**ISSUE BRIEF**

# MICHIGAN'S LAW PROTECTING HEARTBEATS OF UNBORN CHILDREN – *Longest Existing and Strongest Law in the Nation for 88 years*

**By**
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## Executive Summary

Michigan boasts the longest existing and strongest law in the nation protecting the hearts of unborn children. The State began protecting beating hearts of unborn children as early as 1846. Michigan's current law took effect on Sept. 18, 1931.

**<u>Challenge/ Opportunity</u>.** Most Michiganders are unaware that Michigan's law protects living unborn children even *before the child's heart begins beating*.

*Persuasion Points:*

- Michigan holds a special place as the strongest and longest continuing protection for unborn lives in the nation.

- Michigan's law broadly makes it a felony to perform an abortion, even before the child's heart begins to beat.

- The Michigan Supreme Court, in a post-*Roe* decision, upheld (within the parameters of *Roe*) Michigan's broad comprehensive pro-life law.

  - Thus, unlike most states, Michigan may, upon *Roe's* reversal, immediately prosecute anyone performing an abortion at any stage of the unborn child's life.

- We oppose efforts to repeal or potentially weaken Michigan's law that protects an unborn baby's heart, even before it begins to beat.

**<u>Challenge/ Opportunity</u>.** *Roe* and its progeny proscribe enforcement against abortion in the early stages of the child's life. *Roe* judicially-created a "right" to personal autonomy that recharacterizes abortion, (and other unhealthy, dangerous, and immoral conduct) as constitutionally protected liberty. The Court's judicially-manufactured "right" presently limits states from enforcing bans on abortion. This includes Michigan's 1931 law, and weaker "heartbeat" laws in other states.

*Persuasion Points:*

- Reversing *Roe's* judicially-manufactured constitutional right of personal autonomy frees a state to stop the killing of unborn children. Thus, it makes sense to pursue initiatives which can serve as vehicles to overturn *Roe*. <u>We must however, distinguish between wise and imprudent efforts to reverse *Roe*</u>.

  - A new law making it a felony to perform an abortion, after the detection of a heartbeat, falls within the unconstitutional parameters of *Roe*. Thus, if a state enacts a heartbeat law, federal courts will immediately rule it unconstitutional. With no split among the federal appellate circuit courts ever likely to occur, it is improbable the U.S. Supreme Court will ever find the issue ripe for review... at least until a substantial majority of the federal appellate circuits strike down state heartbeat laws. Thus, while legal challenges to heartbeat laws provide a slight opportunity to overturn *Roe*, more prudent vehicles exist.

**Challenge/ Opportunity.** In an alarming development, some presently seek to totally repeal Michigan's 1931 law because they expect the U.S. Supreme Court to reverse *Roe* soon. Others seek to enact a competing weaker "heartbeat bill" into Michigan law. Unlike Michigan's existing law that broadly protects children from the moment of conception, the new proposal protects children specifically after their heart begins to beat. Given the existence of Michigan's broader statutory provision, proposing a competing weaker heartbeat proposal makes no sense as a matter of law and public policy. This is especially so given the rules of statutory construction courts apply when faced with two competing statutes governing similar conduct on a similar subject.

*Persuasion Points:*

- Truth matters. We must expose false narratives supporting attempts to totally repeal Michigan's law protecting children even before their heart begins to beat.

- Legal consequences exist when a state enacts a competing statute governing similar conduct on a similar subject in an existing law. Courts presume a different intent when a legislature omits words used in a prior statute on a similar subject. Moreover, if a new statute allows what another prohibits, the most recent statute controls and the more specific controls over the general.

    - Here the more recent statutory heartbeat proposal omits the general language in existing law making it a felony to perform an abortion. Then, the more recent statutory proposal includes more specific language making the detection of a heartbeat the starting point of permissible enforcement.

    - Perhaps attempting to overcome this statutory construction catastrophe, the competing weaker proposal states its provisions do not preclude enforcement of existing law. Because the new proposal injects such confusing irrationality into Michigan's statutory scheme though, it is impossible to predict how a court might resolve the problem of two duly enacted statutes governing similar conduct on a similar subject.

- Moreover, Michigan rests within the U.S. Court of Appeals for the Sixth Circuit. Two other States within the Sixth Circuit enacted heartbeat laws. While questionably prudent in the broader effort to overturn *Roe*, these laws provide a vehicle in the Sixth Circuit to get a case to the Supreme Court. Thus, it makes no sense to potentially weaken Michigan law, when alternative vehicles to overturn *Roe* exist in the Sixth Circuit.

- Finally, current U.S. Supreme Court cases recognize a government interest exist in protecting unborn children and the life of their mother. Michigan's pro-life statutory scheme does so. (i.e., partial-birth abortion procedure ban; various laws requiring consent, reporting, and other means within the constitutional parameters of *Roe*). We should continue to strengthen Michigan's pro-life statutory scheme by supporting similar enforceable laws (e.g., outlawing a horrific abortion procedure used five times a day in Michigan, where doctors dismember limbs and decapitate heads of living unborn children).

## Michigan's Legacy of Protecting the Hearts of Unborn Children

Michigan law protects live unborn children more effectively than any other law in the nation.[2] The State began protecting beating hearts of unborn children as early as 1846.[3] Michigan's current abortion law took effect on Sept. 18, 1931.[4] This law expressly protects life at all stages, even before the child's heart beats.[5] Thus, it a felony to

> wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or [to] employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman,[6]

## U.S. Supreme Court Decides *Roe* and *Doe*

The United States Supreme Court decided *Roe v Wade*[7] and *Doe v Bolton*[8] in January 1973. These decisions limited states from enforcing bans on abortion. Before these cases, Michigan banned anyone from performing any abortions, except to save the life of the mother.[9] Just prior to these cases, pro-abortion groups sought to weaken Michigan's abortion restrictions. Michigan's citizens overwhelmingly repudiated the effort via referendum. In doing so, Michigan's citizens reaffirmed their intent to keep its abortion ban in place. Barely three months later the

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[2] MICH. COMP. LAWS § 750.14
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.* The law provides for an exception where necessary to preserve the life of the mother.

[7] Roe v Wade, 410 U.S. 113 (1973).
[8] Doe v Bolton, 410 U.S. 179 (1973).
[9] MICH. COMP. LAWS § 750.14

Court ignored the will of the people in our State when it manufactured the personal autonomy "right" to abortion published in Roe and *Doe.*[10]

### Michigan Supreme Court Post-*Roe* Decisions

Thereafter, in *People v Bricker*[11] and *Larkin v Cahalan,*[12] Michigan's Supreme Court reviewed Michigan's abortion restrictions in light of the U.S. Supreme Court decision in *Roe*. In *Bricker*, the state charged a defendant with attempting to perform an abortion procedure in violation of Michigan's law.[13] The defendant's crime occurred in 1967. On appeal in 1973, he argued the U.S. Supreme Court's *Roe/ Doe* rulings invalidated Michigan's pre-*Roe/Doe* criminal ban on abortions. The *Bricker* Court acknowledged that "the judicial opinions filed by the United States Supreme Court in *Roe* and *Doe* are binding upon us under the Supremacy Clause."[14] Michigan's Supreme Court distinguished the facts of the case at bar, and upheld the defendant's conviction under Michigan's pre-*Roe* statutory abortion ban.[15] Here the defendant was not a licensed physician.[16] Thus, notwithstanding the binding nature of *Roe* and *Doe*, the *Bricker* Court held:

> we cannot accept as a necessary implication that, because doctors may perform abortions under prescribed circumstances, [it] means that anyone who has or will perform an abortion can do so with impunity.[17]

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[10] Robert Karrer, *The Formation of Michigan's Anti-Abortion Movement, 1967-1974*, MICH. HIST. REVIEW 22, no. 1 (1996), at 95.
[11] People v Bricker, 389 Mich. 524, 208 NW2d 172 (1973).
[12] Larkin v Cahalan, 389 Mich. 533 (1973).
[13] Bricker, 389 Mich. at 527 (MCL Section 750.14).
[14] *Id.* at 528.
[15] *Id.* at 531 (MCL Section 750.14).
[16] *Id.* at 527.
[17] *Id.* at 531.

Thus, the *Bricker* Court upheld Michigan's law proscribing abortions except, in keeping with the *Roe* and *Doe* holdings, as applied to licensed medical physicians.[18] Indeed, the Court made it clear that:

> the decision we render today is based upon a construction of Michigan's statute guided by constitutional principles well recognized and applied in our state. We hold that, except as to those cases defined and exempted under *Roe v Wade* and *Doe v Bolton, supra,* criminal responsibility attaches.[19]

In *Larkin,*[20] a companion case to *Bricker,* some Michigan physicians and others sought to enjoin and declare unconstitutional Michigan's law criminalizing: 1) the advertising or sale of abortifacients, and 2) the willful killing of an unborn "quick" child. The *Larkin* Court addressed the constitutionality of these provisions in light of the *Roe* and *Doe* decisions. *Larkin* upheld all as constitutional, and refused to issue injunctive relief.[21]

Specifically, the Court held that MCL section 750.14, as discussed in *Bricker*, was constitutional and applicable against all persons except licensed medical physicians.[22] Likewise, the Court upheld MCL section 750.15 as constitutional. This provision expressly prohibited advertising or selling "pills, powder, drugs or combination of drugs" (i.e. abortifacients) used for procuring an abortion.[23] The Court upheld section 750.15 because the statute specifically excluded physicians who could provide an abortifacient via prescription. The Court expressly found:

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[18] *Id.* at 531 (MCL Section 750.14).
[19] Id. at 532
[20] The Michigan Supreme Court heard *Larkin* as a consolidated case as an appeal from two separate judgments involving two separate groups of plaintiffs. The Wayne County Circuit Court had granted the plaintiffs' request for declaratory and injunctive relief. *Sua sponte*, the Court granted leave to appeal and stayed the Wayne County Circuit Court's decisions.
[21] Larkin, 389 Mich. at 544 (MCL 750.14, 750.15; 750.322, 750.323).
[22] *Id.* at 537.
[23] *Id.* at 538.

[It] would appear to be entirely consistent with the rationale of *Roe v Wade*. It makes the sale of drugs or medicines designed to produce abortion a medical rather than a commercial activity.[24]

The *Larkin* Court also upheld MCL sections 750.322 and 750.323, as in accord with the *Roe* and *Doe* decisions.[25] Section 750.322 reads,

> The willful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter.

The Court limited the application of this provision so as not to offend the due process clause of the Fourteenth Amendment (in accordance with *Roe* and *Doe*). It did so by ruling that the law only applies to "abortions caused by felonious assault upon the mother, which result in the death of an unborn quick child *en ventre sa mere*."[26]

Some refer to MCL section 750.323 as Michigan's Manslaughter by Abortion statute. The *Larkin* Court also upheld the constitutionality of this law. It did so by limiting its applicability to the *viability* parameters established by *Roe*:

> By reason of *Roe v Wade*, we are compelled to rule that as a matter of Federal constitutional law, a fetus is conclusively presumed not to be viable within the first trimester of pregnancy. Beyond that point, the burden is, of course, upon the people in a prosecution for manslaughter by abortion to prove beyond a reasonable doubt that the subject of the manslaughter was in fact a viable child *en ventre sa mere*. As interpreted herein [MCL 750.323] is not unconstitutional … the intentional destruction of a viable unborn child remains a criminal offense in Michigan.[27]

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[24] *Id.* at 538.
[25] *Id.* at 539, 542.
[26] *Id.* at 539.
[27] *Id.* at 542-543. Note, when upholding the constitutionality of section 750.323, the *Larkin* Court failed to address how the *Doe* health exceptions might make almost all post-viable abortions in Michigan legal.

*Bricker* and *Larkin* remain highly significant because, in these cases, Michigan's Supreme Court reviewed Michigan's statutory abortion proscriptions after *Roe* and *Doe*. In both cases, the State's highest Court definitively upheld section 750.14 and the other pre-*Roe* statutes, finding all valid, except to the extent that *Roe* and *Doe* overruled them.

Moreover, in *Larkin*, Michigan's Supreme Court explained that, under *Roe*, the "right" to an abortion derived from the U.S. Constitution:

> By reason of *Roe v Wade*, we are compelled to rule that as a matter of federal constitutional law, a fetus is conclusively presumed not to be viable within the first trimester of pregnancy.[28]

Likewise, in *Bricker,* Michigan's Supreme Court stated:

> The public policy of this state is a mandate upon us. Our duty to enforce that mandate is as clear as is our duty to comply with the decisions of the United States Supreme Court construing the Federal Constitution.
>
> The public policy of this state is to be found in the declarations and deeds of its people. These find concrete expression in the constitution adopted by the people, the laws enacted by the Legislature, the acts of the Governor, the Attorney General, others exercising executive power, the decisions of our courts, and the vote of the people . . . .
>
> It is the public policy of the state to proscribe abortion.[29]

Thus, nothing in *Michigan's Constitution* provides a right to abortion.

Additionally, *Bricker* and *Larkin* definitively recognize that no legislative repeal of the pre-*Roe* Michigan statutes occurred; Thus, Michigan's laws proscribing abortion remain fully enforceable in the absence of *Roe* and *Doe*.[30]

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[28] Larkin, 389 Mich. at 542.
[29] Bricker, 389 Mich. at 529.

## Michigan's Post-*Roe* Lower Court Rulings

The Michigan Supreme Court decided *Bricker* and *Larkin* in 1973. The Michigan Court of Appeals followed the State Supreme Court's lead on issues concerning abortion.

In 1997, the Michigan Court of Appeals upheld the constitutionality of Michigan's "informed consent law" in *Mahaffey v Attorney General*.[31] Here, Plaintiff argued, *inter alia,* that Michigan's Constitution included a right to abortion. Plaintiff contended the Court should, therefore, invalidate the law. The Court of Appeals held that no separate state right to an abortion existed in Michigan's constitution. The appellate court noted, "*Bricker* and *Larkin* suggest that in Michigan a woman's right to abortion is derived solely from the Federal Constitution."[32] Accordingly, "the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right."[33]

Similarly, in *People v Higuera,* the Michigan Court of Appeals again upheld the reasoning in *Bricker* and *Larkin*.[34] Here the district and circuit courts dismissed a criminal charge against a defendant physician charged under Michigan's pre-*Roe* criminal abortion ban (MCL section 750.14). The state charged defendant with "allegedly inducing the abortion of a fetus of approximately twenty-eight weeks" not intended to save the mother's life or to preserve her health. On appeal the Court of Appeals reversed and re-instated the charge.[35] Relying on *Bricker* and

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[30] *Id.* at 528.
[31] Mahaffey v Attorney Gen., 222 Mich. App. 325 (1997) (section 333.17015).
[32] *Id.* at 338.
[33] *Id.* at 339.
[34] People v Higuera, 244 Mich. App. 429 (2001).
[35] *Id.* at 449-450. (MCL section 750.14)

*Larkin*, the appellate court rejected defendant's contention that section 750.14 had been "repealed by implication" via subsequent legislative enactments:

> Repeals by implication are not favored and will not be indulged in if there is any other reasonable construction. The intent to repeal must very clearly appear, and courts will not hold to a repeal if they can find reasonable ground to hold the contrary. The presumption is always against the intention to repeal where express terms are not used, and the implication, in order to be operative, must be necessary. The Legislature is presumed to act with knowledge of appellate court statutory interpretations and . . . silence by the Legislature for many years following judicial construction of a statute suggests consent to that construction.
>
> After *Bricker* was decided in 1973, the Legislature enacted various statutes regulating the performance of abortions, but did not revise MCL 750.14; The Legislature is presumed to be aware of the *Bricker* Court's interpretation of MCL 750.14, which construction permits abortions to be performed in accordance with *Roe*. We think it clear that in enacting those statutes after *Bricker*, the Legislature intended to regulate those abortions permitted by *Roe* and *Doe,* and *Bricker,* and did not intend to repeal the general prohibition of abortions to the extent permitted by the Federal Constitution, as construed by the United States Supreme Court. We thus must reject defendant's argument that MCL 750.14 has been repealed by implication.[36]

Because no intent to repeal Michigan's broad law making it a felony to perform an abortion exists anywhere in Michigan's subsequent legislative enactments, none of these enactments repeal by implication Michigan's 1931 law. Thus, subsequent Michigan laws and proposed legislation proscribing procedures like partial birth abortion or dismemberment abortion do not impliedly repeal Michigan 1931 abortion law. Similarly, subsequent Michigan laws requiring parental consent, informed consent, and record keeping, likewise do not impliedly repeal the 1931 law. Nor do subsequent Michigan laws providing immunity for those who refuse to perform abortions.

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[36] *Id.* at 436-437 (citations omitted).

Moreover, because all of these subsequent Michigan laws rest outside the U.S. Supreme Court's parameters of unconstitutionality, the state may enforce each now.

## Current Efforts to Legislatively Repeal Michigan's Law

In an alarming development, pro-abortion activists presently seek to repeal Michigan's broad abortion law because they expect the U.S. Supreme Court to reverse *Roe v Wade* soon. Anti-Life legislators introduced proposed legislation that repeals Michigan's law making it a felony to perform an abortion.[37]

The possible false narratives by repeal opponents include:

1) the law should be repealed because of the U.S. Supreme Court's decision in *Roe,* and

2) the law should be repealed as part of cleaning up old unenforceable laws.

We must oppose any attempt to repeal Michigan's law protecting children even before their heart begins to beat.

## Proposed Competing Heartbeat Bill

Others seek to enact a weaker competing "heartbeat bill" into Michigan law.[38] Michigan's existing law already broadly makes it a felony to perform an abortion at any time.[39] The new proposal similarly makes it a felony to perform an abortion. The new proposal though specifies the prohibition begins after detection of a heartbeat. Thus, the new proposed statute addresses an

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[37] HB 4113 https://www.legislature.mi.gov/documents/2019-2020/billintroduced/House/pdf/2019-HIB-4113.pdf and SB 50 https://www.legislature.mi.gov/documents/2019-2020/billintroduced/Senate/pdf/2019-SIB-0050.pdf

[38] Based upon reviewed drafts. At this writing proponents claim on their fundraising website they plan to enact an initiative via petition mirroring Rep. Johnson's bill, but nothing on the Michigan legislature's website indicates such a bill sponsored by Rep. Johnson or an initiative filed. This footnote will be updated if anything changes.

[39] MICH. COMP. LAWS § 750.14

identical subject but omits the words used in the broader existing statute, while adding a specific time point in which a chargeable felony occurs.

Given Michigan's broad statutory scheme, proposing a competing weaker proposal makes no sense as a matter of law and public policy. This is especially so given the rules of statutory construction courts apply when faced with two competing statutes governing similar conduct on a similar subject. Normally, "'courts presume a different intent when a legislature omits words used in a prior statute on a similar subject.'"[40] Moreover, if a new statute allows what another prohibits, the most recent statute controls and the more specific controls over the general.[41] Here the more recent statutory heartbeat proposal omits the general language in the pre-existing law making it a felony to perform an abortion. Then, the more recent statutory proposal includes more specific language making the detection of a heartbeat the starting point of permissible enforcement. Perhaps attempting to overcome this statutory construction catastrophe, the competing weaker proposal states its provisions do not preclude enforcement of existing law. Because the new proposal injects such confusing irrationality into Michigan's statutory scheme though, it is impossible to predict how a court might resolve the problem of two duly enacted statutes governing similar conduct on a similar subject.

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[40] *People v. English*, 317 Mich. App 607, 616 (2016) (citation omitted).

[41] See e.g., Canons of Construction, adopted from Scalia and Garner, https://www.law.uh.edu/faculty/adjunct/dstevenson/2018Spring/CANONS%20OF%20CONSTRUCTION.pdf

## *As a Vehicle to Overturn Roe, the Proposed Michigan Heartbeat Bill is Imprudent*

Reversing *Roe's* judicially-manufactured constitutional right of personal autonomy frees a state to stop the killing of unborn children. Thus, it makes sense to pursue initiatives which can serve as vehicles to overturn *Roe*. We must however, distinguish between wise and imprudent efforts to reverse *Roe*.

A new law making it a felony to perform an abortion, after the detection of a heartbeat, falls within the unconstitutional parameters of *Roe*. Thus, if a state enacts a heartbeat law, expect federal trial and appellate courts to immediately rule it unconstitutional. No split among the federal appellate circuit courts is, therefore, ever likely to occur. Consequently, it is improbable the U.S. Supreme Court will find the issue ripe for review... at least until a substantial majority of the federal appellate circuits strike down state heartbeat laws. Moreover, when federal courts repeatedly rule heartbeat laws unconstitutional, it adversely effects public perception. Thus, while legal challenges to heartbeat laws provide a slight opportunity to overturn *Roe*, more prudent vehicles exist.

Moreover, Michigan rests within the United States Court of Appeals for the Sixth Circuit. Two other States within the Sixth Circuit enacted heartbeat laws. While questionably prudent in the broader effort to overturn *Roe*, these laws provide a vehicle in the Sixth Circuit to get a case to the Supreme Court. Thus, it makes no sense to potentially weaken Michigan law, when alternative vehicles to overturn *Roe* exist in the Sixth Circuit.

## Conclusion

By reversing *Roe v Wade* and *Doe v Bolton* the U.S. Supreme Court sends the issue of abortion back to the states. If and when that happens, *People v Bricker* and *Larkin v Cahalan* control. Those Michigan Supreme Court rulings decisively upheld Michigan's existing statute making it a felony to perform an abortion. Post-reversal of *Roe*, the prosecution for performing abortions can begin on day one. This includes any abortion that stops a beating heart – or any abortion that occurs even before the child's heart begins to beat.

Michigan's law protecting the heartbeats of unborn children is the longest existing and strongest law in the nation. Every citizen should know that Michigan law protects the child even *before* the heart begins to beat. A new competing statute on the same subject makes no sense, especially since it specifically starts the protection of the unborn a later time than the existing broader law.

For those who care about protecting life in Michigan, now is not the time to sit idle. Nor is it a time for well-meaning reckless irrationality. It makes no sense to put Michigan's existing 1931 law at risk by senselessly infusing a weaker competing heartbeat law into our State's strong pro-life statutory scheme.