STATE OF MICHIGAN

COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients, and SARAH WALLET, M.D., M.P.H., FACOG, on her own behalf and on behalf of her patients,

Plaintiffs,

v

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, in her official capacity,

Defendant.
_____/

OPINION AND ORDER

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

Plaintiffs Planned Parenthood of Michigan and Sarah Wallett, M.D., M.P.H, FACOG, filed this suit seeking a declaration that MCL 750.14 is unconstitutional under the Michigan Constitution, and requesting preliminary and permanent injunctions barring its enforcement.

The Court hereby concludes that the balancing of the pertinent factors weighs in favor of granting preliminary injunctive relief. The motion for a preliminary injunction is GRANTED as described herein, and defendant is preliminarily enjoined from enforcing MCL 750.14.

I. MICHIGAN'S ABORTION STATUTES AND THEIR INTERPRETATION BEFORE *ROE V WADE*

The common law proscribed abortion only after a mother first felt fetal movement, referred to as "quickening." "[A]t common law, abortion performed before 'quickening'—the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense." *Roe v Wade*, 410 US 113, 132; 93 S Ct 705; 35 L Ed

2d 147 (1973) (citations omitted).[1] See also *Commonwealth v Parker*, 50 Mass 263, 263 (1845) ("It is not a punishable offence, by the common law, to perform an operation upon a pregnant woman, with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child."), and *State v Cooper*, 22 NJL 52, 58 (1849) ("We are of opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently that the mere attempt to commit the act is not indictable.)

Michigan's first abortion statutes, enacted in 1846, distinguished between the abortion of a "quick" fetus, deemed "manslaughter," 1846 RS, ch 153, §32 and an abortion conducted before quickening, punished "by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment." 1846 RS, ch 153, §33. "In other words, the unquickened fetus was not considered to be a separate human being so as to make the destruction of such fetus a killing." *People v Nixon*, 42 Mich App 332, 336-337; 201 NW2d 635 (1972). The *Nixon* majority concluded that the latter statute's "obvious purpose was to protect the pregnant woman" rather than the fetus. *Id.* at 337.

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[1] Post-*Roe*, in *Larkin v Cahalan*, 389 Mich 533, 541-542; 208 NW2d 176 (1973), the Michigan Supreme Court interpreted the term "quick child" as "a viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernably moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community."

The 1846 abortion statutes were reenacted with little change until 1931, when the statute at issue in this case became part of Michigan law. MCL 750.14 applies to all abortions and deems all abortions felonious, with the exception of those performed to "preserve" the life of the mother:

> Any a person who shall willfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offence shall be deemed manslaughter.
>
> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

One year before the United States Supreme Court decided *Roe v Wade*, a physician convicted under MCL 750.14 challenged the statute as "vague in the constitutional sense, and because it places an undue restraint upon a physician in the discharge of his professional duties." *Nixon*, 42 Mich App at 334-335. The Court of Appeals held that "a licensed physician is not subject to prosecution for an induced abortion performed in a hospital or appropriate clinical setting upon a woman in her first trimester of pregnancy." *Id.* at 341. For the most part, the opinion rested on policy grounds, not constitutional principles.[2] The majority determined that the state had no legitimate interest in proscribing first-trimester abortions performed by licensed physicians "in an antiseptic environment." *Id.* at 339. The Court observed: "Not only has modern medical science made a therapeutic abortion reasonably safe, but it would now appear that it is safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child." *Id.*

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[2] With virtually no analysis, the Court declared the last sentence of the statute unconstitutional because "it impermissibly shifts the burden of proof to the defendant." *Id.* at 344.

The Court of Appeals subsequently concluded that Nixon's "discussion of the constitutionality of the statute under circumstances other than those presented in that case was mere dicta." *Mahaffey v Attorney General*, 222 Mich App 325, 339; 564 NW2d 104 (1997).

II. POST-*ROE* MICHIGAN CASE LAW

In *Roe v Wade*, the United States Supreme Court held that a woman's fundamental due process right to privacy encompasses a right to abortion. *Roe*, 410 US at 153-155. Restrictions on abortion, the Court explained, were subject to strict scrutiny and could be justified only by a demonstration of a compelling state interest. *Id.* at 155. During the first trimester of pregnancy, the Supreme Court declared, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. Before viability, the Supreme Court continued, a state could regulate abortion "in ways that are reasonably related to maternal health." *Id.* After viability, "a state may regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*

Six months after the United States Supreme Court issued *Roe v Wade*, the Michigan Supreme Court held that the United States Constitution's Supremacy Clause precluded the enforcement of MCL 750.14 with regard to abortions performed by physicians. Consistent with "the principles enunciated" in *Roe*, the Court reasoned, Michigan's criminal abortion statute "cannot stand as relating to abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment." *People v Bricker*, 389 Mich 524, 527; 208 NW2d 172 (1973). In *Bricker*, however, the defendant was a non-physician convicted of conspiracy to commit an abortion. Our Supreme Court affirmed the

defendant's conviction, holding that "except as to those cases defined and exempted under *Roe v Wade* and *Doe v Bolton*,[3] ... criminal responsibility attaches." *Id.* at 531. *Bricker* did not consider the constitutionality of MCL 750.14 under the Michigan Constitution.

Over the years following *Roe*, the Michigan Legislature enacted a variety of laws intended "to test its limits." *Planned Parenthood of SE Pennsylvania v Casey*, 505 US 833, 858; 112 S Ct 2791; 120 L Ed 2d 674 (1992). *Casey* discarded the strict scrutiny standard adopted in *Roe*, and in its place introduced an "undue burden" analysis. Pre-*Casey*, the Legislature barred Medicaid funding of abortion, MCL 400.109a; in 1990 the Legislature enacted "the parental rights restoration act," MCL 722.901 *et seq.*; in 1993 the Legislature passed a detailed statute governing the parameters of the informed consent required of adult women undergoing abortion, MCL 333.17015; and in 1996 the Legislature banned "partial birth abortions." MCL 333.17016.

Save for the partial birth abortion ban, these statutes all survived constitutional challenges.[4] In *Mahaffey v Attorney Gen*, 222 Mich App 325, 334; 564 NW2d 104 (1997), the plaintiffs challenged the constitutionality of the informed consent law, MCL 333.17014 *et seq.*, under the Michigan Constitution. The Court of Appeals held that although the Michigan Supreme Court has "long recognized privacy to be a highly valued right" and that "the Michigan Constitution provides a generalized right of privacy," "neither application of traditional rules of constitutional

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[3] 410 US 179; 93 S Ct 739; 35 L Ed 2d 201 (1973)

[4] A federal district court held the "partial birth" abortion ban to be unconstitutionally vague and overbroad, and an undue burden on and overbroad and an undue burden on a woman's right to seek a pre-viability second trimester abortion in *Evans v Kelley*, 977 F Supp 1283 (ED Mich, 1997).

interpretation nor examination of Supreme Court precedent supports the conclusion that there is a right to abortion under the Michigan Constitution." *Id.*

In December 2021, the United States Supreme Court heard oral argument in *Dobbs v Jackson Women's Health Org*, __ US __ ; 141 S Ct 2619; 209 L Ed2d 748 (2021). *Dobbs* presents an opportunity for the United States Supreme Court to overrule *Roe*. See, for example, Greenhouse, *The Supreme Court Gaslights Its Way to the End of Roe* <https://www.nytimes.com/2021/12/03/opinion/abortion-supreme-court.html> (accessed May 16, 2022), and *Ziegler*, *The Supreme Court Just Took a Case that Could Kill Ro v. Wade—or Let it Die Slowly*, <https://www.washingtonpost.com/politics/2021/05/18/supreme-court-just-took-case-that-could-kill-roe-v-wade-or-let-it-die-slowly/> (accessed May 16, 2022). A draft opinion in *Dobbs* purporting to overrule *Roe* was leaked to the press on May 2, 2022.

Plaintiffs' complaint correctly posits that if the United States Supreme Court overrules *Roe v Wade*, abortion will again become illegal in Michigan except when "necessary to preserve the life of [the] woman." MCL 750.14. Implicitly recognizing that the Court of Appeals' decision in *Mahaffey* forecloses a constitutional argument premised on the right to privacy found in the Michigan Constitution, plaintiffs challenge the constitutionality of the statute on additional grounds distinct from privacy. Planned Parenthood's complaint preserves a privacy claim and also avers that the statute is unconstitutional because it violates the rights to liberty, … bodily integrity, and equal protection guaranteed by the Michigan Constitution and the Elliott-Larsen Civil Rights Act, and it is unconstitutionally vague." Before considering plaintiffs' arguments, however, the Court must address the threshold question of its jurisdiction.

III. THE JUSTICIABILITY OF THIS ACTION

Defendant Attorney General concurs with plaintiffs' argument that MCL 750.14 is unconstitutional but does not offer any legal analysis in support of her concurrence.[5] Rather, defendant argues that because she has publicly vowed not to defend or to enforce the law "there is at present a lack of adversity" resulting in the absence of this Court's subject-matter jurisdiction. Defendant has not moved to dismiss the action on jurisdictional grounds, however. And as authority for her jurisdictional argument, defendant relies primarily on a non-precedential source: Justice David Viviano's concurrence to an order denying leave to appeal, which in turn relied on two opinions penned by Justice Scalia: a dissent (the majority opinion is discussed below), and a lower court ruling in a legally immaterial context. The relevant language of Justice Viviano's statement is as follows:

> ... In our adversary system, the parties' competing interests lead to arguments that sharpen the issues so that courts will "not sit as self-directed boards of legal inquiry and research ...." *Carducci v Regan*, 230 US App DC 80, 86, 714 F 2d 171 (1983) (Scalia, J.); see also Fuller, The Adversary System, in Berman, ed., Talks on American Law (New York: Vintage Books, 1971), p. 35 ("[B]efore a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the restraints of judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation."). Our role, therefore, is to act as neutral arbiters of real disputes brought by adverse parties. *Carducci*, 230 US App DC at 86, 714 F.2d 171.[6]

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[5] The Court has had the benefit of two amicus curiae briefs filed in opposition to the relief requested, one by signed by Right to Life of Michigan and the Michigan Catholic Conference, and the other offered by Drs. Gianina Cazan-London and Melissa Halvorson. No third parties have moved to intervene in this case, which has been pending since April 7, 2022.

[6] Respectfully, Justice Viviano mischaracterized the meaning and contextual applicability of Justice Scalia's opinion in *Carducci*. The appellant in that case claimed that the application of a federal law had deprived him of a due process right, but he failed to adequately brief the constitutional issue. Justice (then Judge) Scalia declared that the issue was "of major importance to all employees in the federal competitive service," further expressing that "[w]e will not resolve that issue on the basis of briefing and argument by counsel which literally consisted of no more

> Courts cannot fulfill this role when the parties agree on the merits to such an extent that no honest dispute exists. Cf. *United States v Windsor*, 570 US 744, 782; 133 S Ct 2675; 186 L Ed2d 808 (2013) (Scalia, J., dissenting) ("We have never before agreed to speak—to 'say what the law is'—where there is no controversy before us."). [*League of Women Voters of Mich v Sec'y of State*, 506 Mich 905; 948 NW2d 70 (2020) (VIVIANO, J., concurring)].

In response to the Attorney General's subject-matter jurisdiction argument, plaintiffs assert that their allegations meet the "actual controversy" requirement for a declaratory judgment under MCR 2.605(A)(1), that the Attorney General's "personal views and even present-day intentions" are irrelevant to a case against an official who is merely a representative of a state office, and that the current Attorney General may not be the Attorney General of Michigan on January 1, 2023. Plaintiffs stress: "[T]he chilling effect of such a possibility would be paralyzing; Plaintiffs and other providers need to know whether they could be vulnerable to future prosecution for the conduct they undertake now." Further, plaintiffs contend, a court order is required to bind county prosecutors "who operate under the Attorney General's supervision for purposes of their authority to prosecute violations of state law[.]" Because the statute of limitations for a prosecution under MCL 750.14 is six years, plaintiffs urge, plaintiffs may "be forced to cease providing abortions altogether notwithstanding the current attorney general's legal position[.]"

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than the assertion of violation of due process rights, with no discussion of case law supporting that proposition or of the statutory text and legislative history relevant to the central question of the exclusiveness of entitlements set forth in the" statute at issue. *Carducci v Regan*, 714 F2d 171, 177; 230 US App DC 80, 86 (1983). In context, the cut-and-pasted snippet relied on by Justice Viviano has nothing to do with the justiciability issues under consideration in this case, which plaintiffs have exhaustively briefed.

The Court finds that this matter is a justiciable declaratory judgment action. In reaching this conclusion, the Court is guided by Michigan law, but finds persuasive ancillary support in federal jurisprudence.

MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Our Supreme Court has explained that "[a]n actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). "What is essential to an 'actual controversy' under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000) (citation and quotation marks omitted). A merely hypothetical future injury does not give rise to an actual controversy. *Id.*

In determining whether an "actual controversy" exists in this case, it bears emphasis that unlike the federal Constitution, Michigan's Constitution does not contain an equivalent to Article III's case-or-controversy requirement and does not explicitly or implicitly limit the power of a court to decide declaratory judgment actions. In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 364; 792 NW2d 686 (2010), our Supreme Court emphatically rejected that Article III's check on federal judicial power applies to a state court's justiciability analysis under MCR 2.605(A)(1): "...[T]his Court long ago explained that Michigan courts' judicial power to decide controversies was broader than the United States Supreme Court's interpretation of the Article III

case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not."

Lansing Schools involved the standing doctrine, one component of Article III's case-or-controversy requirement. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012) ("MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness."). Nevertheless, *Lansing Schools* establishes the key threshold proposition that Michigan law rather than federal jurisprudence governs whether the Attorney General's legally non-specific concurrence with plaintiff's general contention that MCL 750.14 is unconstitutional eliminates a "case of actual controversy" under MCR 2.605(A)(1).

Logically, defendant's argument is problematic. The Attorney General essentially maintains that if she expresses agreement with a plaintiff's underlying legal position but disagrees with or resists a judicially crafted remedy, a court is automatically divested of subject-matter jurisdiction. Such a rule would destroy an aggrieved party's ability to obtain a meaningful legal ruling with actual effect. According to defendant's thesis, in any case challenging the constitutionality of a statute the Attorney General would be empowered to derail a constitutional challenge by simply communicating a non-specific consonance with the plaintiff's position. "[I]t would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *INS v Chadha*, 462 US 919, 939; 103 S Ct 2764; 77 L Ed 2d 317 (1983). No authority supports the defendant's jurisdictional argument. To the contrary, Michigan law decidedly refutes defendant's position.

"The Declaratory Judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Id.* "It is clear enough that, if a case has progressed to the point where a traditional action for damages or for an injunction could be maintained, declaratory relief will not be denied for lack of an actual controversy." 3 Longhofer, Michigan Court Rules Practice (7th ed), § 2605.3, p. 465. As the Longhofer text urges, the intended purpose of the declaratory judgment rule is "to give relief, in appropriate cases, before injury has occurred or duties have been violated." *Id.* The text continues:

> Typically, these are cases in which a party would like to know its rights or liabilities under a statute ... without having to act at the party's own peril. These are the precise situations that declaratory relief was meant to cover, and that intent should not be frustrated by an unduly restrictive construction of the actual controversy requirement. [*Id.*]

The Court of Appeals has repeatedly applied the same reasoning. "An actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct. In such situations, courts are "not precluded from reaching issues before actual injuries or losses have occurred." *City of Huntington Woods v City of Detroit*, 279 Mich App 603; 761 NW2d 127, 136 (2008) (citation and quotation marks omitted). "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW*, 295 Mich App at 495 (citation and quotation marks omitted). Thus, Michigan law supports that despite the Attorney General's view that MCL 750.41 is unconstitutional, because the parties do not agree on a remedy, they remain adverse for the purposes of MCR 2.605(A)(1).

The same result obtains even under the more rigorous standards imposed by Article III of the United States Constitution. A somewhat similar case procedurally, *United States v Windsor*, 570 US 744, 756; 133 S Ct 2675; 186 L Ed 2d 808 (2013), involved whether the federal Defense of Marriage Act barred the respondent from claiming an estate tax exemption as a surviving spouse. Windsor and her wife had been legally married in Canada and resided in New York. After her spouse died, Windsor paid the assessed estate taxes but filed suit challenging the constitutionality of §3 of the DOMA, which defined a "spouse" as "a person of the opposite sex who is a husband or a wife." 1 USC §7. While the case was pending in the district court, the Attorney General of the United States announced that the Department of Justice "would no longer defend the constitutionality of DOMA's §3." *Windsor*, 570 US at 753.

At the outset of its analysis, the Supreme Court considered a jurisdictional "complication" not unlike the one asserted by defendant here, and found that it did not destroy the action's justiciability:

> Even though the Executive's current position was announced before the District Court entered its judgment, the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. [*Id.* at 756].

The Court also rejected an amicus argument that the parties were no longer "adverse" after the Department of Justice's concession: "This position ... elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise." *Id.* The Court explained that despite agreeing in principle with Windsor's legal argument, the United States refused to repay the withheld taxes, "thus establish[ing] a controversy sufficient for

Article III jurisdiction." *Id.* at 758. The Court summarized: "It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling." *Id.*

The Attorney General's unwillingness to stipulate to a preliminary injunction or any other relief creates adversity in this case, just as a similar reluctance did in *Windsor*. Furthermore, plaintiff's complaint describes an on-going controversy regarding the constitutionality of MCL 750.41 and a need for a declaration to guide the future conduct of Planned Parenthood's physicians and patients. These allegations suffice to create an actual controversy under MCR 2.605(A)(1).

IV. THE MERITS

As of the date this opinion is issued, it is unknown whether the United States Supreme Court will overrule *Roe v Wade*. Should that occur, an initial question likely to be of interest to our state's citizenry is the power of a state Court to interpret Michigan's Constitution differently than the United States Supreme Court interprets the federal Constitution. To dispel any uncertainty on that subject, the Court offers the following brief review.

The United States Supreme Court has repeatedly endorsed the proposition that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Florida v Powell*, 559 US 50, 59; 130 S Ct 1195; 175 L Ed 2d 1009 (2010) (citation and quotation marks omitted). And the Michigan Supreme Court has accepted that invitation, most notably in *Sitz v Dept of State Police*, 443 Mich 744, 761-762; 506 NW2d 209 (1993). See also *People v Tanner*, 496 Mich 199, 222; 853 NW2d 653 (2014) ("[I]t is this Court's obligation to independently examine our state's

Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].' ")

Sitz involved the constitutionality of sobriety checklanes used by the Michigan State Police. The United States Supreme Court upheld the constitutionality of the checklanes under the Fourth Amendment of the United States Constitution. *Michigan Dep't of State Police v Sitz*, 496 US 444; 110 S Ct 2481; 110 L Ed 2d 412 (1990). On remand, however, a two-judge majority of the Michigan Court of Appeals determined that sobriety checklanes violated art 1, § 11 of the Michigan Constitution. *Sitz v Dep't of State Police (On Remand)*, 193 Mich App 690; 485 NW2d 135 (1992). The Michigan Supreme Court agreed, explaining: "Because there is no support in the constitutional history of Michigan for the proposition that the police may engage in warrantless and suspicionless seizures of automobiles for the purpose of enforcing the criminal law, we hold that sobriety checklanes violate art. 1, § 11 of the Michigan Constitution." *Sitz*, 443 Mich at 747.

In *Sitz*, the Michigan Supreme Court specifically and emphatically addressed its power to interpret Michigan's Constitution more expansively, and in a manner more protective of civil liberties, than the United States Supreme Court had interpreted an analogous provision of the federal constitution:

> [A]ppropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. Indeed, the fragile foundation of the federal floor as a bulwark against arbitrary action is clearly revealed when, as here, the federal floor falls below minimum state protection. 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. [*Sitz*, 443 Mich at 761-762 (footnotes omitted)].

Regarding due process rather than the Fourth Amendment, the Michigan Supreme Court has made it clear that the Michigan Constitution's due process clause need not be interpreted in lockstep with the Fourteenth Amendment's due process clause: "Although these provisions are

often interpreted coextensively, Const 1963, art 1, § 17 may, in particular circumstances, afford protections greater than or distinct from those offered by U.S. Const Am XIV, § 1." *AFT Mich v Michigan*, 497 Mich 197, 245; 866 NW2d 782 (2015) (footnotes omitted).

Thus, this Court is not constrained to adopt the United States' Supreme Court's analysis of the constitutionality of abortion under the United States Constitution but must instead focus its inquiry on the rights and guarantees conferred by *our* Constitution.

One additional preliminary point bears discussion. This Court acknowledges that the Court of Appeals held in *Mahaffey*, 222 Mich App at 334, that although the Michigan Constitution provides "a generalized right of privacy," the right does not embrace a right to abortion. A circuit court judge is required to follow controlling precedent established by a published decision of the Court of Appeals "until a contrary result is reached by this Court or the Supreme Court takes other action." *Holland Home v Grand Rapids*, 219 Mich App 384, 394; 557 NW2d 118 (1996). Accordingly, *Mahaffey* constitutes binding precedent to which this Court must adhere.

Mahaffey describes as follows the arguments made by the plaintiffs in that case regarding the informed consent statute: "Plaintiffs claimed that the act violates a woman's right to privacy and due process, violates a physician's right to free speech, and is unconstitutionally vague with regard to what constitutes a 'medical emergency.' " *Mahaffey*, 222 Mich App at 332. The plaintiffs also claimed that the act was unconstitutional because, in violation of the Headlee Amendment, the Legislature did not enact a specific appropriation for funding the act." *Id.* The "act" in question was not MCL 750.14, but a series of laws governing the informed consent required for abortion procedures. Plaintiffs' argument in the instant case that MCL 750.14 unconstitutionally infringes on the right to bodily integrity was not considered in *Mahaffey*.

Indeed, the right of bodily integrity was not specifically recognized as a right granted by the Michigan Constitution until 2018, when the Court of Appeals decided *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018).

A. The Right To Bodily Integrity Under the Michigan Constitution

Mays was class action that arose from the Flint water crisis. The plaintiffs were individual and commercial consumers of the contaminated water. Their class action complaint stated three causes of action, including "violation of plaintiffs' due-process right to bodily integrity (Count II)" under the Michigan Constitution. *Id.* at 23. Among other defenses, the defendants asserted that the plaintiffs "failed to allege facts to establish a constitutional violation for which a judicially inferred damage remedy is appropriate." *Id.* This Court (Judge Mark T. Boonstra) found that the plaintiffs "have alleged sufficient facts, when taken as true, to establish a violation of each plaintiff's respective individual right to bodily integrity under the substantive due process component of art I, §17." *Mays v Snyder*, opinion and order of the Court of Claims, issued October 26, 2016 (Docket No. 16-000017-MM), p. 29. Summary disposition was granted on other grounds, and the plaintiffs appealed.

In a thoughtful and detailed examination of the contours of the right of bodily integrity, the Court of Appeals' majority affirmed Judge Boonstra's ruling on that issue, holding that "[p]laintiffs have alleged facts sufficient to support a constitutional violation by defendants of plaintiffs' right to bodily integrity." *Id.* at 62. The defendants applied for leave to appeal to our Supreme Court, which affirmed the Court of Appeals by equal division. The lead opinion, authored by Justice Richard Bernstein, held that "plaintiffs pleaded a recognizable due-process

claim under Michigan's Constitution for a violation of their right to bodily integrity." *Mays v Governor of Michigan*, 506 Mich 157, 195; 954 NW2d 139 (2020) (opinion by BERNSTEIN, J.).

In a separate concurrence focusing on the Michigan Constitution, Justice Bernstein provided a more comprehensive explanation of the origins of the right to bodily integrity:

> The United States Supreme Court has recognized for over a century that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). Plaintiffs allege a substantive due-process claim based on defendants' conduct that caused their severe bodily injuries and impaired their liberty. Plaintiffs frame these allegations as a violation of their constitutional right to bodily integrity. Although this Court has not opined on the right before, I believe that it is one of the most fundamental rights ensured by Michigan's Constitution. The right is implicit in our Due Process Clause and would have been obvious to those who ratified our Constitution. I conclude that common notions of liberty in this state are so inextricably entwined with physical freedom and freedom from state incursions into the body that Michigan's Due Process Clause plainly encompasses a right to bodily integrity. [*Id.* at 212-213.]

Justice Bernstein's citation to *Union Pacific R Co v Botsford* is particularly apt. The issue in that case was whether Clara Botsford could be compelled to submit to a "surgical examination" to pursue a damage action against the railway company for an injury she sustained when a berth fell on her head. *Union Pacific R Co*, 141 US at 251. The United States Supreme Court began its discussion of Botsford's right to what we now call bodily integrity with a citation to Michigan's own Justice Thomas M. Cooley. The United States Supreme Court approvingly declared: "As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.' Cooley, Torts, 29." *Id.* at 251.

Justice Cooley is not merely a former member of our Supreme Court. His wisdom is lauded in many opinions of that Court. See, e.g., *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 462; 952

NW2d 434 (2020) ("Former Michigan Supreme Court Justice Thomas M. Cooley, one of our nation's preeminent jurists and learned scholars ..."); *People v Szalma*, 487 Mich 708, 716; 790 NW2d 662 (2010) ("Michigan's own Blackstone, Justice THOMAS M. COOLEY ...); *Michigan Dept of Transp v Tomkins*, 481 Mich 184, 207; 749 NW2d 716 (2008) ("our venerable Michigan Supreme Court Justice Thomas M. Cooley,"); and *Michigan Coal of State Employee Unions v Michigan Civil Serv Comm,* 465 Mich 212, 222; 634 NW2d 692 (2001) ("the great constitutional law scholar and member of this Court in the nineteenth century, Justice Thomas M. Cooley ...). Justice Cooley's 1879 pronouncement has several critical implications for this case.

First, Justice Cooley's succinct acknowledgment of the right "to be let alone" is now viewed as the foundation for the common law's recognition of the right to bodily integrity.[7] Personal autonomy and bodily integrity have been characterized as essential rights in a multitude of cases predating the adoption of Michigan's 1963 Constitution. See, for example, Justice Cardozo's pronouncement in *Schloendorff v Soc'y of New York Hosp*, 211 NY 125, 129; 105 NE 92 (NY, 1914), overruled in part on other grounds *Bing v Thunig*, 2 NY2d 656; 143 NE2d 3 (1957), that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body," the New Jersey Supreme Court's declaration that "The right of a person to control his own body is a basic societal concept, long recognized in the common law," *Matter of Conroy*, 98 NJ 321, 346; 486 A2d 1209 (NJ, 1985), and the Kansas Supreme Court's 1960 holding that: "Anglo-American law starts with the premise of thorough-going self-determination.

[7] The Michigan Supreme Court is also regarded as the source of the right to privacy. As noted in *Dalley v Dykema Gossett*, 287 Mich App 296, 306; 788 NW2d 679 (2010): "Dean William Prosser has identified a Michigan case, *De May v. Roberts,* 46 Mich 160, 9 NW 146 (1881), as among the first reported decisions allowing relief premised on an invasion of privacy theory. Prosser, *Privacy*, 48 Cal L R 383, 389 (1960)."

It follows that each man is considered to be master of his own body ...". *Natanson v Kline*, 186 Kan 393, 406-407; 350 P2d 1093 (Kansas, 1960). And as Justice Brandeis observed in dissent in *Olmstead v United States*, 277 US 438, 478; 48 S Ct 564, 572; 72 L Ed 944 (1928) (BRANDEIS, J, dissenting), "The makers of our Constitution ... sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men."[8]

Second, given its historical provenance and widespread judicial acceptance, there can be no doubt but that the right to be let alone—the right to bodily integrity—was understood by the ratifiers of the 1963 Michigan Constitution as a fundamental component of due process. A Michigan court's objective in discerning the meaning of a constitutional provision "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004) (citation omitted). As held in *Mays* and discussed above, the right to bodily integrity is subsumed within our Constitution's due process guarantees.

Mays did not address whether the due process right to bodily integrity qualifies as fundamental—nor did it need to. The Michigan Supreme Court has not articulated a definitive pathway for evaluating whether a constitutional right qualifies as "fundamental" under our state's

[8] The Supreme Court overruled *Olmstead* in *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed2d 576 (1976).

Constitution. Similar to the law governing the interpretation of constitutional meaning, the case law suggests that history and tradition play major roles in the determination. See *People v Kevorkian*, 447 Mich 436, 477; 527 NW2d 714 (1994), in which the Court explored whether the right to commit suicide "arises from a rational evolution of tradition," and its recognition would not constitute "a radical departure from historical precepts" (opinion CAVANAGH, CJ, and BRICKLEY and GRIFFIN, JJ), and *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004), where the Court rejected that that a jury's "right" to assess full damages is "fundamental" under the Michigan Constitution examining whether it represented "an interest traditionally protected by our society" that is "implicit in the concept of ordered liberty." Examined through those lenses, the right to bodily integrity is indisputably fundamental.

Many fundamental due process rights are not mentioned in our constitutional text but are nevertheless central to our freedoms as Americans and Michiganders. Other rights now generally accepted by our society as fundamental include the right to marry the person of our choice, *Loving v Virginia*, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967); the right to have children, *Skinner v Oklahoma ex rel Williamson*, 316 US 535; 62 S Ct 1110; 86 L Ed 1655 (1942); the right to direct the education of our children, *Meyer v Nebraska*, 262 US 390; 43 S Ct 625 67 L Ed 1042 (1923) and *Pierce v Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925); and the right to be free from intrusive and invasive governmental searches, *Rochin v California*, 342 US 165; 72 S Ct 205; 96 L Ed 183 (1952). All of these rights were commonly understood by the ratifiers of the 1963 Constitution as essential components of our state Constitution's concept of due process. Recognition of the right to bodily integrity as fundamental flows naturally from our understanding of the essential nature of these other due process rights.

B. The Right to Bodily Integrity and Abortion

The due process protections we take for granted in 2022 "have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994). The decision to voluntarily terminate a pregnancy "is at the very heart" of the "cluster of constitutionally protected choices" described in the cases cited above. *Carey v Population Services, Intern*, 431 US 678, 685; 97 S Ct 2010; 52 L Ed 2d 675 (1977).

Thirty years ago, the United States Supreme Court explicitly tied a woman's right to abortion with her right to bodily integrity. In prohibiting abortion, a state not only "touche[s] upon the private sphere of the family but upon the very bodily integrity of the pregnant woman." *Casey*, 505 US at 896. Pregnancy implicates bodily integrity because even for the healthiest women it carries consequential medical risks. Pregnant women face the prospect of developing conditions that may result in death, or may forever transform their health, such as blood clots and hypertensive disorders. See the affidavit of Dr. Sarah Wallett, ¶¶24-34. For others,

> carrying a pregnancy to term may aggravate pre-existing conditions such as heart disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. According to these sources, pregnancy also can hamper the diagnosis or treatment of a serious medical condition, as when a pregnant woman cannot receive chemotherapy to treat her cancer, or cannot take psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus. [*New Mexico Right to Choose/NARAL v Johnson*, 975 P2d 841, 855 (NM, 1998)].

Pregnancy and childbirth, particularly if unwanted, transform a woman's psychological well-being in addition to her body. As recognized in *People v Nixon* half a century ago, legal abortion is actually safer than childbirth. *Nixon*, 42 Mich App at 339. Thus, the link between the right to bodily integrity and the decision whether to bear a child is an obvious one.

Among the substantive due process decisions implicating the right to bodily integrity, the cases most conceptually relevant to the connection between the right to bodily integrity and a woman's right to abortion are *Rochin v California*, 342 US 165, 169; 72 S Ct 205; 96 L Ed 183 (1952), and *Cruzan v Director, Mo Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990). In *Cruzan* the Supreme Court considered whether the parents of a young woman in a persistent vegetative state could demand that a hospital withdraw life-sustaining treatment. *Cruzan*, 497 US at 265-269. The Court extensively traced the roots of the informed consent doctrine, drawing on the common law and specifically on cases recognizing the right to bodily integrity: "This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment," *id.* at 269, and "generally encompass[es] the right of a competent individual to refuse medical treatment." *Id.* at 277. Because every medical procedure implicates a person's liberty interests in personal privacy and bodily integrity, the Supreme Court reasoned, there is "a general liberty interest in refusing medical treatment." *Id.* at 278.

A general liberty interest in *refusing* medical treatment inextricably correlates with a general liberty interest in *seeking* medical treatment. The right to bodily integrity inherent in a decision to reject a physician's advice logically embraces the right to make a medical decision to obtain treatment. "Just as the Due Process Clause protects the deeply personal decision of the individual to refuse medical treatment, it also must protect the deeply personal decision to obtain medical treatment, including a woman's decision to terminate a pregnancy." *Casey*, 505 US at 927 (BLACKMUN, J., concurring).

Forced pregnancy, and the concomitant compulsion to endure medical and psychological risks accompanying it, contravene the right to make autonomous medical decisions. If a woman's

right to bodily integrity is to have any real meaning, it must incorporate her right to make decisions about the health events most likely to change the course of her life: pregnancy and childbirth.

In *Rochin*, 342 US 165, the United States Supreme Court reversed a conviction based on evidence obtained by forcibly pumping the accused's stomach. The Supreme Court tethered its holding to the Due Process Clause rather than to the Fifth Amendment's prohibition of compelled self-incrimination, explaining that "[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which ... are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' ... or are 'implicit in the concept of ordered liberty.' " *Id.* at 169 (citations omitted).

Speaking through Justice Felix Frankfurter, the *Rochin* Court characterized the Due Process Clause as "the least specific and most comprehensive protection of liberties." *Id.* at 170. Those liberties cannot always be precisely labeled or defined, the Court observed, as their meanings are at times garnered from "the deposit of history." *Id.* at 169. In dealing with human rights," however, "the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions." *Id.*

Rochin instructs that as the world changes and history advances, new ideas and perceptions emerge, guiding judicial determinations of "rights." This process is not at odds with judicial humility, Justice Frankfurter advanced; "[t]o believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges." *Id.* at 171. The language of the Due Process Clause "may be indefinite and vague," Justice Frankfurter conceded, but "[i]n each case 'due process of law' requires an

evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, ... on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Id.* at 172.

The judicial process described in *Rochin* is not unlike that employed by the Michigan Supreme Court in *Sitz*, yielding a ruling that sobriety checklanes, unknown in 1963, were nevertheless unconstitutional under the 1963 Constitution. In reaching that conclusion, the Supreme Court drew heavily on Michigan jurisprudence surrounding the search and seizure of automobiles, tracing the case law back to 1922. *Sitz*, 443 Mich at 765. After reviewing the case law (including abundant federal authority) in considerable detail, the Court summarized: "[T]the protection afforded to the seizures of vehicles for criminal investigatory purposes has both an historical foundation and a contemporary justification that is not outweighed by the necessity advanced." *Id.* at 778.

The fundamental right to personal autonomy, to be let alone, has an even deeper "historical foundation" than the checklanes struck down in *Sitz*. As pointed out in *Nixon*, the state had no interest in fetal life before quickening until 1931. And after 50 years of legal abortion in Michigan, there can be no doubt but that the right of personal autonomy and bodily integrity enjoyed by our citizens includes the right of a woman, in consultation with her physician, to terminate a pregnancy. From a constitutional standpoint, the right to obtain a safe medical treatment is indistinguishable from the right of a patient to refuse treatment. Based on the due process principles discussed

above, the Court finds a substantial likelihood that that MCL 750.14 violates the Due Process Clause of Michigan's Constitution.[9]

V. INJUNCTIVE RELIEF

Plaintiffs seek preliminary and permanent injunctions barring the enforcement of MCL 750.14. The parties have waived the requirement of a hearing under MCR 3.310(A)(1).

A party seeking a preliminary injunction bears the burden of demonstrating entitlement to relief based on the following factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm 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 the relief, and (4) the harm to the public interest if the injunction is issued. [*Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted).]

This type of relief is "an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Id.* (citation and quotation marks omitted). "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Mich Alliance for Retired Americans v Sec'y of State*, 334 Mich App 238, 262; 964 NW2d 816 (2020) (citation and quotation marks omitted).

The Court finds a strong likelihood that plaintiffs will prevail on the merits of their constitutional challenge, as discussed above. Second, should the United States Supreme Court overrule *Roe v Wade*, plaintiffs and their patients face a serious danger of irreparable harm if

[9] The Court's opinion is not intended to resolve the other grounds raised by plaintiffs in support of their motions for declaratory judgment and injunctive relief. Those arguments remain outstanding.

prevented from accessing abortion services for the reasons set forth in Dr. Wallett's affidavit. The inability to exercise a fundamental constitutional right inherently constitutes irreparable harm. See *Planned Parenthood of Minnesota, Inc v Citizens for Cmty Action*, 558 F2d 861, 867 (CA 8, 1977) ("Planned Parenthood's showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury.")[10] Dr. Wallett also averred that the current uncertainty regarding *Roe* and *Dobbs* is frustrating the ability of plaintiffs to carry out their organizational goals, which itself can be a form of irreparable harm. See *Santa Cruz Lesbian & Gay Comm Ctr v Trump*, 508 F Supp 3d 521, 545-546 (ND Cal, 2020). Third, the balancing of hardships strongly weighs in plaintiff's favor. MCL 750.14 criminalizes virtually all abortions, and if enforced, will abruptly and completely end the availability of abortion services in Michigan. Maintenance of the status quo will not harm the Attorney General. Finally, a preliminary injunction furthers the public interest, allowing the Court to make a full ruling on the merits of the case without subjecting plaintiffs and their patients to the impact of a total ban on abortion services in this State. Maintenance of the status quo preserves public's interest in the stability and predictability of the law. Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc v Michigan Liquor Control Com'n*, 23 F3d 1071, 1079 (CA 6, 1994).

VI. CONCLUSION

[10] Because it is impossible to predict when the United States Supreme Court will issue a decision in *Dobbs*, the Court finds that the issuance of immediate preliminary injunctive relief warranted to avoid the necessity of another motion and further briefing. Should *Dobbs* not overrule *Roe*, or result in a ruling that calls into question any portion of the Court's analysis, the parties will be expected to advise the Court of the need for additional briefing and a hearing.

The Court **GRANTS** Plaintiffs' motion for a preliminary injunction and further **ORDERS:**

(1) Defendant and anyone acting under defendant's control and supervision, see MCL 14.30, are hereby enjoined during the pendency of this action from enforcing MCL 750.14;

(2) Defendant shall give immediate notice of this preliminary injunction to all state and local officials acting under defendant's supervision that they are enjoined and restrained from enforcing MCL 750.14;

(3) Other laws in effect *regulating* abortion in this State shall remain in full effect;

(4) The parties shall inform the Court within the next thirty (30) days whether there is a need to schedule a trial on the merits;

(5) This preliminary injunction shall remain in effect until this Court resolves the case in full.

This is not a final order and it does not resolve the last pending claim or close the case.

Date: May 17, 2022

Elizabeth L. Gleicher
Judge, Court of Claims