STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients; and **SARAH WALLETT, 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.
_____/

Case No.

Hon.

PLAINTIFFS' APRIL 7, 2022 MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

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Pursuant to Local Rule 2.119, Plaintiffs contacted opposing counsel, seeking concurrence in the relief sought, on April 4, 2022. No concurrence having been obtained, it is necessary to present this matter as a contested motion to this Court.

I. INTRODUCTION & STATEMENT OF RELEVANT FACTS

Plaintiffs, Planned Parenthood of Michigan (PPMI), on behalf of itself and its patients, physicians, and staff, and Sarah Wallett, M.D., M.P.H., FACOG, on behalf of herself and her patients, respectfully move this Court, pursuant to MCR 3.310, for a preliminary injunction to enjoin enforcement of MCL 750.14, Michigan's 1931 felony abortion statute (the "Criminal Abortion Ban"), and to maintain the status quo so that they may continue to provide and their patients may continue to access lawful abortion while Michigan courts settle the Criminal Abortion Ban's scope and unconstitutionality as a matter of Michigan law. The Criminal Abortion Ban states:

> Any person who shall wilfully 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. . . . [MCL 750.14.][1]

Specifically, the Court should enter preliminary injunctive relief restraining Defendant, her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, including all persons supervised by Defendant, from enforcing or giving effect to MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person.

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[1] While "woman" and "women" are quoted here and throughout this motion as recognized terms in statutes and in caselaw, Plaintiffs recognize that people of all gender identities may become pregnant and seek abortions.

While the constitutionality of this statute has been challenged before, the Michigan Supreme Court has not addressed these claims. Instead, in *People v Bricker*, 389 Mich 524, 527–528, 531; 208 NW2d 172 (1973), the Court construed the statute's terms to be consistent with the federal constitutional protections established by *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973). Specifically, *Bricker* held that the Criminal Abortion Ban "shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment to preserve the life or health of the mother. . . . [E]xcept as to those cases defined and exempted under *Roe v. Wade* . . . , criminal responsibility attaches." 389 Mich at 530–531. The Michigan Supreme Court's construction depends entirely on *Roe*'s holding that the United States Constitution prohibits states from penalizing physicians who provide abortions before viability, or after viability where necessary to save the patient's life or health. *Id.* at 529–530. People in Michigan, including PPMI, Dr. Wallett, and their patients, have relied upon and operated under this construction for decades. Because the case arose as a criminal appeal, however, the Court in *Bricker* did not enter an injunction reflecting this construction or otherwise enjoin enforcement of the Criminal Abortion Ban. See generally *Bricker*, 398 Mich 524.

Plaintiffs and their patients now face a risk that the Criminal Abortion Ban will be enforced as written. While the contours of the federal right to abortion have changed in the decades since *Roe* and *Bricker* were decided, the risk is now imminent that the statute could be enforced as a full ban on abortion in Michigan. The United States Supreme Court is due to decide the question whether *Roe* should be overruled. See Brief for Petitioners at i, *Dobbs v Jackson Women's Health Org*, 2021 WL 3145936 (US, July 22, 2021) (Docket No. 19-1392); see also *id.* at 14 ("This Court should overrule *Roe* and *Casey*."); *Dobbs v Jackson Women's Health Org*, ___ US ___; 141 S Ct

2619; 209 L Ed 2d 748 (2021) (mem) (granting certiorari). The Court's anticipated decision in *Dobbs*, argued on December 1, 2021, is already disrupting access to abortion despite nearly fifty years of United States Supreme Court precedent protecting that right.[2]

Absent *Roe*'s overlay, the Criminal Abortion Ban prohibits almost all abortions and puts Plaintiffs and their patients at imminent risk.[3] Plaintiffs risk criminal prosecution and more, MCL 750.14; MCL 750.503; MCL 333.16221(b)(v); MCL 333.16226(1); MCL 333.20165; MCL 333.20168(1); MCL 333.20177; MCL 333.20199(1); see also MCL 750.10; MCL 333.20109, citing MCL 333.1106, and their patients seeking abortion risk being forced to prolong their pregnancies or even carry them to term and give birth against their will.

II. PLAINTIFFS MEET THE LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

Four factors determine whether a court should issue a preliminary injunction: "(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 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 the relief, and (4) the harm to the public interest if the injunction is issued." *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449; 528 NW2d 778 (1995). Granting a preliminary injunction is within the sound discretion of the Court. *City of*

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[2] See Liptak, *Supreme Court Seems Poised to Uphold Mississippi's Abortion Law*, NY Times (December 1, 2021), <https://www.nytimes.com/2021/12/01/us/politics/supreme-court-mississippi-abortion-law.html> (accessed April 4, 2022); Zernike, *States Aren't Waiting for the Supreme Court to Tighten Abortion Laws*, New York Times (March 7, 2022) <https://www.nytimes.com/2022/03/07/us/abortion-supreme-court-roe-v-wade.html> (accessed April 4, 2022).

[3] Three declared candidates for Attorney General in Michigan have asserted they would enforce the Criminal Abortion Ban in Michigan upon a ruling in *Dobbs* abrogating *Roe*. Oosting, *A Michigan Abortion Ban Could 'Shock' State Politics Ahead of 2022 Election*, Bridge Mich (February 22, 2022) <https://www.bridgemi.com/michigan-government/michigan-abortion-ban-could-shock-state-politics-ahead-2022-election> (accessed April 4, 2022).

Grand Rapids v Central Land Co, 294 Mich 103, 112; 292 NW 579 (1940).

As detailed more fully in the accompanying brief in support of this motion, all four of the above-listed factors, especially when considered together, weigh heavily in favor of granting a preliminary injunction here. Plaintiff Dr. Wallett has set forth specific facts in a sworn affidavit that Plaintiffs and their patients would suffer irreparable injury absent an injunction. Every day there is a risk that the Criminal Abortion Ban will be deemed enforceable as written, at which point people in Michigan will be unable to obtain constitutionally-protected abortions in the state under virtually any circumstance. Those seeking banned care will be forced to travel out of state if they are able, at great personal cost; those unable to travel out of state will be forced to remain pregnant and give birth against their will. Others who self-manage their abortions may experience one of the rare complications of medication abortion and be too afraid to seek necessary follow-up care.

Additionally, Plaintiffs are likely to prevail on the merits. First, the Criminal Abortion Ban is unconstitutionally vague because (1) it fails to provide fair notice of what conduct it proscribes because it has been construed as incorporating federal case law that has changed over time and is about to change again; (2) its antiquated plain text will further fail to provide fair notice of what conduct is prohibited after the *Dobbs* decision issues, when prosecutors—emboldened or even merely confused—will attempt to enforce the Criminal Abortion Ban against a broad range of conduct that may or may not be illegal; and (3) its plain text does not include an exception for abortions necessary to save the patient's health, so it is unclear whether *Bricker*'s importation of that health exception, which relies on *Roe*, would survive the overruling of *Roe* itself. Physicians will not know whether it is legal to perform an abortion to save a patient's health, putting patients at imminent risk of grave bodily harm. Additionally, *Bricker*'s interpretation did not address whether a subjective or objective standard governed its imported health exception. The Criminal Abortion Ban is therefore unlawfully vague because it "fails to provide fair notice of the proscribed

conduct," and "is so indefinite that it confers unfettered discretion on the trier of fact to determine whether the law has been violated." *People v Rogers*, 249 Mich App 77, 94–95; 641 NW2d 595 (2001), citing *Woll v Attorney General*, 409 Mich 500, 533; 297 NW2d 578 (1980); *Plymouth Charter Twp v Hancock*, 236 Mich App 197, 200–201; 600 NW2d 380 (1999).

Next, the Criminal Abortion Ban violates the state constitutional right to bodily integrity, *Mays v Snyder*, 323 Mich App 1, 58–60; 916 NW2d 227 (2018), aff'd 506 Mich 157; 954 NW2d 139 (2020). The state constitutional right to bodily integrity stands independent of the federal constitution's protections. See *Glover v Mich Parole Bd*, 460 Mich 511, 522; 596 NW2d 598 (1999); *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993); *Mays v Governor of Mich*, 506 Mich 157, 217; 954 NW2d 139 (2020) (MCCORMACK, C.J., concurring) ("[W]e are separate sovereigns. We decide the meaning of the Michigan Constitution and do not take our cue from any other court, including the highest Court in the land."). Plaintiffs are likely to prevail on their claim that the Criminal Abortion Ban violates this right, a protection against nonconsensual bodily intrusions, because it would force people to remain pregnant against their will and face increased medical risk and more invasive medical interventions, both without sufficient justification.

Plaintiffs are also likely to prevail on their equal protection claim under the Michigan Constitution, see Const 1963, art 1, § 2. Although Michigan courts have employed a mode of equal protection analysis "similar" to that of the federal courts, *Doe v Dep't of Social Servs*, 439 Mich 650, 662 (1992), "a state court is entirely free to read its own State's constitution more broadly than [the United States Supreme Court] reads the Federal Constitution, or to . . . favor . . . a different [mode of] analysis of its corresponding constitutional guarantee," *City of Mesquite v Aladdin's Castle, Inc*, 455 US 283, 293; 102 S Ct 1070; 71 L Ed 2d 152 (1982). Here, the Criminal Abortion Ban violates the state constitution's Equal Protection Clause for two reasons. First, the

law prevents pregnant people who seek abortion from exercising their fundamental rights to liberty, privacy, and bodily integrity under the Michigan Constitution while placing no such government restriction on pregnant people who decide to carry their pregnancies to term. Second, the Criminal Abortion Ban is a sex-based classification that enforces antiquated and overbroad generalizations about women and requires women to undertake greater risks than men to their health, financial stability, and ability to exercise personal autonomy over their futures. See *Heckler v Mathews*, 465 US 728, 745; 104 S Ct 1387; 79 L Ed 2d 646 (1984); *United States v Virginia,* 518 US 515, 533–534; 116 S Ct 2264; 135 L Ed 2d 735 (1996). Because the Criminal Abortion Ban directly undermines the State's purported interest in protecting women's health, *People v Nixon*, 42 Mich App 332, 337–339; 201 NW2d 635 (1972), remanded 389 Mich 809 (1973), on remand 50 Mich App 38; 212 NW2d 797 (1973), it cannot be substantially related to furthering that interest, and it is therefore unconstitutional, *People v Idziak*, 484 Mich 549, 570–571; 773 NW2d 616 (2009).

Similarly, Plaintiffs are likely to prevail under the Elliott-Larsen Civil Rights Act (ELCRA). The Criminal Abortion Ban deprives women of "the full and equal enjoyment" of public services and accommodations, as well as their ability to exercise their constitutional rights. MCL 37.2302(a). The Michigan Supreme Court has recognized that ELCRA: (1) "enlarge[s] the scope of civil rights" to include protection from discrimination on the basis of sex in public accommodations, housing, education, and employment, *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Rec*, 425 Mich 173, 186, 188; 387 NW2d 821 (1986); and (2) also protects against "state action violations that amount to constitutional deprivation" in public services, *id.* at 188. Enforcing the Criminal Abortion Ban as written would reduce access to education and employment for women forced to carry pregnancies to term. And because state action enforcing the law is a public service under ELCRA, see *id.*, enforcement will also violate

ELCRA by depriving women of full and equal privileges under the Michigan Constitution.

Plaintiffs are also likely to prevail on their claim that the Criminal Abortion Ban violates their state constitutional right to liberty and privacy under the Retained Rights Clause of the Michigan Constitution. See Const 1963, art 1, § 23. The Retained Rights Clause clearly anticipates and authorizes courts to recognize, infer, and enforce constitutional rights not textually enumerated in 1963. Michigan courts should recognize that the choice whether to continue a pregnancy is encompassed in a penumbra of rights granted to the people of Michigan, separate from the federal right to privacy. Reinforcing the existence of this retained right, not only was abortion *not* a crime at common law, *Nixon*, 42 Mich App at 335 & n 3; women had a common law *right* to terminate a pregnancy. Ample precedent therefore exists upon which to recognize that the Michigan Constitution's Retained Rights Clause protects a pregnant person's fundamental right to abortion.

Finally, while lower courts may be bound by the Court of Appeals's holding in *Mahaffey v Attorney General*, 456 Mich App 325, that the Michigan Constitution's right to privacy does not protect a right to abortion that is separate and distinct from the federal right, *id*. at 334, 345, *Mahaffey* did not have the legality of the Criminal Abortion Ban before it. Moreover, *Mahaffey* insufficiently considered the Michigan Constitution's support for an independent state right to abortion grounded in the liberty and privacy interests protected by the Due Process Clause, Const 1963, art 1, § 17, and it should be overruled.

The right to privacy is grounded in the Michigan Constitution's substantive due process liberty interest. The Michigan Supreme Court has made clear that the 1963 Michigan Constitution protects a right to privacy. *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10)*, 396 Mich 465, 504; 242 NW2d 3 (1976), citing *De May v Roberts*, 46 Mich 160; 9 NW 146 (1881). While that Court has not explicitly addressed whether this right includes the right to abortion, abortion falls squarely within the zone of liberty and privacy that is protected under

Michigan's constitution. Before *Mahaffey*, the Court of Appeals had recognized a right to abortion under the Michigan Constitution. *Doe v Dir of Dep't of Social Servs*, 187 Mich App 493, 508; 468 NW2d 862 (1991), rev'd on other grounds 439 Mich 650; 487 NW2d 166 (1992). Given that rights under the Michigan Constitution can be broader than federal rights, and that abortion is well within the zone of liberty interests recognized in Michigan, Plaintiffs are therefore ultimately likely to prevail on the claim that the right to abortion is part of the state substantive due process right as well.

Plaintiffs have established that each of these violations will inflict irreparable constitutional, medical, and other harms on Plaintiffs and Plaintiffs' patients for which there is no adequate remedy at law. Plaintiffs risk potential arrest and prosecution for violating the Criminal Abortion Ban without any opportunity for this Court to address the statute's constitutionality. Plaintiffs may therefore be forced to cease providing abortions altogether, thus depriving pregnant patients of access to abortion and forcing many to carry their pregnancies to term against their will, a breathtaking irreparable harm.

Defendant, on the other hand, will suffer no harm should the status quo be maintained while the case proceeds, such that the balance of equities weighs strongly in Plaintiffs' favor. The relief Plaintiffs request will also further the public interest by maintaining the status quo—nearly fifty years of access to abortion—while this case proceeds.

For the foregoing reasons, and as set forth more fully in the accompanying brief in support of this motion and attached affidavit, incorporated here by reference, Plaintiffs respectfully request that this Court GRANT this Motion for Preliminary Injunction and enter an order restraining Defendant, her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, including all persons supervised by Defendant, from enforcing or giving effect to MCL 750.14 and any other Michigan statute or regulation to the extent that it

prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person.

Respectfully submitted,

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