UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHLAND FAMILY PLANNING CLINIC, INC., et al.,

Plaintiffs,

v

JANET OLSZEWSKI, et al.,

Defendants.

No. CV 03-71054

Hon. John Corbett O'Meara

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THE STATE DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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1. Is the elimination of financial incentives for an abortion a rational basis for delaying payment to an abortionist during the 24-hour decisional waiting period?

2. Does the delay in payment to an abortionist until the 24-hour decisional period expires implicate a fundamental right or create a suspect classification?

3. Do §§ 17015(9) or (11)(c) outlaw constitutionally protected expression or expressive conduct?

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INTRODUCTION

Plaintiffs challenge the constitutionality of MCL 333.17015(9), which reads:

> This subsection does not prohibit notifying the patient that payment for medical services will be required or that collection of payment in full for all medical services provided or planned may be demanded after the 24-hour period described in this subsection has expired. A physician or an agent of the physician shall not collect payment, in whole or in part, for a medical service provided to or planned for a patient before the expiration of 24 hours from the time the patient has done either or both of the following, except in the case of a physician or an agent of a physician receiving capitated payments or under a salary arrangement for providing those medical services:
>
> (a) Inquired about obtaining an abortion after her pregnancy is confirmed and she has received from that physician or a qualified person assisting the physician the information required under subsection (3)(c) and (d).
> (b) Scheduled an abortion to be performed by that physician.

Plaintiffs also challenge on the same grounds the constitutionality of the requirement in subsection (11)(c) that the acknowledgement and consent form state:

> I certify that I have not been required to make any payments for an abortion or any medical service before the expiration of 24 hours after I received the written materials listed in paragraphs (a), (b), and (c) above, or 24 hours after the time and date listed on the confirmation form if paragraphs (a), (b), and (c) were viewed from the state of Michigan internet website."

Plaintiffs argue this delay in payment for medical services during the 24-hour informational and decisional waiting period violates due process and equal protection and that the requirement is vague. Defendants contend that these provisions are constitutional.

STATEMENT OF FACTS

In 1993 the Michigan legislature enacted 1993 PA 133, MCL 333.17014, *et seq.* which is known as the informed consent for abortion statute. Prior to its implementation, some of the Plaintiffs in the instant case and similar abortion providers brought suit, effectively preventing its

implementation for 5 ½ years. As a result of a settlement, the 1993 act became effective in 1999 and then was amended by 2000 PA 345, which *inter alia* amended section 17015 to add subsection (9) and delay the collection of payments for abortion related medical services during the 24-hour decisional waiting period.

Many of the Plaintiffs in the instant case filed suit to prevent the implementation of 2000 PA 345. Again through a settlement, all provisions of Act 345, except subsection (9) and related portions of subsection (11), were implemented. These were subjected to judicial scrutiny by this Court, which heard arguments similar to those raised in this case. On February 26, 2002, this Court issued its opinion and order, finding subsection 17015(9) unconstitutional.

The basis for this Court's decision was explained in its Order Denying Defendants' Motion to Amend Findings, dated July 17, 2002. In that opinion (attached in Appendix A) this Court clarified that its decision was based solely on its finding that subsection (9) was void for vagueness. On page 3, this Court held:

> Whether the statute violates substantive due process by imposing an **undue burden** on women's right to choose **is an issue separate from** Plaintiffs' **vagueness** claim **and an issue this court did not reach."** (Emphasis added.)

With this Court's opinion of February 26, 2002, and its clarification of July 17, 2002, in hand, the legislature determined to correct the void for vagueness constitutional deficiencies contained in subsection (9). See legislative history in Appendix B. The result was 2002 PA 685, the subject of this lawsuit.

Act 685 specifically corrected the constitutional problems found in or discussed concerning the previous language. In § 17014 it made a finding explaining the rational basis for subsection (9). In § 16299 it deleted the criminal penalty for violation of § 17015. And in § 17015 it altered the provision to eliminate the vagueness perceived by the court in its decisions.

Among other things, a definition of "medical services" was added and the delay in payment provision was made definite in its terms.

The legislature also amended subsection (11)(c) in an attempt to make it conform to subsection (9).

ARGUMENT

The discussion of constitutional issues in this case must begin with attention to several bedrock principles of jurisprudence. The first principle is that a federal district court must follow controlling Supreme Court precedent, and may not reject, dismiss, disregard or deny such precedent. *Hutto v Davis*, 454 US 370, 375 (1982); *Thurston Motor Lines, Inc. v Jordan K. Rand, Ltd.*, 460 US 533, 535 (1983); *Hopwood v State of Texas*, 84 F3d 720, 722 (5th Cir 1996). The same logic suggests that a district court also may not expand the Supreme Court's decisions, but is limited by the holding of the court and the material facts upon which it is based.

The second bedrock principle is that state statutes enjoy a presumption of constitutionality, which requires the court to construe the statute to avoid constitutional difficulty. This same principle also requires the court to give deference to the statute whenever possible. *McDonald v Brd of Elec Commrs*, 394 US 802, 809 (1969); *Hartford Fire Ins v Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F2d 1362, 1366 (6th Cir 1984); *Ann Arbor v Northwest Park Constr Corp*, 280 F2d 212, 223 (6th Cir 1960); *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 341-42 (1946). Furthermore, the logic behind this principle requires the court to reject the plaintiffs' claims when, as in this case, they adopt a construction of the statute designed to raise every constitutional difficulty; even those that do not clearly appear in or are not fairly presented by the statutory language. "The Supreme Court has instructed on numerous occasions that a court is not to strike down a law as unconstitutional on the bases of a 'worst-case

analysis that may never occur.'" *Planned Parenthood v Casey*, 947 F2d 682, 701 (3rd Cir 1991) (quoting *Ohio v Akron Center for Reproductive Health*, 497 US 502, 514 (1990)).

The third bedrock principle to which this Court must adhere is that federal courts should exercise great restraint in enjoining state laws and not substitute their own judicial policy preferences for those of elected policymakers. Only when a statute is clearly unconstitutional and/or clearly violates controlling judicial precedent should a federal court step in and enjoin a state law. *Kevorkian v Thompson*, 947 F Supp 1152 (ED Mich 1997). The logic of federalism embedded within and underlying this latter principle also requires the court to favor the policy of the peoples' elected representatives whenever constitutional doctrine permits. See, *Eubanks v Wilkinson*, 937 F2d 1118, 1125 (6th Cir 1991).

According to the final bedrock principle that this Court must follow, the practice of medicine is subject to regulation under State police power. "Where an individual or corporation engages in occupations in which the public has an interest, that occupation may be regulated under the police power of the State." *United States v Tehan*, 365 F2d 191, 194 (6th Cir 1966)(citing *Nebbia v New York*, 291 US 502 (1934)), *cert den* 395 US 1012 (1967). And this principle is applicable to abortionists as well as other occupations. Since "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child" (*Planned Parenthood of Southeastern Pa. v Casey*, 506 US 833, 846 (1992)), there is no legitimate reason for exempting abortionists from the police power to which physicians and other occupations are subject. Because "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning" (*Id* at 873), the power of the state to enact reasonable economic regulations aimed at

"important and legitimate interests" (*Id* at 871) in protecting "the potential life within the woman" (*Id* at 875) "throughout pregnancy" (*Id* at 876) is indisputable.

I. A Delay In Obtaining Payment for a Medical Service During the 24-Hour Information Period Does not Violate an Abortion Provider's Constitutional Right to Due Process or Equal Protection.

Plaintiffs claim a constitutional right to collect for medical services as they are rendered, without the delay imposed by § 17015(9). However, this is not a fundamental right. There is no fundamental right to unfettered economic forces. Free market theory was never a part of the U.S. Constitution. In fact, this notion of striking down state economic regulation because it does not meet certain predilections of the U.S. Supreme Court Justices (or this Court for that matter) is no longer a part of U.S. Constitutional analysis. See *Moore v East Cleveland*, 431 US 494, 502 (1977)(opinion of Powell, J); *Armendariz v Penman*, 75 F3d 1311, 1318 (9th Cir 1996).

The U.S. Supreme Court's pre-1937 era opinions protected economic interests by striking down business regulatory measures under the due process clause that were regarded as tampering with the free market system. "From 1941 to 1970, the United States Supreme Court found economic legislation to violate the equal protection clause in only one case, *Morey v Doud*, 354 US 457 (1957)." *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 688, n 34; 232 NW2d 636 (1975). This lone sentinel to an era gone-by was the only such case to exist until 1976 when it too was overruled by *Orleans v Dukes*, 427 US 297 (1976). See, *Mass Bd of Retirement v Murgia*, 427 US 307, 320 (1976), Justice Marshall dissenting. The high Court has now moved completely away from that analysis of economic regulation, and substantive due process guarantees no longer impose significant restraints on the government's ability to act in such matters. J. Nowak, R. Rotunda, and J. Young (1978), *Constitutional Law*, pp 404-410. See also, Anticau, *Modern Constitutional Law*, § 3.17, pp 228-321.

A. The Appropriate Standard of Review is the Rational Basis Test.

The controlling Supreme Court precedent establishes that economic regulation will be upheld against constitutional due process and equal protection challenges if a rational basis exists for the requirements imposed. As the Supreme Court stated nearly 50 years ago:

> . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

Williamson v Lee Optical, 348 US 483, 488 (1955).

The modern substantive due process approach looks at the type of interest allegedly involved. Only if a "fundamental" right "implicit in the concept of ordered liberty" is implicated will the court subjectively inquire into the importance of the state's objective (ends test) or the reasonableness of the means for achieving it (means test). *Substantive Due Process Analysis of Nonlegislative State Action*, Brig Young U L Rev (1980), pp 353-354; *Substantive Due Process Comes Home to Roost*; Fundamental Rights. Women's Rights L Rptr (1988), Vol 10, pp 178-180; *Substantive Due Process in 1791*, Wis L Rev (1990), pp 942-943. In the absence of "fundamental" interests, state action will generally be upheld if it simply meets the rational basis test. Brig Young U L Rev (1980), *supra*, p 347.

If a fundamental right is not involved, a plaintiff may obtain relief if the state statute or regulation creates a suspect classification. "To withstand Fourteenth Amendment scrutiny, a statute is required to bear only a rational relationship to a legitimate state interest, unless it makes a suspect classification or implicates a fundamental right." *Nat'l Assoc for Advancement of Psychoanalysis v Calif Bd of Psychology*, 228 F3d 1043, 1049 (9th Cir 2000). See also, *City of New Orleans v Derkes*, 427 US 297, 303 (1976); *Richardson v City & County of Honolulu*, 124

F3d 1150, 1162 (9th cir 1997). The challenge to §§ 17015(9) and (11) involves no fundamental right or suspect classification.

Instead, only a limited number of rights fundamental to the concept of ordered liberty are protected against state economic regulation. In addition to the guarantees of the first eight amendments to the U.S. Constitution, the fundamental rights that have been enumerated so far are: (1) freedom of association, (2) a right to vote, (3) a right to interstate travel, and (4) a right to privacy and some freedom of choice in marital, sexual, and family matters. Brig Young U L Rev (1980), *supra*, p 354. Plaintiffs' challenge to §§ 17015(9) and (11) does not implicate a suspect classification, or a fundamental right guaranteed by the Bill of Rights or implicit in ordered liberty. Therefore, § 17015 is not subject to strict scrutiny under the U.S. Constitution. The court may not inquire into the importance of the state's objective (ends test) or the reasonableness of the means of achieving it (means test), and §§ 17015(9) and (11) must only meet the rational basis test. Brig Young U L Rev (1980) *supra*, p 355.

B. The Delay in Obtaining Payment has a Rational Basis.

The rational basis test places an extraordinary burden on the plaintiff. One commentator has described it as "a presumption of validity so sweeping that it will not be disturbed if any basis for the legislation 'could' reasonably be assumed." *State Economic Regulation and Substantive Due Process of Law*, Northwestern U L Rev (1958), Vol 53, p 25. The rule extends "to all businesses and occupations, and effectively forecloses judicial relief from economic legislation on substantive due process grounds." *Id.* The burden on plaintiff has been described by the U.S. Supreme Court itself as "virtually impossible to discharge." *Miller v California*, 413 US 15, 22 (1973); *Substantive Due Process; A Doctrine for Regulatory Control*, Southwestern U L Rev (1983), Vol 13, p 481.

In 1938 Justice Stone stated the rational basis standard applied under the U.S. Constitution: "[Judicial inquiries] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *United States v Carolene Products Co*, 304 US 144, 154 (1938). Under this standard the courts are not permitted to second-guess the reasonableness of the legislative judgment. The federal courts "do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy it expresses offends public welfare." *Day-Brite Lighting, Inc. v Missouri*, 342 US 421, 423 (1952).

Even where the U.S. Supreme Court conceded that a law might impose a "needless, wasteful requirement in many cases," it would be upheld if the legislature "might have concluded" that the waste was justified in order to achieve a legitimate objective. *Williamson v Lee Optical, supra*, at 487. The party attacking the law must show that the legislature could not in good faith believe a need for the law to exist. Northwestern U L Rev (1958), *supra*, pp 24-25.

Moreover, "we do not require that the government's action actually advance its stated purposes, but merely looks to see whether the government *could* have had a legitimate reason for acting as it did." *Dittman v California*, 191 F3d 1020, 1031 (9th Cir 1999) (emphasis in original). The Court need only determine whether the statutory scheme has a "conceivable basis" on which it might survive rational basis scrutiny. *Id.*

"This deference helps explain why today socioeconomic legislation is not struck down under substantive due process. The judgment that a particular socioeconomic program will achieve its objective is virtually always plausible." *Substantive Due Process Revisited*, Northwestern U L Rev (1977), Vol 71, p 423. Consequently, "[t]he last [US] Supreme Court case to declare an economic regulation invalid as a violation of substantive due process was *Morehead v New York ex rel Tipaldo*, 298 US 587, 617-18 (1936)." Wis L Rev (1990), *supra*, p

944. Therefore, §§ 17015(9) and (11) are unconstitutional only if no rational basis exists; only if no reasonably conceivable state of facts can possibly justify the delay in obtaining payment for medical services during the 24-hour information and decision period.

There is a rational basis for §§ 17015(9) and (11) by providing protection for the potential human life within a woman in a vulnerable situation who may be exploited by someone standing to gain financially from the decision to abort her baby. The statute protects mother and unborn by preventing and/or eliminating the use of financial incentives, e.g., deposits, prepayments or other inducements, during the 24-hour decisional period. A woman cannot freely contemplate her decision during the decisional period if the abortionist has already extracted a 50% down payment, or required prepayment of the fee. When such financial inducements are used, a woman has a coercive financial investment in a decision to go ahead with the abortion. The statute attempts to take this financial incentive out of the calculus during this decisional period. The bill analyses attached as Appendix C demonstrate this clearly. In the House Legislative Analysis of May 15, 2002, the problem being corrected is stated as follows:

> After the 24-hour waiting period was created, it was reported that some physicians were requiring patients to pay for planned abortions and related services during the 24-hour waiting period and then refusing to refund fully or partially the payment to patients who decided not to have abortions.

The same analysis discusses arguments for the bill, stating:

> The code's current restriction on prepayments for abortion related services was intended to ensure that a woman who is considering having an abortion is not financially vested in doing so before she has had time to read and reflect on the material that must b e given to her. Physicians and facilities often advertise free services to women seeking to determine whether they are pregnant and seeking information or advice on what to do if they are pregnant. After advertising free pregnancy testing and other services, some physicians and facilities have required that a woman who is planning to have an abortion make a down payment. Some unscrupulous physicians and facilities that have required down payments have refused to refund the money to women who eventually decide to carry their pregnancies to term or have at least created hurdles for women seeking to obtain

> refunds. Such actions effectively pressure women to make decisions that they might not otherwise make. For instance, a woman who has decided not to have an abortion might reason that since she has paid $200 towards an abortion, or whatever the amount may be, and since she cannot get the money back, she might as well go through with it.

Thus, subsection (9) also creates a "bubble" around the 24-hour decisional period in which a woman is insulated from having to concern herself with financial matters, while making such a momentous decision. Providing such protection is a rational basis for delaying payment for medical services during the 24-hour period.

II. Sections 17015(9) and (11)(c) are not Unconstitutionally Vague.

A. Sections 17015(9) and (11)(c) do not Outlaw any Constitutionally Protected Activity.

As noted in this brief, abortionists have no constitutionally protected right to immediate payment for their services. Payment may be delayed for a short period of time in the interest of eliminating financial incentives to obtain an abortion and for consumer protection purposes. Therefore, §§ 17015(9) and (11) do not reach constitutionally protected activities. The statute does not ban or discourage use of the right to choose. Further, no fundamental right, such as free speech, is implicated by operation of §§ 17015(9) and (11).

B. The Statutory Language Informs Those of Ordinary Intelligence of the Conduct Prohibited.

The void-for-vagueness doctrine requires a statute to: (a) define the prohibited conduct with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (b) permit enforcement in a non-arbitrary, non-discriminatory manner. *Kolendar v Lawson*, 461 US 352, 357 (1983). A statute is void-for-vagueness if it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis. . . ." *Grayned v City of Rockford*, 408 US 104, 108 (1972). However, the doctrine recognizes that "[w]ords inevitably contain germs of uncertainty." *Broadrick v Oklahoma*, 413 US 601, 608

(1973). So to be invalid a statute must be so vague that "men of common intelligence must necessarily guess at its meaning." *Connally v General Constr Co*, 269 US 385, 391 (1926). See *Grayned v City of Rockford*, 408 US 104, 108-114 (1972); *Colten v Kentucky*, 407 US 104, 110-111 (1972); *Cameron v Johnson*, 390 US 611, 616 (1968)." [*Id.*]

Neither subsection 17015(9) nor 17015(11)(c) is vague in its terms. The language of subsection 17015(9) allows a physician to collect payment for medical services at the time of service, except during the 24-hour period following delivery to the patient of the information materials listed in the law and/or following the scheduling of an abortion. Only during that 24-hour decisional period can no payments be collected. See Affidavit of Peter Trezise, Appendix D. Similarly, the challenged portion of subsection 11(c) is a certification wherein a woman reiterates that she was not required to make payment for a medical service during the 24-hour decisional period.

Plaintiffs claim that the statute is vague due to the apparent inconsistencies between the language requiring a delay in payment as imposed on a physician in subsection (9) and the language of the patient's certification in subsection 11(c). However, close scrutiny of the arguments discloses no unconstitutional vagueness.

Subsection (9) imposes a limit on a physician. If the physician adheres to subsection (9) and does not collect payment for medical services during the 24-hour decisional period, he/she will be in conformance with the law. No vagueness there. Subsection 11(c) is a statement that must be signed by a patient. The salient physician's obligation is to present it to the patient for signature. There is nothing vague in that requirement.

Plaintiffs' claim § 17015(9) is unconstitutionally vague because Plaintiffs are subjectively uncertain about some of its terms in relation to the § 17015(11)(c) certification and unsure

whether they can obtain prompt payment for some services. However, Plaintiffs' subjective uncertainty is not an appropriate test of the statute's constitutionality, and their uncertainty is not justifiably based upon indefiniteness in § 17015(9). The appropriate test is an objective one: whether a person of ordinary intelligence can determine the proscribed conduct which could lead to sanctions.

A statute is not unconstitutionally vague simply because it lacks perfect harmony between two subsections. Plaintiffs profess confusion because they have a vested interest in raising impossible standards of clarity and closing their eyes and minds to simple application of the statute. Section 17015(9) and 11(c) only becomes clouded in Plaintiffs' world of worst-case scenarios and make-believe circumstances. However, there is no vagueness in the statute. "A statute may be sustained against charges of vagueness if, as construed, it gives reasonable notice of forbidden conduct:"

> That the notice does not sink in—that some people close their eyes (or minds) and thus do not learn of the law's contents or appreciate its application to their conduct—does not prevent a state from enforcing its rules. *Hope Clinic v Ryan*, 195 F 3d 857, 866 (7th Cir 1999).

In this case, Plaintiffs have a vested interest in closing their eyes and minds to simple application of the statue and in raising impossible standards of clarity. However, their claims to the contrary notwithstanding, a reasonable interpretation of § 17015(9) and (11)(c) leads to the relatively obvious conclusion that a physician may not collect for services from a patient who schedules an abortion or receives the informational materials during the 24-hour decision-making period that immediately follows. Thus § 17015 is as reasonably precise and clear as the constitution requires and is not void-for-vagueness.

III. Plaintiffs Do Not Meet the Requirements For Temporary or Preliminary Injunctive Relief.

The Sixth Circuit recently reiterated the standard for preliminary injunction in *Sandison v Michigan High School Athletic Association*, 64 F3d 1026 (6th Cir. 1995): 1) Whether the movant has a strong likelihood of success on the merits; 2) Whether the movant would otherwise suffer irreparable injury; 3) Whether issuance of a preliminary injunction would cause substantial harm to others; and 4) Whether the public interest would be served. 64 F3d at 1030. The moving party bears the burden of demonstrating the existence of these four crucial prerequisites before injunctive relief can be granted. *Merrill Lynch Pierce Fenner & Smith, Inc v E F Hutton & Co, Inc*, 403 F Supp 336, 339 (ED Mich, 1975). The Sixth Circuit's reiteration of the necessity for a strong likelihood of success on the merits in *Sandison, supra*, and the citation therein to *USACO Coal Co. v Carboman Energy*, 689 F2d 94, 98 (6th Cir 1982) suggests that the Sixth Circuit **does** require much more than a fair likelihood of success on the merits. Under the Sixth Circuit standard, the criteria is a "strong likelihood of success on the merits." The Sixth Circuit has also ruled, however, that the criteria are "factors to be balanced" and, thus, the degree of likelihood of success required to support the grant of preliminary injunction depends on the strength of other factors. *Dayton Area Visually Insured Persons v Fisher*, 70 F3d 1474, 1480 (6th Cir 1995).

A. There Is No Threat of Imminent, Irreparable Harm.

Irreparable injury has been defined as injury which is certain and great. *Coffee Dan's, Inc v Coffee Don's Charcoal Broiler*, 305 F Supp 1210, 1216 (ND Cal 1969). The harm that would result in the absence of the injunction must be irreparable, not merely substantial. *Sampson v Murray*, 415 US 61, 88 (1974); *Hodge Business Systems v USA Mobile Communications*, 910 F2d 307, 309 (6th Cir 1990). Irreparable injury must be both *certain and great; it must be*

actual, and not merely theoretical. Merrill Lynch Pierce Fenner & Smith, Inc, supra at 343. An injunction should not be issued upon speculative suppositions about possible future action by others. See, *Metrobanc v Fed Home Loan Bank Bd*, 666 F Supp 981, 985-986 (1987). It therefore follows that a preliminary injunction should not be granted where such harm is not *imminent* and proof of mere *apprehension* of injury is insufficient to justify granting injunctive relief.

1. Section 17015(9) as enacted in 2002 PA 685 does not ban or restrict the provision of abortion services

The amendments to 1993 PA 133, enacted as 2002 PA 685, do not ban or restrict the provision of abortion services. As set forth more fully in this brief, Plaintiffs misinterpret the statute and contend in their complaint and brief that a delay in payment for medical services concomitant with the constitutionally approved informational and decisional 24-hour waiting period will lead to abortionists not offering their services. The myriad of assumptions and suppositions that Plaintiffs strain their way through on pages 5 and 6 of their brief certainly do not rise to the level of substantial harm. Indeed, they are not even credible proof of an apprehension of injury.

2. There Is No Immediate Threat of Prosecution.

The potential injury from the challenged government conduct must be imminent and not merely hypothetical. *Los Angeles v Lyons*, 461 US 95, 102 (1983). When a party brings a pre-enforcement challenge to a statute, this Court must ask whether "the conflicting parties present a real, substantial controversy which is definite and concrete rather than hypothetical and abstract." *Babbitt v United Farm Workers*, 422 US 289, 298 (1979). In order to prove that a real and substantial controversy exists under *Babbitt*, Plaintiffs must demonstrate "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." 442 US at 298.

Plaintiffs suggest, in their motions for temporary restraining order and preliminary injunction, that the Act provides no clear notice of the conduct it proscribes that could impose possible administrative sanctions on abortionists. Plaintiffs cannot specifically allege, however, that they are threatened with prosecution, because the criminal sanction for violation of section 17015 was deleted by the amendment of Section 16299 of the act by amendatory Act 685. *Babbitt*, 442 US at 299; *Younger v Harris*, 401 US 37, 42 (1971). Indeed, in the House Legislative Analysis of May 15, 2002, the intent of the legislation is made clear, when it states:

> The bill would also decriminalize violations of the informed consent provisions in order to address an unintended consequence of the original legislation. The point of the informed consent requirements has never been to punish or intimidate physicians who perform abortions but to ensure that women have access to medically accurate information prior to making such an important decision.

Defendants submit that Plaintiffs cannot demonstrate imminent harm and cannot meet this criteria for injunctive relief.

B. Plaintiffs Do Not Have a Substantial Probability of Success on The Merits of This Facial Challenge.

As stated herein at the outset, the discussion of constitutional issues in this case must begin with attention to what District Judge Rosen called "several bedrock principles of jurisprudence" in *Evans v Kelley*, 977 F Supp 1283, 1303 (ED Mich, 1997). First, a federal district court must follow controlling Supreme Court precedent, and may not reject, dismiss, disregard or deny such precedent. The same logic suggests that a district court also may not expand the Supreme Court's decisions, but is limited by the holding of the court and the material facts upon which it is based. Second, state statutes enjoy a presumption of constitutionality, which requires the court to construe the statute to avoid constitutional difficulty. This same principle also requires the court to give deference to the statute whenever possible. Furthermore, the logic behind this principle requires the court to reject the plaintiffs' claims when, as in this

case, they adopt a construction of the statute designed to raise every constitutional difficulty; even those that do not clearly appear in or are not fairly presented by the statutory language. "The Supreme Court has instructed on numerous occasions that a court is not to strike down a law as unconstitutional on the bases of a 'worst-case analyses that may never occur.'" *Planned Parenthood v Casey*, 947 F2d 682, 701 (3d cir, 1991). Third, federal courts should exercise great restraint in enjoining state laws and not substitute their own judicial policy preferences for those of elected policymakers. Only when a statute is clearly unconstitutional and/or clearly violates controlling judicial precedent should a federal court step in and enjoin a state law. The logic of federalism embedded within and underlying this latter principle also requires the court to favor the policy of the peoples' elected representatives whenever constitutional doctrine permits.

As set forth more fully in this brief, Plaintiffs do not have a substantial probability of success on the merits because:

1. The amendments to 1993 PA 133, enacted as 2002 PA 685, do not ban medical abortions or restrict access to abortion services.
2. Scienter is not mandated by the constitution, and 2002 PA 685 removes any criminal penalty for violation of Section 17015.
3. Section 17015 of 2002 PA 685 is not unconstitutionally vague.
4. Even if certain provisions of the act are vague, the appropriate remedy is not to invalidate the entire statute but to strike only the offending provisions.

Moreover, this case was filed prior to the effective date of 2002 PA 685, and the act has never been implemented. Indeed, the injunction Plaintiffs seek will prevent implementation. Therefore, the issues presented are necessarily limited to pre-implementation matters. It follows that this case constitutes a **facial** challenge to the constitutionality of 2002 PA 685, and should be governed by the test established in *U.S. v Salerno*, 481 US 739, 745 (1987), where the U.S. Supreme Court stated "the challenger must establish that no set of circumstances exists under

which the act would be valid." Defendants assert that Plaintiffs have not met their burden and their motion for injunctive relief should be denied.

C. The Public Interest in Having 2002 PA 685 Implemented Outweighs Plaintiffs' Unfounded Apprehension of Harm.

Consideration of the public interest becomes paramount when a preliminary injunction is sought against a state agency. Preliminary relief cannot be issued where doing so would result in harm to the public interests involved. In *Hamlin Testing Laboratories, Inc v US Atomic Energy Comm*, 337 F2d 221, 222 (6th cir, 1964) citing *Virginia Petroleum Jobbers Ass'n v FPC*, 104 US App DC 106; 259 F2d 921, 925 (1958), the Court said:

> In litigation involving the administration of regulatory statutes designed to promote the public interest this factor necessarily becomes crucial. *The interest of the private litigant must give way to the realization of public purposes.*

(Emphasis supplied). A preliminary injunction must be denied where the moving party fails to establish that the requested relief would not harm the public interest. *Hamlin Testing Laboratories, Inc, supra* 337 F2d at 222, citing *Associated Securities Corp v Securities & Exchange Comm*, 283 F2d 773, 775 (10th cir, 1960). In the instant cause, Plaintiffs fail to demonstrate that the proposed relief will not harm the interests of the public in assuring that a woman is protected from undue financial influences before determining to terminate the life of her unborn child.

Act 685 explains this clearly in the finding added to Section 17014 in subsection (h), which states:

> Because abortion services are marketed like many other commercial enterprises, and nearly all abortion providers advertise some free services, including pregnancy tests and counseling, the legislature finds that consumer protection should be extended to women contemplating an abortion decision by delaying any financial transactions until after a 24-hour waiting period. Furthermore, since the legislature and abortion providers have determined that a woman's right to give informed consent to an abortion can be protected by means other than the patient having to travel to the abortion facility during the 24-hour waiting period, the

> legislature finds that abortion providers do not have a legitimate claim of necessity in obtaining payments during the 24-hour waiting period.

In this case the public's interest in implementing valid acts of its elected representatives is balanced on the one hand against Plaintiffs' apprehension, fear, concern, and speculation on the other that abortionists might suffer a small financial loss. As a result, this Court is left with balancing the public interest in having 2002 PA 685 implemented against the abortionists' unfounded and totally unsupported fears.

In any case, no administrative licensing actions can be undertaken against licensed physicians without elaborate, time consuming preliminary proceedings that will give Plaintiffs ample time to ask this or other courts for relief, should it ever become necessary. Accordingly, the public's legitimate interest in implementation clearly outweighs mere apprehension of harm. If an injunction is granted Plaintiffs win, and the public interest loses every day that 2002 PA 685 cannot be implemented.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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Dated: April 16, 2003
s:2003005598A-L Northland pldgs; Resp Oppos Mot for PI 4-16-03

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHLAND FAMILY PLANNING
CLINIC, INC., et al.,

Plaintiffs,

v

JANET OLSZEWSKI, et al.,

Defendants.
_____/

No. CV 03-71054

Hon. John Corbett O'Meara

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APPENDIX TO
THE STATE DEFENDANTS' RESPONSE
IN OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION

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APPENDICES CONTENTS

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PROOF OF SERVICE

The undersigned certifies that on April 16, 2003, a copy of The State Defendants' Response in Opposition to Motion for Preliminary Injunction with Appendix was served upon the parties of record in the above cause by mailing the same to them at their respective address by UPS Next Day Air.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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