JANE DOE and NANCY DOE,

Plaintiffs-Appellees,

-vs-

PATRICK BABCOCK, in his official capacity as DIRECTOR OF THE MICHIGAN DEPARTMENT OF SOCIAL SERVICES; and KEVIN SEITZ, in his official capacity as DIRECTOR OF MEDICAL SERVICES ADMINISTRATION OF THE MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellants,

and

RIGHT TO LIFE OF MICHIGAN, INC., a Michigan nonprofit corporation; RIGHT TO LIFE OF MICHIGAN, INC. LEGAL DEFENSE FUND, a trust; COMMITTEE TO END TAX FUNDED ABORTIONS, a ballot question committee; and MARY ZICK, JENNIFER DONOVAN, KENT DONOVAN, RICH HALLIBURTON, COLLEEN HOLBROOK, and JOE KLEE, in their individual capacities,

Intervening Defendants-Appellants.
_____/

Supreme Court
No. 91092 and 91093

Court of Appeals
No. 116069

Lower Court
No. 89 904749 CZ

BRIEF OF THE NATIONAL ABORTION RIGHTS ACTION LEAGUE, THE MICHIGAN ABORTION RIGHTS ACTION LEAGUE AND FORTY-FIVE NATIONAL AND MICHIGAN ORGANIZATIONS COMMITTED TO WOMEN'S EQUALITY AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF AMICI CURIAE

Amici Curiae share a common concern for the judicial protection of women's rights, including the constitutional right to choose abortion. We submit this brief to urge this Court to protect the fundamental right of all women to choose whether or not to terminate a pregnancy, and to strike down the discrimatory funding ban, MCLA 400.109(a), as violative of the Michigan Constitution.

STATEMENT OF ISSUE PRESENTED

Whether the Michigan Constitution forbids the State from discriminating against women who exercise their fundamental right to choose abortion by denying those women medical benefits that are provided to women who choose to carry their pregnancies to term.

STATEMENT OF FACTS

We adopt the statement of facts as set forth in the brief of the Plaintiffs-Appellees.

SUMMARY OF ARGUMENT

The ability of a woman to make the deeply personal life-shaping decision whether to have an abortion is a fundamental right under the Michigan Constitution. This case involves a law that singles out for discriminatory treatment those women who choose to exercise that right by denying them funds that are available for virtually all other medically necessary health care, including medical care associated with childbirth. Under the Michigan Constitution, laws that penalize the exercise of fundamental rights must be subjected to strict scrutiny. Simply put, the abortion funding restriction at issue in this case cannot withstand that rigorous standard of review.

In striking down that restriction, the Michigan Court of Appeals was not entering unchartered terrain. To the contrary, the court was only joining the growing ranks of state courts nationwide that have independently interpreted their state constitutions to invalidate similar restrictions. We urge this Court to do the same.

For this Court blindly to limit its interpretation of the Michigan Constitution to federal courts' interpretation of the U.S. Constitution would be at odds with the long and proud tradition in this country of independent state constitutional adjudication -- a tradition that accords with the original conceptions of how state courts would function in our dual constitutional system. It is this tradition that has produced

scores of state court constitutional decisions -- including decisions of this Court -- that diverge from federal constitutional precedents and provide more protection for individual liberties, even in cases that present virtually the same facts and implicate virtually identical constitutional provisions as the federal precedents.

ARGUMENT

I. FUNDAMENTAL PRINCIPLES UNDERLYING OUR NATION'S DUAL CONSTITUTIONAL SYSTEM DEMAND THAT THIS COURT INTERPRET THE MICHIGAN CONSTITUTION INDEPENDENTLY OF THE FEDERAL CONSTITUTION.

Throughout our nation's history, it has usually been state courts -- independently construing the constitutions of their states -- that have been the primary bulwark of individual rights. This long tradition of state constitutional adjudication independent of federal courts' interpretations of the U.S. Constitution is rooted in the very foundations of our nation, and is in perfect accord with the original conceptions of how our dual system of government would function. State courts have afforded greater protections to individual liberties than their federal counterparts in a wide array of contexts, including safeguarding the fundamental right of a woman to make her own decision whether or not to have an abortion.

A. States Were Guardians of Individual Rights Long Before the Federal Government, and Our System of Government Is Premised on States Remaining Independent Custodians of Individual Rights.

Prior to the adoption of the federal Bill of Rights in 1791, state constitutions provided the sole source of constitutional protection for individual liberties.[1/] These

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[1/] See Heitman v. State, No. 1380-89, 1991 WL 111761, *5 (Tex. Crim. App. June 26, 1991) (en banc) ("State courts and state constitutions originally were the primary guarantors of individual rights.").

state protections can be traced back to the original colonial charters. For example, the Massachusetts Body of Liberties of 1641 prohibited double jeopardy, and Rhode Island's charter of 1663 guaranteed freedom of religion.[2/] As the colonies became states, the colonial charters were replaced with constitutions securing "the great and principal rights of mankind."[3/] By 1778, eleven states had adopted constitutions, all of which included provisions that protected individual rights.[4/]

The federal Bill of Rights was not adopted until 1791, when the states demanded that provisions be added to the federal Constitution to protect the "same guarantees against the new central government that people had secured against their own local officials."[5/] The drafters of those new federal protections were profoundly influenced by the existing state constitutional guarantees, and looked to them as models.[6/] As a result, the Bill of Rights "mirrored" those state constitutions

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2/ See Mosk, State Constitutionalism: Both Liberal and Conservative, 63 Tex. L. Rev. 1081, 1081-82 (1985).

3/ Patrick Henry's description of the 1776 Virginia Bill of Rights, quoted in 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 461 (Reprint ed. 1987).

4/ See Sherry, The Founders' Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1131-33 (1987).

5/ Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 381 (1980).

6/ Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 501 (1977).

that had "long predated the federal charter."[7] Even after the adoption of the federal Bill of Rights, "the states that adopted new constitutions during the following decades took their bills of rights from the preexisting state constitutions rather than from the federal amendments."[8]

The role of state constitutions as independent sources of protection for individual rights is entirely consistent with the intent of both the framers of the Bill of Rights and the framers of the Constitution: it is a fundamental premise of our system of government that state constitutions may, and frequently do, provide individuals with greater protection from intrusive government action than does the federal Constitution.[9] As one commentator has described it, "at no time did the framers place a limit, or a cap, on the protections the states could provide their citizens."[10] In fact, early on in our nation's history:

> [A] question of great importance to the people in establishing independent

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[7] Kaye, Contributions of State Constitutional Law to the Third Century of American Federalism, 13 Vt. L. Rev. 49, 51 (1988).

[8] Linde, supra note 5, at 381. Accord Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, in Developments in State Constitutional Law 243 (B. McGraw ed. 1985).

[9] See Utter, supra note 8, at 242. ("[S]tate constitutions often protect individual rights that are nowhere explicitly recognized in the United States Constitution.").

[10] Mosk, The Power of State Constitutions in Protecting Individual Rights, 8 N. Ill. U. L. Rev. 651, 652 (1988).

> governments was whether each state should form a separate constitution, following its own inclination as to the form it should adopt, or whether it would be better to ask the Continental Congress to prepare a uniform plan of government for all the states.[11]

Ultimately the suggestion that all states should adopt a uniform plan of government was rejected, and the framers of the Constitution chose to preserve a dual constitutional system:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments . . . . Hence a double security arises to the rights of the people.[12]

For most of our history, the federal Bill of Rights was inapplicable to actions by state governments;[13] therefore the only real security against such action was provided by state constitutions. It was not until the adoption of the Fourteenth Amendment in 1868 that the federal Constitution provided any restraints at all on state intrusion. But even then the check was limited: "it took another hundred years and much disputed reasoning to equate most of the first eight amendments with due

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[11] F. Green, Constitutional Development in the South Atlantic States 1776-1860, 52-56 (1930).

[12] The Federalist No. 51, at 321 (Madison) (Penguin ed. 1987). One of the delegates to the Convention, Roger Sherman, commented that "[t]he State Declarations of Rights are not repealed by the Constitution; and being in force are sufficient." 2 The Records of the Federal Convention of 1787 588 (M. Farrand ed. 1911).

[13] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

process under the fourteenth."[14] The U.S. Supreme Court did not apply a single one of those amendments to the states until 1897,[15] and nearly three more decades passed before the Court applied another.[16] Only in the 1960s -- in a series of decisions that spanned the decade -- were most of the provisions of the federal Bill of Rights finally declared applicable to the states.[17]

During the long period in which the state constitutions were really the only source of protection against intrusive state action, state courts enforced their state constitutional guarantees of individual liberties -- and did so wholly apart from any arguably corresponding federal guarantees.[18] For instance, Wisconsin's bill of rights was held to mandate publicly supported counsel for indigent defendants more than a century before Gideon v. Wainwright, 372 U.S. 335 (1963).[19] And decades

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[14] Linde, E Pluribus -- Constitutional Theory and State Courts, 18 Ga. L. Rev. 165, 174 (1984); see also Brennan, supra note 6, at 493-94.

[15] Chicago, B&O R.R. v. Chicago, 166 U.S. 226, 241 (1897).

[16] Gitlow v. New York, 268 U.S. 652, 666 (1925).

[17] See, e.g., Benton v. Maryland, 395 U.S. 784 (1969); Klopfer v. North Carolina, 386 U.S. 213 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Robinson v. California, 370 U.S. 660 (1962); Mapp v. Ohio, 367 U.S. 643 (1961).

[18] See Collins, Reliance on State Constitutions, in Developments in State Constitutional Law 1, 17 (B. McGraw ed. 1985).

[19] Carpenter v. Dane County, 9 Wisc. 274 (1859).

prior to New York Times v. Sullivan, 376 U.S. 254 (1964), Illinois and Kansas courts placed limits on libel actions in order to promote the free speech rights guaranteed by those states' constitutions.[20] These and other state court decisions interpreting state constitutions have had a significant impact on the development of federal constitutional jurisprudence.[21]

It would be ironic if the U.S. Supreme Court's recognition that the federal Constitution provides a base line guarantee of individual rights were permitted to erode the historic and indispensable role of the state constitutions. As Justice Brennan urged: "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law -- for without it, the full realization of our liberties cannot be guaranteed."[22] Certainly the U.S. Supreme Court never intended, through its incorporation decisions, to alter this essential dual structure of our government.

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[20] See City of Chicago v. Tribune Co., 139 N.E. 86 (Ill. 1923); Coleman v. MacLennan, 98 P. 281 (Kan. 1908).

[21] See, e.g., Roe v. Wade, 410 U.S. 113, 154-55 (1973) (citing both federal and state constitutional decisions); Batson v. Kentucky, 476 U.S. 79, 82 n.1 (1986) (noting decisions based on state constitutional law by federal courts of appeals); Mapp v. Ohio, 367 U.S. 643, 651 (1961) (citing state decisions based on state constitutional law as well as federal).

[22] Brennan, supra note 6, at 491.

B. Limiting the Interpretation of State Constitutions to the U.S. Supreme Court's Interpretation of the Federal Constitution Would Denigrate the Importance of State Constitutional Jurisprudence.

To allow the federal courts' interpretations of the federal Constitution to dictate, as a matter of course, the precise boundaries of state constitutional guarantees, is at odds with the fundamental tenets of our dual system of constitutional adjudication. It would deprive the citizens of the state of a critical source of protection for their rights and "render[] moot the state constitutional provisions." Heitman v. State, No. 1380-89, 1991 WL 111761, *6 (Tex. Crim. App. June 26, 1991) (en banc) (holding that Texas search and seizure provision was not to be construed in harmony with the Fourth Amendment). Abdicating the determination of the nature of state constitutional rights to judges outside the state would denigrate the role of state courts, and limit the protection of rights not only to "a single constitutional instrument, but also to the construction of that document by a single court."[23/] Stripped of one of their most essential functions, state courts would simply place their constitutions in lockstep with the federal Constitution, and become "mimicking court jesters of the Supreme Court of the

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23/ Collins, supra note 18, at 5; see also Williams, In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result, 35 S.C. L. Rev. 353, 402 (1984).

United States." Brown v. State, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983) (Teague, J., dissenting).[24]

To be sure, state courts should "afford[] respectful consideration" to the opinions of the U.S. Supreme Court, State v. Kimbro, 496 A.2d 498, 506 n.16 (Conn. 1985), just as it is appropriate to afford respectful consideration to the opinions of the courts of other states.[25] But "respectful consideration" does not mean blind allegiance.[26]

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[24] Judge Teague's position ultimately prevailed in Heitman v. State, No. 1380-89, 1991 WL 111761 (Tex. Crim. App. June 26, 1991) (en banc).

[25] Indeed, the decisions of sister states may offer even more persuasive authority than the federal courts. Federal courts weigh, against the finding of a federal right, a concern that the federal government not overly intrude upon state polity. State courts sit in a different position, able to probe the meaning of their own constitutions unencumbered by this structural limitation. See Williams, supra note 23, at 396-97. This Court has recognized the value of considering the decisions of the courts of sister states interpreting their constitutions. See discussion infra at note 40.

[26] Abdicating their responsibility by blindly interpreting state constitutional provisions in lockstep with federal ones could also leave state courts in difficult quandaries. For instance, suppose the U.S. Supreme Court overrules a precedent and changes its interpretation of a specific provision after a state's highest court has interpreted a related state guarantee in tandem with the U.S. Supreme Court's interpretation of the federal provision. What should the state court do in subsequent state law challenges: continue to follow the U.S. Supreme Court and find its new approach controlling, or follow the state's own precedent based on the previous federal standard as to what the state constitution guarantees? See Linde, supra note 5, at 381.

As the Supreme Court of Minnesota explained:

> In deciding whether a right alleged to be fundamental is indeed fundamental, under our [state] Constitution, we are not limited by United States Supreme Court decisions. . . . 'State courts are, and should be, the first line of defense for individual liberties within the federalist system.'

State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987) (quoting State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985)). In the same vein, the Supreme Court of California admonished that fundamental principles of federalism, as well as our nation's history, demand that state courts exercise their role as independent guardians of liberty:

> [T]he California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principles of federalism but also the historic bases of state charters. It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.

People v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975).[27]

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[27] See also State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983) ("[A] state's constitutional guarantees . . . were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics. State courts cannot abdicate their responsibility for these independent guarantees . . . .").

The U.S. Supreme Court itself has repeatedly acknowledged the importance of these principles. Indeed, it has often reminded states that the federal Constitution provides a floor of protection and not a ceiling, and that state constitutions may be separate and independent sources of protections broader than the federally guaranteed minimum.[28] Writing for the majority in Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980), then-Associate Justice Rehnquist remarked: "Our reasoning [as to the federal Constitution] does not ex proprio vigore limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." Id. at 81. Similarly, in remanding a case for clarification as to whether the decision below was based on state or federal law, the Court again advised that "a state court is entirely free . . . to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee." City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982).[29]

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[28] The Supreme Court of the United States may not even review a state court decision "clearly and expressly" based on its state constitution, Michigan v. Long, 463 U.S. 1032, 1041 (1983), unless the decision clashes with federal law by affording less than the minimum protections guaranteed under the federal Constitution. See Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

[29] See also Oregon v. Hass, 420 U.S. 714, 719 (1975) ("A State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be (continued...)

C. Courts in the Vast Majority of States Have Interpreted Their State Constitutions to Provide Broader Protection of Individual Rights Than the Federal Constitution Provides.

Heeding the U.S. Supreme Court's admonition concerning the need for independent state constitutional adjudication, courts in the vast majority of the states -- at least forty -- have found that their state constitutions provide greater protection of individual rights than the federal Constitution.[30] State courts have applied that principle in a wide array of contexts, and have issued literally hundreds of decisions construing particular provisions of their constitutions more broadly than analogous federal provisions.[31] These courts have stressed their obligation to interpret their state constitutions as documents of independent force, even when the language in

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[29] (...continued)
necessary upon federal constitutional standards.") (emphasis in original); Lego v. Twomey, 404 U.S. 477, 489 (1972) ("Of course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake."); Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect [a] State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

[30] See Collins, Looking to the States, Nat'l L.J., Sept. 29, 1986, at S-9, S-12, S-13 & S-14.

[31] See Schuman, The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection," 13 Vt. L. Rev. 221, 221 n.1 (1988).

specific provisions of these documents are similar to language in the federal Constitution.[32/]

Moreover, state courts have recognized that in interpreting their state constitutions independently from the

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[32/] See, e.g., State v. Kimbro, 496 A.2d 498, 507 (Conn. 1985) ("We eschew the amorphous standard of [Illinois v.] Gates" in passing upon the Connecticut constitutional provision corresponding to the federal search and seizure clause.); State v. Sierra, 692 P.2d 1273, 1276 (Mont. 1985) ("As long as we guarantee the minimum rights guaranteed by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution."); State v. Opperman, 247 N.W.2d 673, 674 (S.D. 1976) ("There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution. . . . We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution."); O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979) ("The states may, as the United States Supreme Court has recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are 'independently responsible for safeguarding the rights of their citizens.'") (citations omitted); State v. Kaluna, 520 P.2d 51, 58 (Haw. 1974) ("[A]s the ultimate judicial tribunal in this state, this court has final, unreviewable authority to interpret and enforce the Hawaii Constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted."); State v. Sklar, 317 A.2d 160, 165 (Me. 1974) (rejecting the U.S. Supreme Court's interpretation of the federal guarantee of jury trial in criminal cases as not affording beneficial guidance for assessing the scope of the similarly worded right guaranteed by the Maine Constitution); State v. Taylor, 210 N.W.2d 873, 882 (Wis. 1973) ("It is, of course, within the power of this court to apply higher constitutional standards than those that are required of states by the federal constitution. In many instances the Wisconsin Supreme Court has afforded constitutional protections long before the United States Supreme Court has seen fit to make those standards mandatory upon the states.").

federal Constitution, they "are embarking on no revolutionary course. Rather [they] are simply reaffirming a basic principle of federalism -- that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens." People v. Brisendine, 531 P.2d at 1113-14.[33/]

Of particular salience here, state courts have routinely afforded greater protections under their states' constitutions for rights of sexual equality, privacy and bodily integrity -- all of which have been recognized as supporting the right to choose abortion. In cases involving sex-based classifications, at least eight of the highest state courts have rejected the U.S. Supreme Court's "intermediate" standard of review for such classifications in favor of a more rigorous standard.[34/] As one court asserted, "[i]t is our duty to

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[33/] Even state courts with a history of construing their constitutional provisions as coterminous with federal provisions have recently reconsidered the wisdom of that approach. The Washington Supreme Court is one such court. Abandoning its reliance on federal interpretation, the court announced in 1983 that it had decided "to return to the protections of our own constitution and to interpret them consistent with their common law beginnings." State v. Ringer, 674 P.2d 1240, 1247 (Wash. 1983), overruled on other grounds, State v. Stroud, 720 P.2d 436 (Wash. 1986).

[34/] In direct contrast with the U.S. Supreme Court's holding in Craig v. Boren, 429 U.S. 190 (1976), which established the "intermediate" level of scrutiny for sex discrimination as the federal standard, at least five states impose strict scrutiny and require a compelling state interest to justify sex-based classifications, and another three impose a standard even higher (continued...)

determine what the standard should be under our own constitution for statutes that classify on the basis of gender. In doing so, we decline the opportunity to adopt the present standards of the United States Supreme Court's opinions . . . ." Hewitt v. State Accident Ins. Fund, 653 P.2d 970, 975 (Or. 1982). The court described the federal standard as a "kaleidoscope of standards and rationales" which leave lower courts with "'an uncomfortable feeling,' like players in a shell game who are not absolutely sure there is a pea." Id. at 975 (citations omitted). Similarly, in the area of pregnancy discrimination, state courts have flatly rejected the U.S. Supreme Court's holding in Geduldig v. Aiello, 417 U.S. 484 (1974), that classifications that burden pregnant women do not amount to sex discrimination.[35]

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[34] (...continued)
than strict scrutiny that effectively bars all classifications based on sex. At least two of these states, California and Oregon, have found this broader protection requiring the imposition of strict scrutiny in the state's equal protection clause. Hewitt v. State Accident Ins. Fund, 653 P.2d 970, 977-78 (Or. 1982); Arp v. Workers' Compensation Appeals Bd., 563 P.2d 849, 855 (Cal. 1977). Three other states cite a state Equal Rights Amendment as the ground for imposing strict scrutiny. Petrie v. Illinois High School Ass'n, 394 N.E.2d 855, 862 (Ill. 1979) (following People v. Ellis, 311 N.E.2d 98 (Ill. 1974)); Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977); Mercer v. Board of Trustees, 538 S.W.2d 201, 206 (Tex. Civ. App. 1976). States that, on the basis of an equal rights amendment, impose a standard even higher than strict scrutiny and effectively bar all sex-based classifications include Colorado, Maryland, and Washington. See People v. Salinas, 551 P.2d 703 (Colo. 1976); Rand v. Rand, 374 A.2d 900 (Md. 1977); Marchioro v. Chaney, 582 P.2d 487, 491 (Wash. 1978) (following Darrin v. Gould, 540 P.2d 882 (Wash. 1975)).

[35] For example, the Colorado Supreme Court ruled that an employer who denied coverage under group health insurance policy for medical expenses associated with normal pregnancy violated (continued...)

State courts also have gone further than federal courts with respect to the rights of privacy and bodily integrity. A number of state courts have found a state constitutional right to refuse medical treatment that surpasses the protection afforded by the federal courts.[36] Also particularly telling is a landmark decision of the New Jersey Supreme Court striking down a fornication statute as violative of a state constitutional right of privacy, even though "the conduct prohibited by this statute

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[35] (...continued)
the state constitution. Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358, 1363 (Colo. 1988).

[36] See, e.g., In re Guardianship of Browning, 568 So. 2d 4, 9-10 (Fla. 1990) ("'Privacy' has been used interchangeably with the common understanding of the notion of 'liberty,' and both imply a fundamental right of self-determination subject only to the state's compelling and overriding interest. . . . These components of privacy are the same as those encompassed in the concept of freedom, and . . . are deeply rooted in our nation's philosophical and political heritage. . . . Thus, we begin with the premise that everyone has a fundamental right to the sole control of his or her person."); Rasmussen v. Fleming, 741 P.2d 674, 682 (Ariz. 1987) ("Although Arizona Constitution article 2, section 8 has been invoked most often in a Fourth Amendment context, we see no reason not to interpret 'privacy' or 'private affairs' as encompassing an individual's right to refuse medical treatment. An individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally-protected privacy than does an individual's home or automobile."); Bartling v. Superior Court, 163 Cal. App. 3d 186 (1984) ("The right of a competent adult patient to refuse medical treatment has its origins in the constitutional right of privacy. This right is specifically guaranteed by the California Constitution (art. I, sec. 1) and has been found to exist in the 'penumbra' of rights guaranteed by the Fifth and Ninth Amendments to the United States Constitution."). In re Quinlan, 355 A.2d 647, 663-64 (N.J. 1976), cert. denied, 429 U.S. 922 (1976) ("This right [to privacy] is broad enough to encompass a patient's decision to decline medical treatment . . . . [t]he State's interest . . . weakens and the individual rights to privacy grows as the degree of bodily invasion increases and the prognosis dims.").

has never been explicitly treated by the [United States] Supreme Court as falling within the [federal] right of privacy." State v. Saunders, 381 A.2d 333, 339 (N.J. 1977).[37] The court noted that, whatever analysis might be appropriate as a matter of federal constitutional law, "considerations of federalism permit[] this Court to demand stronger and more persuasive showings of a public interest in allowing the State to prohibit [adult] sexual practices than would be required by the United States Supreme Court." Id. at 341.

D. Construing Their State Constitutions Independently of the Federal Constitution, State Courts Have Routinely Struck Down Abortion Funding Restrictions and Other Laws That Impede the Right to Choose Abortion.

In ruling that the right to privacy in the federal Constitution encompasses a woman's right to choose abortion, the U.S. Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), looked to the decisions of state as well as federal courts that had considered challenges to restrictive abortion laws. The Court observed that: "A majority . . . have held state laws unconstitutional, at least in part . . . because of overbreadth and abridgement of rights." The Court cited cases such as People v. Belous, 458 P.2d 194 (Cal. 1969), cert. denied, 397 U.S. 915 (1970), in which the California Supreme Court recognized --

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[37] In addition, the Court in Saunders remarked: "The right of privacy, upon which defendant bases his attack, is not explicitly mentioned in either the New Jersey or United States Constitutions. However, both documents have been construed to include such a right." 381 A.2d at 337.

several years before Roe -- that both the California and U.S. Constitutions protected a woman's fundamental right to choose abortion. 410 U.S. at 154-55.

In the immediate wake of Roe, there was little need to bring state constitutional challenges to most forms of restrictions on a woman's right to choose abortion. As a result, abortion rights issues have generally been litigated in federal courts; relatively few cases regarding abortion restrictions have been decided on state constitutional grounds. But in those cases, state courts have almost uniformly provided greater protection under their state constitutions to the right to choose abortion than have federal courts. Already, state courts have been more protective of a woman's right to choose than federal courts when reviewing laws that discriminate against abortion in otherwise comprehensive health benefit programs for the indigent, and laws that prohibit young women from obtaining abortions without "parental consent" or "parental notice." This trend is likely to become more pronounced as federal courts continue to undermine the foundations of the federal right established in Roe.[38]

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[38] The Supreme Court has yet to overrule Roe v. Wade outright, but has gradually chipped away at a woman's right to choose abortion, and hinted in no uncertain terms that the continued validity of Roe is in question. See Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3079 (1989) (Blackmun, J., dissenting) ("For today, at least, the law of abortion stands undisturbed. . . . But the signs are evident and very ominous, and a chill wind blows.").

In the abortion funding context, eight state courts in addition to the Michigan Court of Appeals have been asked to decide whether restrictions that are substantially similar to the statute at issue in this case violate their states' constitutions. All but one have declined to follow the U.S. Supreme Court and have struck down the restrictions, holding in each case that their state constitution prohibits discrimination against abortion in programs in which the government offers medical benefits for all other medically necessary procedures, including costs associated with childbirth. See Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981); Doe v. Celani, No. S81-84CnC, slip op. (Vt. Super. Ct. May 23, 1986); Doe v. Maher, 515 A.2d 134 (Conn. 1986); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981); Right To Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247 (Or. App. 1983);[39] Hope v. Perales, No. 21073/90, slip op. (N.Y. Sup. Ct. Apr. 15, 1991) (appeal pending). But see Fischer v. Commonwealth Dep't of Public Welfare, 482 A.2d 1148 (Pa. 1984), aff'd, 502 A.2d 114 (1985).

These courts have struck down abortion funding restrictions under the banner of independent state constitutional

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[39] On appeal, the Oregon Supreme Court affirmed on statutory grounds, without reaching the state constitutional issue. See Planned Parenthood Ass'n v. Department of Human Resources, 687 P.2d 785 (Or. 1984).

adjudication.[40] For example, in rejecting the assumptions underlying the U.S. Supreme Court's abortion funding opinions, the New Jersey Supreme Court declared:

> Fundamental to our decision is the role of a state court of last resort in our federalist system. . . . [S]tate Constitutions are separate sources of individual freedoms and restrictions on the exercise of power by the Legislature. . . . Although the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete.

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[40] The best argument that Defendants can muster in the face of the near unanimity of other states' abortion funding decisions is the false claim that Michigan courts have no tradition of looking to the case law of "sister states." This is patently untrue: this Court often looks to decisions from other states in construing the Michigan Constitution. In Michigan Dep't of Civil Rights v. General Motors Corp., 412 Mich. 610, 317 N.W.2d 16, 29 (1982), this Court said: "[W]hile we certainly are not controlled by such case law from other jurisdictions, we can be guided by it when it is determined to be appropriate and sound." Applying that principle in Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 378 N.W.2d 337 (1985), this Court surveyed state court decisions from a "number of other jurisdictions [that had] recently considered similar issues with regard to their state Constitutions." 378 N.W.2d at 354. Indeed, before this Court reached its conclusion in Woodland, it reviewed and discussed at length state constitutional decisions from courts in California, Connecticut, Massachusetts, New Jersey, Pennsylvania and Washington. Id. at 354-58.

More recently, in People v. Collins, this Court considered the opinions of all twenty-six states that had addressed the issue presented. No. 86690, slip op. at 28-29 & n.48 (Mich. Aug. 22, 1991). In concluding that the Michigan Constitution does not provide a different level of constitutional protection than that of the federal Constitution in the narrowly defined area of electronic surveillance, this Court found it persuasive that "only two others [states], Alaska and Massachusetts, interpret their state constitutions to require a warrant for participant monitoring, while the highest courts in the other twenty-four states in which the issue has been addressed have ruled that their constitutions do not require a warrant." Id. at 28-29.

Byrne, 450 A.2d at 931 (citation omitted). Echoing this theme, the California Supreme Court said that eschewing the reasoning of the U.S. Supreme Court did "not represent an unprincipled exercise of power, but a means of fulfilling our solemn and independent constitutional obligation to interpret the safeguards guaranteed by the [state's] Constitution in a manner consistent with the governing principles of [state] law." Myers, 625 P.2d at 783-84 (emphasis in original).

In the parental consent context, the U.S. Supreme Court has ruled that under most circumstances, laws restricting a young woman's access to abortion by requiring state-mandated parental consent do not infringe the federal right to choose abortion.[41/] The Florida Supreme Court, however, held that a parental consent law that would have met federal constitutional standards violated the Florida Constitution, stating: "We expressly decide this case on state law grounds and cite federal precedent only to the extent that it illuminates Florida law." In re T.W., 551 So. 2d 1186, 1196 (Fla. 1989). Again, it was the principle of independent state constitutional adjudication that provided the impetus for the Florida court's decision to diverge from the federal constitutional precedents.

41/ See, e.g., Bellotti v. Baird, 443 U.S. 622 (1979).

II. MICHIGAN'S DISCRIMINATORY BAN ON ABORTION FUNDING VIOLATES THE EQUAL PROTECTION CLAUSE OF THE MICHIGAN CONSTITUTION.

A. A Woman's Decision to Choose Abortion is a Fundamental Right Under the Michigan Constitution.

The Court of Appeals broke no new ground in this case when it said that the Michigan Constitution "affords a right to an abortion." Doe v. Babcock, 187 Mich. App. 493, 468 N.W.2d 862, 869 (1991). The court carefully reviewed "Michigan statutes and case law concerning abortion," and concluded that Michigan "has a strong, long established interest in protecting the lives and health of its pregnant women." 468 N.W.2d at 868. In support of that conclusion, the Court of Appeals cited Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich. 465, 242 N.W.2d 3, 19 (1976), in which this Court recognized that Article 1 of the Michigan Constitution protects the fundamental right to privacy, including the right to choose abortion.

Moreover, the Court of Appeals was correct in observing that even prior to Roe v. Wade, Michigan courts recognized that women possess a right to make their own decisions concerning abortion.[42] Even the Defendants concede:

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[42] See People v. Nixon, 42 Mich. App. 332, 201 N.W.2d 635, 640 n.17 (1972). In Nixon, the Michigan Court of Appeals pointed to the state's long history of protecting the right to choose abortion, noting that ever "[s]ince In re Vickers' Petition, 371 Mich. 114, 123 N.W.2d 253 (1963), recognized that the woman could not be prosecuted . . . for . . . a self-induced abortion . . . the law has, at least to some extent, indicated that the woman has a right to abort." 201 N.W.2d at 641.

> It is true, as the Court of Appeals majority stated, that the decisions of the Court of Appeals in People v. Nixon, supra, and People v. Bricker, supra, can be read as having declared the right of a woman to an abortion as a matter of state law even prior to the decision of the United States Supreme Court in Wade.

Defendants-Appellants' Brief at 23. Foreshadowing the reasoning employed by the U.S. Supreme Court just a year later in Roe v. Wade, the court in Nixon ruled:

> There is no longer a sufficient state interest to justify continued prosecution of licensed physicians for the mere act of [performing an abortion on] . . . an unquickened fetus. What state interest there is in [proscribing abortion] . . . is counterbalanced and offset by the superior right of the woman and her physician to undertake such medical treatment as is deemed appropriate.

People v. Nixon, 42 Mich. App. 332, 201 N.W.2d 635, 640 (1972).

Defendants mischaracterize this Court's decision in People v. Bricker, 389 Mich. 524, 208 N.W.2d 172 (1973), as somehow overruling Nixon and standing for the proposition that the Michigan Constitution provides no protection for the right to choose abortion independent of the federal Constitution. This Court held no such thing in Bricker. It merely recognized that under the Supremacy Clause of the U.S. Constitution, it was bound to follow the U.S. Supreme Court's ruling in Roe v. Wade. Nowhere did this Court dispute the ruling of the Court of Appeals in Nixon or the existence of state constitutional protection for

the right to choose. Furthermore, Defendants fail to acknowledge that even after Bricker, this Court's opinion in Advisory Opinion 1975 PA 227, recognized that Article 1 of the Michigan Constitution protects the fundamental right to privacy. 242 N.W.2d at 19.

B. The Fundamental Right to Choose Abortion Is Essential to Women's Ability to Control the Course of Their Lives and to Participate Fully and Equally in Society.

The right to choose whether or not to terminate a pregnancy is essential to women's ability to participate fully and equally in society. Restrictions on the right to choose abortion deprive women of the ability to control their bodies, of the power to shape their lives, of the capacity to act in the best interests of their families, and of their dignity. As the Supreme Court of Florida stated when it declared that the Florida Constitution protects the fundamental right to choose: "We can conceive of few more personal private decisions concerning one's body that one can make in the course of a lifetime." In re T.W., 551 So. 2d 1186, 1192 (Fla. 1989). It is a telling and tragic testament to the importance of the right to choose that when abortion was prohibited by law, millions of women felt they had no alternative but to risk their lives in the back alleys.

In striking down provisions that discriminate against abortion in state health care programs, state courts have consistently recognized the fundamental nature of the right to

choose abortion, and the profound impact that decision inevitably has on the lives of women and their families. The New Jersey Supreme Court described the importance of the right as follows:

> [T]he statute impinges upon the fundamental right of a woman to control her body and destiny. That right encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child.

Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982). Similarly, the California Supreme Court said:

> [F]or a woman, the constitutional right of choice is essential to her ability to retain personal control over her own body. . . . This right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny.

Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 792 (Cal. 1981).

At some time in their lives, most women willingly choose to bear and raise children; having a wanted child is often a joyful and enriching experience. But forcing a woman to continue a pregnancy against her will dispossesses her of the most basic control of her life and physical being:

> [T]he woman's body will be subjected to a continuous regimen of diet, exercise, medical examination, and possibly surgical procedures. Her most elemental biological and psychological impulses will be enlisted . . . . In these ways, anti-abortion laws exert power productively over a woman's body

> and, through the uses to which her body is put, forcefully reshape and redirect her life.

Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 790 (1989).

Moreover, it cannot be ignored that most American women -- an estimated two-thirds -- will face an unintended pregnancy at some time in their lives.[43] The high failure rates of existing methods of contraception and the unavailability of certain advanced contraceptive technologies contribute to this extraordinarily high rate of unintended pregnancies.[44]

The most immediate effect of abortion restrictions is to force women to assume tremendous physical changes and substantial health risks. A woman's body must adjust dramatically during pregnancy: the size of her uterus expands to 500-1000 times its original capacity, displacing and compressing organs such as the heart, appendix and gastrointestinal tract; her pulse rate increases by ten to fifteen beats a minute; and

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[43] Forrest, Unintended Pregnancy Among American Women, 19 Fam. Plan. Persps. 76, 77 (1987).

[44] Approximately one of every seven women using a diaphragm or condom as a method of contraception will become pregnant during the first year of use of that method; similarly, one woman in sixteen who rely on oral contraceptives will become pregnant during the first year. Jones & Forrest, Contraceptive Failure in the United States: Revised Estimates from the 1982 National Survey of Family Growth, 21 Fam. Plan. Persps. 103, 109 (1989).

her body weight increases by twenty five pounds or more.[45] Even healthy pregnancies are often accompanied by nausea, vomiting, more frequent urination, fatigue and back pain.[46] Pregnancy can seriously endanger a woman's health by exacerbating medical problems such as lupus, multiple sclerosis, asthma, diabetes, high blood pressure and AIDS.[47] Women also risk many serious, and in some cases life-threatening, complications of pregnancy, including toxemia of pregnancy or preeclampsia (a combination of high blood pressure, water retention and protein in urine), eclampsia (preeclampsia plus convulsions potentially leading to coma), gestational diabetes (glucose intolerance during pregnancy), thromboembolic disease (vascular inflammation and blood clots potentially leading to fatal pulmonary embolism), and cardiomyopathy (enlargement of the heart potentially leading to congestive hear failure).[48]

Labor and delivery pose additional physical demands, including extreme pain during the six to twelve or more hours of

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[45] J. Pritchard, P. MacDonald & N. Gant, Williams Obstetrics 181-205, 218, 260-63 (17th ed. 1985) [hereinafter Williams Obstetrics].

[46] Id. at 181-210, 218, 260-263.

[47] Id. at 597, 600, 609, 619-20; Winton, Skin Diseases Aggravated by Pregnancy, 20 J. Am. Academy Dermatology 1, 7 (1989). Medications and other medical treatment that normally control preexisting conditions often pose risks to fetal development, requiring women either to accept those risks or to sacrifice their own health. See Williams Obstetrics, supra note 45, at 260.

[48] Williams Obstetrics, supra note 45, at 526-30, 600, 731.

labor and vaginal delivery. Health risks are even greater in the approximately one in four deliveries that require a cesarean section, and include all the attendant dangers of surgery such as infection, blood clots, hemorrhage and hypertension.[49] The intrusions forced upon women's bodies by compulsory pregnancy and childbirth are underscored by the medical fact that legal abortion is far safer than childbirth. In terms of mortality, "abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates, Smith, Rochat & Grimes, Mortality From Abortion and Childbirth, Are the Statistics Biased?, 248 JAMA 192, 196 (1982).

In addition to the unparalleled intrusions on the bodily integrity and privacy of women who would be forced by restrictions on abortion to continue pregnancies,[50] perhaps an

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[49] L. Silver & S. Wolfe, Unnecessary Cesarean Sections: How to Cure a National Epidemic 9, 13 (1989). See Williams Obstetrics, supra note 45, at 3.

[50] Governmental action far less intrusive than abortion restrictions have been deemed violative of the right to privacy and bodily integrity under federal and state institutions and common law. A number of states have recognized a state constitutional right to bodily integrity, including a right to refuse medical treatment. See supra cases cited at note 36.

The right to bodily integrity is so highly valued that people are generally not required, against their will, to submit to any bodily intrusion in order to aid another person -- even when it is possible to save another from grave injury or certain death at little or no risk to one's self. See In re A.C., 573 A.2d 1235, 1247 (D.C. 1990) (en banc) (a court order directing a woman to submit to a cesarean section against her will interfered with her fundamental right to bodily integrity: "every person has the right, under the common law and the Constitution, to accept or refuse medical treatment"); McFall v. Shimp, 10 Pa. D.& (continued...)

even more horrifying consequence is the death, disease, and mutilation of women who, inevitably would be forced to resort to illegal abortions. The magnitude of this problem should not be underestimated. The number of illegally induced abortions during the 1960s has been estimated at over one million each year nationwide.[51] Indeed, prior to 1973, Michigan courts were confronted with the realities of illegal abortions:

> A partial autopsy showed inflammation and peritonitis in the abdominal cavity . . . . [T]here was an internal laceration on [the uterine] . . . wall; a large mass of its lining, which appeared to have been forcibly removed from its normal position, was projected into the uterine cavity . . . .

People v. Sinclair, 327 Mich. 686, 42 N.W.2d 786, 788 (1950). In another case:

> The deputy medical examiner . . . testified that the cause of death was "laceration of

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[50] (...continued)
C. 3d 90 (Allegheny County 1978) (per curiam) (court refused to order a man to donate bone marrow even though the donation was necessary to save the life of his cousin); In re Guardianship of Pescinski, 226 N.W.2d 180, 182 (Wis. 1975) (court refused to order kidney transplant from incompetent mentally ill individual to his sister in dire need of transplant, "[i]n the absence of real consent on his part, and in a situation where no benefit to him has been established").

[51] Illegal abortions performed by back-alley abortionists led to the death of at least hundreds -- and perhaps thousands -- of women each year, and countless other women suffered serious, often permanent, injuries including sterilization. See R. Schwarz, Septic Abortion Ch. 2, 7-15 (1968); Cates, Legal Abortion: The Public Health Record, 215 Science 1586 (1982); Cates & Rochat, Illegal Abortions in the United States: 1972-1974, 8 Fam. Plan. Persps. 86 (1976); L. Lader, Abortion II: Making the Revolution 13 (1974).

> vagina and uterus with peritonitis; laceration of large and small bowel" . . .; that the damage to the sexual organs, bowels, and rectum could have been inflicted by a sharp instrument, such as a scalpel but, also, by a long pencil or knitting needle . . . .

People v. Holcomb, 360 Mich. 362, 103 N.W.2d 457, 459 (1960).

Beyond the extreme physical intrusions, restrictions on the right to choose abortion drastically limit women's capacity for self-determination and impair their ability to participate fully and equally in the socio-economic life of this country. Being forced to become a parent dramatically alters a woman's sense of self, as well as her educational prospects and employment opportunities. This endangers not only her ability to support herself, but also her family, including any children she may have. As such, restrictions on abortion touch on virtually every aspect of women's lives: social, economic, spiritual, political and moral. Indeed, when the state restricts access to legal abortion:

> [A]ll women of childbearing age know that pregnancy may violently alter their lives at any time. This pervasively affects the ability of women to plan their lives, to sustain relationships with other people, and to contribute through wage work and public life. The right to equal citizenship encompasses the right to "take responsibility for choosing one's own future . . . . [T]o be a person is to respect one's own ability to make responsible choices in controlling one's own destiny, to be an active participant in society rather than an object." Denying abortion denies women the capacity of responsible citizenship.

Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1017 (1984) (quoting Karst, The Supreme Court 1976 Term, Foreward: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 58 (1977)).

If young women are unable to postpone motherhood until they have completed a basic education and are prepared to care for their children, the paths their lives will take will be largely predetermined before they have even developed their own identities and aspirations. Childbearing curtails most teenagers' ability to obtain even the most basic education: nationally, eight of ten who become mothers at age seventeen or younger do not complete high school, and four of ten who have a child by the age of fifteen do not finish even the eighth grade.[52/] Early motherhood also imposes severe limitations on a woman's ability to earn a living wage and often entraps young women in a cycle of poverty from which they never escape. Women who have children while in their teens for the rest of their lives earn lower incomes than women who postpone childbearing.[53/]

[52/] Fielding, Adolescent Pregnancy Revisited, 299 Mass. Dep't Pub. Health 893, 894 (1978). Moreover, less than two percent of teenage mothers complete college, compared to more than one-fifth of those women who do not bear children until age 24. Center for Population Options, The Facts: Teenage Childbearing, Education, and Employment 1 (1987).

[53/] This comparison holds true even when factors such as socioeconomic status are taken into account. Risking the Future: Adolescent Sexuality, Pregnancy and Childbearing (Vol. I) 130 (C. Hayes ed. 1987). Nationally, teenage mothers earn about half as much income as those who first give birth in their twenties.
(continued...)

Moreover, because today's workplace generally does not accommodate the responsibilities of those caring for young children, and because day care often is inadequate, unavailable or unaffordable, many mothers must leave their jobs in order to care for their children.[54]

In Michigan, these problems are particularly severe. While 8.2% of all families in Michigan have incomes below the poverty level, 55% of female-headed households with children live in poverty -- a number significantly higher than the national average.[55] A staggering 71% of single mothers in Michigan between the ages of 15 and 24 live in poverty. Eighty-one percent of African American single mothers in Michigan in that same age group live in poverty, and the corresponding number for Hispanic women is 77%.[56]

In sum, the right to choose abortion is essential to women's health and their ability to control their lives and care for their loved ones. The Court of Appeals correctly concluded, and this Court should affirm, that "a pregnant woman in this state has a fundamental right to procreative choice, which

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[53] (...continued)
Center for Population Options supra note 52, at 1 (figures for families with children aged five or younger).

[54] See Women's Work, Men's Work: Sex Segregation on the Job 73-74 (B. Reskin & H. Hartmann eds. 1986).

[55] Sari, Butts, Morrow, Russell & Zinn, Women in Michigan . . . A Statistical Portrait, Sept. 1987, at 52.

[56] Id.

includes the right to an abortion, as well as the corollary fundamental right to bear her child." Doe v. Babcock, 468 N.W.2d at 875.

C. The State's Discriminatory Refusal to Provide Medicaid Funding for Medically Necessary Abortions While Funding Other Medically Necessary Procedures, Including Those Associated With Pregnancy and Childbirth, Unconstitutionally Interferes With a Woman's Right to Choose Under the Michigan Constitution.

It is axiomatic that under the equal protection clauses of both the Michigan Constitution and the U.S. Constitution, statutes or regulations that penalize the exercise of fundamental rights are subject to "strict scrutiny," the most exacting standard of constitutional review, and laws that neither penalize the exercise of fundamental rights nor create "suspect classifications" are reviewed under the more lenient "rational basis" standard. Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636, 641 (1975).[57] In applying these equal protection standards to the facts of a specific case, however, Michigan courts are by no means bound to reach the same conclusion under the Michigan Constitution that the U.S. Supreme Court reaches when interpreting federal constitutional

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[57] See also Socialist Workers Party v. Secretary of State, 412 Mich. 571, 317 N.W.2d 1 (1982) (strict scrutiny applied because restriction infringed fundamental right to vote and to associate).

guarantees.[58] As the Court of Appeals observed: "The United States Supreme Court does not have a monopoly on correct constitutional interpretation. This fact is a cornerstone of federalism, justifying substantive disagreement by state courts." Doe v. Babcock, 468 N.W.2d at 873 (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982)).

This case presents a state constitutional equal protection challenge to MCLA 400.109(a) -- an abortion funding restriction that is substantially similar to those the U.S. Supreme Court has upheld against equal protection challenges under the federal constitution.[59] The U.S. Supreme Court's

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[58] Even in cases that present identical factual situations, and in which the same standard of review is applied, this Court has not hesitated to reach a different conclusion than that of the U.S. Supreme Court. In Delta Charter Township v. Dinolfo, 419 Mich. 253, 361 N.W.2d 831 (1984), for example, this Court held under the rational basis test, that a zoning ordinance that prohibited unrelated individuals from living together violated the due process clause of the Michigan Constitution. That ruling was in direct opposition to the result reached by the U.S. Supreme Court, also employing the rational basis test, when it applied the federal due process clause to virtually the same facts. Compare Dinolfo with Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). See also Woodland v. Michigan Citizens Lobby, 423 Mich. 188, 378 N.W.2d 337, 345 n.22 (1985) ("It has been noted, by at least one commentator, that the Michigan Constitution's equal protection provision . . . , which is worded substantially the same as its federal counterpart, has been interpreted differently than the Equal Protection Clause of the Fourteenth Amendment.") (citing Kelman Rediscovering the State Constitutional Bill of Rights, 27 Wayne L. Rev. 413, 427 (1981) ("[a]s interpreted and administered" by this Court, the state equal protection clause "has a distinctive meaning that may not always conform to fourteenth amendment precedents.")).

[59] See, e.g., Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

decisions have been widely criticized by legal scholars,[60] and the overwhelming majority of state courts to consider this issue, including the Michigan Court of Appeals, have rejected the U.S. Supreme Court's analysis and have struck down discriminatory abortion funding restrictions on state constitutional grounds.[61] This Court should not hesitate to do the same.

Michigan's Medicaid program is designed to provide recipients with the full range of medical services available to citizens in the "mainstream."[62] Although the State is under no constitutional obligation to provide Medicaid benefits for any medical service, once it establishes a program to fund medically necessary health care, the State may not fund in a manner that penalizes the exercise of a fundamental right without satisfying strict scrutiny. As the California Supreme Court explained, once benefits are conferred, they may be not be withdrawn "on a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right." Committee to

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[60] Goldstein, A Critique of the Abortion Funding Decisions, 8 Hastings Const. L.Q. 313 (1981); Perry, Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 Stan. L. Rev. 1113 (1980); Rubin, The Resurrection of the Right-Privilege Distinction? A Critical Look at Maher v. Roe and Bordenkircher v. Hayes, 7 Hastings Const. L.Q. 165 (1979); Simson, Abortion, Poverty and the Equal Protection of the Laws, 13 Ga. L. Rev. 505 (1979); Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330 (1985).

[61] See supra cases cited at 21.

[62] Brief of Plaintiffs-Appellees in the Court of Appeals at 12.

Defend Reproductive Rights v. Myers, 625 P.2d 779, 786 (Cal. 1981).[63] But that is precisely what MCLA 400.109(a) does.

By singling out abortion for exclusion from an otherwise comprehensive health care program, MCLA 400.109(a) injects a coercive financial incentive favoring childbirth into a decision that is guaranteed to be free from governmental intrusion under the Michigan Constitution. The law creates two classes of needy women: Medicaid-eligible women who choose to carry their pregnancy to term, and Medicaid-eligible women who choose to have an abortion. Solely on the basis of the decision to exercise the constitutional right of choice, the first class is granted desperately needed health benefits which are denied to

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[63] This Court has adopted a similar rule that prevents the state from imposing a penalty on the exercise of a constitutional right. For example, this Court has held that it is impermissible for a defendant to receive a harsher sentence merely because he "exercis[ed] his constitutional right to trial by jury and right not to plead guilty." People v. Snow, 386 Mich. 586, 194 N.W.2d 314, 317 (1972). This Court has also recognized the principle of Kramer v. Union Free School Dist., 395 U.S. 621 (1969), "that . . . once the right is given, lines cannot be drawn inconsistent with equal protection." Alan v. County of Wayne, 388 Mich. 210, 200 N.W.2d 628, 695 (1972) (citing Wilkins v. Ann Arbor City Clerk, 385 Mich. 670, 189 N.W. 2d 423 (1971)). Elaborating on that principle, this Court stated:

> Once a right is given, be it a job, the right to vote, a telephone, the right to hold property, the right to bid on government contracts or whatever, the right cannot be restricted by means not consonant with due process.

200 N.W.2d at 695. This principle -- that it is constitutionally intolerable to penalize the exercise of a constitutionally protected right -- applies with equal force to the funding restriction challenged in this case.

the second class. Thus, this Court should affirm the conclusion of the Court of Appeals that MCLA 400.109(a) penalizes the exercise of the fundamental right to choose abortion, and that therefore strict scrutiny must be applied.

Above all, MCLA 400.109(a) goes beyond penalizing the exercise of a fundamental right: in excluding medically necessary abortions from the medicaid program, the law in some cases acts as an absolute barrier to a woman's ability to obtain a legal abortion. As a practical matter, the law forces a woman who cannot afford the cost of an abortion, to pay with her health -- by delaying the procedure while she attempts to gather the necessary funds, by carrying a health-threatening pregnancy to term, or by resorting to illegal abortion.

MCLA 400.149(a) will inevitably force some poor women to delay abortions until later in pregnancy when the medical risks are higher. Although the risks of legal abortion never exceed the risks of childbirth, after the first eight weeks of pregnancy, the risk of major complications from abortion increases about 15 to 30% for each week of delay.[64/] For other women MCLA 400.109(a) will act as an absolute barrier to

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[64/] Cates & Grimes, Morbidity and Mortality of Abortion in the United States, in Abortion and Sterilization: Medical and Social Aspects 158 (J. Hodgson ed. 1981). Nationally, almost fifty percent of women who obtained abortions after 16 weeks of pregnancy attribute their delay to difficulties in raising the needed money. Torres & Forrest, Why Do Women Have Abortions?, 20 Fam. Plan. Persps. 169 (1988); C. Teitze & S. Henshaw, Induced Abortion: A World Review 110 (6th ed. 1986).

obtaining an abortion, and they will be forced to carry their pregnancy to term despite serious and substantial risks to their health.[65] As Defendant Babcock, the director of the State's medicaid program, testified:

> Q. [A]re there numbers of people who were beneficiaries of Medicaid and eligible for publicly funded abortion who would have, in your opinion as director of this agency [the Michigan Department of Social Services], no other economic means whereby to obtain an abortion other than medicaid assistance?
>
> A. The answer is yes . . . . It would be my opinion there would be individuals who would not have access because of the ability to pay.

Brief of Plaintiffs-Appellants in the Court of Appeals at 41-42.

Finally, as a result of the funding ban some women in Michigan will once again return to the back alleys for health care. As Defendant Babcock also acknowledged, if abortion is excluded from the program, Medicaid recipients may forego seeking legal abortions at licensed clinics, and instead resort to unsafe illegal abortions. Id. at 42-43. Prior to the time legal abortions were available in Michigan, women suffered terribly. In one case: "The complaining witness had been pregnant about 2 months . . .; X-ray pictures disclosed a metal catheter extending through the uterus into her abdomen." People v. Karcher, 322 Mich. 158, 33 N.W.2d 744, 745 (1948). In another: "3 illegal

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[65] See discussion supra p. 28-30.

attempts were made to terminate the pregnancy, and finally, . . . a Grand Rapids physician removed a mummified dry fetus which was protruding through the cervix." People v. Wellman, 6 Mich. App. 573, 149 N.W.2d 908, 910-11 (1967). Although deaths resulting from illegal abortions are substantially under-reported, seventeen deaths were reported nationally between 1975 and 1979. The primary reason that five of the women sought an illegal abortion was the inability to raise the money needed to pay for a legal abortion.[66/]

Under strict scrutiny, Defendants bear the burden of articulating a "compelling interest" to justify MCLA 400.109(a). Although the State has never once clearly articulated any purported compelling interest, it appears to rely on interests in protecting the potentiality of human life and in encouraging childbirth. But these interests cannot survive strict scrutiny.

MCLA 400.109(a) discriminatorily denies funding to poor women who require medically necessary abortions. Any interest that the State may have in protecting potential life and encouraging childbirth simply does not outweigh the State's "strong, long-established interest in protecting the lives and health of its pregnant women"[67/] and a woman's right to decide

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[66/] Binkin, Gold & Cates, Illegal-Abortion Deaths in the United States: Why are They Still Occurring?, 14 Fam. Plan. Persps. 163 (1982).

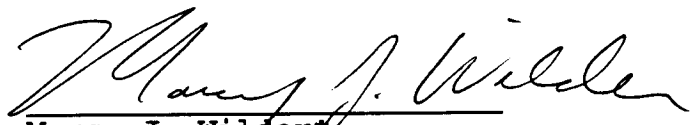
[67/] Doe v. Babcock, 468 N.W.2d at 868.

for herself a matter which so intimately and fundamentally affects her physical well-being and future life and happiness.

III. CONCLUSION

For the reasons described above, this Court should affirm the judgment of the Court of Appeals that MCLA 400.109(a) violates Article 1, Section 2 of the Michigan Constitution.

Respectfully submitted,



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APPENDIX: LIST OF AMICI CURIAE

THE NATIONAL ABORTION RIGHTS ACTION LEAGUE (NARAL) has over 500,000 members nationwide, 10,000 of whom reside in Michigan. Founded in 1969, NARAL is the largest organization dedicated primarily to keeping abortion safe, legal, and accessible to all women. NARAL recognizes that constitutional protection for the right to choose abortion, and access to a full range of reproductive health care, is critical to women's ability to participate fully and equally in society.

THE MICHIGAN ABORTION RIGHTS ACTION LEAGUE is the Michigan affiliate of the National Abortion Rights Action League and is dedicated to protecting and preserving the right of all women to choose and obtain a legal abortion.

THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (AAUW), a network of 135,000 college-educated women, promotes equity and education for women and girls. AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care. AAUW believes that decisions concerning reproductive health care are personal ones, and that the right to make informed decisions should be available to all women.

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) is a labor union with 1.3 million members over half of whom are women. AFSCME represents employees in state and local government and the private non-profit sector including over 300,000 health care workers. AFSCME has over 65,000 members in the State of Michigan.

THE AMERICAN MEDICAL WOMEN'S ASSOCIATION (AMWA) is a non-profit organization of 12,000 women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly supports laws which protect the health of women, particularly the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

THE AMERICAN PUBLIC HEALTH ASSOCIATION (APHA) is a professional society, founded in 1872, that represents all disciplines and specialties of public health. The Association's aggregate membership includes more than 30,000 members in 24 specialty sections that serve to develop the technical and scientific foundations of the Association's standards, policies, advocacy, professional meetings, and publications. As a national organization, APHA is strengthened by the contributions and participation of 20,000 community health leaders within its network of 51 state and local affiliates. As the world's oldest and largest multi-disciplinary organization of public health professionals and community health leaders, APHA has throughout

its history been in the forefront of numerous efforts to prevent disease and promote health.

CATHOLICS FOR A FREE CHOICE is a national organization of persons of the Catholic faith who are committed to principles of religious liberty and constitutional privacy. The religious and moral beliefs and values of amici, which are deeply rooted in Catholic theology, include the beliefs that the abortion decision is a highly personal one made in an individual's religious and moral teachings and values, and that the individual woman's conscience is the final arbiter of any abortion decision. Amici recognize that other religious faiths permit, counsel, and even mandate abortion in some circumstances. Amici strongly believe that a woman's decision about childbearing must be free of government burden, interference, and coercion.

CENTER FOR POPULATION OPTIONS (CPO) is a national, non-profit organization dedicated to the prevention of unintended adolescent pregnancy and too-early childbearing. CPO develops programs to increase opportunities for young people through education, comprehensive health care, and access to family planning services.

CITIZENS FOR PERSONAL FREEDOM is committed to furthering the right of every woman to reproductive freedom, and ensuring the right to privacy from government intervention.

COALITION OF LABOR UNION WOMEN - JACKSON AREA is dedicated to equal rights for women and the belief that the government should not interfere with the constitutional right to privacy and to choose abortion.

COALITION OF LABOR UNION WOMEN - KENT COUNTY (KCCLUW) believes the government should not interfere with a person's constitutional right to privacy and the right to choose abortion.

COALITION OF LABOR UNION WOMEN, MACOMB OAKLAND CHAPTER (CLUWMOC) was founded in 1974 and believes the government should not interfere with a person's constitutional right to privacy or a women's right to choose abortion.

DETROIT ASSOCIATION OF BLACK SOCIAL WORKERS, DETROIT CHAPTER advocates for freedom of the people to make choices regarding livelihood, work and family life. The DABSW believes that all women should have equal access to reproductive freedom regardless of economic status.

THE 80% MAJORITY CAMPAIGN is a national non-profit organization that provides a pro-choice research and information service. It publishes a national newsletter, The Campaign

Report, which informs its subscribers about the many varied events that impact on the right to legal abortion.

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law that affect equality between the sexes. ERA believes that the right to control ones' reproductive life is fundamental to women's ability to gain equality in other aspects of society.

THE HUMAN RIGHTS CAMPAIGN FUND is the largest national organization representing lesbian and gay Americans, including many lesbians and gays living in Michigan. Our members are vitally concerned with issues related to reproductive freedom, equal protection, privacy and due process, as well as full access to medical procedures.

THE INSTITUTE FOR WOMEN'S POLICY RESEARCH is an independent, non-profit, scientific research organization, founded in 1987, to meet the need for women-centered, policy-oriented research. The Institute works with policy makers, scholars, and advocacy groups around the country to design, execute and disseminate research findings that illuminate policy issues affecting women and families, and to build a network of individuals and organizations that conduct and use policy research of importance to women.

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. is a national public interest law organization which advocates for the rights of lesbians and gay men through impact litigation and education. Lambda has been particularly involved in constitutional litigation to ensure that the guarantees of equal protection, due process and privacy include gay and lesbian citizens, and has special interest in the development of independent interpretations of state constitutions. The broad guarantees of state constitutions regarding individual rights are crucial to the continued legal right of women to control their own bodies and the right of each individual to engage in intimate associations without governmental interference.

THE MICHIGAN FEDERATION OF BUSINESS & PROFESSIONAL WOMEN'S CLUBS, INC. supports the rights of all women to unhindered access to the full range of health care options. Equality in health care includes freedom of choice in the areas of treatment, reproductive rights, research and insurance provisions encompassed in a safe and healthy environment.

THE MICHIGAN WOMEN'S CAMPAIGN FUND (The FUND) fosters, promotes, and supports the election and appointment of qualified, progressive women to Michigan public office and supports issues

of interest to progressive women. The FUND will support only those candidates who support the ERA, are pro-choice and oppose sex discrimination.

MICHIGAN WOMEN'S POLITICAL CAUCUS (MWPC) is an independent, bipartisan, pro-choice organization dedicated to electing women to state and federal offices. We believe woman's right to choose is a private issue and the government should not interfere in the decision-making process.

MS. FOUNDATION FOR WOMEN, INC. was established in 1972, and is the only public, nationwide multi-issue women's fund in the United States. Since its inception, the Foundation has supported the efforts of grassroots women to fight discrimination and violence, protect children and develop healthy families, achieve economic justice and safeguard reproductive rights.

THE NATIONAL ABORTION FEDERATION (NAF) was founded in 1977, and has 298 institutional members, 272 of which are abortion providers. NAF's primary objective is to unite providers of abortion services into a professional community dedicated to quality care. NAF provides professional standards, guidelines, training, and education to its members. It also serves as a clearing house for information and advice to abortion-service professionals and the general public.

THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC. (NASW), a non-profit professional association with over 135,000 members, is the largest association of social workers in the United States. Founded in 1955, NASW has chapters in every state as well as the Virgin Islands, Puerto Rico and Europe. The Michigan Chapter has over 7,300 members. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession, and to improving the quality of life through utilization of social work knowledge and skills. NASW is deeply committed to personal choice and to the protection of individual rights and personal privacy.

THE NATIONAL COUNCIL FOR RESEARCH ON WOMEN (NCRW) is an independent association of 69 centers devoted to increasing access to information and resources on women. NCRW supports interpretations of state law that increase all women's constitutional rights, and particularly advocate equal rights for women with less access to resources.

THE NATIONAL COUNCIL OF JEWISH WOMEN (NCJW) was founded in 1893, and is the oldest Jewish women's volunteer organization in America. NCJW's 100,000 members in more than 200 sections across the United States keep the organization's promise to dedicate themselves, in the spirit of Judaism to advancing human

welfare and the democratic way of life through a combination of social action, education and community service. Based on NCJW's concern for individual rights and our National Resolutions which include working for "services which provide family planning and reproductive choice, regardless of age and ability to pay, while assuring confidentiality" we join this brief.

THE NATIONAL COUNCIL OF JEWISH WOMEN - MICHIGAN CHAPTER endorses, and resolves to work for, the protection of every female's right to choose abortion and the elimination of obstacles that limit reproductive freedom.

THE NATIONAL COUNCIL OF NEGRO WOMEN, INC. believes that all women, regardless of economic status, are entitled to the right to privacy. This right must be protected to the greatest extent possible under federal and state law. We believe the rights of the individual must be protected especially in matters relating to the right to choose. We are strongly opposed to the economic coercion of poor women by states with Medicaid funding for prenatal care and childbirth, but no Medicaid funding of abortions. All women must be able to freely decide if and when to bear children with all medically feasible options open to them regardless of economic status.

THE NATIONAL GAY AND LESBIAN TASK FORCE is a national organization dedicated to building a movement to promote freedom and full equality for lesbians and gay men. The organization serves 17,000 members and exists to eradicate prejudice, discrimination, and violence based on sexual orientation and HIV status. The organization engages in lobbying, community organizing, public education, research, and policy analysis, and is committed to the protection of privacy and other individual rights for all persons.

THE NATIONAL WOMEN'S LAW CENTER is a Washington-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women, especially those who are poor. The fundamental right to abortion recognized in Roe v. Wade, and under assault by the Supreme Court, is of profound importance to the lives, liberty, equality, and health of women throughout the country. However, the right to choose is meaningless for women who cannot afford to pay for abortions. Public funding is absolutely essential if women are to exercise real choices in their lives.

NOW LEGAL DEFENSE & EDUCATION FUND (NOW LDEF), founded in 1970 by leaders of the National Organization for Women, is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of

women's efforts to eliminate sex-based discrimination and secure equal rights. One of NOW LDEF's priorities is the protection of the reproductive rights and health of all women, particularly low-income women and women of color.

THE NATIONAL ORGANIZATION FOR WOMEN, MICHIGAN CONFERENCE is dedicated to taking action to bring women into full partnership in the mainstream of American society, exercising all privileges and responsibilities thereof in truly equal partnership with men. Our commitment to achieving full equality is illustrated by our firm support of reproductive freedom.

THE NATIONAL WOMEN'S CONFERENCE COMMITTEE is the authority constituted under Public Law 94-167 as guardians and monitors of the 1977 National Plan of Action for Women. It fully supports a woman's right to choose abortion. This position was affirmed overwhelmingly by demographically proportionate elected delegates to the only federally-sponsored National Women's Conference.

PEOPLE FOR THE AMERICAN WAY (PFAW) is a national nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including freedoms protected both by state constitutions and the Bill of Rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAW now has over 300,000 members nationwide. PFAW joins this brief because of the potential significance of this case in further establishing that state constitutions can and do go beyond the federal constitution in protecting fundamental rights and liberties, including the right to choose.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. (PPFA) is a New York not-for-profit corporation organized in 1922. It is the leading national voluntary public health organization in the field of family planning. PPFA has 169 affiliates in 49 states and the District of Columbia, all of them separate not-for-profit entities. These affiliates operate over 800 family planning clinics offering services to the public. PPFA's mission statement declares that Planned Parenthood believes in the fundamental right of each individual, throughout the world, to manage his or her fertility, regardless of the individual's income, marital status, age, national origin, or residence. It is also the policy of PPFA to ensure that women have the right to seek and obtain medically safe, legal abortions under dignified conditions and at reasonable cost, and that no one should be denied abortion services solely because of age, or economic or social circumstances. It is also PPFA's stated policy that public funds should be made available to subsidize the cost of

abortion services for those who choose abortion but cannot afford it.

THE RELIGIOUS COALITION FOR ABORTION RIGHTS is composed of 35 national religious organizations -- Protestant, Jewish and other faith groups. We hold in high respect the value of potential human life; we do not take the question of choice lightly. Because each denomination and faith group represented among us approaches the issue of choice from the unique perspective of its own theology, members hold widely varying viewpoints as to when abortion is morally justified. It is exactly this plurality of beliefs which leads us to the convictions that the abortion decision must remain with the individual, to be made on the basis of conscience and personal religious principles, and free from governmental interference. We oppose efforts to enact into secular law one particular religious doctrine on abortion or the beginning of human life.

THE UNION OF AMERICAN HEBREW CONGREGATIONS (UAHC) represents 850 Reform Jewish congregations across the United States and Canada with membership of 1.5 million Jews. The UAHC has long been committed to the importance of religious freedom, the right to privacy, and the expansion of rights for women and has engaged in extensive educational work on behalf of these rights.

UPPER PENINSULA COALITION FOR WOMEN'S RIGHTS is a network of individuals and member organizations in the Upper Peninsula which promotes information, education, and action concerning women's rights. We are committed to promoting "choice" in all aspects of women's lives; particularly in the area of reproductive responsibility. We strongly support the premise that women in the state of Michigan and elsewhere in our country have a constitutional right to privacy in matters that concern their bodies.

VOTERS FOR CHOICE is a national, independent, bipartisan, and pro-choice political action committee. In order to preserve access to safe and legal abortion for all women, Voters For Choice helps to elect pro-choice candidates to federal and state-level public offices.

VOICE FOR CHOICE OF KALAMAZOO is dedicated to the preservation and restoration of a full range of reproductive options for all women.

VOTERS FOR CHOICE OF SOUTHWESTERN MICHIGAN believes that every woman is guaranteed the right to privacy. This includes the right to choose either to continue or terminate a pregnancy without the interference of the State. We have found that there is no conclusive evidence determining when life begins

and that it is a matter of personal faith. For this reason we believe that the person most profoundly affected, the pregnant woman, must be the only person allowed to make the abortion decision. She must be allowed to make this decision according to her own ethical, moral, and religious beliefs. We further believe that this decision must be available, without fear, to all women regardless of socioeconomic status.

WOMEN EMPLOYED is a national organization of working women, based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that any limitation on women's reproductive rights will have a profoundly negative impact on women's opportunities to achieve economic equity.

THE WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM represents 15,000 women across the United States. We fully support and advocate for a woman's right to choose whether or not to have an abortion, and are committed to accessibility and affordability of abortions for women of all classes and income levels. We oppose any effort to restrict access to abortion or to information about abortion as an option.

THE WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, DETROIT CHAPTER fully supports and advocates for a woman's right to choose whether or not to have abortion, and is committed to accessibility and affordability of abortions for women of all classes and income.

THE WOMEN'S MEDICAL FUND is a voluntary organization which has helped thousands of women pay for abortion care since 1972. The Women's Medical Fund believes all women, including poor women, should have the right to choose abortion.

THE WOMEN'S LEGAL DEFENSE FUND (WLDF), a non-profit national advocacy organization, works at the federal and state levels for policies that offer equal opportunity to women, respond to women's basic economic and health needs, and enable women and men to participate fully in family and community life. Because WLDF believes that reproductive freedom for all women is fundamental to the achievement of these goals, it files amicus briefs in major reproductive rights and health cases, advocates for reproductive rights and health care for women before Congress, and provides policy options about reproductive health policies to federal and state legislators.

ZERO POPULATION GROWTH is committed to promoting the linkages between population growth and environmental degradation.

ZPG's goal is to stop global population growth and over-consumption of the world's natural resources by changing U.S. public policies, attitudes, and behavior.

STATE OF MICHIGAN
IN THE SUPREME COURT

JANE DOE and NANCY DOE,

Plaintiffs-Appellees,

-vs-

PATRICK BABCOCK, in his official capacity as DIRECTOR OF THE MICHIGAN DEPARTMENT OF SOCIAL SERVICES; and KEVIN SEITZ, in his official capacity as DIRECTOR OF MEDICAL SERVICES ADMINISTRATION OF THE MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellants,

and

RIGHT TO LIFE OF MICHIGAN, INC., a Michigan nonprofit corporation; RIGHT TO LIFE OF MICHIGAN, INC. LEGAL DEFENSE FUND, a trust; COMMITTEE TO END TAX FUNDED ABORTIONS, a ballot question committee; and MARY ZICK, JENNIFER DONOVAN, KENT DONOVAN, RICH HALLIBURTON, COLLEEN HOLBROOK, and JOE KLEE, in their individual capacities,

Intervening Defendants-Appellants.

Supreme Court
No. 91092 and 91093

Court of Appeals
No. 116069

Lower Court
No. 89 904749 CZ

_____/

PROOF OF SERVICE

)
DISTRICT OF COLUMBIA)
)

MICHAEL SMALL, being first duly sworn, deposes and says that he is counsel for the National Abortion Rights Action League, and on the 9th day of October, 1991, he sent a corrected

copy of the Brief of The National Abortion Rights Action League, The Michigan Abortion Rights Action League, and Forty-five National and Michigan Organizations Committed to Women's Equality as Amici Curiae in Support of Plaintiffs-Appellees, by Federal Express to: Elizabeth Gliecher, Esq., 30th Floor Cadillac Tower, Detroit, Michigan 48226; John B. Curcio, Esq., 800 Michigan National Tower, Lansing, Michigan 48933; and to Gay Secor Hardy, Solicitor General, 525 W. Ottawa, 7th Floor, Lansing, Michigan 48933.

By _____
Michael C. Small
Counsel for the National Abortion Rights Action League

Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

Dated: October 9, 1991

Before me, a Notary Public, this 9th day of October, 1991, appeared Michael C. Small who, after first being duly sworn, deposed and stated that he has prepared the within Proof of Service and that, upon information and belief, all of the factual assertions contained therein are true.

_____
Notary Public
My Commission Expires May 14, 1993