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RESPONSE TO CONCERNS ABOUT ADOPTION OF MICHIGAN HEARTBEAT BILL

By Walter M. Weber, Senior Counsel, American Center for Law and Justice

Michigan currently has on the books a statute that criminalizes abortion except when "necessary to preserve the life" of the mother.

1. The first contention is that enactment of a new abortion law might *by implication repeal* the existing abortion ban. There are two reasons **concerns about implied repeal should not be an obstacle**.

First, the Michigan Supreme Court has long embraced the "axiom" that "repeals by implication are disfavored." *IBM v. Dep't of Treasury*, 496 Mich. 642, 651, 852 N.W.2d 865, 871 (2014). That is, unless the legislature makes it clear it meant to repeal the prior statute, both remain in effect.

Second, it is a simple matter to add a savings clause to any new abortion bill stating explicitly that "nothing in this Act shall be construed as authorizing any abortion that is illegal under any other provision of state law."

2. The second contention is that a heartbeat bill is *unnecessary* because the existing abortion ban will automatically cover abortions done after heartbeat if such bans become, according to the courts, constitutional in Michigan. But **adoption of a heartbeat bill is a more certain and effective way to ban most abortions.**

a. First, the argument that a more specific bill is unnecessary is open to significant dispute. The logic of the argument is that the Michigan courts have held that the current ban can be applied to abortions not protected by the Supreme Court's 1973 decision in *Roe v. Wade* and subsequent federal abortion cases. But it's not so simple. The Michigan Supreme Court held in *People v. Bricker*, 389 Mich. 524, 208 N.W.2d 172 (1973), that the existing abortion ban could still be applied to *nonphysician* abortions and to physician (or nonphysician) abortions *after viability*. While the Michigan Court of Appeals followed the *Bricker* rule in a prosecution for a 28-week abortion in *People v. Higuera*, 244 Mich. App. 429, 625 N.W.2d 444 (2001), neither court has addressed the situation where the U.S. Supreme Court has retracted *Roe* (which it has done in the 2007 partial birth abortion case of *Gonzales v. Carhart*, for example and in the 1992 case of *Planned Parenthood v. Casey*). In theory, the Michigan abortion ban could be treated as an elastic statute that expands or contracts in response to shifting federal abortion law. But the state supreme court has not specifically said that. It is by no means *certain* that the state courts would be willing continually to revisit and reinterpret the statute every time the Supreme Court modifies its abortion decisions.

b. Second, even if the state abortion ban were held by the *Michigan Supreme Court* to expand and contract in this manner, a *federal* court would not be bound to rule that this is a constitutional way to legislate against abortion. In *Higuera*, a 2-1 decision, the dissent in the state appeals court argued that the abortion ban law was

201 Maryland Avenue, N.E.
Washington, DC 20002
202-546-8890
202-546-9309 (Facsimile)

unconstitutionally vague if interpreted to apply after viability. If the statute is interpreted to apply in other, changing circumstances, the vagueness argument might become even stronger. And a federal court might well rule that, while a state may, e.g., ban abortions after heartbeat, it must do so in a law that actually says that, rather than a law that does not say that at all but is reinterpreted to apply to such situations.

c. Third, the existence of an abortion ban is not an obstacle to passing other laws that clearly target specific harms. The current abortion ban law does not mention nonphysicians or post-viable babies, yet the state supreme court has read those elements into the law. Presumably the court also could read in qualifiers for other particularly horrific aspects of abortion, such as partial birth or dismemberment methods, or abortions on minors without parental notice or consent, or forced abortions. But that does not mean the state legislature should not adopt laws addressing those particular harms. In other words, it is permissible, indeed a prudent idea, to adopt laws aimed at particularly noxious abortion practices rather than rely upon a prosecutor possibly initiating such prosecutions and hoping the state courts will reinterpret the abortion ban to apply to such cases. This is especially true where the state attorney general is hostile to laws limiting abortion and therefore likely to ignore, or sabotage, efforts to expand the applicability of the existing abortion ban.

d. Fourth, relying upon the state courts to reinterpret the existing statute creates legal vulnerabilities. One is the vagueness argument mentioned earlier. Another is due process: a defendant abortionist could argue that it violates due process to be charged for a crime that was not yet endorsed by the state courts when the abortion was done. (In *Bricker*, the prosecution began before *Roe v. Wade*, when abortion was still clearly illegal. In *Higuera*, the prosecution began after *Bricker*, when it was clear post-viability abortions were still illegal. Neither abortionist could claim surprise or lack of notice.) And what happens if the Sixth Circuit rules that a heartbeat ban (e.g., from Ohio or Kentucky) is constitutional? Does Michigan's law *immediately* apply, or must the state wait until the time for rehearing has passed? What if a party seeks Supreme Court review? Must the state first apply to a federal court for a declaration that the law is enforceable? These sorts of uncertainties will be exploited by abortionists as defenses to prosecution and may also supply legal ammunition for affirmative constitutional challenges to the existing abortion ban. Why not avoid these legal headaches by simply adopting a law that explicitly bans what the state wants to outlaw?

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It is good that Michigan has a preexisting ban on the killing of innocent children in the womb. That ban should be preserved by including savings clauses in any new abortion laws. But *babies and their mothers can be protected by other laws at the same time*; indeed, failing to do so may cause legal problems down the road, problems that may not be able to be fixed if the composition of the legislature changes in a way that makes pro-life bills harder – or impossible – to pass.

Walter Weber is a 1984 graduate of the Yale Law School who has practiced constitutional law for nearly 35 years. He completed his undergraduate studies at Princeton. Weber has filed more than 100 briefs in the U.S. Supreme Court.