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 L. Gleicher

Motion of Right to Life of Michigan and the Michigan Catholic Conference for leave to file combined *amici curiae* brief in excess of 20 pages opposing Planned Parenthood's motion for summary disposition and supporting the Legislature's motion for summary disposition

THIS CASE INVOLVES A CLAIM THAT A MICHIGAN STATUTE IS UNCONSTITUTIONAL

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Right to Life of Michigan and the Michigan Catholic Conference respectfully move this Court under MCR 2.119 for leave to file the attached combined *amici curiae* brief opposing Planned Parenthood's motion for summary disposition and supporting the Legislature's motion

for summary disposition. In support of this motion, Right to Life of Michigan and the Michigan Catholic Conference state as follows:

1. This Court's June 28, 2022, order provides that "amicus curiae briefs may be submitted for filing without leave of the Court."

2. Responses to motions generally may not exceed 20 pages. MCR 2.119(A)(2)(a).

3. In this case, Planned Parenthood and the Legislature have filed dueling motions for summary disposition.

4. Taken together, this Court's June 28, 2022, order and MCR 2.119(A)(2) entitle *amici curiae* Right to Life of Michigan and the Michigan Catholic Conference to file a 20-page brief opposing Plaintiffs' motion for summary disposition and a 20-page brief supporting Intervenor-Defendants' motion for summary disposition, for a combined total of 40 pages.

5. In lieu of filing two separate briefs, Right to Life of Michigan and the Michigan Catholic Conference request leave to file the attached 26-page *amici curiae* brief, which addresses both Planned Parenthood's and the Legislature's motions for summary disposition.

6. Granting this motion is in the interests of efficiency and justice, and will lessen—not increase—the length of Right to Life of Michigan and the Michigan Catholic Conference's amicus submission.

7. This Court previously granted Right to Life of Michigan and the Michigan Catholic Conference leave to file a brief *amici curiae* and accepted their brief in support of dismissal for lack of jurisdiction, for recusal, and for a briefing schedule, if necessary. 4/20/22 Order

8. Right to Life and the Michigan Catholic Conference respectfully ask the Court to grant leave to file the attached combined *amici curiae* brief addressing both motions for summary disposition, which is attached as **Exhibit A**.

WHEREFORE, Right to Life of Michigan and the Michigan Catholic Conference respectfully request that this Court grant their request to file a combined *amici curiae* brief opposing Planned Parenthood's motion for summary disposition and supporting the Legislature's motion for summary disposition and accept the attached brief for filing.

Respectfully submitted,

Dated: August 22, 2022

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QUESTIONS PRESENTED

1. Whether the Michigan Constitution or the Elliott-Larsen Civil Rights Act create a right to abortion that overrides MCL 750.14 and other pro-life laws.

Amici answer: No.

2. Whether MCL 750.14 is unconstitutionally vague.

Amici answer: No.

3. Whether any alleged state constitutional right to abortion is superseded by the U.S. Constitution.

Amici answer: Yes.

3. Whether this Court has jurisdiction over this lawsuit when an actual controversy and standing were lacking at the time it was filed, and the case is not ripe for judicial decision either then or now.

Amici answer: No.

STATEMENT OF INTEREST

Right to Life of Michigan is a nonpartisan, nonsectarian, nonprofit organization whose members from all over Michigan are dedicated to protecting the gift of human life from conception to natural death. To that end, it provides educational resources to Michiganders and encourages community participation in programs that foster respect and protection for human life across the state. Right to Life of Michigan also seeks to give a voice to the voiceless on life issues like abortion, and fights for the defenseless and most vulnerable humans, born and unborn. As a result, Right to Life of Michigan, both on its own and on behalf of its members, has a strong interest in maintaining laws that promote life throughout Michigan, including MCL 750.14.

The Michigan Catholic Conference serves as the official voice of the Catholic Church in Michigan on matters of public policy. Its mission is to promote a social order that respects the dignity of all persons and to serve the common good in accordance with the teachings of the Catholic Church. Its board of directors includes the active bishops of Michigan's seven Catholic dioceses. The Michigan Catholic Conference has a deep, abiding interest in this matter—the dignity and sanctity of all human life. The Conference is dedicated to preserving and protecting human life at all stages, including by supporting laws like MCL 750.14. The Michigan Catholic Conference was the lead voice against Proposal B in 1972, a referendum that sought to invalidate MCL 750.14 and legalize abortion up to the 20th week of pregnancy. The Conference led the campaign against Proposal B, which saw 61% of the people vote "No."

INTRODUCTION

Planned Parenthood's motion for summary disposition urges this Court to make up a state constitutional right to abortion that violates binding precedent, has no grounding in the Michigan Constitution, and would put all the pro-life laws that Right to Life of Michigan and the Michigan Catholic Conference have sponsored or defended over the last 50 years in peril. Making this Court's preliminary injunction permanent would give *any* abortionist—physician or not—free rein to abort *any* unborn child for *any* reason—even after viability. There is no legal basis for doing so, or for declaring MCL 750.14 otherwise invalid, and the U.S. Constitution supersedes such basis in any event. Of course, this Court should not resolve any of these questions because, as the Legislature's motion for summary disposition correctly argues, the case should be dismissed for the lack of an actual controversy, standing, and ripeness. For all of the reasons explained below, Planned Parenthood's motion should be denied and the Legislature's motion should be granted.

ARGUMENT

I. The Michigan Constitution creates no right to abortion.

A. This Court is bound by *Mahaffey*'s holding that the Michigan Constitution creates no right to abortion separate and apart from *Roe v Wade*.

In *Mahaffey v Attorney General*, the Court of Appeals held in a published, post-November 1990 opinion litigated by the presiding judge in this matter "that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." 222 Mich App 325, 339; 564 NW2d 104 (1997). For more than a quarter century, it has been clear "that the Michigan Constitution does not provide a right to end a pregnancy." *Taylor v Kurapati*, 236 Mich App 315, 347; 600 NW2d 670, 687 (1999) (citing *Mahaffey*, 222 Mich App at 334–39).

Under MCR 7.215(C)(2), *Mahaffey* "has precedential effect under the rule of *stare decisis*." Its holding is broad and unambiguous: "neither application of traditional rules of constitutional interpretation nor examination of Supreme Court precedent supports the conclusion that there is a right to abortion under the Michigan Constitution." 222 Mich App at 334.

Mahaffey does speak, a few times, in terms of "whether the constitutional right to privacy encompasses the right to abortion." *Id.* But none of its reasoning was specific to an alleged right to privacy. Rather, the Court of Appeals based its holding on the 1963 Constitution as a whole:

- First, the Michigan Constitution and surrounding debates "are silent regarding the question of abortion." 222 Mich App at 335–36.
- Second, abortion "was a criminal offense" when the 1963 Constitution was ratified and the ratifiers demonstrated "no intention of altering the existing law." *Id.* Creating a constitutional right to abortion would have "elicit[ed] major debate" among the delegates and the public but no such debate occurred. *Id.* at 336.
- Third, less than a decade after the 1963 Constitution's adoption, "essentially the same electorate that approved the constitution rejected" Proposal B, which would have legalized abortion up to 20 weeks. *Id.*
- Last, Michigan's public policy "does not favor abortion" either in 1963 or now. 222 Mich App at 337.

Mahaffey's *stare decisis* effect isn't limited to identical cases. This Court must "reach the same result in a case that presents the same or *substantially similar issues*." *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246, 250 (2014) (per curiam) (emphasis added). At the least, *Mahaffey* rejected a state constitutional right to abortion that is *similar* to the abortion right that Planned Parenthood proposes here, holding that *no one* at the time of the 1963 Constitution's ratification would have understood the document to somehow invalidate MCL 750.14. This Court's failure to abide by *Mahaffey* in its preliminary-injunction ruling was legal error; extending that ruling here would be additional error.

B. The Michigan Constitution's Due Process Clause does not create a right to abortion.

1. Fundamental rights under Michigan's Due Process Clause turn on a historical review and the right to abortion badly fails that test.

Courts apply a "historical review" in analyzing the Michigan Constitution. *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993). As Chief Justice Cooley explained, courts interpreting the Michigan Constitution

> must take into consideration the times and circumstances under which the State Constitution was formed—the general spirit of the times and the prevailing sentiments among the people. . . . [The State Constitution must be] interpreted in the light of this history, [so as *not]* to be made to express purposes which were never within the minds of the people in agreeing to it. This [history] court[s] must keep in mind when called upon to interpret [the State Constitution]; for their duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express. [*Id.* at 764 (quoting *People v Harding*, 53 Mich 481, 485; 19 NW 155 (1884); *accord League of Women Voters of Mich v Sec'y of State*, 508 Mich 520, 535; 975 NW2d 840 (2022).]

Courts thus interpret the 1963 Constitution in light of the people's prevailing sentiments in 1963, not those of today. And, as the *Mahaffey* court recognized, *no one* in 1963 understood Const. 1963, art 1, § 17's language that "[n]o person shall . . . be deprived of . . . due process of law" as encompassing a right to abortion. To the contrary, MCL 750.14 had rendered most abortions a felony for 32 years.

Specifically, as to substantive due process, Michigan courts define a fundamental right as "an interest traditionally protected by our society," *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004) (quotation omitted), or a right "deemed implicit in the concept of ordered liberty," *AFT Mich v State of Michigan*, 497 Mich 197, 245; 866 NW2d 782 (2015) (quotation omitted). Planned Parenthood's asserted right to abortion meets neither definition, and this Court should deny a permanent injunction for three reasons.

First, abortion is not a right traditionally protected in Michigan. Quite the opposite, "[i]t is the public policy of the state to proscribe abortion." *People v Bricker*, 389 Mich 524, 529; 208 NW2d 172 (1973); *accord Larkin v Cahalan*, 389 Mich 533, 540–41; 208 NW2d 176 (1973) (abortion "is a serious crime both at common law and under our statutes"). And, because Michigan's law has not changed, that is just as true now as it was 49 years ago. Planned Parenthood's appeal to the prior common law misses the mark. 6/29/22 Br in Supp of Pl's June 29, 2022 Mot for Summ Disposition ("Pl's Mot") at 19–20. As the U.S. Supreme Court held conclusively, there was no right to abortion under the common law. *Dobbs v Jackson Women's Health Organization*, 142 S Ct 2228, 2248–53 (2022). "[Q]uickening [was] only evidence of life. It [was] not conclusive[ ]" or an "attempt to define a point in time when human life begins." *Larkin*, 389 Mich at 540.

Second, Planned Parenthood's claimed abortion right would allow women to end the lives of their unborn children at any point in gestation—including a healthy baby on its due date—for any reason or no reason at all. That notion of extreme self-autonomy in matters of life or death is contrary to "[t]he very concept of ordered liberty," which "precludes allowing every person to make [her] own standards on matters of conduct in which society as a whole has important interests." *People v Bennett*, 442 Mich 316, 330 n21; 501 NW2d 106 (1993) (quotation omitted). Michigan has vital interests in protecting human life, which is irreparably damaged and sapped of unique potential each time an unborn child's life is intentionally destroyed through abortion.

Third, Michigan courts must be "reluctant to expand the concept of substantive due process." *Bonner v City of Brighton*, 495 Mich 209, 227; 848 NW2d 380 (2014) (alteration omitted). The Michigan Supreme Court places a heavy emphasis on "judicial self-restraint" in this area. *Id.* Yet that quality is sorely lacking from this Court's preliminary-injunction order, which

creates a constitutional right to abortion out of whole cloth and *completely enjoins* MCL 750.14's enforcement for the first time in Michigan's history.

Fourth, Michigan courts have never applied the *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584 (2015), brand of substantive due process that Planned Parenthood cites here. Pl's Mot at 33. It offers no case in which either a majority of the Michigan Supreme Court or the Court of Appeals has approved that expansive theory of judicially-created rights. *But see Mays v Snyder*, 323 Mich App 1, 58; 916 NW2d 227 (2018), *aff'd by Mays v Governor of Michigan*, 506 Mich 157, 167 (2020) (citing *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258 (1997)). And for good reason, *Obergefell*'s forward-looking nature is directly contrary to the "historical review" that *Sitz* commands. 443 Mich at 763; *accord People v Kevorkian*, 447 Mich 436, 481; 527 NW2d 714 (1994) (refusing to make "an impermissibly radical departure from existing tradition, and from the principles that underlie that tradition").

2. The right to bodily integrity protected by the Michigan Constitution does not include a right to abortion.

Planned Parenthood asserts a state constitutional right to abortion grounded in bodily integrity. Pl's Mot at 9–10. Michigan's leading case on the right to bodily integrity is *Mays*, 323 Mich App 1, 58–62, which the Supreme Court "affirmed by equal division," 506 Mich at 167 (citing MCR 7.315(A)). The Court of Appeals's majority opinion in *Snyder* recognizes that "'[t]he due process guarantee of the Michigan Constitution is coextensive with its federal counterpart.'" 323 Mich App at 58 (quoting *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013)). That dooms Planned Parenthood's bodily-integrity argument.

In *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833; 112 S Ct 2791 (1992), the U.S. Supreme Court grounded the federal due process right to abortion in "personal autonomy and bodily integrity." *Id.* at 857. But *Dobbs v Jackson Women's Health Organization*,

142 S Ct 2228 (2022), overruled *Casey* and its substantive due process holding. *Id.* at 2242. After *Dobbs*, no right to abortion "is implicitly protected by *any* [federal] constitutional provision, including . . . the Due Process Clause of the Fourteenth Amendment." *Id.* (emphasis added). Because Michigan courts give Const. 1963, art 1, § 17 the same meaning, *Snyder*, 323 Mich App at 58, there is no right to abortion under Michigan's Due Process Clause either.

Perhaps the law was hazy in May 2022 when this Court issued a preliminary injunction in advance of the U.S. Supreme Court's ruling in *Dobbs*. But it is clear now. The Court of Appeals's published opinion in *Snyder*, which holds that the federal and state constitutions protect an *identical* right to bodily integrity, excludes this Court from declaring a state due process right to abortion (via bodily integrity or otherwise) that contradicts *Dobbs*.

Planned Parenthood's argument also fails on the merits. Bodily integrity is not a limitless right to personal autonomy. If it were, the Michigan Supreme Court would have recognized a constitutional right to assisted suicide based on bodily integrity, rather than rejecting one nearly 30 years ago. *Kevorkian*, 447 Mich at 464–82; *accord Glucksberg*, 521 US at 723–28.

The constitutional right to bodily integrity is important but limited: it protects against "egregious, nonconsensual entr[ies] *into* the body" that are "without any legitimate governmental objective." *Snyder*, 323 Mich App at 60 (emphasis added, quotation omitted). Competent adults have "the right to *refuse* medical treatment and procedures." *In re Rosebush*, 195 Mich App 675, 681; 491 NW2d 633 (1992) (emphasis added). As a result, the government usually cannot forcibly pump someone's stomach, compel an individual to take medication, or otherwise veto a competent adult's rejection of medical treatment. *Guertin v State*, 912 F3d 907, 919–20 (CA6, 2019). The right to bodily integrity is a *negative* right—the right to *close* one's body to unwanted entry.

What Planned Parenthood seeks is a *positive* right—the right to *open* one's body to wanted entries designed to destroy an unborn child. That claimed right to abortion finds no grounding in

bodily integrity. Far from trying to avoid a "*nonconsensual* entry into the body," *Snyder*, 323 Mich App at 60 (quotation omitted and emphasis added), Planned Parenthood pursues a *consensual* entry into a woman's body to end the life of her unborn child. What's more, MCL 750.14 plainly serves a "legitimate governmental objective," *id.* (quotation omitted), to "protect human life," *Larkin*, 389 Mich at 540.[1] So, the type of bodily-integrity rights courts have traditionally protected aren't even implicated. Planned Parenthood's radical new theory would dramatically curtail the government's ability to pursue its legitimate objectives in protecting life—while at the same time, fostering Planned Parenthood's business model.

Kevorkian confirms this conclusion. There, the Supreme Court drew a firm line between "action and inaction." *Kevorkian*, 447 Mich at 471. Bodily integrity protects *inaction*, such as "the refusal or cessation of life-sustaining medical treatment [that] simply permits life to run its course," *id.* at 471–72, because "the treatment itself is a violation of bodily integrity." *Id.* at 480 n59. In contrast, the fundamental right to bodily integrity does not apply to "*affirmative act[s*]," such as "end[ing] a life." *Id.* at 471–72 (emphasis added). "When one acts to end [a] life, it is the intrusion of the lethal agent that violates bodily integrity." *Id.* at 480 n59. And that is equally true whether a woman seeks to end her own life or the life of her unborn child. In short, the right to bodily integrity is a shield, not a sword: it provides no positive right to end a human life regardless of whether that life is outside the womb or inside it.

[1] Planned Parenthood's motion and this Court's preliminary injunction rely on *People v Nixon*, 42 Mich App 332; 201 NW2d 635 (1972). *E.g.*, Pl's Mot at 19–21, 23, 25, 28, 35, 37. Crediting *Nixon* is legal error because that opinion is not good law. The Supreme Court took jurisdiction and "remanded to the Court of Appeals for disposition not inconsistent with" *Larkin* and *Bricker*. *People v Nixon*, 389 Mich 809, 809–10; 387 NW2d 921 (1973). On remand, the Court of Appeals did an about-face and reversed Nixon's conviction under *Bricker*. *People v Nixon*, 50 Mich App 38, 40; 212 NW2d 797 (1973) (per curiam). None of the Court of Appeals's pre-*Bricker* analysis remains valid.

In addition, there are obvious differences between the right to decline medical treatment and Planned Parenthood's asserted right to abortion. Refusing medical intervention physically impacts no one but the patient. In stark contrast, an abortion ends a completely unique and innocent human life, often in gruesome ways—violating the unborn child's bodily integrity in the process. Parents enjoy no right to harm (let alone kill) children outside the womb. The only broadly comparable situation is when a parent rejects life-saving medical treatment for a minor child. And, in that scenario, the law often rejects a parent's decision and preserves a child's life. *E.g.*, *In re AMB*, 248 Mich App 144, 183–85; 640 NW2d 262, 284–85 (2001) (discussing the federal Child Abuse Prevention and Treatment and Adoption Reform Act).

3. Planned Parenthood's privacy argument for a right to abortion is barred, meritless, and waived.

Planned Parenthood admits that *Mahaffey* bars its claim that there is a right to privacy under the Michigan Constitution that covers abortion. Pl's Mot at 35. But *Mahaffey* is not the only obstacle. The right to privacy is grounded in substantive due process. And "'[t]he due process guarantee of the Michigan Constitution is coextensive with its federal counterpart.'" *Snyder*, 323 Mich App at 58 (quotation omitted). That means the Supreme Court's substantive-due-process analysis in *Dobbs* applies equally to Michigan's Due Process Clause. Const. 1963, art 1, § 17.

Dobbs held that "[o]ur Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated." 142 S Ct at 2257. In so doing, the U.S. Supreme Court rejected *Roe v Wade*'s asserted "right to privacy" in the abortion context, *id.*, because no privacy case "involved the critical moral question posed by abortion," *id.* at 2258, or the intentional destruction of human life, *id.* at 2243, thus rendering the cases on which *Roe* relied "inapposite," *id*. at 2258. Planned Parenthood cannot resuscitate this moribund privacy theory based on Const. 1963, art 1, § 17's mere existence.

Not only is Planned Parenthood's privacy theory barred by *Mahaffey*, *Snyder*, and *Dobbs*, it is also waived because Planned Parenthood's motion is conclusory and fails to develop the substance of a privacy argument based on the Michigan Constitution in any meaningful way. Pl's Mot at 35–37. Plaintiffs cannot "simply . . . announce a position or assert an error and then leave it up to th[e] Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation omitted).

C. Michigan's Equal Protection Clause does not create a right to abortion or subject MCL 750.14. to heightened scrutiny.

Planned Parenthood separately says that Michigan's Equal Protection Clause creates a right to abortion. Pl's Mot at 23–29. But that argument is also barred by controlling precedent. Just like due process, "Michigan's equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010); *accord People v Idziak*, 484 Mich 549, 570; 773 NW2d 616 (2009) ("The equal protection clauses of the United States and Michigan Constitutions are coextensive."). In *Dobbs*, the U.S. Supreme Court rejected a federal equal-protection challenge to Mississippi's abortion law, holding "that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny[.]'" 142 S Ct at 2245.

Under the federal and state Equal Protection Clauses, "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretext designed to effect an invidious discrimination against members of one sex of the other.'" *Id.* at 2245–46 (quoting *Geduldig v Aiello*, 417 US 484, 496 n20; 94 S Ct 2485 (1974) (alteration omitted). A state's "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Id.* at 2246 (quoting *Bray v Alexandria*

Women's Health Clinic, 506 US 263, 273–74; 113 S Ct 753 (1993)). Binding Supreme Court precedent, in conjunction with *Dobbs*, thus precludes this Court from holding that MCL 750.14 warrants heightened scrutiny under Const. 1963, Art. 1, § 2.

There is also no substance to Planned Parenthood's equal-protection claim. First, Planned Parenthood fails to posit a sex-based classification. It merely says that some "pregnant people" want "to carry their pregnancies to term" and some "pregnant people" want "to have abortions." Pl's Mot at 23. "Pregnant people" who want their babies and "pregnant people" who want an abortion are all the same sex—female. So there is no inequality on that score. Because men cannot bear children, they are not similarly situated. *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 192; 387 NW2d 821 (1986) ("When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated.") (quotation omitted). "Physical differences between men and women . . . are enduring" and "[t]he two sexes are not fungible." *United States v Virginia*, 518 US 515, 533; 116 S Ct 2264 (1996). Pregnancy merely demonstrates this truth.

Second, MCL 750.14's penalties do not apply to pregnant woman. *In re Vickers*, 371 Mich 114, 117-118; 123 NW2d 253, 254 (1963). The statute applies only to abortionists and treats them the same whether they are male or female, exactly as the Equal Protection Clause requires. *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 439; 105 S Ct 3249 (1985).

Third, Planned Parenthood cannot show that MCL 750.14 infringes on a fundamental right. As *amici* have explained, Planned Parenthood's substantive due process arguments for a state constitutional right to abortion are barred by precedent and fail on the merits. *Supra* Part I.B.

Fourth, it makes no difference that abortion restrictions have a greater impact on women than men. Laws are not "unconstitutional [s]olely because [they have] a . . . disproportionate impact" on a protected class. *Washington v Davis*, 426 US 229, 239; 96 S Ct 2040 (1976). The

Equal Protection Clause is implicated only if Planned Parenthood proves that MCL 750.14 is not a genuine abortion regulation but a "'pretext designed to effect an invidious discrimination against [women].'" *Dobbs*, 142 S Ct at 2245–46 (quoting *Geduldig*, 417 US at 496 n20); *accord Crego v Coleman*, 463 Mich 248, 265–66; 615 NW2d 218 (2000) (relying on *Geduldig*).

Planned Parenthood cannot make this showing. The U.S. Supreme Court rejected such an untenable theory in *Dobbs*. *Id.* And the Michigan Supreme Court did the same by taking jurisdiction over *Nixon* and remanding for a new decision that complied with *Bricker* and *Larkin*. *Supra* p 7, n1. In those cases, the Supreme Court (1) upheld MCL 750.14 to the maximum extent possible, rather than invalidating the statute as invidious, *Bricker*, 389 Mich at 531; and (2) acknowledged that Michigan's abortion laws "are designed to protect human life," *Larkin*, 389 Mich at 540. *Accord Mahaffey*, 222 Mich App at 345 (another pro-life law was designed "to protect . . . the life of the fetus"). Planned Parenthood cites no evidence of discriminatory intent specific to MCL 750.14's terms or enactment, let alone compelling evidence sufficient to overcome the law's presumed constitutionality. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). In fact, 60% of the electorate—including many women—voted to *keep* MCL 750.14 in 1972 when the feminist movement was at its height. And these voters were not motivated by animus.

Some wrongly claim that MCL 750.14 is "undesirable, unfair, unjust[,] or inhumane" but that does not "empower" a court "to override the [L]egislature and substitute its own solution." *Doe v Dep't of Soc Servs*, 439 Mich 650, 681; 487 NW2d 166 (1992) (quotation omitted). MCL 750.14 does not violate Michigan's Equal Protection Clause.

1. Michigan's Retained Rights Clause does not empower courts to recognize and enforce unenumerated constitutional rights, and Planned Parenthood's contrary arguments are meritless.

Planned Parenthood suggests that the Retained Rights Clause empowers courts to recognize and enforce non-textual rights that would be completely foreign to those who ratified

the Constitution in 1963. Pl's Mot at 31–35. Not so. The Retained Rights Clause means what it says: "[t]he enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people." Const 1963, art 1, § 23. In other words, the rights listed in the Michigan Constitution cannot refute or lessen other individual rights. But the clause does not *create* or *elevate* retained rights either. It surely does not promote unenumerated individual rights to constitutional status, as Planned Parenthood implies. The clause leaves retained rights completely untouched—neither worse nor better than when the constitution was ratified.

Notably, the Court of Appeals has described the Retained Rights Clause as the Ninth Amendment's "counterpart." *People v Kevorkian*, 248 Mich App 373, 384; 639 NW2d 291 (2001). Professor Michael McConnell explained that the Ninth Amendment ensures that "rights arising from natural law or natural justice are not abrogated on account of . . . incomplete enumeration. But it did not elevate those rights to the status of constitutional positive law, superior to ordinary legislation." Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup Ct Rev 13, 23 (2010). So too here.

What's more, where the Michigan Constitution grants power to the Legislature no individual right is "retained." *Cf Roth v United States*, 354 US 476, 493; 77 S Ct 1304 (1957) (where there is a "granted power" to the government any claim to "invasion of those rights[ ] reserved by the Ninth . . . Amendment[ ] must fail"). The Michigan Constitution grants the Legislature power and responsibility to "pass suitable laws for the protection and promotion of the public health," including the health of the unborn. Const 1963, art 4, § 51; *accord City of Ecorse v Peoples Cmty Hosp Auth*, 336 Mich 490, 502; 58 NW2d 159 (1953) (recognizing that the Legislature has "a large area of discretion" in health-related matters). Because the Michigan Constitution grants the Legislature explicit authority to enact MCL 750.14, Planned Parenthood's retained-rights argument is meritless.

The only substantive argument Planned Parenthood makes in support of this claim relates to the common law. But Planned Parenthood misreads that history. The U.S. Supreme Court in *Dobbs* established, once and for all, that no right to abortion existed under the common law. *Dobbs*, 142 S Ct at 2248–53. And the Michigan Supreme Court held the same concerning Michigan specifically by (1) recognizing that abortion "is a serious crime both at common law and under our statues" and (2) explaining that "quickening [was] only evidence of life," not an "attempt to define a point in time when human life begins." *Larkin*, 389 Mich at 540–41.

II. MCL 750.14 is not vague and Planned Parenthood's claim to the contrary is meritless and barred.

Planned Parenthood contends that MCL 750.14 is unconstitutionally vague. Pl's Mot at 37–40. Yet the Supreme Court in *Bricker* established that MCL 750.14's terms are not vague: "The central purpose of this legislation is clear enough—to prohibit all abortions except those required to preserve the health of the mother." 389 Mich at 529. Planned Parenthood does not contest this holding. In fact, it does not raise a proper vagueness claim at all.

Planned Parenthood's complaint is that it's not clear whether *Bricker*'s narrowing construction of MCL 750.14 in light of *Roe v Wade* survives the U.S. Supreme Court's overruling of *Roe*. But this claim is meritless for two reasons. First, the conundrum that Planned Parenthood poses is whether *Bricker* remains good law in light of *Dobbs*. Whether *Bricker* has been effectively abrogated is a question of that judicial ruling's scope and force, not of MCL 750.14's vagueness. Only a court can answer that question—not the Legislature that passed MCL 750.14—and Planned Parenthood has made no attempt to obtain an answer from this Court or any other. *E.g.*, *Woodring v Phoenix Ins Co*, 325 Mich App 108, 112; 923 NW2d 607 (2018).

Second, a judicial narrowing construction may *save* a statute from vagueness. *E.g.*, *Twp of Plymouth v Hancock*, 236 Mich App 197, 201; 600 NW2d 380 (1999) (per curiam). But Planned

Parenthood cites no case in which a judicial narrowing construction *created* vagueness and doomed an otherwise valid law. Nor does that argument hold water. The point of a narrowing construction is "to save a statute from unconstitutionality." *Kildea v Electro-Wire Prods, Inc*, 144 F.3d 400, 407 (CA6, 1998) (quotation omitted). Perhaps this Court could apply an old or new narrowing construction to uphold MCL 750.14's constitutionality. *E.g.*, *People v Higuera*, 244 Mich App 429, 448–50; 625 NW2d 444 (2001). But it cannot cite an old narrowing construction to strike down the law.

Planned Parenthood's vagueness argument is also barred. For a plaintiff to raise such a claim, the statute must be "vague as applied to [its] conduct." *People v Lawhorn*, 320 Mich App 194, 200; 907 NW2d 832 (2017) (per curiam) (quotation omitted). But Planned Parenthood's entire case is predicated on the fact that, "[u]nder [MCL 750.14], providing . . . an abortion at any point in pregnancy is punishable as a felony, unless the abortion is necessary to save the pregnant person's life." Pl's Mot at 1. All of Planned Parenthood's alleged harms hinge on the statute being "enforced according to its terms." Pl's Mot at 6. During months of litigation, Planned Parenthood has had no doubts about what MCL 750.14 means. It cannot now claim that *Bricker*'s narrowing construction *might* apply. If that were true, Planned Parenthood's case would be largely a waste of time and this Court's preliminary-injunction order would have been nonsensical and overbroad.

III. The Elliott-Larsen Civil Rights Act is irrelevant.

Planned Parenthood claims that enforcing MCL 750.14 would violate the Elliott-Larsen Civil Rights Act ("ELRCA"). Pl's Mot at 29–31. But that argument is unsupported. Planned Parenthood never explains why the ELCRA trumps MCL 750.14. Court read statutes that purportedly conflict "harmoniously," giving "force and effect to each," and will adopt "*any other* reasonable construction than a repeal by implication." *Int'l Bus Machs Corp v. Dep't of Treasury*, 496 Mich 642, 651–52; 852 NW2d 865 (2014) (court's emphasis; citation and quotation marks

omitted). For Planned Parenthood to succeed, it must prove that the ELCRA and MCL 750.14 are "so incompatible that both cannot stand." *Id.* at 652. And Planned Parenthood cannot make that impossible showing.

What's more, it is a basic rule of construction that "when two statutes . . . conflict and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails." *People v Ellis*, 224 Mich App 752, 756; 569 NW2d 917 (1997) (per curiam). The ELCRA bars discrimination based on certain characteristics generally. It has no obvious relevance to Michigan's abortion laws. In contrast, MCL 750.14 is directly on point and highly specific: it bans abortion unless necessary to save the mother's life. So, this Court must resolve any alleged conflict between the ELCRA and MCL 750.14 in the latter's favor, treating "[t]he specific statute . . . as an exception to the general one." *Id.*

IV. MCL 750.14 is subject to rational basis review, a deferential level of scrutiny that the statute easily satisfies.

Under binding Michigan precedent, the right to abortion "is not a right at all . . . . Therefore, strict scrutiny does not apply." *Phillips*, 470 Mich at 434. This Court must assess MCL 750.14's constitutionality under the rational basis test that generally "applies to social and economic legislation." *Id.*; *accord Dobbs*, 142 S Ct at 2284. Under that rubric, the question is whether MCL 750.14 is rationally related to a legitimate government interest. *Id.* It clearly is.

Courts applying rational-basis review do not "test the wisdom, need, or appropriateness of the legislation." *Id.* (quotation omitted). Nor do they examine its "effects" because the fact that a law "may have profound and far-reaching consequences" is "all the more reason for [a court] to defer to the [Legislature's] judgment." *Phillips*, 470 Mich at 434. Courts' "highly deferential" review is limited to determining whether the law is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Crego*, 463 Mich at 259 (quotation omitted). "[I]f the

legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable," a court will uphold the statute. *Id.* at 259–60.

To prevail, Planned Parenthood must demonstrate that MCL 750.14 is "based solely on reasons totally unrelated to the pursuit of the State's goals," which requires "negati[ng] every conceivable basis which might support the legislation." *TIG Ins Co, Inc v. Dep't of Treasury*, 464 Mich 548, 558; 629 NW2d 402 (2001) (quotations omitted). Only then will Planned Parenthood "overcome the presumption that the statute is constitutional." *Id.* at 557–58. It cannot hurdle this high bar.

The Legislature's purpose in enacting MCL 750.14 is self-evident: the statute bans most abortions to protect innocent human life. As the Michigan Supreme Court has explained, "statutes proscribing . . . abortion are designed to protect human life and carry the necessary implication that [unborn] life . . . is human life." *Larkin*, 389 Mich at 540. The Supreme Court's ruling in *Bricker* acknowledges the validity of that interest by (1) declaring that "the public policy of the state [is] to proscribe abortion," (2) observing that "there was little or no reason to question [MCL 750.14's] constitutionality" before *Roe v Wade*, (3) rejecting the notion that post-*Roe* "anyone who has or will perform an abortion can do so with impunity," and (4) holding that MCL 750.14 was valid and continued to apply post-*Roe* "except as to those cases defined and exempted under" federal precedent. 389 Mich at 529–31.

Recently, the U.S. Supreme Court held much the same. *Dobbs* established that states have "legitimate interests" for "regulating abortion," including "respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric . . . procedures; [and] the preservation of the integrity of the medical profession." 142 S Ct at 2284 (quotations omitted). Because such "legitimate interests provide a rational basis for [MCL 750.14]," Planned Parenthood's

"constitutional challenge must fail." *Id.* So, Planned Parenthood is not likely to prevail on the merits and its motion for summary disposition should be denied.

V. Planned Parenthood's alleged harms are spurious: its requested permanent injunction would cause irreparable harm, not recognizing MCL 750.14's validity.

Planned Parenthood imagines all manner of harms if MCL 750.14 takes effect. Pl's Mot at 44–45. But none of its allegations are true. The Attorney General and a long list of county prosecutors have no intention of enforcing MCL 750.14 regardless of any court order. At least seven county prosecutors took that public position before any injunction issued and have reaffirmed it since.[2] Those prosecuting attorneys represent some of Michigan's most-populous counties, including Wayne, Oakland, Genesee, Washtenaw, and Ingham. Because no abortionist prosecutions are viable in these locations, there is no reason to think that abortionists would shut down, especially as Planned Parenthood declined to do so *even after* the Court of Appeals clarified that county prosecutors were never subject to this Court's jurisdiction.[3] Speculative harms like these cannot justify a permanent injunction. *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 149; 809 NW2d 444 (2011) (per curiam).

What any order akin to this Court's preliminary injunction will provide is abortion without limits. Only one irreparable harm is sure to result: an unprecedented loss of *even viable* unborn life. Right now in Michigan, a *non-physician* could abort a baby at six months' gestation without consequence. Or one of Planned Parenthood's physicians could abort a baby *at nine months' gestation*, for no medical reason, and there may be little-to-nothing the Attorney General or a county prosecutor can do. Certainly, there is irreparable harm to the innocent lives that will be lost

[2] **Exhibit 1**, News Release, Moment Strategies, Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose (Apr 7, 2022), https://bit.ly/3zHtFXg; **Exhibit 2**, News Release, Charter County of Wayne, Seven Michigan Prosecutors Reaffirm their Position on Abortion Prosecution (Aug 1, 2022), https://bit.ly/3CiSla3.

[3] **Exhibit 3**, @PPofMI, Twitter (Aug 1, 2022, 3:00 pm), https://bit.ly/3PiNZCw.

while MCL 750.14 is enjoined, abortionists enjoy free rein, and Michigan serves as a Mecca for out-of-state abortions. But none of that harm applies to abortion advocates or validates an injunction. Indeed, the harm that does exist compels denying Planned Parenthood's motion.

Before this Court's preliminary injunction and the Oakland County Circuit Court's TRO, there was no history of MCL 750.14 being completely moribund. The statute was in full effect for 42 years. After *Roe v Wade*, the Supreme Court limited MCL 750.14's scope for the next 49 years to (1) nonphysicians who performed abortions, and (2) physicians who performed abortions after viability where it was not necessary, in their medical judgment, to preserve the life or health of the mother. *Bricker*, 389 Mich at 529–30. Yet *Bricker* made clear that "criminal responsibility" continued to "attach[ ]," "except as to those cases defined and exempted under *Roe v Wade* and *Doe v Bolton*." *Id.* at 531. This Court's preliminary injunction and the circuit court's TRO went much further, enjoining county prosecutors from enforcing MCL 750.14 *in any circumstance*, including against nonphysicians and physicians who abort viable babies for no medical reason.

Even Planned Parenthood recognizes that this Court's preliminary injunction went too far. Its motion for summary disposition requests a permanent injunction that restrains the Attorney General "from enforcing or giving effect to MCL 750.14, MCL 750.323, and any other Michigan statute or regulation *to the extent that it prohibits abortions before viability, or after viability when preserving the life or health of the pregnant person*." Pl's Mot at 46–47 (emphasis added). That is a far cry from invalidating MCL 750.14, or any other pro-life law, altogether.

VI. Any alleged state constitutional right to abortion is superseded in these circumstances by the U.S. Constitution.

Even if a Michigan court were to ignore all the binding Michigan and U.S. Supreme Court precedent and judicially create a right to abortion that does not exist in the text, tradition, or history

of Michigan's Constitution, that made up "right" would be superseded by two separate provisions of the U.S. Constitution.

1. First, the Fourteenth Amendment to the U.S. Constitution provides that no State shall "deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* without its jurisdiction the equal protection of the laws." US Const, Amend XIV (emphasis added). And common-law history at the time of the founding shows conclusively that unborn children were considered "persons" within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Specifically, the Fourteenth Amendment, like the Civil Rights Act of 1866 it was meant to sustain, codified equality in the fundamental rights of persons as explained in Blackstone's *Commentaries* and leading U.S. treatises. As the *Commentaries*, treatises, landmark English cases, and state high courts in the years before 1868 make clear, an unborn human beginning through pregnancy "is a person" and, under "civil and common law," is "to all intents and purposes a child, as much as if born." Br of Amici Curiae Scholars of Jurisprudence at 3 & n4, *Dobbs v Jackson Women's Health Org*, 142 S Ct 2228 (2022) (No 19-1392), available at https://bit.ly/3JXKgJi. Accordingly, unborn children are constitutional persons entitled to the equal protection of the laws. *Id.* at 4–27 (cataloguing the history and citing scores of relevant cases and statutes establishing the proposition that unborn children are protected by the Fourteenth Amendment as "persons" from the moment of conception).

For example, Blackstone's *Commentaries* taught expressly that unborn human beings are rights-bearing "persons." "An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. . . . . It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born." William Blackstone, *Commentaries on the Laws of England*, pp 129–30. Common-law

decisions followed this principle, holding for example, in the years immediately preceding the Fourteenth Amendment's drafting and ratification, that "a child is to be considered *in esse* [in being] at a period commencing nine months previously to its birth." *Hall v Hancock,* 32 Mass (15 Pick) 255, 257–58 (1834). Indeed, "a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered." *Id.* Accordingly, the original public meaning in 1868 of the phrase "any person" in the Fourteenth Amendment included living, unborn human beings.

Recognizing that a proper construction of the Fourteenth Amendment includes the protection of the unborn has obvious implications at the state level. It prohibits state courts from enjoining laws that protect unborn, human life. And it authorizes injunctions against state officials who intend to facilitate abortions. Yet the mother's own constitutional rights could require states to allow doctors to engage in life-saving medical interventions when the mother's life is at stake. These principles require this Court to deny Planned Parenthood's request to enjoin MCL 750.14.

2. Second, the Guarantee Clause of the U.S. Constitution commands the United States to "guarantee to every State in this Union a Republican Form of Government." US Const, art IV, § 4. While the Clause does not require the United States to require any particular *form* of republican government at the state level, it does require the United States to prevent a state from imposing rule by, for example, monarchy, dictatorship, or permanent military rule. The U.S. Constitution requires governing by electoral processes.

When a state judiciary makes up rights that do not exist anywhere in that state's constitution, it has violated the Guarantee Clause. Consider the situation here. In 1931, the Michigan Legislature enacted and the Governor signed into law MCL 750.14. Thirty-two years later, Michigan's citizens adopted the 1963 Constitution, yet, as explained above, not a single person believed that document created a state constitutional right to abortion rendering MCL

750.14 invalid in whole or in part. Until this Court's preliminary-injunction order, no Michigan court had recognized such a right in nearly 60 years that have elapsed since the 1963 Constitution went into effect without being overruled. Any judicial effort to revise or even "reinterpret" the Constitution today to include a right to abortion would necessarily have the hallmarks of legislation, an act that can only be done by the Legislature itself. Such a ruling would *not* be an interpretation or application of Michigan Constitution in any sense of those words.

If the language of the Guarantee Clause is to be taken seriously, there must be *some* limit on state court authority to overturn legislation by judicial fiat.[4] For instance, if the Michigan Supreme Court held that the Governor alone has authority to unilaterally enact legislation notwithstanding the Michigan Constitution's provisions delegating that authority to the Legislature, there would be no question the federal courts could intervene. Such a decision would subject Michigan's citizens to a dictatorship of the judiciary, one that denigrates the electoral processes the State's citizens have chosen for their self-governance.

So too here. For the reasons explained above, no Michigan court can recognize a state constitutional right to abortion without rewriting Michigan's Constitution and wholesale ignoring a plethora of state-court and U.S. Supreme Court precedents. The Guarantee Clause provides a backstop to prevent such a judicial override over Michigan electoral processes and thus provides

[4] While some suggest that all Guarantee Clause claims are non-justiciable, that claim is belied by the fact that the U.S. Supreme Court has addressed the merits of Guarantee Clause claims without holding them nonjusticiable. *E.g.*, *Att'y Gen of Mich ex rel Kies v Lowrey*, 199 US 233 (1905); *Forsyth v City of Hammond*, 166 US 506 (1897); *Duncan v McCall*, 139 US 449 (1891). Indeed, the Court has indicated that while some questions raised under the Guarantee Clause are nonjusticiable, others can be decided. *New York v United States*, 505 US 144, 184 (1992); *Reynolds v Sims*, 377 US 533, 582 (1964). The issue of justiciability is thus "one of 'political questions,' not one of 'political cases,'" and one governed by six factors satisfied here. See *Baker v Carr*, 369 US 186, 217 (1962). A case where a state court makes up a constitutional right that is not apparent from the text, history, and tradition of a state constitution is certainly one where the Guarantee Clause would have justiciable effect.

an independent ground on which to deny Planned Parenthood's request for summary disposition and a permanent injunction.

VII. Planned Parenthood's lawsuit should be dismissed.

The Legislature's motion for summary disposition argues that Planned Parenthood's lawsuit should be dismissed for lack of an actual controversy, standing, and ripeness. 7/12/22 Intervenor-Def's Br in Supp of Intervenor-Def's Mot for Summ Disposition Under Rule 2.116(C)(4) and (C)(8) at 12–18. The Legislature is correct. Because jurisdiction is lacking, this Court should dismiss the case.

A. For jurisdiction to exist, there must be an actual controversy and standing at the case's outset, and both were lacking here.

"When considering whether courts may properly exercise judicial power to decide an issue, the most critical element is the requirement of a genuine case or controversy between the parties . . . ." *LaFontaine Saline Inc v Chrysler Grp LLC*, 298 Mich App 576, 589; 828 NW2d 446 (2012) (per curiam) (quotations omitted), *vacated on other grounds*, 496 Mich 26; 852 NW2d 78 (2014). "When there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 545; 904 NW2d 192 (2017). Likewise, plaintiffs' standing in a declaratory-judgment action standing depends on "the requirements in MCR 2.605 [being] met," *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 373; 792 NW2d 686, 700 (2010), and MCR 2.605(A)(1) demands "a case of actual controversy within [the court's] jurisdiction."

Jurisdictional matters like an actual controversy and standing are assessed "at the time the complaint is filed." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 595 n54; 957 NW2d 731 (2020). Both requirements were originally lacking here. An actual controversy never existed between Planned Parenthood and the Attorney General. They agreed that MCL

750.14 is unconstitutional and should be enjoined. Accordingly, the Attorney General refused to file a motion to dismiss or offer any substantive defense of the statute. *But see League of Women Voters of Mich v Sec'y of State*, 506 Mich 905; 948 NW2d 70, 70 (2020) (Viviano, J., concurring) (condemning such "a friendly scrimmage brought to obtain a binding result that both sides desire"). This Court issued a preliminary injunction without any adversarial briefing or argument from the original parties. Planned Parenthood now seeks to make that injunction permanent.

Though the Legislature intervened later to appeal the preliminary injunction, that does not solve the original jurisdictional problem. Just as "joinder properly arises only when jurisdiction otherwise exists," *Bowes v Int'l Pharmakon Labs, Inc*, 111 Mich App 410, 415; 314 NW2d 642 (1981) (per curiam), intervention is proper only when a court *already* has jurisdiction and cannot retroactively create it. The Sixth Circuit has made this limitation clear:

> Intervention cannot, as a general rule, create jurisdiction where none exists. Intervention "presuppose[s] an action duly brought"; it cannot "cure [the] vice in the original suit" and must "abide the fate of that suit." *United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157, 163–64, 34 S.Ct. 550, 58 L.Ed. 893 (1914). As such, a court requires an already-existing suit within its jurisdiction as a prerequisite to the "ancillary proceeding" of intervention. *Horn v. Eltra Corp.*, 686 F.2d 439, 440 (6th Cir.1982); *see also Kelly v. Carr*, 691 F.2d 800, 806 (6th Cir.1980) ("[I]ntervention presumes a valid lawsuit in a court of competent jurisdiction."). *See generally* 7C Wright, Miller & Kane, Federal Practice and Procedure § 1917 (3d ed.1998). In the absence of jurisdiction over the existing suit, a [trial] court simply has no power to decide a motion to intervene; its only option is to dismiss. [*Vill of Oakwood v State Bank & Trust Co*, 481 F3d 364, 367 (CA 6, 2007).]

Because there was no actual controversy in which the Legislature could intervene, the jurisdictional vice in Planned Parenthood's lawsuit remains and requires dismissal.

B. Planned Parenthood lacks standing to raise third-parties' rights.

Planned Parenthood offers no explanation for why it has standing to invoke an asserted right to abortion on women's behalf. No abortion-minded woman is a plaintiff. And MCL 750.14 does not regulate women who seek abortions, it applies *only* to abortionists like Planned

Parenthood who perform them. *In re Vickers*, 371 Mich at 117–18. Generally, a plaintiff's standing is limited to "assert[ing] his own legal rights and interests" and does not extend to "the legal rights or interests of third parties." *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013) (per curiam) (quotations omitted). Normal standing rules would confine Planned Parenthood's interests to those of abortionists, not the women who procure them. *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Tr Bd of Trs v City of Pontiac No 2*, 309 Mich App 611, 622; 873 NW2d 783 (2015) (per curiam); *accord* MCR 2.201(B).

Allowing Planned Parenthood to exercise third-party standing would be particularly improper here. Planned Parenthood seeks to enshrine a right to abortion in the Michigan Constitution to protect abortionists, not the women who seek them out. Many women oppose abortion for scientific, religious, or moral reasons. What's more, not everyone who is capable of being an abortionist wants to end innocent, unborn lives—some healthcare entities and licensed medical providers have religious or moral objections to abortion. In fact, two female obstetricians-gynecologists filed an amicus brief in this Court opposing Planned Parenthood's arguments because they believe "that all direct abortions performed with the object and intent to terminate a pregnancy are contrary to natural moral law, the wellbeing of women, and the good of society." 5/6/22 Amicus Curiae Br of Gianina Cazan-London, M.D. and Melissa Halvorson, M.D. in Opp to Pl's Mot for Prelim Inj at iii.

If Planned Parenthood succeeds in establishing a judicially-conjured constitutional right to abortion grounded in bodily integrity—which this Court's preliminary-injunction branded "a right of complete immunity; to be let alone," 5/17/22 Op & Order at 17—healthcare entities and licensed providers in Michigan could be *forced* to become abortionists (like Planned Parenthood) in violation of their convictions. Given these conflicts of interest, third-party standing is inappropriate. *E.g.*, *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 15–17; 124 S Ct 2301 (2004),

abrogated on other grounds by *Lexmark Int'l, Inc v Static Control Components, Inc*, 572 US 118, 127; 134 S Ct 1377 (2014). This Court should reject Planned Parenthood's attempt to invoke it here.

C. Planned Parenthood's case is not ripe for judicial decision.

Ripeness "focuses on the timing of the action." *Van Buren Charter Twp*, 319 Mich App at 553. The question is whether Planned Parenthood's asserted harm "has matured sufficiently to warrant judicial intervention." *People v Robar*, 321 Mich App 106, 128; 910 NW2d 328 (2017) (quotation omitted). It hasn't. "[R]ipeness doctrine precludes adjudication of merely hypothetical claims." *Id.* And that's all Planned Parenthood raises here.

As the Court of Appeals's order makes clear, the *only* prosecutors subject to this Court's jurisdiction reside in the Attorney General's Office. 8/1/22 Order, *In re Jarzynka*, Ct. of App. No. 361470. And the Attorney General has steadfastly refused to enforce MCL 750.14 against *anyone*. Because the Attorney General agrees with Planned Parenthood that Michigan's pro-life laws are unconstitutional, no one in her office will enforce them.

Planned Parenthood argues that *might* change someday *if* a different Attorney General is elected. But "[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." *Oakland Cnty v State*, 325 Mich App 247, 265 n2; 926 NW2d 11 (2018) (per curiam) (quotation omitted). No enforcement actions by the Attorney General's Office are happening now or substantially likely to occur. So, this case rests "on contingent future events," is "not ripe," *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013), and must be dismissed, V*an Buren Charter Twp*, 319 Mich App at 556.

CONCLUSION

For these reasons, *amici curiae* Right to Life of Michigan and the Michigan Catholic Conference ask the Court to deny Planned Parenthood's motion for summary disposition, grant the Legislature's motion for summary disposition, and dismiss the case.

Respectfully submitted,

Dated: August 22, 2022

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EXHIBIT 1

MOMENT
STRATEGIES

NEWS RELEASE
For Immediate Release:
April 7, 2022

Contact: Alexis Wiley
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Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose
Joint Statement

As Michigan's elected prosecutors, we are entrusted with the health and safety of the people we serve. We believe that duty must come before all else. For that reason, we are reassuring our communities that we support a woman's right to choose and every person's right to reproductive freedom.

Michigan's anti-abortion statutes were written and passed in 1931. There were no women serving in the Michigan legislature. Those archaic statutes are unconstitutionally and dangerously vague, leaving open the potential for criminalizing doctors, nurses, anesthetists, health care providers, office receptionists – virtually anyone who either performs or assists in performing these medical procedures. Even the patient herself could face criminal liability under these statutes.

We believe those laws are in conflict with the oath we took to support the United States and Michigan Constitutions, and to act in the best interest of the health and safety of our communities. We cannot and will not support criminalizing reproductive freedom or creating unsafe, untenable situations for health care providers and those who seek abortions in our communities. Instead, we will continue to dedicate our limited resources towards the prosecution of serious crimes and the pursuit of justice for all.

Today, our Governor filed a lawsuit to guarantee the right to reproductive freedom in Michigan, and to prevent the arbitrary enforcement of those 90-year-old statutes. These statutes were held unconstitutional five decades ago, and are still unconstitutional today. We support the Governor in that effort.

We hope you will stand with us as we work to protect and serve our communities.

Respectfully,

Karen D. McDonald
Oakland County Prosecutor

Kym L. Worthy
Wayne County Prosecutor

Carol A. Siemon
Ingham County Prosecutor

Matthew J. Wiese
Marquette County Prosecutor

Eli Savit
Washtenaw County Prosecutor

Jeffrey S. Getting
Kalamazoo County Prosecutor

David Leyton
Genesee County Prosecutor

EXHIBIT 2

MOMENT
STRATEGIES

NEWS RELEASE
For Immediate Release:
August 1, 2022

Contact: Alexis Wiley
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Seven Michigan Prosecutors Reaffirm their Position on Abortion Prosecution Following Monday's Michigan Court of Appeals Decision

Today, the Michigan Court of Appeals issued a decision which suggests that county prosecutors have the authority to enforce Michigan's archaic 1931 abortion law.

Nearly four months ago—when the draft Supreme Court decision in Dobbs was leaked—all of us issued a statement indicating that we "cannot and will not support criminalizing reproductive freedom or creating unsafe, untenable situations for health care providers and those who seek abortions in our communities."

We reaffirm that commitment today. Litigation on this issue will undoubtedly continue. We have supported Governor Whitmer's litigation efforts to guarantee the right to reproductive freedom. And we will continue to fight, in court, to protect the right to safe and legal abortion in Michigan.

In the interim, however, we reiterate that we will not use our offices' scarce resources to prosecute the exercise of reproductive freedom. Instead, as these issues continue to play out in court, we will remain focused on the prosecution of serious crimes.

We hope you will continue to stand with us as we seek to ensure the health, safety, and wellbeing of everyone in our communities.

Respectfully,

Karen D. McDonald
Oakland County Prosecutor

Jeffrey S. Getting
Kalamazoo County Prosecutor

Carol A. Siemon
Ingham County Prosecutor

Matthew J. Wiese
Marquette County Prosecutor

Eli Savit
Washtenaw County Prosecutor

David Leyton
Genesee County Prosecutor

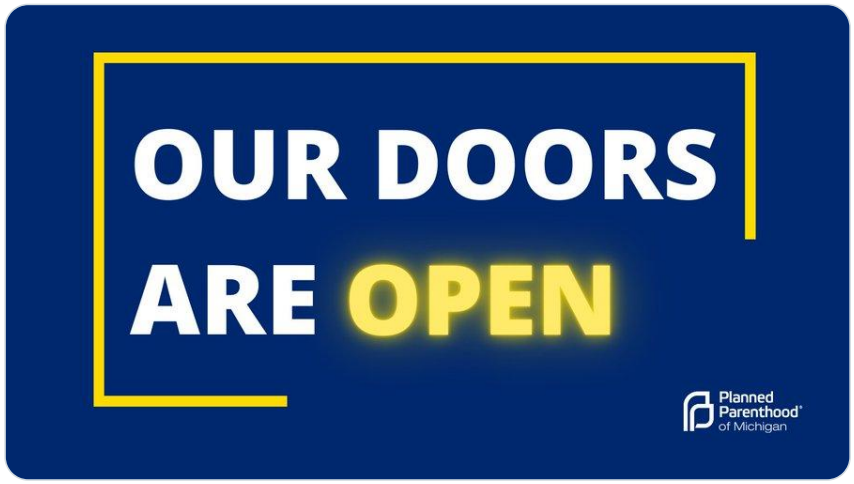
Kym L. Worthy
Wayne County Prosecutor

EXHIBIT 3

Thread

Planned Parenthood of Michigan
@PPofMI

Today, the MI Court of Appeals issued an order suggesting that the injunction against the 1931 #abortion ban doesn't prevent county prosecutors from pursuing enforcement. We know this is alarming for patients and we want to be clear — abortion is still safe and legal in MI. (1/3)



3:00 PM · Aug 1, 2022 · Twitter Web App

38 Retweets **7** Quote Tweets **77** Likes

Planned Parenthood of Michigan @PPofMI · Aug 1
Replying to @PPofMI
The injunction remains in effect and this ruling doesn't take effect for at least 21 days.

Our doors remain open and we will continue to provide #abortion care in accordance with the law. Patients can keep their appts. (2/3)

1 4 17

Planned Parenthood of Michigan @PPofMI · Aug 1
We won't stop fighting to protect #abortion access for all Michiganders.

Read more: plannedparenthood.org/uploads/filer_...

#BansOffOurBodies (3/3)

5 13

carematters @livescare · Aug 1
Replying to @PPofMI
fight it! #fight don't physically fight of course though