

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN,
on behalf of itself, its physicians and staff, and
its patients; and SARAH WALLETT, M.D.,
M.P.H., FACOG, on her own behalf and on
behalf of her patients,

Plaintiffs,

v

ATTORNEY GENERAL OF THE STATE
OF MICHIGAN, in her official capacity,

Defendant

and

MICHIGAN HOUSE OF
REPRESENTATIVES and
MICHIGAN SENATE,

Intervenor-Defendants.

Case No. 22-000044-MM

Hon. Elizabeth Gleicher

**JULY 12, 2022 INTERVENOR-
DEFENDANTS' MOTION FOR
SUMMARY DISPOSITION
UNDER RULE 2.116(C)(4) and (C)(8)**

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Intervenor-Defendants Michigan House of Representatives and Michigan Senate (“Legislature”), by their counsel, Schaerr | Jaffe LLP, move for summary disposition under MCR 2.116(C)(4) and (C)(8). The Legislature requests that this Court enter an order dismissing Plaintiffs’ claims for lack of subject-matter jurisdiction and lack of standing. In support of their Motion, the Legislature states:

1. On April 7, 2022, Plaintiffs filed the Verified Complaint seeking a declaration that MCL 750.14 violates the Michigan Constitution and the Elliott-Larsen Civil Rights Act and requested a permanent injunction barring its enforcement.

2. Plaintiffs' claims are premature, as they are based on a series of hypotheticals that have yet to occur. MCL 750.14 is not being enforced, and Plaintiffs do not claim that there are any concrete threats of enforcement.

3. To establish an "actual controversy" sufficient for declaratory relief under MCR 2.605(A)(1), Plaintiffs cannot rely on hypotheticals. *Shavers v Kelley*, 402 Mich 554, 589 (1978). Without an "actual controversy," this Court lacks subject-matter jurisdiction over Plaintiffs' claims. See *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 545 (2017).

4. Further, if "plaintiffs do not meet the requirements of MCR 2.605, they do not have standing" to pursue their claims. *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586–587 (2020).

5. Plaintiffs also lack standing to pursue claims on behalf of their patients, as MCR 2.201(B) requires actions to be prosecuted in the name of the real party in interest. As a result, Plaintiffs "must assert their own legal rights and cannot rest their claims to relief on the rights or interests of third parties." *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 622 (2015) (per curiam).

6. The Court should therefore dismiss Plaintiffs' claims under MCR 2.116(C)(4) for lack of subject-matter jurisdiction and MCR 2.116(C)(8) because Plaintiffs lack standing and are not the real party in interest for most of their claims.

7. Counsel for the Legislature sought the concurrence of Plaintiffs and Defendant in the relief sought through emails exchanged between July 5 and July 12, 2022, but concurrence was not obtained, necessitating this motion.

For these reasons, and those explained in the accompanying brief, the Legislature requests that this Court grant it summary disposition on Plaintiffs' claims based on lack of subject-matter jurisdiction, lack of standing, and failure to state a claim.

Respectfully submitted,

/s/ Nicholas P. Miller

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July 12, 2022

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QUESTIONS PRESENTED

1. To seek declaratory relief under MCR 2.605(A)(1), a plaintiff must present an actual, rather than hypothetical, controversy. Plaintiffs' claims are based on several hypotheticals that have not yet, and may never, occur, including the enforcement of MCL 750.14. Does this Court lack subject-matter jurisdiction over Plaintiffs' claims?

Intervenor-Defendants' answer: Yes.

2. If a plaintiff cannot meet the "actual controversy" requirement of MCR 2.605(A)(1), she lacks standing to pursue declaratory relief. Plaintiffs' claims present a possible, future controversy rather than a present, actual controversy. Furthermore, MCR 2.201(B) requires an action to be prosecuted "in the name of the real party in interest." Plaintiffs seek to pursue claims on behalf of their patients who are not parties to this lawsuit. Do Plaintiffs lack standing to pursue their claims?

Intervenor-Defendants' answer: Yes.

INTRODUCTION

Plaintiffs filed this lawsuit before the U.S. Supreme Court ruled in the *Dobbs* case, and they conceded that even if *Roe* were overturned, they would be unaffected unless the statute at issue were enforced. But Plaintiffs do not allege that there is any indication of present or future enforcement. This entire case is therefore based on hypotheticals. Constitutional limits on this Court's judicial power, as well as the text of the declaratory judgment rule, prevent this Court from answering hypothetical questions.

As an initial matter, the Michigan Constitution provides that “the judiciary is to exercise the ‘judicial power.’” *Nat’l Wildlife Fed’n v Cleveland Cliffs Iron Co*, 471 Mich 608, 613 (2004), citing Const 1963, art 6, § 1, overruled on other grounds by *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349 (2010) (hereinafter “*Lansing*”). The “judicial power” of a court pertains to “the right to determine actual controversies arising between adverse litigants.” *Anway v Grand Rapids Ry Co*, 211 Mich 592, 616 (1920).

Further, because Plaintiffs seek a declaratory judgment, they must satisfy the requirements of MCR 2.605(A)(1), which states that “a Michigan court of record may declare the rights and other legal relations” of parties only “[i]n a case of actual controversy within its jurisdiction.” This rule incorporates “the traditional restrictions on justiciability such as standing, ripeness, and mootness.” *Associated Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 125 (2005), overruled on other grounds by *Lansing*. The rule “does not limit or expand the subject-matter jurisdiction of the courts.” See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (per curiam).

Because Plaintiffs’ claims are based only on speculative events, Plaintiffs cannot meet the “actual controversy” requirement for declaratory relief. And when “plaintiffs do not meet the requirements of MCR 2.605, they do not have standing” to pursue their claims. *League of Women*

Voters of Mich v Secretary of State, 506 Mich 561, 586–587 (2020). Plaintiffs also lack standing to bring claims on behalf of their patients. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 622 (2015) (per curiam) (“[P]laintiffs must assert their own legal rights and cannot rest their claims to relief on the rights or interests of third parties.”). Without standing, Plaintiffs have failed to state a claim. *Id.* The Court should therefore dismiss Plaintiffs’ claims for lack of jurisdiction and lack of standing.

PROCEDURAL BACKGROUND

Plaintiffs filed the Verified Complaint on April 7, 2022, seeking a declaration that MCL 750.14 violates the Michigan Constitution and the Elliott-Larsen Civil Rights Act and requested a permanent injunction barring its enforcement. The same day, Plaintiffs moved for a preliminary injunction to enjoin enforcement of MCL 750.14. The Attorney General agreed that the statute at issue is unconstitutional and said she would not defend it. Def’s PI Response at 4. But she also correctly argued there was “a lack of adversity” and thus no “actual, live controversy before the Court” to support jurisdiction. *Id.* at 7–8. For that reason, the Attorney General further suggested that the Court take it upon itself to dismiss this case *sua sponte*. *Id.* at 10.

Nonetheless, on May 17, 2022, this Court granted Plaintiffs’ motion, enjoining the Attorney General, and those under her control and supervision, from enforcing MCL 750.14 during the pendency of the action. PI Order at 27. On June 6, the Legislature filed a motion to intervene and for reconsideration of the Court’s PI Order. The Court granted the motion in part, allowing the Legislature to intervene, but denied the motion regarding reconsideration. June 15, 2022 Order.

LEGAL STANDARD

MCR 2.116(C)(4) authorizes this Court to dismiss claims for lack of subject-matter jurisdiction. “A party may attack subject-matter jurisdiction at any time, and a proven lack of subject-matter jurisdiction renders a judgment void. The existence of subject-matter jurisdiction does not depend on the correctness of the trial court’s ultimate legal conclusions.” *Usitalo v Landon*, 299 Mich App 222, 228 (2012) (citation omitted).

And MCR 2.116(C)(8) authorizes this Court to grant summary disposition if “[t]he opposing party has failed to state a claim on which relief can be granted.” If a plaintiff lacks standing, she has failed to state a claim. See *Pontiac No 2*, 309 Mich App at 626. A motion under 2.116(C)(8) “may be raised at any time.” MCR 2.116(D)(4). “Only the pleadings may be considered when the motion is based on subrule (C)(8).” MCR 2.116(G)(5).

ARGUMENT

I. This Court Should Dismiss Plaintiffs’ Premature Claims for Lack of Subject-Matter Jurisdiction.

The “requirement of an ‘actual controversy’ prevents a court from deciding hypothetical issues.” *Shavers v Kelley*, 402 Mich 554, 589 (1978). Without a “real, immediate, and substantial controversy,” a court lacks subject matter jurisdiction over declaratory-judgment actions. 3 Longhofer, Michigan Court Rules Practice Text (7th ed), § 2605.3; see also *Fieger v Comm’r of Ins*, 174 Mich App 467, 470 (1988); *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 545 (2017). The related principle of ripeness deprives the court of a different type of jurisdiction—constitutional jurisdiction. *Michigan Chiropractic Council v Comm’r of Office of Fin & Ins Servs*, 475 Mich 363, 378–379 (2006), overruled on other grounds by *Lansing*. Because the two requirements are nearly identical and result in the same outcome—no jurisdiction—they are analyzed together.

Claims must be ripe to ensure that the “harm asserted has matured sufficiently to warrant judicial intervention.” *Warth v Seldin*, 422 US 490, 499 n 10 (1975). “A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Michigan Chiropractic Council*, 475 Mich at 371 n 14 (cleaned up).

When it comes to pre-enforcement harm, the plaintiff must still show “a real and immediate threat to protected constitutional rights.” *Dep’t of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 410 (1990) (CAVANAGH, J., concurring). The threat of injury cannot be mere speculation. *Id.*; *League of Women Voters of Mich*, 506 Mich at 585–587 (“Though ‘a court is not precluded from reaching issues before actual injuries or losses have occurred,’ there still must be ‘a present legal controversy, not one that is merely hypothetical or anticipated in the future.’”). Thus, in *Emmanuel Baptist Preschool*, the Michigan Supreme Court refused to decide whether a statute regarding financial disclosures violated the defendants’ First Amendment rights because “the state ha[d] not exercised its statutory authority to compel financial disclosure, making these issues unripe for review.” 434 Mich at 389.

No state authority has sought to enforce the statute at issue here, making Plaintiffs’ claims unripe. First, Michigan’s statute cannot be used to prosecute pregnant women. See *People v Nixon*, 50 Mich App 38, 39–40 (1973) (per curiam); *In re Vickers*, 371 Mich 114, 117–118 (1963). Second, there are there are no pending prosecutions or threatened prosecutions of any abortion provider under MCL 750.14.

The sole prosecutor defendant in this case, the Attorney General, has repeatedly made clear that “[a]s this state’s top law enforcement officer, . . . [she] will not prosecute women or their

doctors.”¹ She has “reiterated her refusal to prosecute” anyone under the statute multiple times.² In fact, she admitted that there would be no controversy in this case unless prosecutors created one “down the road.”³ Plaintiffs offer nothing to the contrary. Instead, they agree with Attorney General Nessel, relying on the hypothetical possibility “that a future attorney general could seek to prosecute a Michigan abortion provider.” Pltfs’ Mot Summ Disp at 42.

These realities force Plaintiffs to rely on speculation about the future conduct of county prosecutors—nonparties to this case. The theory undergirding the complaint is that after *Dobbs*, abortion providers “may no longer” be protected from prosecution. Compl ¶ 4. And Plaintiffs admit many times that their claims are contingent on a chain of hypothetical events. *Id.* ¶¶ 4, 6, 28, 42, 48, 71, 96, 97, 102, 107, 111, 114, 115. They argue that “overzealous prosecutors,” *may* capitalize on the “uncertainty” surrounding federal abortion law and *may* “attempt[] to enforce the Criminal Abortion Ban.” PI Motion at 7. They further theorize that:

some PPMI staff *may* be afraid to continue working at PPMI *if* the Criminal Abortion Ban were enforced . . . [E]ven *if* PPMI and its staff complied with the Ban, a prosecutor *might* accuse staff of violating it. . . . Some staff *might* prefer to leave PPMI given this risk. . . . Other staff *might* simply be unable to bear turning patients away. [*Id.* at 13 (emphasis added).]

In their recent motion for summary disposition, Plaintiffs also refer to some vague statements of county prosecutors. Pltfs’ Mot Summ Disp at 41–42.

But these statements and the possibility of the prosecutors’ future conduct are irrelevant

¹ Press Release, Dana Nessel, Mich Attorney General, AG Nessel’s Statement on Efforts to Preserve Abortion Rights in Michigan, <https://tinyurl.com/2jftwjbh> (April 7, 2022) (accessed June 5, 2022).

² LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer’s suit should take precedence*, THE DETROIT NEWS, <https://tinyurl.com/53wh3u9n> (May 3, 2022) (accessed June 1, 2022).

³ *Id.*

for a few reasons. First, because county prosecutors are not parties to this suit, their actions, especially those that occurred after the filing of the complaint, do not matter for the “actual controversy” analysis. See *UAW*, 295 Mich App at 496 (noting that there must be an “actual controversy *between the parties*” (emphasis added)); *Sch Dist No 1, Fractional, S, Lansing Tp v Sch Dist of City of Lansing*, 331 Mich 523, 533 (1951) (same); *Lujan v Defenders of Wildlife*, 504 US 555, 571 n 4 (1992) (“[J]urisdiction is to be assessed under the facts existing when the complaint is filed.”). Second, even if nonparties’ actions could create a ripe, actual controversy, Plaintiffs (again) fail to allege any facts showing that the nonparties’ statements or actions have created such a controversy.

Finally, rather than supporting Plaintiffs’ claims, the affidavit of Plaintiff Dr. Sarah Walleth further proves just how speculative Plaintiffs’ purported harm is. For example, she speculates: “*If the Criminal Abortion Ban were enforced as written in Michigan, my colleagues at PPMI and I would be forced to stop providing abortion under virtually any circumstance.*” Walleth Aff, ¶ 75 (emphasis added). She also admits that “[a]bsent enforcement of the Criminal Abortion Ban, PPMI will continue to provide both medication and procedural abortion in Michigan.” *Id.* ¶ 88.

In short, even though the Supreme Court has overruled *Roe*, Plaintiffs offer no allegations, much less evidence, regarding the enforcement (or even threatened enforcement) of MCL 750.14. Thus, all of Plaintiffs’ allegations and arguments “rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Michigan Chiropractic Council*, 475 Mich at 371 n 14. This type of speculation is insufficient to establish an “actual controversy” or ripeness. See *League of Women Voters*, 506 Mich at 579–580; *Delaware Women’s Health Org, Inc v Wier*, 441 F Supp 497, 501 (D Del 1977) (dismissing plaintiffs’ application for declaratory relief regarding the constitutionality of abortion statutes when there was no threat of prosecution

under those statutes). It follows, then, that this Court lacks jurisdiction to decide Plaintiffs' claims.

II. This Court Should Dismiss Plaintiffs' Claims for Lack of Standing.

MCR 2.116(C)(8) authorizes a court to grant summary disposition when "[t]he opposing party has failed to state a claim on which relief can be granted." "A motion for summary disposition premised on the doctrine of standing as a defense may be proper pursuant to MCR 2.116(C)(8)." *Le Gassick as Trustee of James A Bellamy Trust v Univ of Michigan Regents*, 330 Mich App 487, 496 (2019).

Here, Plaintiffs lack standing for two separate reasons. First, in *Lansing*, the Michigan Supreme Court stated that "whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." 487 Mich at 372. The inverse is also true: If "plaintiffs do not meet the requirements of MCR 2.605, they do not have standing." *League of Women Voters*, 506 Mich at 585–587. As discussed in detail above, Plaintiffs cannot meet MCR 2.605's requirement that their claims involve an actual (real and immediate) controversy. Plaintiffs thus lack standing to bring all of their claims.

Second, Plaintiffs lack standing to challenge MCL 750.14 on behalf of unnamed and unknown persons in Michigan who may sometime in the future become pregnant, decide to seek abortion, and then decide to become Plaintiffs' patients.⁴ On its face, the statute does not apply to pregnant women. See *Nixon*, 50 Mich App at 39–40; *In re Vickers*, 371 Mich at 117–118. Even if it did, "plaintiffs must assert their own legal rights and cannot rest their claims to relief on the rights or interests of third parties." *Pontiac No 2*, 309 Mich App at 622. This is especially true in the declaratory-judgment context, as MCR 2.605(A)(1) permits a court only to "declare the rights

⁴ Those persons for whom Plaintiffs have performed abortions in the past are no longer Plaintiffs' patients. And persons who may become pregnant in the future and seek out an abortion from Plaintiffs are not yet considered patients. Thus, it is misleading for Plaintiffs to assert (as they do in the caption of their Complaint) that they are asserting claims "on behalf of" their patients.

. . . of *an interested party*.” (emphasis added).

MCR 2.201(B) similarly requires that “[a]n action must be prosecuted in the name of the real party in interest.” The rule demands a “party who by the substantive law in question owns the claim asserted.” *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 356 (2013). When a third party “owns the claim asserted,” the party bringing the claim is not the real party in interest. *Id.* An exception to this rule exists for an organization that advocates “for the interests of its members” when those “members themselves have a sufficient interest.” *Pontiac No 2*, 309 Mich App at 625.

As an initial matter, Plaintiffs are not the real party in interest for almost all of their claims. Plaintiffs assert a violation of their “*patients*’ right to bodily integrity,” a violation of their *patients*’ equal protection rights, a violation of their *patients*’ liberty and privacy rights under the Retained Rights Clause, a violation of their *patients*’ liberty and privacy rights under the Due Process Clause, and sex discrimination against their *patients*. Compl ¶¶ 126 (Count II), 134 (Count III), 148–149 (Count IV), 157 (Count V), 166 (Count VI) (emphasis added). Plaintiffs only assert one claim on their own behalf—that MCL 750.14 is unconstitutionally vague. Compl ¶ 119 (Count I). But even this claim is on behalf of “Plaintiffs and Plaintiffs’ patients.” *Id.* So aside from one part of one claim, none of the alleged rights at stake belong to Plaintiffs. Plaintiffs therefore do not “own the claims” asserting violations of those rights. See *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 356.

Further, Plaintiffs cannot benefit from the exception for organizations representing their members’ interests. The class of persons who in the future may become pregnant and may decide to seek an abortion from Plaintiffs PPMI and Dr. Wallett are not “members” of the PPMI organization. PPMI therefore has no organizational standing here.

Plus, even if predicted future patients were “members” of PPMI, Plaintiffs concede that they provide care to patients for non-abortion services and that “[t]here is no typical abortion patient.” Compl ¶ 81. In other words, the patients Plaintiffs purport to represent are not a monolithic group with common interests capable of mass representation. See *Pontiac No. 2*, 309 Mich App at 625–626 (holding that board did not have standing on behalf of its individual members because its members did not “shar[e] a common interest” or “assert through their group association a common injury.”).

What is more, rather than share the same interests with all of their patients, Plaintiffs have significant interests, mainly financial, that potentially conflict with their patients’ interests. See Compl ¶ 113 (“The Criminal Abortion Ban would directly harm PPMI’s mission to provide comprehensive sexual and reproductive health care . . . Some PPMI staff might leave the organization.”). It takes little imagination to see how Plaintiffs’ pecuniary interest in performing abortions is at odds with patients’ interests in “design[ing] their own future.” *Id.* ¶ 92.

In sum, Plaintiffs lack standing to bring any of their claims because they cannot meet MCR 2.605’s “actual controversy” requirement. Plaintiffs also lack standing and are not the real parties in interest to vindicate their patients’ rights. The Court should therefore dismiss all of Plaintiffs’ claims for lack of standing.

CONCLUSION AND RELIEF REQUESTED

This Court lacks subject-matter jurisdiction over Plaintiffs’ conjectural claims, and Plaintiffs lack standing to bring those claims. The Legislature therefore respectfully asks this Court to grant this motion for summary disposition and dismiss all of Plaintiffs’ claims under MCR 2.116(C)(4) and (C)(8).

Dated this 12th day of July, 2022

Respectfully submitted,

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