarily on behalf of that area." Pursuant to MCL § 333.2421, the Detroit Health Department "shall have the powers and duties of a local health department," powers and duties described in MCL §§ 333.2433 & 333.2435. Thus, section 29 applies to all local health departments, whether organized as county, city, or district departments.

contemplation of section 29.

B. *There Has Been No Appropriation or Disbursement by the State to Local Health Departments To Pay for These New State Mandates.*

Once 1993 PA 133 is recognized as a mandate imposed upon units of local government, it can only pass muster under section 29 if "a state appropriation is made and disbursed to pay the unit[s] of Local Government for any necessary increased costs." Const 1963, art 9, § 29. The state argues that section 29 is not violated by 1993 PA 133 because "existing funds were already available within the existing appropriation to the Department of Public Health" to satisfy the financial burdens imposed by the mandates contained in 1993 PA 133. This argument is fatally flawed both as a matter of law and as a matter of fact.

The Michigan Supreme Court has observed that section 29 "makes clear its intent to prohibit . . . the introduction of new obligations without *accompanying* appropriations." Livingston County, 430 Mich at 644 (emphasis added). The type of budgetary legerdemain proposed by the state -- diverting money from a previous appropriation to pay for an otherwise-unfunded mandate -- is neither contemplated nor countenanced by section 29. As the trial court commented, this sophistical argument "def[ies] the very essence" of the Headlee Amendment, which explicitly demands that "a state appropriation [be] made and disbursed to pay the unit of Local Government for any necessary increased costs." Const 1963, art. 9, § 29.

Even if the state could legitimately employ its proposed budgetary chicanery to circumvent the clear import of section 29, the state failed to do so here. The appropriations

act for the Department of Public Health for Fiscal Year 1993-94, 1993 PA 174, contains absolutely no appropriation for local health departments to pay for the new or increased costs to local health departments that will necessarily flow from the state requirements in 1993 PA 133. See 1993 PA 174, at 871. Moreover, local health departments in the state have not received timely disbursement of state funds to pay for these new or increased costs. See Bertler Affidavit ¶ 7. The Headlee Amendment's implementing legislation, MCL § 21.235(1), requires the Legislature to "annually appropriate an amount sufficient to make disbursement to each local unit of government for the necessary cost of each state requirement . . . ." The "initial advance disbursement [must] be made at least 30 days prior to the effective date of the state requirement," with annual disbursements thereafter. MCL § 21.235(2).[24] In this case, the state plainly failed to satisfy the statutory requirement that the initial advance disbursements be made at least 30 days prior to the effective date of the legislation.

The state dismisses this manifest violation of Michigan law by suggesting in a footnote that such a violation is a "sort of technical and temporary flaw, one which the State has already moved to correct." This contention entirely misses the point of section 29, which "requires the state *to appropriate funds* to units of government for the necessary increased costs associated with 'an increase in the level of any activity or service beyond that

[24]Any argument that local health departments failed to submit claims to the state Department of Management and Budget for disbursement is unfounded. The statute clearly dictates that the Department "shall notify each local unit to which the state requirement applies not less than 180 days before the effective date of the state requirement. The notice shall include a preliminary claim form . . . ." MCL § 21.238(2)(a). *None* of these requirements was satisfied.

required by existing law[.]" Livingston County, 430 Mich at 637. By virtue of section 29, the local governments need not depend upon the largesse of the state or upon the ability of the state to rearrange its finances in order to belatedly fund operative legislative mandates. In failing to comply with the statutory funding directive enacted to implement the Headlee Amendment, the state has demonstrated precisely why section 29 itself was written in a manner that directly links the validity of state mandates to specific appropriations necessary to fund such mandates.

C. *The trial court properly enjoined implementation of 1993 PA 133 in its entirety because the unfunded mandates should not be severed from the balance of the legislation.*

The state contends that the unfunded mandates contained in 1993 PA 133, which violate the Headlee Amendment, must be severed from the balance of the legislation. Thus, the state suggests that only the unfunded mandates should be enjoined, while all of the other provisions should be rendered operational. To be sure, 1993 PA 133 contains a severability clause, MCL § 333.17015(14), and Michigan law generally prescribes severability, MCL § 8.5; MSA § 2.216, but state law nonetheless requires that the "law enforced after separation must be reasonable in light of the act as originally drafted." Republic Airlines v Department of Treasury, 169 Mich App 674, 685; 427 NW2d 182 (1988). Severing the portions of 1993 PA 133 requiring local health department services fails this test because it would undermine the essential purpose of the legislation itself and flout the intent of the legislature.

The local health department provisions were added to the bill as amendments on the House floor. See Legislative Status, and excerpts of the House Journal (attached at

Appendix 7). On the basis of this significant compromise, the bill containing the local health department amendments passed the House by a vote of 97-3 on July 7, 1993. Six days later, the Senate concurred in the amended House Substitute, H-12. Thus, the clear legislative intent was to enact an informed consent law that included the local health department requirements. The trial court correctly concluded that the only way to give effect to this legislative intent is to enjoin 1993 PA 133 *in toto* until the state addresses the Headlee Amendment violation so as to render operational the local health department requirements. See Seals v Henry Ford Hospital, 123 Mich App 329, 336; 333 NW2d 272 (1983) (court "should not presume that the act would have passed in 1976 without those provisions" subject to challenge). As Justice Cooley explained, "we know of no principle which would warrant us in selecting out portions of the section to stand unaffected by the constitutional infirmity of the remainder, when all parts relate to the same subject matter, and provide the successive steps to be taken in perfecting a single proceeding." Campau v City of Detroit, 14 Mich 276, 285 (1866).

IV. PLAINTIFFS SATISFY THE REQUIREMENTS FOR SUMMARY DISPOSITION.

As an initial matter, it is important to note that the state's reliance upon the standard for facial challenges set forth in United States v Salerno, 481 US 739, 745; 107 S Ct 2095 (1987), is completely misplaced where the challenge at issue is to the state constitutionality of abortion restrictions. In Salerno, the U.S. Supreme Court held that to bring a successful facial *federal* constitutional challenge, a plaintiff must be able to show there is no set of circumstances under which the challenged provisions would be valid. Id. at 745. Notwithstanding the applicability of Salerno in other factual contexts, the Supreme Court's

decision in Casey has made unmistakably clear that Salerno's language does not govern courts' review of facial challenges to laws restricting abortions. In reaching its conclusion that the Pennsylvania abortion restrictions did not unduly burden women seeking abortions, the joint opinion in Casey quite purposefully reviewed the factual record from the trial court and fashioned its own standard -- namely, that a law restricting abortions is invalid if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 112 S Ct at 2830. If Casey's disavowal of the stringent Salerno standard is not obvious enough from how the Court actually examined the Pennsylvania restrictions, one of the joint opinion's authors later stated it in even plainer terms. In concurring in the denial of a motion for stay in Fargo Women's Health Organization v Schafer, 113 S Ct 1668 (1993), Justice O'Connor emphasized that "[i]n striking down Pennsylvania's spousal-notice provision, [Casey] did not require petitioners to show that the provision would be invalid in *all* circumstances." Id. at 1669 (O'Connor, J., joined by Souter, J., concurring).[25]

Turning to the standard for summary disposition under MCR 2.116(C)(10), a court considering such a motion should not assess credibility or determine facts, but must review the pleadings, affidavits, depositions, admissions, and documentary evidence, consider all reasonable inferences therefrom, and decide whether a genuine issue of any material fact

[25] Fargo involved an unsuccessful facial challenge to abortion restrictions in North Dakota. Though Justice O'Connor voted to deny a stay pending appeal because such stays are warranted only in "rare and exceptional cases," she filed a concurring opinion to note that the lower courts' reliance upon Salerno in granting summary judgment for the state was "inconsistent with Casey" and that the courts "should have undertaken the same analysis" as the joint opinion undertook in Casey. Fargo, 113 S Ct at 1669.

exists to warrant a trial. Allstate Ins Co v Freeman, 432 Mich 656, 662; 443 NW2d 734 (1989). The test for determining whether a genuine issue of material fact exists is "whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." Farm Bureau Mutual Ins Co v Stark, 437 Mich 175, 184-185; 468 NW2d 498 (1991).

The state's contention that the plaintiffs have not met the standard for summary disposition misunderstands what that standard requires. Although both parties develop their arguments with factual information, much of it based upon the affidavits of four physicians, the state has not identified one instance in which any disputes engendered by those affidavits or by other factual assertions constitute *genuine issues of material fact*. On the contrary, the examples upon which the state's brief focuses represent primarily disputes about legal issues. The trial court was correct to conclude that summary disposition was appropriate.

The two illustrations the state proffers exemplify the infirmity of its position. The state first points to the "dispute" between the plaintiffs' assertion that the required waiting period would increase the medical risks to patients and the state's own expert's view that in 99 percent of all pregnancies, the delay has no impact on risk. Defendants-Appellants Brief at 23 (citing Hertz Affidavit ¶ 6). That expert, Dr. Roger H. Hertz, went on to state his opinion that even where a woman faces an increased risk, the medical emergency provision, MCL §§ 333.17105(2)(d) and (7); MSA §§ 14.15(17015)(2)(d) and (7), is adequate to excuse physicians from compliance with the law. Id.

The statement regarding the severity of the risk, though clearly factual, is not

material and is not really the focus of any dispute. The plaintiffs argued below and continue to argue on appeal that the frequency of the heightened risk is irrelevant to the legal analysis -- a conclusion bolstered by the U.S. Supreme Court's statement in Planned Parenthood of Southeastern Pennsylvania v Casey, 112 S Ct 2791, 2829 (1992) (stating that the constitutional inquiry should focus upon "the group for whom the law is a restriction, no the group for whom the law is irrelevant"). See also supra note 12. As for the state's expert's comment regarding the adequacy of the medical emergency provision, that issue is material and unquestionably in dispute, but it is manifestly not factual. The assertion amounts to the expert's legal conclusion about the meaning of the statute, and as such, involves a question for the court to settle as a matter of law.

In its second example, the state purports to find a material factual dispute in the plaintiffs' assertions in the court below that some women find it extremely distressing to listen to the coercive information and that the statute provides no exemption permitting noncompliance with these provisions in such circumstances. Defendants-Appellants Brief at 23 (citing slip op at 22, 21). The state stops short of declaring that no women would find the materials distressing, but argues instead that the plaintiffs' conclusion that doctors are not free to refuse to comply "is directly contradicted by the Affidavits of the State's experts and by the statute itself." Id. at 24. The state's very reference to "the statute itself" verifies that this issue is one of law, not fact.

The state's examples portray two parties at odds over the scope of the new law's medical emergency exception -- a purely legal question of statutory construction. Though the state cites liberally to its experts' affidavits to support its position against the propriety

of summary disposition, those affidavits cannot transform a legal dispute into a disagreement about facts. Indeed, by their plain terms, the affidavits the state refers to in its brief simply set forth the affiants' personal interpretations of the statute. Dr. Hertz stated, for example, that "[i]n my view" the medical emergency provision would allow a physician to forgo providing the mandated information where it would represent a serious risk. Hertz Affidavit ¶ 8 (attached at Appendix D of Defendants-Appellants' Brief). Likewise, Dr. Watson A. Bowes, Jr., offered his judgment that the Act gives physicians the discretion to tailor the required information to individual patients, and that nothing in the Act would preclude a physician from advising a certain patient not to read the materials. Bowes Affidavit ¶ 9 (attached at Appendix E of Defendants-Appellants Brief).[26]

These statements are presumably the best examples of material factual disputes the state could offer. And yet they signify nothing more than that the parties do differ over the legal interpretation of the new law, which is, of course, why this case arose in the first place. It is the duty of the trial judge to make these legal determinations, and any disagreement between the parties on questions of this nature is not an impediment to the court's granting of summary disposition.[27] Some assertions in the state's examples fail to highlight *any* dispute, not to mention a dispute that is genuine, material, and factual. The plaintiffs do

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[26] It is telling that the state resorts to the argument that the statute does not expressly forbid physicians from taking actions to circumvent its most basic requirements. The state's own acknowledgement that it may often be desirable to defy the statute's terms demonstrates just how troubling the counseling provision and the overly stringent "medical emergency" exemption are.

[27] As discussed supra at Part I.D, the court's interpretation of the medical emergency provision is complicated by the imprecision as well as the inadequacy of its dictates. This is a separate concern from the question whether material factual disputes persist.

not dispute, for example, Dr. Bowes' statement that under 1993 PA 133 patients have the right not to review the required materials. As a substantive matter, that clear-cut deduction is unhelpful in assessing the statute's impact upon those women who will look at whatever information their doctors give them before undergoing a medical procedure.[28] More to the point, it fails to approximate a genuine contested issue of material fact.

The plaintiffs and the state undoubtedly have serious differences in opinion about fundamental issues in this case. The state has nonetheless completely failed to identify the kind of conflict that must be left to a finder of fact and accordingly would preclude summary disposition. The validity of the new law does not turn on contentions at the margins regarding exactly how disturbing the counseling materials might be, or precisely how many women will be at a higher risk because of the statute's requirements. The parties' disagreements with respect to the construction of the statute or the proper conclusions to be drawn from the undisputed facts are irrelevant to this Court's consideration of the summary disposition standard. If this case were remanded to the trial court for a full factual hearing, it is difficult to fathom what contested matters a factfinder might be asked to resolve. The trial court did not err in concluding that the plaintiffs were entitled to summary disposition.

CONCLUSION

For the foregoing reasons, the trial court's judgment should be affirmed.

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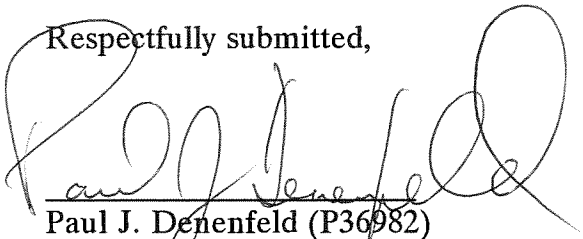
[28] Similarly, Dr. Hertz's statement that the medical emergency provision allows physicians to refrain from providing the mandated information in situations involving "serious risk" is difficult to take issue with, particularly as that language closely parallels the terms of the statute itself. The plaintiffs' more nuanced point in this regard, however, is that the statute encumbers physicians from providing an appropriate standard of care in a wide range of circumstances that arguably or even clearly fall short of creating a "serious risk" for the patient.

Respectfully submitted,



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