UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WOMANCARE OF SOUTHFIELD, P.C., *et al.*,

Plaintiffs,

v.

JENNIFER M. GRANHOLM, Attorney General,

Defendant.

CIVIL ACTION
NO: 00-70585



MARK I. EVANS, M.D., *et al.*,

Plaintiffs,

v.

JENNIFER M. GRANHOLM, Attorney General,

Defendant.

CIVIL ACTION
NO: 00-70586

Consolidated Cases
Hon. Arthur J. Tarnow

**MOTION FOR SUMMARY JUDGMENT**

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For the reasons set forth in the accompanying memorandum, Plaintiffs in the above-consolidated case move for summary judgment on their claim that Michigan Public Act 107 of 1999, the "Infant Protection Act" (to be codified at Michigan Compiled Laws (Mich. Comp. Laws) § 750.90g) ("the Act") is unconstitutional. Plaintiffs seek summary judgment on the grounds that the Act is unconstitutional because it bans dilation and extraction and some dilation and evacuation abortions, and because it lacks a health exception. Attorneys for Plaintiffs discussed the bases for summary judgment with opposing counsel and requested his concurrence in the motion; opposing counsel did not concur in the relief sought. Accordingly, Plaintiffs request that the Court grant their motion for summary judgment; declare the Act unconstitutional; permanently enjoin its enforcement; and award Plaintiffs costs and fees.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## STATEMENT OF THE ISSUES PRESENTED

1. Is the Act an "undue burden" on a woman's right to choose a previability abortion?

2. Is the Act unconstitutional because it lacks a health exception?

## CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

Stenberg v. Carhart, 120 S. Ct. 2597 (2000)

Planned Parenthood v. Casey, 505 U.S. 833 (1992)

## INTRODUCTION

Plaintiffs in WomanCare of Southfield v. Granholm and Evans v. Granholm (together "Plaintiffs") jointly submit this memorandum of law in support of their motion for summary judgment that Michigan Public Act 107 of 1999, the so-called "Infant Protection Act" (to be codified at Michigan Compiled Laws (Mich. Comp. Laws) § 750.90g) [hereinafter "the Act"], is unconstitutional in its entirety and must be permanently enjoined.[1] The primary basis for this motion is the failure of the Act, on its face, to comport with the holdings of the United States Supreme Court in Stenberg v. Carhart, 120 S. Ct. 2597 (2000).

Plaintiffs move for summary judgment on the grounds that the Act bans abortions using the dilation and extraction ("D&X") method, as well as some abortions using the dilation and evacuation ("D&E") method, and on the ground that the Act lacks a health exception. The motion is limited in this respect so as to rely only on facts that are admitted or cannot be contested by Defendant, and that clearly entitle Plaintiffs to judgment as a matter of law.

Although this motion is based on these narrow grounds, Plaintiffs maintain their original position on the scope of the Act–that it criminalizes an array of critical medical care, including essentially all abortion methods, treatment of miscarriage, and some obstetrical procedures. Indeed, that the Act is even broader than Defendant has conceded is supported by the undisputed testimony in this case and this Court's memorandum

[1] A copy of the Act is attached as Exhibit A to the Complaints filed by Plaintiffs in each of these consolidated cases.

Opinion and Order, dated March 9, 2000 ("Opinion"). See Opinion at 47-48. Plaintiffs reserve the right to pursue claims based on these facts if this motion is denied.

## THE STATUTORY SCHEME

The Act makes it a crime for "a person [to] intentionally perform[] a procedure or take[] any action upon a live infant with the intent to cause the death of the live infant." Mich. Comp. Laws § 750.90g(3). The Act defines "live infant" as a "human fetus at any point after any part of the fetus is known to exist outside of the mother's body and has 1 or more of the following: (i) A detectable heartbeat. (ii) Evidence of spontaneous movement. (iii) Evidence of breathing." Mich. Comp. Laws § 750.90g(6)(a). "Part of the fetus" is defined as "any portion of the body of a human fetus that has not been severed from the fetus, but not including the umbilical cord or placenta." Mich. Comp. Laws § 750.90g(6)(c). "Outside of the mother's body" is defined as "beyond the outer abdominal wall or beyond the plane of the vaginal introitus." Mich. Comp. Laws § 750.90g(6)(b).

The Act applies regardless of the stage of gestation of the pregnancy, and regardless of whether the fetus is viable. The only exception to the Act is "if a physician takes measures at any point after a live infant is partially outside of the mother's body, that in the physician's reasonable medical judgment are necessary to save the life of the mother and if every reasonable precaution is also taken to save the live infant's life." Mich. Comp. Laws § 750.90g(4).

Violation of the Act is a felony, punishable by imprisonment for life or any term of years, a fine of not more than $50,000.00, or both. Mich. Comp. Laws § 750.90g(3).

## PROCEDURAL BACKGROUND

The Act was passed by the Michigan legislature in 1999 and scheduled to take effect on March 10, 2000. On February 14 and 15, 2000, Plaintiffs moved for a temporary restraining order and a preliminary injunction. Defendant filed an opposition brief on February 22, 2000 ("Opp. Br."), and on March 2, 2000, this Court held a preliminary injunction hearing. At the hearing, Plaintiff Timothy R.B. Johnson, M.D., testified that the Act would ban every abortion method used both before and after viability.[2] In particular, he testified that the Act would ban suction curettage abortions (Transcript of March 2, 2000, Preliminary Injunction Hearing ("Trans.") 41-43); D&E abortions—both when the fetus is disarticulated during removal and when it remains relatively intact (Trans. 51-57); inductions (Trans. 59-63); and hysterotomy and hysterectomy (Trans. 64-65). In addition, Dr. Johnson testified that the Act would ban medical care necessary to treat some women who are in the process of miscarrying (Trans. 69-71), and others in the process of delivering nonviable fetuses at term (Trans. 71-73). Dr. Johnson further testified that the Act's lack of a health exception would endanger the health of some pregnant women. See Trans. 78-79, 82.

Defendant has admitted the facts that entitle Plaintiffs to the judgment they seek through this motion.[3] In its opposition brief, Defendant admitted that "intact D&X" abortion procedures would be banned by the Act. See Opp. Br. at 9. At the preliminary

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[2] Plaintiffs summarize Dr. Johnson's testimony as part of the procedural history of this case, but do not rely on that testimony for purposes of this motion.

[3] Defendant offered no evidence at the preliminary injunction hearing, and did not cross-examine Dr. Johnson. Although Defendant stated an intent to "save cross-examination of [Dr. Johnson] for the trial in this matter," (see Trans. 83), Plaintiffs dispute that Defendant has preserved the ability to cross-examine Dr. Johnson if a trial in this case becomes necessary.

injunction hearing, Defendant further admitted that the Act would ban D&E abortion procedures where the fetal skull is crushed "after the fetus has traversed the plane of the vaginal introitus." See Trans. 104.

In its ruling on Plaintiffs' motion for preliminary injunction, the Court preliminarily enjoined Defendant and the State of Michigan from enforcing the Act.[4] In its Opinion, the Court noted that:

> Defendants, themselves, initially argued in their brief that D&X was the only act prohibited by the statute. However, at the conclusion of the hearing, Defendants then declared that the Act would ban not only the D&X procedure, but any D&E procedure, "that results in the crushing of the fetus' skull after the fetus has traversed the plane of the vaginal introitus."

Opinion at 39.

## STATEMENT OF FACTS

The following facts are not disputed:

1. Some women need to terminate their pregnancies because continued pregnancy poses risks to their health. See Trans. 78-79, 82; see also Opp. Br. at 27 (Defendant admitting existence of "health interests" of pregnant woman); Trans. 108 (same).

2. The Act lacks an exception that permits performance of a banned procedure when it is necessary for a woman's health. See Mich. Comp. Laws § 750.90g; see also Trans. 78-79; Trans. 108 (Defendant stating that Act lacks health exception because once any part of fetus is "beyond vaginal introitus," fetal life "outweighs simple health interests of" woman); Opp. Br. at 27 (same).

3. A person who performs a D&X abortion violates the Act. See, e.g., Opp. Br. at 9.

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[4] In its Opinion, the Court also denied Defendant's motion to dismiss for lack of standing. The Court found that Plaintiffs have standing to challenge the constitutionality of the Act on their own behalf, and that they also have *jus tertii* standing to challenge the Act on behalf of their pregnant patients. Opinion at 27.

4. A person who performs a D&E abortion that entails crushing the skull of a living fetus after part of the fetus has traversed "the plane of the vaginal introitus" violates the Act. See Trans. 104.

## ARGUMENT

### A. Plaintiffs Are Entitled to Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, . . . and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only disputes over material facts, or facts that might affect the outcome of the suit, may properly preclude the entry of summary judgment. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Thus, if the material facts of a case are undisputed, summary judgment is appropriate. See, e.g., Hammon v. DHL Airways, Inc., 165 F.3d 441, 447 (6th Cir. 1999). As set forth below, this case involves no genuine issue as to any material fact, and Plaintiffs are entitled to summary judgment.

### B. *Carhart* Controls the Outcome of this Case

On June 28, 2000, the United States Supreme Court held that a Nebraska law banning so-called "partial-birth abortion" is unconstitutional. Carhart, 120 S. Ct. 2597. The ruling has two components: first, a ban that encompasses D&E procedures imposes an undue burden on women seeking abortions; second, a statute that bans methods of abortion which may be the most medically appropriate for some women must contain a health exception. Carhart, 120 S. Ct. at 2609 (citing Planned Parenthood v. Casey, 505 U.S. 833, 874, 879 (1992)).

In ruling that the statute imposed an undue burden, the Court rejected Nebraska's claim that the ban could be limited to the D&X procedure, holding that "[e]ven if the

statute's basic aim is to ban D&X, its language makes clear that it also covers a much broader category of procedures," including the D&E procedure. Carhart, 120 S. Ct. at 2614. Thus, the Court found that:

> using this law some present prosecutors and future Attorneys General may choose to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions. All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision.

Id. at 2617. By imposing "'an undue burden on a woman's ability' to choose a D&E abortion," the statute unduly burdens "the right to choose abortion itself." Id. at 2609 (quoting Casey, 505 U.S. at 874).

The Court also held that the Nebraska law violates the Constitution because it lacks any exception "for the preservation of the . . . health of the mother." Id. (internal quotation and citation omitted). The Court noted that:

> the governing standard [set forth in Casey] requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother,' Casey, supra at 879, for this Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion.

Id. (citations omitted). Because the Nebraska law lacked a health exception, the Court held that *even if it could be interpreted to ban only the D&X method of abortion,* it was unconstitutional. Id. at 2613.

The Court specifically rejected Nebraska's claim—echoed by Defendant here, see Opp. Br. at 27-28—that a health exception is not required because "a ban on [the D&X procedure] would create no risk to the health of women," because safe alternative methods would remain available. Carhart, 120 S. Ct. at 2610 (internal quotation and

citation omitted). The Court found that:

> [t]he State fails to demonstrate that banning D&X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure.

Id. at 2610. Moreover, such an exception is required even if the procedure is "rarely used." Id. at 2611.

Every court to address the constitutionality of an abortion procedure ban since Carhart—including the Sixth Circuit and three other circuit courts—has treated Carhart as dispositive.[5] See Causeway Med. Suite v. Foster, No. 99-30324, 2000 WL 1059821, at *1 (5th Cir. Aug. 17, 2000) ("In the light of the Supreme Court's recent decision in [Carhart] . . . , the judgment of the district court [striking down the Louisiana statute] is affirmed."); Richmond Med. Ctr. v. Gilmore, No. 98-1930 (L), 2000 WL 1132790, at *1 (4th Cir. Aug. 9, 2000) ("It follows [from Carhart] that we affirm the judgment of the district court"); Eubanks v. Stengel, No. 98-6671, 2000 WL 1050914, at *1 (6th Cir. July 31, 2000) (summarily affirming district court's ruling invalidating Kentucky "partial-birth abortion" ban, "conclud[ing] that [Carhart] is controlling in this case"); Planned Parenthood v. Farmer, Nos. 99-5042 & 5272, 2000 WL 1025617, at *24 (3d Cir. July 26,

[5] The day following its decision in Carhart, the Supreme Court disposed of petitions for certiorari in challenges to "partial-birth abortion" bans from Illinois, Wisconsin, and Iowa. The Court granted certiorari in the Illinois and Wisconsin cases, vacated the Seventh Circuit's judgments upholding the bans, and remanded "for further consideration in light of Stenberg v. Carhart." Hope Clinic v. Ryan, 120 S. Ct. 2738 (2000); Planned Parenthood v. Doyle, 120 S. Ct. 2738 (2000); Christensen v. Doyle, 120 S. Ct. 2739 (2000). At the same time, the Court denied review of Iowa's "partial-birth abortion" ban, thus rendering final the decision of the Eighth Circuit finding the statute unconstitutional. Miller v. Planned Parenthood, 120 S. Ct. 2801 (2000). These actions by the Court—vacating a decision that is clearly contrary to the Carhart ruling, while denying review of a case permanently enjoining a similar statute—demonstrate that the Carhart decision controls the outcome of all similar cases.

2000) ("Under Carhart, the decision of the District Court [enjoining the statute] must be affirmed" because the New Jersey statute lacks a health exception and bans the D&E, as well as the D&X, procedure) (Alito, J., concurring); Daniel v. Underwood, 102 F. Supp. 2d 680, 681 (S.D. W. Va. 2000) ("The United States Supreme Court's decision in [Carhart] . . . compels the conclusion that the provisions of [West Virginia's "partial-birth abortion" ban]. . . violate the United States Constitution."); see also Planned Parenthood v. Owens, No. 99-WM-60, 2000 WL 1175180 (D. Col. Aug. 16, 2000) (granting summary judgment and holding that, under Carhart, law requiring parental notification for minor's abortion is unconstitutional because it lacks a health exception).

Notably, in the wake of Carhart, a federal district court enjoined a Florida statute that, like the Act, was the state's second attempt to ban abortion procedures. See A Choice For Women v. Butterworth, No. 00-1820-CIV-Lenard/Turnoff (S.D. Fla. July 11, 2000) (attached as Exhibit A). The operative language in that statute is quite similar to that of the Act. The Florida statute bans all abortions in which a fetus is intentionally killed after delivery of a non-severed part past the vaginal opening or the abdominal wall. Id., slip op. at 4. The court held the statute unconstitutional because the absence of a health exception "is violative of the [Carhart] decision." Id., slip op. at 7. It also held that the Florida statute would ban "five currently practiced abortion procedures, including D&E and D&X," id., slip op. at 6, and thus that it is an undue burden. Id.

**C. The Act Violates the Constitution**

On the basis of the dual holdings in Carhart and Defendant's admissions, this Court must conclude that the Act is unconstitutional. First, although the Act is differently worded than the "partial-birth abortion" ban struck down in Carhart, Defendant admits

that the Act would ban the D&X procedure and some D&E procedures. See Trans. 104; Opinion at 39. Thus, as in Carhart, the Act allows prosecutors "to pursue physicians who use D&E procedures, the most commonly used method for performing previability second trimester abortions," thus imposing an undue burden upon a woman's right to make an abortion decision. Carhart, 120 S. Ct. at 2617; see also Butterworth, slip op. at 6 (similarly worded ban is an "undue burden"). Indeed, the Carhart Court made clear that any D&E can progress in the fashion Defendant has admitted the Act bans. See Carhart, 120 S. Ct. at 2606 (noting that despite "variations in D&E[s] . . . , the common points" include "the potential need for instrumental disarticulation or dismemberment of the fetus or the collapse of fetal parts to facilitate evacuation from the uterus") (emphases added); see also Trans. 104 (Defendant acknowledging that the "ending to a D&E procedure that results in the crushing of the fetus's skull after the fetus has traversed the plane of the vaginal introitus" would violate the Act).

Second, the Act is unconstitutional because it does not permit physicians to use a banned procedure when it is necessary for a pregnant woman's health. "Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation." Carhart, 120 S. Ct. at 2609. The Act, which bans abortions both before and after viability, without providing a health exception, is therefore unconstitutional. Id. This is true regardless of whether it bans only D&X abortions (as Defendant originally maintained), D&E and D&X abortions (as Defendant's admissions establish), or virtually all abortions and many other obstetrical/gynecological procedures (as Dr. Johnson testified and Plaintiffs maintain). "[A] statute that altogether forbids D&X . . . must contain a health exception." Id. at

2613 (emphasis added). A fortiori, a statute that forbids other safe procedures as well as D&X, such as the Act, must also contain a health exception. See Farmer, 2000 WL 1025617, at *24 ("Under Carhart, the decision of the District Court [enjoining the statute] must be affirmed" because the New Jersey statute lacks a health exception and bans the D&E, as well as the D&X, procedure) (Alito, J., concurring).

## CONCLUSION

There is no dispute as to the material facts that entitle Plaintiffs to summary judgment. At a minimum, the Act prohibits both D&X and D&E abortion procedures and does not contain a health exception. Upon the basis of these facts it is clear that the Act does not withstand analysis under the Carhart decision. Accordingly, for the foregoing reasons, Plaintiffs respectfully request that the Court enter summary judgment in favor of Plaintiffs, declare the Act unconstitutional, permanently enjoin its enforcement, and award Plaintiffs costs and fees.

Dated: September 19, 2000

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

LINDA A. ROSENTHAL, being duly sworn, states that on: September 19, 2000, she did serve the following documents in the above captioned case: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, and this CERTIFICATE OF SERVICE on:

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Linda A. Rosenthal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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