STATE OF MICHIGAN
IN THE SUPREME COURT

In re JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County; CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County; RIGHT TO LIFE OF MICHIGAN; and THE MICHIGAN CATHOLIC CONFERENCE,

Plaintiffs-Appellants.

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Supreme Court Case No.

Court of Appeals Case No. 361470

Lower Court Case: *Planned Parenthood of Michigan v Attorney General*, Court of Claims Case No. 22-000044-MM

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PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL OR FOR PEREMPTORY REVERSAL

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF CONTENTS CONTINUED

INDEX OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction under MCR 7.305(C)(2)(a) to grant leave to appeal from the Court of Appeals' August 1, 2022, Order denying Appellants' complaint for superintending control. 8/1/2022 Order, attached as **Exhibit 1**. Appellants timely file this application within 42 days of that final Order.

ORDER APPEALED AND RELIEF SOUGHT

Appellants seek leave to appeal a Court of Appeals final order issued August 1, 2022. In it, the Court of Appeals held that Appellants Right to Life of Michigan and the Michigan Catholic Conference suffer no harm from a Court of Claims opinion and order that impairs enforcement of numerous pro-life laws that Right to Life of Michigan and the Michigan Catholic Conference helped sponsor, shepherd, and defend. The Court of Appeals further held that Appellants Jarzynka and Becker, two county prosecutors, are not harmed by that same order, even though it has been used against them in other proceedings. Appellants respectfully request that this Court reverse that erroneous decision and hold that they have a sufficient interest in this case to have standing to bring a complaint for superintending control, since none of the parties is a state entity with a right to intervene as defendants in the underlying Court of Claims action.

Appellants also ask this Court to hold that their request for an order of superintending control is proper, and that the Court of Claims' opinion must be vacated and the underlying Court of Claims action dismissed. The Court of Claims acted improperly when it proceeded to rule in a case that lacks a plaintiff with standing, adverse parties, and a ripe, justiciable case or controversy.

STATEMENT OF QUESTIONS PRESENTED

1. Whether a public-interest group that helps sponsor, shepherd, and defend legislation is harmed by a court order that impairs enforcement of that legislation, and whether county prosecutors are harmed when that same order is used against them in other proceedings.

Plaintiffs-Appellants answer:	Yes
Defendant-Appellee Court of Claims Judge:	Did not answer
Non-party Planned Parenthood answers:	No
The Court of Appeals answered:	No

2. Whether a complaint for superintending control should be granted—and the underlying action dismissed for lack of jurisdiction—when the underlying action lacks a plaintiff with standing, a proceeding with adverse parties, and a ripe, justiciable case or controversy.

Plaintiffs-Appellants answer:	Yes
Defendant-Appellee Court of Claims Judge:	Did not answer
Non-party Planned Parenthood answers:	No
The Court of Appeals:	Did not answer

INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL

Without question, the validity of MCL 750.14—Michigan's 1931 law protecting innocent, human life—is of substantial jurisprudential significance. That's why it is critically important for Michigan courts to tread cautiously into the debate, issuing rulings only in cases with proper parties that present justiciable issues.

That is not what happened here. Planned Parenthood and one of its employees, who are represented by the ACLU, sued Michigan Attorney General Nessel in the Court of Claims seeking (1) a declaration that the Michigan Constitution creates a right to abortion, and (2) an injunction barring the Attorney General from enforcing the State's abortion laws, including MCL 750.14. But the Attorney General is a supporter of abortion rights who, years before this litigation, pledged not to defend or enforce MCL 750.14 in any circumstances. The Attorney General has repeatedly asserted in the Court of Claims action that (1) she is *not* adverse to Planned Parenthood and the ACLU, (2) the Court of Claims accordingly lacks jurisdiction, and (3) the action should therefore be dismissed. That makes sense: not only does the litigation lack adversity, Planned Parenthood and the ACLU lack standing because the Attorney General is no threat to their activities, and there is no ripe dispute presenting facts that require adjudication. In any non-abortion case, that would have been the end of the matter.

Instead, the Court of Claims judge—who used to litigate on behalf of the ACLU, represented Planned Parenthood in abortion litigation, financially contributes to Planned Parenthood, and personally litigated the key Michigan Court of Appeals case holding that there is *no* Michigan constitutional right to abortion—

refused to dismiss the case for lack of jurisdiction, declined to recuse herself, and granted Planned Parenthood a preliminary injunction despite the binding Court of Appeals precedent she lost as an advocate. The judge did so without any party filing a merits brief or presenting oral argument against that relief. And she extended the injunction to Michigan's prosecuting attorneys, even though they are not parties to the case at all. That is the sort of improper judicial takeover of abortion law that *Dobbs v Jackson Women's Health Organization*, 142 S Ct 2228 (2022), sought to end by overruling *Roe v Wade*, 410 US 113 (1973), and allowing "the people's elected representatives [to] decide[ ]how abortion should be regulated." *Dobbs*, 142 S Ct at 2257. Yet, the same harms that *Roe* caused are now taking root in Michigan.

Plaintiffs-Appellants are Jackson County Prosecutor Jerard M. Jarzynka, Kent County Prosecutor Christopher R. Becker, Right to Life of Michigan, and the Michigan Catholic Conference, each of whom are proponents of MCL 750.14's constitutionality and enforcing Michigan's validly enacted laws. They filed a complaint for superintending control, asking the Court of Appeals to vacate the injunction and dismiss what is obviously an improper case. A Court of Appeals panel held correctly that the Court of Claims injunction did not bind the non-party prosecutors (a ruling for which Planned Parenthood now also seeks leave to appeal). But it erroneously left the case—and the injunction—in place, holding that neither the prosecutors, nor Right to Life of Michigan and the Michigan Catholic Conference were suffering an ongoing harm sufficient to create standing to request superintending control. It is that latter ruling of which Appellants now seek review.

The analysis is simple. The Michigan Catholic Conference was primarily responsible for keeping MCL 750.14 intact when that law was threatened by a 1972 ballot initiative. And Right to Life of Michigan and the Michigan Catholic Conference together played a central role in the enactment of many (if not most) of Michigan's pro-life laws, frequently defending those laws in court. Their unique and concrete injury by a trial-court order that makes up a constitutional right to abortion is unassailable, as that ruling likely impedes many of those pro-life laws, undoing decades of Right to Life of Michigan and the Michigan Catholic Conference's work.

Courts outside of Michigan routinely recognize that "public interest group[s] that [are] involved in the process leading to adoption of legislation [have] a cognizable interest in defending that legislation," and they grant intervention on that basis. *E.g.*, *Mich State AFL-CIO v Miller*, 103 F3d 1240, 1245 (CA 6, 1997; *accord id.* at 1245–47). To put it another way, Right to Life of Michigan and the Michigan Catholic Conference have "an interest in defending [their] own work." *Mich All for Retired Ams v Sec'y of State*, 334 Mich App 238, 250; 964 NW2d 816 (2020). And if the injury to Right to Life of Michigan and the Michigan Catholic Conference harms them sufficiently for intervention, then they have also suffered injury sufficient to file a complaint for superintending control. Standing, after all, is "a limited, prudential doctrine" that erects no possible barrier here. *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372; 792 NW2d 686 (2010).

Jarzynka and Becker, the county prosecutors, too, have suffered injury. In a separate action brought by the Governor in Oakland County Circuit Court, *Whitmer*

v Linderman, Oakland County Circuit No. 22-193498-CZ, a trial-court judge improperly entered an *ex parte* TRO against MCL 750.14, then preliminarily enjoined the law by relying substantially on the Court of Claims decision here. By leaving the unlawful Court of Claims opinion in place, the Court of Appeals panel "loaded the dice" for other trial courts to follow suit, and that is exactly what has transpired. Indeed, it took only a matter of hours after the Court of Appeals issued its order for the Oakland County Circuit Court to remove *Linderman* from the limbo in which that court had placed it two months earlier and issue an *ex parte* TRO enjoining MCL 750.14's enforcement completely—without even so much as a response brief from Jarzynka and Becker, who are named defendants.

In sum, the Court of Appeals ignored Appellants' plain injuries and erroneously dismissed their complaint for an order of superintending control. In so doing, the Court of Appeals allowed an injunction to stand in a proceeding where there were no adverse parties, the plaintiffs lacked standing, and there was no case or controversy at all. If a Michigan court wants to read a right to abortion into the Michigan Constitution's silence, it should at least do so in a case where there are adverse parties, plaintiffs have standing, and an actual controversy exists. Allowing trial courts to make highly politicized decisions in the absence of jurisdiction will inevitably harm confidence in the judiciary.

To be clear, Right to Life of Michigan, the Michigan Catholic Conference, and Prosecutors Jarzynka and Becker are not seeking to cross appeal, contingent on this

Court granting Planned Parenthood's earlier filed application for leave.[1] They are filing their own, independent application for leave, and every relevant ground for granting that application is present:

- The issues presented involve substantial questions about the validity of a legislative act. MCR 7.305(B)(1).
- The issues presented have significant public interest, and the underlying case is one against the state. MCR 7.305(B)(2).
- The issues presented involve legal principles of major significance to the state, including when public interest groups have a cognizable interest in protecting legislation they have sponsored, shepherded, and defended, and the propriety of a trial court acting when there is no plaintiff with standing, no adverse parties, and no ripe, justiciable case or controversy, and when the Court of Claims attempts to bind non-state officials who are outside of that court's jurisdiction. MCR 7.305(B)(3).
- And the decision is clearly erroneous, has caused and will continue to cause material injustice and a lack of confidence in the Michigan judiciary, and conflicts with decisions of this Court and the Court of Appeals. MCR 7.305(B)(5).

For all these reasons, Right to Life of Michigan, the Michigan Catholic Conference, and Prosecutors Jarzynka and Becker respectfully request that the Court grant leave to appeal, order briefing, conduct oral argument, reverse the Court of Appeals' standing holding, exercise superintending control, vacate the Court of Claims injunction, and dismiss the underlying Court of Claims action. Alternatively, they ask that this Court grant that relief summarily. At a minimum, this Court should vacate the Court of Appeals's ruling that Appellants lack standing and

[1] For this reason, Plaintiffs are Appellants in this Application, as it is a separate application from Planned Parenthood's appeal.

remand for the Court of Appeals to rule on the merits of their superintending-control complaint.

BACKGROUND[2]

I. MCL 750.14 and its construction by Michigan courts.

MCL 750.14 is a valid and duly enacted statute that bans performing an abortion unless necessary to save the life of the mother. The law does not regulate or target women, only medical professionals or others who seek to take innocent, unborn life. For nearly 60 years, it has existed peaceably side-by-side with the Constitution that Michigan citizens ratified in 1963, without altering any of the State's abortion laws. Indeed, those who ratified the Michigan Constitution in 1963 were fully aware of MCL 750.14 and its limits on abortion: it had been the law-of-the-land for 32 years. Yet there is no historical evidence that even one person believed that the new Constitution's adoption impacted MCL 750.14 in any way.

This Court has already held that no woman in Michigan can be charged under MCL 750.14 for having an abortion or assisting with her own abortion. *In re Vickers*, 371 Mich 114, 117–118; 123 NW2d 253, 254 (1963). In addition, this Court in 1973 construed MCL 750.14 to comport with the U.S. Supreme Court's holding in *Roe v. Wade*, holding that the statute did not apply to any pre-viability abortions or to post-viability abortions necessary "to preserve the life or health of the mother." *People v Bricker*, 389 Mich 524, 529–30; 208 NW2d 172, 175 (1973). The Court of Appeals

[2] Much of this background is covered in more detail in Plaintiffs-Appellants' complaint for superintending control and accompanying exhibits, filed in the Court of Appeals, attached as Exhibit 2.

refined that life-or-health-of-the-mother exception in *People v Higuera*, 244 Mich App 429, 449; 625 NW2d 444, 455–56 (2001).

II. In a binding published opinion, the Court of Appeals rejected a Michigan constitutional right to abortion in a case where abortion advocates were represented by the presiding judge in the underlying action at issue here.

In 1994, the president of the Detroit City Council and several abortion doctors asked a state court to declare that the Michigan Constitution protects a right to abortion. *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104, 108 (1997) (per curiam). The right they asserted would have forbid not only major protections for unborn life but also minor preconditions to an abortion, such as providing women truthful information about their unborn children, or maintaining a 24-hour waiting period for women to review this information. *Id.* at 329–30. The *Mahaffey* plaintiffs were represented by a group of ACLU attorneys that included the Court of Claims judge who is now presiding over the underlying suit at issue here.

The Court of Appeals held unambiguously, in a published decision, "that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." *Id.* at 339. *Mahaffey* established that nothing in the Michigan Constitution subjects abortion laws (of whatever type) to anything more than rational-basis review. For a quarter century, all agreed that the Court of Appeals "has held that the Michigan Constitution does not provide a right to end a pregnancy." *Taylor v Kurapati*, 236 Mich App 315, 347; 600 NW2d 670 (1999). Indeed, *Mahaffey*'s clarity on this issue extends beyond Michigan's borders. See *Planned Parenthood of the Heartland v Reynolds ex rel State*, 915 NW2d 206, 254 n10 (Iowa,

2018) (Mansfield, J, dissenting) ("Michigan state courts have found no right to an abortion at all in their state constitution.") (citing *Mahaffey*).

III. Proceedings below.

On April 7, 2022, the ACLU filed suit on behalf of Planned Parenthood and its chief medical officer against Attorney General Dana Nessel, as the sole defendant, in the Court of Claims. The ACLU and Planned Parenthood argued that—notwithstanding *Mahaffey*—the Court of Claims should declare that the Michigan Constitution includes a right to abortion and enjoin the Attorney General and all county prosecutors from enforcing "MCL 750.14 *and any other Michigan statute or regulation* to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person." 4/7/22 Br in Supp of Pls' Mot for Prelim Inj at 39 (emphasis added). The case was immediately assigned to the Hon. Elizabeth Gleicher, who as an attorney had litigated and lost *Mahaffey*.

Just hours after the plaintiffs filed their lawsuit and motion for preliminary injunction in the Court of Claims, Attorney General Nessel—the sole defendant—issued a press release declaring that she would not defend MCL 750.14 and would support Planned Parenthood's legal position. 4/7/22 Press Release, Mich Dep't of Att'y Gen, *AG Nessel's Statement on Efforts to Preserve Abortion Rights in Michigan*, https://bit.ly/3QMdFcj.

Right to Life of Michigan and the Michigan Catholic Conference filed an amici brief with the Court of Claims explaining that the Court lacked jurisdiction because,

among other things, Planned Parenthood lacked standing, as there was no possibility that Defendant Attorney General Nessel would enforce any abortion laws against Planned Parenthood, there was admittedly no adversity between the parties, no actual case or controversy existed, and the case was not ripe. They also noted the appearance of impropriety created by, among other things, Judge Gleicher's ongoing status as a Planned Parenthood donor and her prior role as losing counsel in the case that should bar the relief that the court was being asked to grant, and suggested the judge should recuse. The Attorney General's submissions agreed in part with Right to Life of Michigan and the Michigan Catholic Conference, recognizing that the Court of Claims lacked jurisdiction

The Court of Claims indicated that it would schedule oral argument on the motion after the parties completed their briefing. But after excluding counsel for Right to Life of Michigan and the Michigan Catholic Conference from a May 2, 2022, Zoom status conference, Judge Gleicher, her former client Planned Parenthood, and Attorney General Nessel all apparently agreed that *no party* would seek the Judge's recusal and that they would dispense with oral argument. So, without adversarial briefing or argument by the parties, without a public hearing of any kind, and without jurisdiction or even a ripe controversy, the Court of Claims issued an opinion and order on May 17, 2022, that preliminarily enjoined the Attorney General from enforcing MCL 750.14. The injunction was issued over a month before the U.S. Supreme Court rendered its decision in *Dobbs* and purported to enjoin all state and local officials acting under the Attorney General's supervision—including all county

prosecutors in the State—even though they are not parties to the action and are not even state officials who could be sued in the Court of Claims.

As to jurisdiction, the Court of Claims relied on a nonbinding treatise that suggests Michigan courts should not apply "an unduly restrictive construction of the actual controversy requirement." 5/17/2022 Op & Order at 11. The court also cited *United States v Windsor*, 570 US 744 (2013), where jurisdiction turned on the federal government's refusal to refund the plaintiff estate taxes that she allegedly should not have been required to pay and thus created an actual controversy. *Id.* at 12. The plaintiff in *Windsor* had a justiciable case because the United States refused to provide her requested relief—a refund of the estate taxes that she otherwise would not have paid. In contrast here, the Attorney General acceded to the ACLU and Planned Parenthood's requested relief, i.e., non-enforcement of MCL 750.14, as a candidate for office years before the ACLU and Planned Parenthood filed suit, and again in this very litigation and an accompanying press release. Planned Parenthood faces no danger of enforcement from the Attorney General.

As to the merits, the Court of Claims had to circumvent the Court of Appeals' binding decision in *Mahaffey*—the very case which the presiding Court of Claims judge had herself litigated and lost. The Court of Claims attempted to do so by (1) arguing that MCL 750.14 was not specifically at issue in *Mahaffey*, and (2) claiming to locate a right to abortion in the "right to bodily integrity," a substantive due process concept just like the *Mahaffey* plaintiffs' asserted right to privacy. 5/17/2022 Op & Order at 4, 15–16, 19–20. Drawing on federal caselaw, the

Court of Claims derived from "[a] general liberty interest in *refusing* medical treatment . . . a general liberty interest in *seeking* medical treatment." *Id.* at 22.

Though the Attorney General consistently argued that the Court of Claims lacked jurisdiction, she never filed a motion to dismiss, and she praised the court's rejection of her jurisdictional arguments and issuance of an overly broad preliminary injunction. She declined to appeal. Within hours of its issuance, the Attorney General e-mailed all 83 county prosecutors a copy of the opinion and order, stating that all Michigan county prosecutors are now enjoined from enforcing MCL 750.14. This included Appellants Jarzynka and Becker.

Appellants Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference jointly filed a complaint for order of superintending control in the Michigan Court of Appeals on May 20, 2022. 5/20/22 Compl for Order of Superintending Control, attached as **Exhibit 2.** They requested that the Court of Appeals order the Court of Claims to dismiss the case and/or vacate the preliminary injunction. They further requested that Judge Gleicher be recused on the ground that (among other things) she had previously represented Planned Parenthood on behalf of the ACLU in abortion cases, as well as the plaintiffs in *Mahaffey*, arguing—and losing—the very issue presented in the Court of Claims action: whether a right to abortion can be read into the silence of Michigan's Constitution. Judge Gleicher, defendant in the superintending-control action, did not appear and filed no response in the Court of Appeals. Instead, Planned Parenthood, a non-party, appeared defending the injunction.

On August 1, 2022, the Court of Appeals ruled that the Court of Claims lacked jurisdiction over county prosecutors because they are local—not state—officials. (**Exhibit 1**) So, the Court of Claims's preliminary injunction had never applied to county prosecutors—contrary to the Attorney General's May 17th email—and Appellants Jarzynka and Becker were free to enforce MCL 750.14. In a perfunctory, three-sentence paragraph, the Court of Appeals also found that Right to Life of Michigan and the Michigan Catholic Conference lacked standing because they had not been injured by the injunction or had a "special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Id.*, p 5. The Court of Appeals thus dismissed the complaint for superintending control based on lack of standing.

Within hours, Governor Whitmer requested an *ex parte* TRO from the Oakland County Circuit Court in *Linderman*, even though counsel for prosecutors Jarzynka and Becker were available and could have been easily contacted and allowed to oppose that request. The Circuit Court issued the TRO one hour after the Governor's filing. 8/1/22 Order Granting Temporary Restraining Order, *Whitmer v Linderman*, Oakland Cnty No 22-193498-CZ, attached as **Exhibit 3**. A few days later, the Circuit Court extended the TRO until it could rule on Governor Whitmer's motion for a preliminary injunction. 8/3/22 Order Regarding Temporary Restraining Order Hearing on Aug 3, 2022, *Whitmer v Linderman*, Oakland Cnty No 22-193498-CZ, attached as **Exhibit 4**.

Two days after the Court of Appeals issued its order, without first seeking relief from that court, non-party Planned Parenthood filed in this Court a motion to stay the Court of Appeals decision below, along with an application for leave to appeal and a motion for immediate consideration of the stay motion.

On August 19, 2022, the Oakland County Circuit Court in *Linderman* issued its own preliminary injunction against MCL 750.14, relying substantially on the Court of Claims's reasoning in this case. 8/19/2022 Order of Preliminary Injunction, *Whitmer v Linderman*, Oakland Cnty No 22-193498-CZ, attached as **Exhibit 5**. As a result of these rulings, prosecutors Jarzynka and Becker cannot enforce MCL 750.14, and many pro-life laws that are the result of Right to Life of Michigan and the Michigan Catholic Conference's hard work are likely unenforceable as well.

ARGUMENT

I. The Court should grant leave and hold that interest groups that sponsor, shepherd, and defend enacted laws suffer concrete harm from court orders that invalidate such laws.

Right to Life of Michigan and the Michigan Catholic Conference have a unique and cognizable interest in the validity and enforcement of Michigan's pro-life laws, many of which they have shepherded into existence or defended in court. They have described those efforts in their reply brief in this Court supporting their motion to intervene in the *Whitmer v. Linderman* certification matter and will not repeat them here. 5/10/22 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Reply in Supp of Mot to Intervene at 3–4, *Whitmer v Linderman*, Mich Sup Ct No 164256.

The state constitutional right to abortion that Planned Parenthood, the Attorney General, and the Court of Claims collectively conjured out of thin air in this non-adverse, non-justiciable case threatens not just MCL 750.14, but *all* of Michigan's pro-life laws, including those that Right to Life of Michigan and the Michigan Catholic Conference have worked diligently to enact and defend. *Id.* In fact, Planned Parenthood's complaint makes this threat plain: it seeks to permanently enjoin any prosecutor in the state "from enforcing or giving effect to MCL 750.14 *and any other Michigan statute or regulation* to the extent that it prohibits abortion." 4/7/22 V Compl at 35, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM (emphasis added).

Right to Life of Michigan and the Michigan Catholic Conference's interests in upholding state laws that protect innocent, unborn life are second to none. Their unique interest in this action—and in nullifying the Court of Claims's unlawful order, which creates a state constitutional right to abortion—is clear. And the strength of that "interest in the outcome" ensures the "sincere and vigorous advocacy . . . [necessary] to confer standing." *Beer v City of Fraser Civ Serv Comm'n*, 127 Mich App 239, 243–44; 338 NW2d 197 (1983) (per curiam).

Courts routinely recognize that "public interest group[s] that [are] involved in the process leading to adoption of legislation [have] a cognizable interest in defending that legislation" and they grant intervention on that basis. *Mich State AFL-CIO*, 103 F3d at 1245; *accord id.* at 1245–47. That is especially true when public interest groups: (1) "filed a timely motion to intervene," (2) "supported the legislation

challenged in the instant case," (3) "had been active in the process leading to the litigation," (4) serve as "vital participant[s] in the political process," (5) are "repeat player[s] in . . . litigation," and (6) represent "significant part[ies] which [are] adverse to the [plaintiff] in the political process." *Id.* at 1246–47 (quotation omitted). Substitute "filed a timely complaint for superintending control" for a "timely motion to intervene" and all those factors describe Right to Life of Michigan and the Michigan Catholic Conference perfectly.

Much like the Legislature itself, Right to Life of Michigan and the Michigan Catholic Conference "certainly [have] an interest in defending [their] own work. *Mich All for Retired Ams*, 334 Mich App at 250. And that is especially true here because Right to Life of Michigan and the Michigan Catholic Conference seek to "defend[ ] the constitutionality of several of [their] statutes." *Id.* They "undoubtedly [have] a significant interest in [this case]. Indeed, it is difficult to envision interests that would assure more sincere and vigorous advocacy." *Id.*

Importantly, 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." The Court of Claims's ruling below now treats MCL 750.14 as though Proposal B had passed instead of failed in 1972. Similarly, Right to Life of Michigan and the Michigan Catholic Conference were instrumental in enacting bans on delivering a substantial portion of a living child outside her mother's body and then killing her by crushing her skull or removing her

brain by suction, a procedure known as partial birth abortion and codified in MCL 750.90g & 333.1081-85. Right to Life of Michigan was also actively involved in defending the Legal Birth Definition Act in court, as well as several other pro-life laws. Yet those laws, too, are on the chopping block based on the Court of Claims's holding that the Michigan Constitution creates a constitutional right to abortion. With one stroke of the pen, the Court of Claims wiped away decades of defeats in the electoral, legislative, and judicial arenas, instantly transforming those losses into victory.

Imagine if the shoe were on the other foot. Liberal and progressive public-interest organizations routinely file suit as plaintiffs or seek to intervene to defend ballot initiatives and legislation that they have sponsored and supported. Yet no one suggests that they lack a concrete injury if those initiatives or statutes are struck down. The result should be no different because pro-life organizations support MCL 750.14 and other Michigan laws effectively suspended by the Court of Claims's ruling. Right to Life of Michigan and the Michigan Catholic Conference have much more than a preference regarding the outcome of this case. They have striven for decades to pass pro-life legislation, sponsor and see pro-life citizens initiatives succeed, and defend pro-life laws in court. The Court of Claims's injunction effectively undoes all their work. Their interest is unique and shared by no one else.

As for Jarzynka and Becker, the county prosecutors, they too are adversely impacted in a unique way by the Court of Claims' unlawful order, even though the Court of Appeals rightly removed them from that order's scope. As noted above, the

Oakland County Circuit Court on August 19, 2022, entered a preliminary injunction against prosecutors Jarzynka and Becker, and it did so in substantial reliance on the Court of Claims's reasoning. That, too, is a cognizable harm that gives the prosecutors standing to seek superintending control.

The Court of Appeals' order here will have far-reaching and long-lasting effects. It will be used by the State and others to keep public-interest groups like Right to Life of Michigan, the Michigan Catholic Conference, the League of Women Voters, the ACLU, and many others from filing or intervening in lawsuits that directly impact their work and interests. This Court should not allow that holding to stand but should instead grant leave or summarily reverse and hold that Plaintiffs-Appellants have a cognizable, concrete interest, unique to them, that they can vindicate through the filing of their complaint for superintending control.

II. The Court should also grant leave and hold that trial courts lack jurisdiction to proceed and must dismiss actions where plaintiffs lack standing, the case lacks adversity, and there is no ripe case or controversy to adjudicate.

The Court of Claims lacked jurisdiction in every possible way. The fact that it acted anyway is deeply troubling, not just in this case, but in future cases involving ideologically aligned plaintiffs and state defendants who share a common disdain for the same law. When injunctions are issued in such cases, they upend the rule of law, result in well-deserved public skepticism about the neutrality of Michigan's judicial system, and threaten the democratic process. As the Sixth Circuit noted in staying a collusive injunction to which the Governor, the Attorney General, and the constitutional universities had stipulated, attempting to delay the effectiveness of a

constitutional amendment ending the consideration of race in college admissions, "this is an unusual way to use the . . . courts." *Coal to Defend Affirmative Action v Granholm*, 473 F3d 237, 252 (CA 6, 2006).

Complaints for orders of superintending control are "an original civil action designed to order a lower court to perform a legal duty." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 346–47; 675 NW2d 271 (2003). Issuing such an order is appropriate when "a lower court exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, or [otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*, 273 Mich App 594, 598; 733 NW2d 65 (2007). The plaintiff seeking an order of superintending control "bears the burden of establishing the grounds for issuing the order." *In re Gosnell*, 234 Mich App 326, 342; 594 NW2d 90 (1999).

To obtain an order of superintending control, the plaintiff must show (1) that a lower court has fail[ed] to perform a clear legal duty" and (2) the plaintiff is otherwise without "an adequate legal remedy." *Id.* at 341. A plaintiff is without an adequate legal remedy when it lacks the ability to appeal. *Fort v City of Detroit*, 146 Mich App 499, 503; 381 NW2d 754 (1985). All the elements are satisfied here.

A. The Court of Claims violated a clear legal duty to dismiss the case for lack of jurisdiction and failed to proceed according to law in entering a preliminary injunction that directly contradicted the Court of Appeals' decision in *Mahaffey*.

1. Without adversity between the parties, the Court of Claims lacks jurisdiction to issue declaratory or injunctive relief.

As this Court held almost 90 years ago, "it is the duty of the court to raise the question of jurisdiction on its own motion." *Halkes v Douglas & Lomason Co*, 267 Mich 600, 602; 255 NW 343, 344 (1934). But, in this case, the Court of Claims did not have to raise jurisdiction on its own because the sole defendant, Attorney General Nessel, argued clearly and consistently that a lack of adversity between the parties deprived the court of jurisdiction to issue declaratory or injunctive relief. This should have ended the analysis.

Nonetheless, the Court of Claims refused to dismiss the action and issued a preliminary injunction without the benefit of any adversarial briefing, argument, or hearing on the merits of Planned Parenthood's claims, and it did so in contravention of a binding Court of Appeals decision that the presiding judge had litigated and lost as an attorney. In so doing, the Court of Claims "exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, [and otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*, 273 Mich App at 598.

Michigan courts only have jurisdiction over "'actual controversies arising between adverse litigants.'" *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 243 (2019) (Clement, J, concurring) (quoting *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), itself quoting *Anway v Grand Rapids Ry Co*, 211 Mich 592, 616; 179 NW 350 (1920)). A "controversy must be real and not *pro forma*," even when a *pro forma* case presents "real questions." *Anway*, 211 Mich at 612 (cleaned up). Absent adversity, a lawsuit like the ACLU and Planned Parenthood's suit against the

Attorney General is nothing more than "a friendly scrimmage brought to obtain a binding result that both sides desire." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 905; 948 NW2d 70, 70 (2020) (Viviano, J., concurring).

"Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding." *Fox v Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965) (citation omitted). "When a court is without jurisdiction of the subject matter, any action with respect to such a cause . . . is absolutely void." *Id.*

Because there was no adversity between the parties, the Court of Claims issued a preliminary injunction order without any form of adversarial briefing, argument, or hearing on the critical question of whether the Michigan Constitution protects a right to abortion. There are a multitude of answers to the ACLU and Planned Parenthood's merits arguments. But none of them were ever made by a party before the Court of Claims ruled that the Michigan Constitution, though silent on the matter, likely contains a right to abortion and enjoined a valid Michigan law. The Court of Claims exceeded its jurisdiction in multiple respects. This Court should declare the preliminary injunction order null and void, vacate the preliminary injunction, and direct the Court of Claims to dismiss the case.

2. There is no standing; there must be an "actual controversy," not just a hypothetical or anticipatory one.

The Court of Claims held "that this matter is a justiciable declaratory judgment action." 5/17/2022 Op & Order at 9. That ruling is wrong. In a declaratory judgment action, like this one, a plaintiff has standing only "if the requirements in MCR 2.605 are met." *Lansing Schs Educ Ass'n*, 487 Mich at 373. And MCR 2.605(A)(1) provides that "[i]n a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment . . . ." (emphasis added).

In other words, the statute's "essential requirement . . . is an '*actual controversy*,'" which serves as a "condition precedent," *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Tr Bd of Trs v City of Pontiac No 2*, 309 Mich App 611, 624; 873 NW2d 783 (2015) (per curiam) (emphasis added), or "prerequisite to declaratory relief." *Welfare Emps Union v Mich Civ Serv Comm'n*, 28 Mich App 343, 350; 184 NW2d 247 (1970). "An actual controversy exists when a declaratory judgment is *needed* to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020) (emphasis added). Michigan courts may rule before injuries occur but "a present legal controversy, not one that is merely hypothetical or anticipated in the future," is needed for a plaintiff to have standing under MCR 2.605. *Id.* (quotation omitted).

Planned Parenthood "cannot show a present legal controversy rather than a hypothetical or anticipated one." *Id.* Planned Parenthood is not being prosecuted—or

even threatened with prosecution—by the Attorney General for an alleged violation of MCL 750.14. To the contrary, the Attorney General has repeatedly proclaimed that she will *never* prosecute anyone under MCL 750.14.

Just as in *League of Women Voters*, where a voting rights group and individual voters lacked standing to challenge a statute governing petition drives when there was no petition drive in process, "[a] declaratory judgment is not *needed* to guide [anyone's] future conduct" here. 506 Mich at 586 (emphasis in original). Like those plaintiffs, the ACLU and Planned Parenthood ask "for a declaratory judgment because it *perhaps may be needed* in the future" should a particular chain of events occur. *Id.* (emphasis added). Mays, ifs, and other hypothetical possibilities do not establish an "actual controversy." "There is no specific circumstance that [the ACLU and Planned Parenthood] claim[s] should be different" *right now*. *Id.* at 588. They "only want instruction going forward. And nothing in the relevant case law gives [a plaintiff] standing to challenge any [abortion]-related laws at any time." *Id.*

This is particularly so where the only named Defendant has emphatically refused to enforce Michigan law. Where, as here, an injury is "merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000). "Because there is no actual controversy, the [Court of Claims] lack[ed] jurisdiction to issue a declaratory judgment" or preliminary injunction. *Id.* at 56.

3. There was no dispute ripe for judicial decision.

Ripeness "focuses on the timing of the action." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192 (2017). The question is whether

Planned Parenthood's asserted harm "has matured sufficiently to warrant judicial intervention." *In re Reliability Plans of Elec Utils for 2017–2021*, 325 Mich App 207, 218; 926 NW2d 584 (2018), *rev'd on other grounds*, 505 Mich 97; 949 NW2d 73 (2020) (quotation omitted).

The plain answer is "no." Ripeness doctrine "is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Id.* at 217 (quotation omitted). Planned Parenthood's lawsuit is a classic example of speculative claims based on anticipatory harms that are guesswork, not fact. This matter is not even potentially ripe unless Attorney General Nessel alters her longstanding position and agrees to enforce MCL 750.14, which, based on her public and litigation comments, is not going to happen. As a result, the ACLU and Planned Parenthood's claims rest, as they forthrightly admit, "upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Mich's Const v Sec'y of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008) (per curiam).

Because the ACLU and Planned Parenthood's "challenge is premised on [a chain of] hypothetical future events" leading to equally speculative future harm, this lawsuit is "not ripe for judicial review." *Oakland Cnty v State*, 325 Mich App 247, 265 n2; 926 NW2d 11 (2018) (per curiam). "A claim that 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 when a lawsuit is not ripe for judicial decision, the case must be dismissed. *Van Buren Charter Twp*, 319 Mich App at 556.

4. The underlying dispute was moot.

As this Court explained in an analogous context, a case is moot when the plaintiff "seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment" that will have no "practical effect upon a then existing controversy." *League of Women Voters*, 506 Mich at 580 (quoting *Anway*, 211 Mich at 610). For a court to act, "a disputed right" must be exercised and "a justiciable controversy" presented so "that the disputed right can be passed upon in a judicial tribunal, which can pronounce the right and . . . enforce it." *Id.*

A case is moot if it fails any of these requirements. Planned Parenthood's suit falls into all of them: it is moot in every possible way. First, this case is a "pretended controversy." Attorney General Nessel has exercised no power related to MCL 750.14. Planned Parenthood cannot point to a single person or entity who she has prosecuted or even threatened to prosecute under MCL 750.14. In fact, Attorney General Nessel has repeatedly affirmed that she will never enforce MCL 750.14. This case is not a real controversy in any sense of the word.

Second, Planned Parenthood seeks a "'decision in advance about a right'" to abortion before it has been actually asserted or contested by anyone. *League of Women Voters*, 506 Mich at 580 (quoting *Anway*, 211 Mich at 610). The ACLU and Planned Parenthood do not claim that Attorney General Nessel has violated any Michigander's rights, nor could they.

Third, any decision by the Court of Claims "'cannot have any practical legal effect upon a then existing controversy.'" *Id.* (quoting *Anway*, 211 Mich at 610). The

Court of Claims's injunctive order has no practical effect on Attorney General Nessel in any way. The Attorney General was not enforcing MCL 750.14 prior to Planned Parenthood's lawsuit, and she would continue that non-enforcement today regardless of any ruling by the Court of Claims. And, as the Court of Appeals correctly held, no Court of Claims decision may bind county prosecutors.

Fourth, a live case requires a "'disputed right.'" *Id.* (quoting *Anway*, 211 Mich at 610). But Planned Parenthood and the Attorney General dispute nothing. They agree that MCL 750.14 violates the Michigan Constitution. Nor does Planned Parenthood claim that anyone (least of all the Attorney General) has sought to violate its rights. As a result, no party has "anything at stake in this dispute," judicial intervention is moot, and the case must be dismissed. *Id.* at 583.

"[B]ecause reviewing a moot question would be a purposeless proceeding, . . . courts will *sua sponte* refuse to hear cases that they do not have the power to decide, including cases that are moot." *People v Richmond*, 486 Mich 29, 35, 782 NW2d 187, 190 (2010) (cleaned up). "Whether a case is moot is a threshold issue that a court addresses before it reaches the substantive issues of the case itself." *Id*. But the Court of Claims ignored all these issues.

For instance, there are no facts establishing any dispute. Attorney General Nessel has not exercised any power relating to MCL 750.14. Planned Parenthood cannot (and does not) allege that the Attorney General has violated the Michigan Constitution. What's more, it is false that Defendant Nessel's non-enforcement of MCL 750.14 presents a "real and imminent danger of irreparable injury" sufficient to

warrant injunctive relief. *Davis v City of Detroit Fin Rev Team*, 296 Mich App 568, 614; 821 NW2d 896 (2012) (quotation omitted). Attorney General Nessel has made it plain that the sun will rise in the West before she prosecutes anyone under MCL 750.14. Planned Parenthood has grounded this litigation on the "mere apprehension of future injury" because a future Attorney General may have different views. *Sandstone Creek Solar, LLC v Twp of Benton*, 335 Mich App 683, 706; 967 NW2d 890, 903 (2021). But such fears "cannot be the basis for injunctive relief," which proves this case is moot and must be dismissed. *Id.*

5. *Mahaffey* required the Court of Claims to reject the ACLU and Planned Parenthood's claims.

Planned Parenthood asked the Court of Claims to declare that various provisions of the Michigan Constitution protect a right to abortion and enjoin MCL 750.14's enforcement on that basis. *E.g.*, 4/7/22 V Compl at 3 ¶¶ 7, 9–10, 26, and 34–35, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM. The Court of Claims accepted this invitation based on Planned Parenthood's argument concerning a right to bodily privacy anchored in the Michigan Constitution's Due Process Clause. *Id.* at 27–28 ¶¶ 125–27.

In *Mahaffey*, Michigan courts encountered a similar claim by abortion advocates that a statute requiring pregnant women to receive information about their unborn children and wait 24 hours to decide whether to review that information before obtaining an abortion—and intentionally ending an innocent human life—"violates a woman's [state constitutional] right to privacy and due process." *Mahaffey,* 222 Mich App at 332.

The *Mahaffey* trial court ruled that "the Michigan Constitution guarantees a right to abortion, which is separate and distinct from the federal guarantee" and that "the proper test for evaluating [any] legislation related to abortion under state law," whether a broad ban or a narrow regulation, "is strict scrutiny." 222 Mich App at 333. On appeal, the Court of Appeals answered the trial court's broad ruling under the Michigan Constitution with an expansive holding of its own. It reversed the trial court's grant of summary disposition in the abortion advocates' favor and stated unambiguously "that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." *Id.* at 339.

Mahaffey's holding is clear-cut. The Court of Appeals ruled that "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. A few times the *Mahaffey* Court spoke in terms of "whether the constitutional right to privacy encompasses the right to abortion." *Id.* But none of the Court's reasoning was specific to any constitutional right to privacy. Instead, the *Mahaffey* decision was based on four overarching factors that apply to the 1963 Constitution as a whole:

- First, the Michigan Constitution itself and the debates surrounding it "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.* at 335–36. Creating a constitutional right to abortion would have "elicit[ed] major debate among the delegates to the Constitutional Convention as well as the public at large." *Id.* at 336 (quotation omitted). But no major debate occurred because the 1963 Constitution left Michigan's abortion laws—including MCL 750.14,

which predated the constitutional convention by roughly 30 years—untouched. *Id.*

- Third, less than a decade after the constitution was adopted, "essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute." *Id.*

- Last, Michigan's public policy "does not favor abortion" either in 1963 or now. *Id.* at 337.

MCR 7.215(C)(2) provides that "[a] published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*." Because *Mahaffey* is "a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals," Judge Gleicher was required to apply *Mahaffey*'s holding to Planned Parenthood's case. MCR 7.215(J)(1). This was so even though then-attorney Gleicher was on the losing side of *Mahaffey*.

Critically, *stare decisis* requires courts "to reach the same result in a case that presents the same *or substantially similar issues* as a case that another panel of this Court has decided." *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246 (2014) (per curiam) (emphasis added). *Mahaffey*, at the least, considered substantially similar issues to those presented in Planned Parenthood's suit. As a result, *Mahaffey*'s holding that there is no right to abortion under the Michigan Constitution controls in the Court of Claims. *Mahaffey,* 222 Mich App at 334.

The Court of Claims's refusal to apply *Mahaffey* and reject Planned Parenthood's claims under the Michigan Constitution is a failure to proceed according to law. 5/17/2022 Op & Order at 15–16. It is an especially egregious failure given that

the judge was one of the ACLU attorneys who represented the *Mahaffey* plaintiffs, and thus received the Court of Appeals' unambiguous, published decision that "the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." 222 Mich App at 339. Moreover, the Court of Claims issued its preliminary injunction ruling in the friendly confines of litigation that involved only parties who share the same views, after excluding any dissenting voices by literally pulling the plug on counsel for Michigan Right to Life and the Michigan Catholic Conference—disconnecting him from the court's Zoom status conference. These egregious facts combine to call for an order of superintending control directing the Court of Claims to dissolve its preliminary injunction order, which directly contradicts *Mahaffey*, and dismiss Planned Parenthood's case.

B. Appellants are without an adequate legal remedy.

Right to Life of Michigan is a nonpartisan, nonsectarian, nonprofit organization of caring people, united to protect the precious gift of human life from conception to natural death. Right to Life encourages community participation in programs that foster respect and protection for human life. Right to Life gives a voice to the voiceless on life issues like abortion, infanticide, euthanasia, and physician-assisted suicide. Right to Life educates people on these issues and motivates them to action, including support for laws like MCL 750.14. But because Right to Life is not a state entity or official, it had no right to move to intervene to defend MCL 750.14 in the Court of Claims, and thus no right to appeal the Court of Claims's opinion and order. Right to Life's only remedy is a complaint of superintending control.

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. But because Right to Life is not a state entity or official, it had no right to move to intervene to defend MCL 750.14 in the Court of Claims, and thus no right to appeal the Court of Claims's opinion and order. The Michigan Catholic Conference's only remedy is a complaint of superintending control.

As the Court of Appeals correctly determined, Prosecutors Jarzynka and Becker are not parties in the Planned Parenthood case and have their own prosecutorial discretion. But they have now been enjoined in Governor Whitmer's lawsuit by the Oakland County Circuit Court, which used the Court of Claims's ruling, in part, as the basis for its own deeply flawed preliminary injunction. Because they are not the State or a state entity or official, they, too, have no recourse or right to appeal the Court of Claims's unlawful injunctive order, and their only remedy is a complaint of superintending control.

The Court of Claims's order enjoining MCL 750.14's enforcement preempts Right to Life of Michigan and the Michigan Catholic Conference's interest in the

constitutionality of MCL 750.14 and other abortion laws. Right to Life of Michigan and the Michigan Catholic Conference have worked for decades to see many pro-life measures become law. And they have already moved to intervene in Governor Whitmer's adverse actions to defend MCL 750.14 in court.

All this leaves Prosecutors Jarzynka and Becker, Right to Life of Michigan and the Michigan Catholic Conference without an adequate legal remedy. Filing a complaint for an order of superintending control was their only option.

CONCLUSION

Michigan courts will undoubtedly have an opportunity to weigh in on whether Michigan's Constitution silently created a right to abortion in 1963 that no one recognized until today. But that opportunity should not be manufactured in a case that lacks a plaintiff with standing, lacks adverse parties, is moot, and lacks a ripe, justiciability case or controversy. Further, it is of paramount importance that this Court reinforce the long-standing principle that lower courts must follow binding precedent. Our judicial system will be thrown into disarray if state trial courts are allowed to find endless ways to circumvent superior courts' decisions in cases where ideologically aligned plaintiffs and defendants concoct a lawsuit that lacks any true adversity. This is a judicial-branch problem no matter the politics of the parties seeking to end-run laws and precedent they dislike.

The Court of Claims should have dismissed the underlying case at the earliest possible stage, and the fact that it did not but instead enjoined a valid Michigan law, on a legal basis that was soundly rejected in a case the judge herself litigated as counsel 25 years ago, warrants the exercise of superintending control.

This Court should grant leave to appeal and hold that public interest groups are allowed to seek intervention or superintending control when legislation they have sponsored, shepherded, and defended is at risk in a litigation proceeding. Leaving the Court of Claims's ruling in place will invite future ideologically aligned plaintiffs and state officials to find judges who share disdain for a particular law and enjoin that law with no opposing views welcomed to the table as parties. In other words, this Court should stop Michigan trial courts from striking down validly enacted laws in fake proceedings.

For all these reasons, Right to Life of Michigan, the Michigan Catholic Conference, and Prosecutors Jarzynka and Becker respectfully request that the Court grant leave to appeal, vacate that part of the Court of Appeals's August 1, 2022, order holding that they lack standing, and direct that court to enter an order of superintending control directing the Court of Claims in *Planned Parenthood of Michigan v Attorney General*, Court of Claims No 2022-000044-MM, to vacate its May 17, 2022 opinion and order granting a preliminary injunction and dismiss the case. At a minimum, this Court should vacate the Court of Appeals's ruling that Appellants lack standing and remand for the Court of Appeals to rule on the merits of their superintending-control complaint.

Respectfully submitted,

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Dated: August 31, 2022

EXHIBIT 1

Court of Appeals, State of Michigan

ORDER

In re Jarzynka

Docket No. 361470

LC No. 22-000044-MM

Stephen L. Borrello
Presiding Judge

Michael J. Kelly

Michael F. Gadola
Judges

The complaint for superintending control is DISMISSED because plaintiffs Jerard M. Jarzynka, Christopher R. Becker, Right to Life of Michigan, and the Michigan Catholic Conference lack standing to seek superintending control.

Plaintiffs seek superintending control over Court of Claims Judge Elizabeth L. Gleicher. Their complaint relates to Court of Claims Case No. 22-000044-MM, *Planned Parenthood of Mich v Mich Attorney General*. The parties to the Court of Claims action are Planned Parenthood of Michigan and Dr. Sarah Wallett (the plaintiffs); the Attorney General of the State of Michigan (the defendant); and the Michigan House of Representatives and the Michigan Senate (collectively, the Legislature) (the intervening parties). On May 17, 2022, Judge Gleicher entered a preliminary injunction in the Court of Claims case which, in relevant part, purported to enjoin Michigan county prosecutors from enforcing MCL 750.14.[1]

We invited the parties to this action to submit supplemental briefs addressing whether dismissal for lack of jurisdiction was warranted under MCR 3.302. *In re Jarzynka*, unpublished order of the Court of Appeals, entered June 27, 2022 (Docket No. 361470). Having received supplemental briefs from plaintiffs and from Planned Parenthood of Michigan (who filed an appearance as an other party in this action), we conclude that dismissal for lack of jurisdiction is not warranted. "Superintending control is an extraordinary remedy, and extraordinary circumstances must be presented to convince a court that the remedy is warranted." *In re Wayne Co Prosecutor*, 232 Mich App 482, 484; 591 NW2d 359 (1998). "Superintending control is available only where *the party seeking the order* does not have another adequate remedy." *In re Payne*, 444 Mich 679, 687; 514 NW2d 121 (1994) (emphasis added), citing MCR 3.302(B). An appeal available to the party seeking an order of superintending control is "another adequate remedy" that is available to the party seeking the order , and it requires denial of the request. MCR 3.302(D)(2); *In re Payne*, 444 Mich at 687.

An appeal of the Court of Claims' order is not available to either Right to Life of Michigan or the Michigan Catholic Conference, neither of whom were parties to the Court of Claims' action.

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[1] MCL 750.14 prohibits any person from administering any drug or substance or utilizing any instrument to procure a miscarriage unless necessary to preserve a woman's life.

Therefore, dismissal of their complaint for superintending control is not mandated under MCR 3.302(D)(2).

As it relates to Jarzynka and Becker, Planned Parenthood of Michigan argues that they are state officials subject to the jurisdiction of the Court of Claims. As a result, they contend that, like the Legislature, Jarzynka and Becker could have intervened in the Court of Claims action and, subsequently, could have appealed the Court of Claims' decision. County prosecuting attorneys, however, are local officials, not state officials.

"The Court of Claims is a court of legislative creation" designed to "hear claims against the state." *Council of Organizations & Others for Ed About Parochiaid v State of Michigan*, 321 Mich App 456, 466-467; 909 NW2d 449 (2017) (quotation marks and citation omitted). MCL 600.6419(1)(a) grants the Court of Claims jurisdiction:

> To hear and determine any claim or demand, statutory or constitutional . . . or any demand for monetary, equitable, or declaratory relief . . . against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

In relevant part, MCL 600.6419(7) defines "the state or any of its departments or officers" to include "an officer . . . of this state . . . acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a governmental function in the course of his or her duties." Our Supreme Court has determined that county prosecutors are "clearly local officials elected locally and paid by the local government." *Hanselman v Killeen*, 419 Mich 168, 188; 351 NW2d 544 (1984). Moreover, our Supreme Court has stated that a reviewing court should consider the following four factors to determine if an entity is a state agency that is subject to the jurisdiction of the Court of Claims:

> (1) whether the entity was created by the state constitution, a state statute, or state agency action, (2) whether and to what extent the state government funds the entity, (3) whether and to what extent a state agency or official controls the actions of the entity at issue, and (4) whether and to what extent the entity serves local purposes or state purposes. [*Manuel v Gill*, 481 Mich 637, 653; 753 NW2d 48 (2008).]

The test requires an examination of the "totality of the circumstances" to determine "the core nature of an entity" so as to ascertain "whether it is predominantly state or predominantly local." *Id*. at 653-654. We adopt this test in order to determine whether a county prosecutor is a state official under MCL 600.6419(7).

First, the office of a county prosecutor was created by our State Constitution. Michigan's 1963 Constitution addresses county prosecutors in Article VII, which governs "Local Government." Const 1963, art 7, § 4 provides:

> There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law.

Further, the general duties of county prosecutors are set forth by statute. MCL 49.153 provides that:

> The prosecuting attorneys shall, *in their respective counties*, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested. [Emphasis added.]

While MCL 49.153 states that county prosecutors "shall appear for the state," their authority is explicitly limited to "their respective counties." We conclude that because our state constitution addresses county prosecutors as part of local government and because their authority is limited to their respective counties, the first *Manuel* factor cuts against a finding that county prosecutors are state officials. See *Manuel*, 481 Mich at 653.The next inquiry is "whether and to what extent the state government funds the entity." *Manuel*, 481 Mich at 653. As recognized in *Hanselman*, 419 Mich at 189, county prosecutors are generally locally funded. Indeed, MCL 49.159(1) provides that "[t]he prosecuting attorney shall receive compensation for his or her services, as the county board of commissioners, by an annual salary or otherwise, orders and directs." Accordingly, this factor weighs in favor of a determination that county prosecutors are local, not state officials.

The next inquiry is "whether and to what extent a state agency or official controls the actions of the entity at issue." *Manuel*, 481 Mich at 653. This Court has recognized that the Attorney General has supervisory authority over local prosecutors. See *Shirvell v Dep't of Attorney Gen*, 308 Mich App 702, 751; 866 NW2d 478 (2015), citing MCL 14.30. MCL 14.30 provides that "[t]he attorney general shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices." Yet, despite the Attorney General's supervisory authority, county prosecutors retain substantial discretion in how to carry out their duties under MCL 49.153. See *Fieger v Cox*, 274 Mich App 449, 466; 734 NW2d 602 (2007) ("Pursuant to MCL 49.153, prosecuting attorneys in Michigan possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings."). Because county prosecutors have substantial discretion to carry out their duties to prosecute and defend cases in their respective counties, the fact that the Attorney General has supervisory authority does not transform what is otherwise a local official into a state official.

The final inquiry is "whether and to what extent the entity serves local purposes or state purposes." *Manuel*, 481 Mich at 653. Taking all of the above into consideration, a county prosecutor represents the state in criminal matters (and in child protective proceedings),[2] but their authority only extends to matters in their respective counties and they exercise independent discretion in carrying out those duties. Stated differently, notwithstanding that county prosecutors represent the State of Michigan, they serve primarily local purposes involving the enforcement of state law within their respective counties.

In light of the four-part inquiry from *Manuel*, we conclude that, under the totality of the circumstances, the core nature of a county prosecutor is that of a local, not a state official. Because county prosecutors are local officials, jurisdiction of the Court of Claims does not extend to them. See *Mays v*

[2] See *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 640; 591 NW2d 393 (1998) (stating that county prosecutors act "as the state's agent for effectuation of the obligations of *parens patriae* in matters concerning the custody or welfare of children . . . .").

Snyder, 323 Mich App 1, 47; 916 NW2d 227 (2018) ("The jurisdiction of the Court of Claims does not extend to local officials."). As a result, plaintiffs Jarzynka and Becker could not intervene in the Court of Claims action and an appeal of the Court of Claims' decision was not available to them. Dismissal of the county prosecutors is, therefore, not warranted under MCR 3.302(D)(2).

We next consider whether the availability of an appeal by a party other than the party seeking superintending control is sufficient to deprive this Court of jurisdiction under MCR 3.302(D)(2). We conclude that, under the circumstances of this case, it is not. First, as the defendant in the Court of Claims action, the Attorney General could have appealed the decision enjoining it from enforcing MCL 750.14. The Attorney General, however, declined to do so. Second, as the Michigan House of Representatives and the Michigan Senate are intervening parties in the Court of Claims action, an appeal of that decision was available to them. They have, in fact, filed an application for leave to appeal the decision of the Court of Claims. However, that application remains pending, and there is no guarantee that leave to appeal will be granted or will otherwise be decided on the merits. We conclude that, under the facts of this case, the possibility that the decision by the Court of Claims *may* be challenged in an appeal brought by an individual or entity other than the one seeking superintending control is not the equivalent of "another adequate remedy *available to the party seeking the order*" of superintending control. MCR 3.302(B) (emphasis added). As a result, dismissal of the complaint for superintending control is not warranted based on the fact that an appeal is available to the Attorney General or to the Legislature.

Having determined that the complaint for superintending control does not fail for want of jurisdiction under MCR 3.302, we next turn to whether plaintiffs' complaint for superintending control must be dismissed for lack of standing. It is well-established that "a party seeking an order for superintending control must still have standing to bring the action." *Beer v City of Fraser Civil Serv Comm*, 127 Mich App 239, 243; 338 NW2d 197 (1983). "Standing is the legal term to be used to denote the existence of a party's interest in the outcome of a litigation; an interest that will assure sincere and vigorous advocacy." *Id*. "A party lacks standing to bring a complaint for superintending control where plaintiff has shown no facts whereby it was injured." *Id*. Here, as a legal cause of action is not provided to plaintiffs at law, this Court must determine whether plaintiffs have standing. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). Under such circumstances, "[a] litigant may have standing . . . if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large . . . ." *Id*.

Plaintiffs Jarzynka and Becker contend that they have standing because the Court of Claims' preliminary injunction purports to bind them. The preliminary injunction provides in relevant part:

> (1) Defendant [i.e., the Attorney General] and anyone acting under defendant's control and supervision, see MCL 14.30, are hereby enjoined during the pendency of this action from enforcing MCL 750.14;
>
> (2) Defendant shall give immediate notice of this preliminary injunction to all state and local officials acting under defendant's supervision that they are enjoined and restrained from enforcing MCL 750.14[.]

Although the injunction purports to enjoin anyone acting under the Attorney General's control and supervision, MCL 14.30 does not give the Attorney General "control" over county prosecutors. Rather, it provides that "[t]he attorney general shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices." Thus, although the Attorney General may supervise, consult, and advise county prosecutors, MCL 14.30 does not give the Attorney General the general authority to control the discretion afforded to county prosecutors in the exercise of their statutory duties.[3]

Moreover, under MCR 3.310(C)(4), an order granting an injunction "is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." As recognized by Planned Parenthood of Michigan in a footnote in their supplemental brief filed on July 1, 2022, in this action, plaintiffs Jarzynka and Becker are not parties to the action before the Court of Claims. Further, as local officials, they could not be parties to the Court of Claims action. See *Mays*, 323 Mich App at 47. Nor are they the officers, agents, servants, employees, or attorneys of the parties, i.e., the Attorney General, Planned Parenthood of Michigan, or Dr. Wallett. Additionally, they are not "in active concert or participation" with those parties given that the Attorney General, Planned Parenthood, and Dr. Wallett appear to agree that MCL 750.14 should not be enforced.

We conclude that on the facts before this Court, plaintiffs Jarzynka and Becker are not and could not be bound by the Court of Claims' May 17, 2022 preliminary injunction because the preliminary injunction does not apply to county prosecutors. As a result, Jarzynka and Becker cannot show that they were injured by the issuance of the preliminary injunction. See *Beer*, 127 Mich App at 243, or that they have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large," *Lansing Sch Ed Ass'n*, 487 Mich at 372. And, because they lack standing, their complaint for superintending control must be dismissed.

Plaintiffs Right to Life of Michigan and the Michigan Catholic Conference also lack standing. Although they do not favor the preliminary injunction, they have not suffered any injury as a result of it, *Beer*, 127 Mich App at 243, nor have they shown the existence of "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large,"

[3] Although MCL 14.30 does not give the Attorney General the ability to control county prosecutors, other statutory provisions give the Attorney General limited control over county prosecutors. For example, MCL 49.160(2), provides that the Attorney General may determine that a county prosecutor is "disqualified or otherwise unable to serve." Under such circumstances, the Attorney General "may elect to proceed in the matter or may appoint a prosecuting attorney or assistant prosecuting attorney who consents to the appointment to act as a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve." Even that "control" over the prosecuting attorney, however, is limited. MCL 49.160(4) expressly provides that "[t]his section does not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney . . . to perform the necessary duties . . . or if an assistant prosecuting attorney has been otherwise appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney."

Lansing Sch Ed Ass'n, 487 Mich at 372. Their complaint for superintending control, therefore, must also be dismissed for lack of standing.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

Date

Chief Clerk

EXHIBIT 2

STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN RE JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County; CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County; RIGHT TO LIFE OF MICHIGAN; and THE MICHIGAN CATHOLIC CONFERENCE,

Plaintiffs.

_____/

Case No.

COMPLAINT FOR ORDER OF SUPERINTENDING CONTROL

***Planned Parenthood of Michigan v Attorney General*, Court of Claims Case No. 22-000044-MM**

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COMPLAINT FOR ORDER OF SUPERINTENDING CONTROL

Pursuant to MCR 7.206(B) and MCR 3.302, Jerard M. Jarzynka, the Prosecuting Attorney for Jackson County, Christopher R. Becker, the Prosecuting Attorney for Kent County, Right to Life of Michigan, and the Michigan Catholic Conference ("Plaintiffs"), respectfully ask this Court to issue an order of superintending control over the Hon. Elizabeth L. Gleicher of the Court of Claims in *Planned Parenthood of Michigan v Attorney General*, Court of Claims Case No. 22-000044-MM.

The ACLU, Planned Parenthood of Michigan, and one of its employees sued Attorney General Nessel in the Court of Claims based on fears that the U.S. Supreme Court *might* overrule *Roe v Wade*, 410 US 113 (1973). They seek a declaration that the Michigan Constitution creates a right to abortion and an injunction barring the Attorney General from enforcing the State's abortion laws, including MCL 750.14, a statute that bars performing elective abortions. Yet the Attorney General is a supporter of abortion rights who pledged not to defend or enforce MCL 750.14 years before this litigation. The Attorney General has repeatedly asserted in the Court of Claims action that she is not adverse to the ACLU and Planned Parenthood, the Court of Claims accordingly lacks jurisdiction, and the Court of Claims action should therefore be dismissed.

Even though the Attorney General admits that there is no adversity between the parties or actual controversy here, the Court of Claims refused to dismiss the case for lack of jurisdiction and granted Planned Parenthood a preliminary injunction that addresses one of the most controversial issues of our time without

any party filing a merits brief or presenting oral argument against that relief. In her order, Judge Gleicher held that the Michigan Constitution likely creates a right to abortion and preliminarily enjoined the Attorney General—and all prosecuting attorneys in the State, even though they are not parties to the action—from enforcing MCL 750.14. The Attorney General, who already declined to file a motion to dismiss or file a brief opposing the requested preliminary injunction on the merits, now cheers her own defeat and the Court of Claims's purported injunction. Not surprisingly, she now refuses to appeal. In short, this Court of Claims action has become a runaway train and only this Court can apply the brakes.

This Court must intervene and do so immediately. Michigan courts lack jurisdiction over manufactured disputes where there is no adversity, no actual controversy, and the plaintiff's claims are hypothetical, moot, and not ripe. Plaintiffs respectfully ask this Court to issue an order vacating the preliminary injunction and directing the Court of Claims to dismiss the case for lack of jurisdiction. At a bare minimum, Plaintiffs respectfully ask this Court to vacate the Court of Claims's preliminary injunction (issued May 17, 2022) and order Judge Gleicher to adhere to the objective appearance-of-impropriety standard and recuse herself.

Time is of the essence, as the Court of Claim's injunctive order will become unappealable after June 7th, the 21st day following the order's issuance. It is up to this Court to restore the rule of law in Michigan. And it must do so now, before the

Court of Claims litigation erodes the public's perception of a fair and impartial judiciary any further.

LEGAL BACKGROUND

I. MCL 750.14 and its construction by Michigan courts

1. MCL 750.14 is a 91-year-old statute that bans performing an abortion unless necessary to save the life of the mother. The law does not regulate or target women, only medical professionals or others who seek to take innocent, unborn life. For nearly 60 years it has existed peaceably side-by-side with the Constitution that Michiganders ratified in 1963, without altering any of the State's abortion laws. Those who ratified the Michigan Constitution in 1963 were fully aware of MCL 750.14 and its limits on abortion: it has been the law-of-the-land for 32 years.

2. The Michigan Supreme Court has already held that no woman in Michigan can be charged under MCL 750.14 for having an abortion or assisting with her own abortion. *In re Vickers*, 371 Mich 114, 117-118; 123 NW2d 253, 254 (1963).

3. In 1973, the Michigan Supreme Court in *People v Bricker* construed MCL 750.14 to comport with the U.S. Supreme Court's recent holding in *Roe*, narrowing MCL 750.14 as follows:

> [W]e construe § 14 of the penal code to mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant

> woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment to preserve the life or health of the mother. [*People v Bricker*, 389 Mich 524, 529–30; 208 NW2d 172, 175 (1973)]

4. In 2001, this Court in *People v Higuera* recognized that courts "are obliged to read [MCL 750.14] in light of . . . *Bricker*" and narrowed the statute still further based on *Bricker*'s "deference to the subjective good-faith medical judgment of the physician," holding that a prosecuting attorney

> must allege, and, to convict, the prosecution must prove, that the fetus was twenty-eight weeks old and viable, that defendant himself subjectively believed that the fetus was twenty-eight weeks old and viable, and that defendant, in his own mind, did not hold the subjective belief or medical judgment that the procedure was necessary to preserve the life or health of the mother. [244 Mich App 429, 449, 625 NW2d 444, 455–56 (2001)]

5. Now, 21 years later, the law is the same. MCL 750.14 remains in effect, but its scope is limited by *Vickers*, *Bricker,* and *Higuera*. And charges (let alone convictions) under Michigan's abortion statute are exceptionally rare.

II. In a published decision issued after 1990, this Court rejected a right to abortion under the Michigan Constitution in a case where Planned Parenthood was represented by the presiding judge in the action at issue here.

6. In 1994, the president of the Detroit City Council and several abortion doctors asked a state court to declare that the Michigan Constitution protects a right to abortion. *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104, 108 (1997). The right they asserted would forbid not just major abortion bans but minor preconditions to an abortion, such as providing women information about

their unborn children and mandating a 24-hour waiting period for women to review this information. 222 Mich App at 329–30, 564 NW2d at 107. The *Mahaffey* plaintiffs were represented by a group of ACLU attorneys that included Judge Gleicher, who is now presiding over the present suit in the Court of Claims.

7. Abortion advocates won in the trial court, which held that the Michigan Constitution includes a right to abortion that subjects *any law* (ban or regulation) to strict scrutiny. 222 Mich App at 333, 564 NW2d at 109. This Court reversed in a published decision, unambiguously holding "that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." 222 Mich App at 339, 564 NW2d at 111. *Mahaffey* established that nothing in the Michigan Constitution subjects abortion laws (of whatever type) to anything more than rational-basis review. For a quarter century all agreed that "[t]his Court has held 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). Indeed, *Mahaffey*'s clarity on this issue extends beyond Michigan's borders. *Planned Parenthood of the Heartland v Reynolds ex rel State*, 915 NW2d 206, 254 n.10 (Iowa 2018) (Mansfield, J., dissenting) ("Michigan state courts have found no right to an abortion at all in their state constitution.") (citing *Mahaffey*).

8. Under MCR 7.215(C)(2), "[a] published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*," which means that *Mahaffey* controls in the Court of Claims. Similarly, under MCR 7.215(J)(1), *Mahaffey*'s

holding remains binding on subsequent panels of this Court because it was issued after November 1, 1990.

III. The multi-front attack on *Mahaffey*

9. The Governor, Attorney General, and Planned Parenthood have now concocted an extraordinary, three-pronged attack on *Mahaffey* of which this case represents one part. All three initiatives are premised on a hypothetical future event: that the U.S. Supreme Court in *Dobbs v Jackson Women's Health Org*, No 19-1392, *might* overrule *Roe*. For her part, Governor Whitmer sued prosecuting attorneys in the Oakland County Circuit Court, requesting a declaration that MCL 750.14 violates the state constitution and an injunction against its enforcement "because of the U.S. Supreme Court's imminent decision in *Dobbs*," which "has created *uncertainty* about . . . the federal right to abortion." Compl in *Whitmer v Linderman,* Oakland County Circuit Court Case No. 22-193498-CZ, ¶¶ 59, 61 (emphasis added).

10. But the Governor has admitted, quite candidly, that "both the circuit court and the Court of Appeals are bound to decide, in light of *Mahaffey*, that there is no state constitutional right to abortion." 4/7/22 Br in Support of Governor's Exec Message in *Whitmer v Linderman,* Supreme Court Case No. 164256, p 11. Accordingly, the Governor filed an executive message in the Michigan Supreme Court, seeking an order directing the trial court to certify the legal question of whether the Michigan Constitution mandates a right to abortion. *Id.* at 6.

11. Planned Parenthood took a parallel path. It sued Attorney General Dana Nessel in the Court of Claims, requesting a declaration that MCL 750.14 violates the Michigan Constitution and an injunction against its enforcement. Planned Parenthood did so fully aware that the Attorney General is an avid proponent of abortion who would refuse to defend MCL 750.14. What's more, Planned Parenthood argued that the Court of Claims should either ignore or end-run *Mahaffey*, rather than adhere to this Court's controlling precedent. 4/7/22 Br in Supp of Pls.' Mot for Prelim Inj in *Planned Parenthood of Mich v Att'y Gen*, Court of Claims No. 22-000044-MM, at 22 n.10, 34–35.

12. The floodgates are already opening to friendly lawsuits tailor-made to nullify duly enacted statutes. Another case on an abortion issue was just filed against Attorney General Nessel on May 18, 2022. *Elizabeth Cady Stanton Trust v Nessel,* Court of Claims No. 22-000066-MM. This Court must put an immediate stop to this underhanded practice. The judiciary is for the resolution of actual disputes, not a forum for state-wide policy changes sought by non-adverse litigants.

LOWER COURT PROCEEDINGS

I. The ACLU files suit on Planned Parenthood's behalf

13. On April 7, 2022, the ACLU filed suit on behalf of Planned Parenthood and its chief medical officer against Attorney General Dana Nessel, as the sole defendant, in the Court of Claims. The ACLU and Planned Parenthood argued that, notwithstanding *Mahaffey*, the Court of Claims should (1) declare that the Michigan Constitution includes a right to abortion, and (2) enjoin the Attorney General and

all prosecuting attorneys from enforcing MCL 750.14 and other abortion regulations. 4/7/22 Planned Parenthood Verified Compl ¶¶ 34–35, attached as **Exhibit 1**.

14. The ACLU and Planned Parenthood's suit is based explicitly on the future possibility that the U.S. Supreme Court could "modify" *Roe* and *Casey* in *Dobbs*. *Id.* ¶ 96. If a change in federal abortion law occurs, the ACLU and Planned Parenthood fear *Bricker*'s construction of MCL 750.14 "may no longer protect Michigan abortion providers." *Id.* ¶ 96. They sued to prevent "uncertainty" in light of this "potential[ ] revising," even though almost 50 years of post-*Roe* modifications had not altered *Bricker* up till now. *Id.* ¶ 121.

15. Right after filing the complaint, the ACLU and Planned Parenthood also filed a motion for preliminary injunction in the Court of Claims. They sought an order enjoining the enforcement of "MCL 750.14 *and any other Michigan statute or regulation* to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person." 4/7/22 Br in Supp of Pls' Mot for Prelim Inj at 39 (emphasis added), attached as **Exhibit 2**.

16. The lawsuit was immediately assigned to Judge Gleicher.

II. The Attorney General refuses to defend Michigan law while recognizing there is no adversity and the Court of Claims lacks jurisdiction.

17. Just hours after the plaintiffs filed their lawsuit and motion for preliminary injunction in the Court of Claims, Attorney General Dana Nessel—the

sole defendant—issued a press release declaring that she would not defend MCL 750.14 and would support the ACLU and Planned Parenthood's legal position. 4/7/22 Atty Gen Press Release, attached as **Exhibit 3**.

18. On April 20, 2022, Judge Gleicher set a briefing schedule for Plaintiffs' motion for preliminary injunction. The Attorney General's response was due on May 5, 2022, and Plaintiffs' reply was due on May 10, 2022. The Court indicated that it would schedule oral argument on the motion approximately 14 days after Plaintiffs filed their reply. 4/20/22 Briefing Schedule Order, attached as **Exhibit 4.**

19. Before the Attorney General's response to the ACLU and Planned Parenthood's motion for preliminary injunction was due on May 5, 2022, the parties stipulated to a status conference, which Judge Gleicher held on May 2, 2022.

20. At this point, Right to Life of Michigan and the Michigan Catholic Conference had already filed an amici brief with the Court of Claims explaining that the Court lacked jurisdiction because, among other things, there was no jurisdiction because the matter lacked adversity and the case was not ripe because the Attorney General did not intend to enforce or defend Michigan law. Amici's counsel, John Bursch, received an invitation to the status conference, which was convened over Zoom. But Judge Gleicher excluded him and everyone else from the status conference other than attorneys from the Attorney General's Office, the ACLU, and Planned Parenthood—all of whom support a state constitutional right to abortion and agree that MCL 750.14 should be enjoined.

21. On information and belief, at this status conference, the Attorney General's Office took the position that the Court of Claims lacked jurisdiction because there was no adversity between the parties. Despite the obvious lack of adversity between the Attorney General's Office, the ACLU, and Planned Parenthood, the parties apparently waived a hearing on the motion for preliminary injunction. 5/17/22 Op & Order at 25, attached as **Exhibit 5.** But this waiver was not made public. The Court of Claims's April 20, 2022 scheduling order still indicated that "[t]he Court will set a date for oral argument, which will be conducted approximately 14 days after the plaintiffs' reply brief is filed."

22. On May 5, 2022, the Attorney General filed her response to Plaintiffs' motion for preliminary injunction. 5/5/22 Def's Resp to Pls' Mot for Prelim Inj, attached as **Exhibit 6.** This brief confirmed that the Attorney General agreed with the ACLU and Planned Parenthood's legal theories, shared their desired outcome, and refused to defend MCL 750.14 and related laws. As a result, the Attorney General recognized that the Court of Claims lacked jurisdiction, just as Right to Life of Michigan and the Michigan Catholic Conference had explained:

- "As a candidate, the Attorney General made clear she would not enforce Michigan's criminal abortion statute, MCL 750.14, and shortly after taking office in January 2019, she reconfirmed that commitment *at a conference held by Plaintiff* Planned Parenthood of Michigan." *Id.* at 1 (emphasis added).

- "Plaintiffs' complaint powerfully and persuasively alleges that Michigan's criminal abortion statute, MCL 750.14, violates several provisions of the Michigan Constitution, including the Due Process Clause, art 1, § 17, and the Equal Protection Clause, art 1, § 2. The Attorney General agrees that the statute is unconstitutional under the theories alleged by Plaintiffs. And because she agrees, the Attorney General will not exercise her discretion to defend the statute, a point she made clear the day the lawsuit was filed." *Id.* at 4.
- "Given the Attorney General's exercise of discretion not to defend MCL 750.14, there is at present a lack of adversity. Before the Court can order any declaratory or injunctive relief, there must first be an actual, live controversy before the Court. And for there to be a controversy, there needs to be adversity between the parties, which does not presently exist in this case." *Id.* at 8 (citations omitted).
- "Because the parties' interests are aligned, the Court is now confronted with the question of its jurisdiction to hear this matter. For jurisdiction to exist, there must be a live, actual controversy between adverse litigants. Given the Attorney General's decision not to defend the statute, there is presently a lack of adversity sufficient to support jurisdiction." *Id.* at 1.

23. Despite admitting that the Court of Claims lacked jurisdiction, the Attorney General refused to "move to dismiss the action" because she agreed with the ACLU and Planned Parenthood that "[t]he legal issues in this case are important." *Id.* at 10.

24. Rather than creating the necessary adversity by erecting a conflict firewall that might allow other members of the Attorney General's Office to defend MCL 750.14, *id.* at 9–10, the Attorney General offered multiple suggestions to the ACLU, Planned Parenthood, and Judge Gleicher regarding how the Court might allow the lawsuit to proceed and "ensure a defensible result." *Id.* at 10.

25. This would require bringing "an additional party . . . into this lawsuit to create the necessary adversity and stave off claims that the suit is nothing more than a 'friendly scrimmage brought to obtain a binding result that both sides desire.'" *Id.* at 8-9 (quoting *League of Women Voters v Secretary of State*, 506 Mich 905; 948 NW2d 70 (2020) (Viviano, J., concurring).

26. First, the Attorney General confessed that:

> [w]hen a court lacks jurisdiction, it loses its power to hear the case. But that need not happen here. Plaintiffs can amend their lawsuit to add an appropriate party to ensure adversity exists. The Attorney General has offered to stipulate to such an amendment. Plaintiffs may then continue to press, and this Court can resolve, the substantial legal questions presented by this case and so important to the women of Michigan.

Id. at 1.

27. Second, the Attorney General suggested that "various joinder rules also permit the addition of parties to litigation," but recognized that "[i]t is unclear,

however, whether these rules may be used to remedy a jurisdictional defect." *Id.* at 9.

28. Under Michigan law, however, the possibility of joinder only arises when jurisdiction already exists. Joinder cannot vest a court with jurisdiction. *Bowes v Int'l Pharmakon Labs, Inc*, 111 Mich App 410, 415; 314 NW2d 642, 644 (1981).

29. It was inappropriate for the Attorney General to refuse to defend MCL 750.14 and related laws, decline to erect a firewall in the Attorney General's Office to enable a defense, admit that the Court of Claims lacked jurisdiction, and yet suggest ways for the ACLU and Planned Parenthood to remedy the jurisdictional defect to obtain a mutually-desired result, instead of filing a motion to dismiss. The Attorney General's unusual conduct simply underscores the improper nature of the Court of Claims action.

III. The ACLU and Planned Parenthood refuse to create adversity and double down on their preliminary-injunction request.

30. The ACLU and Planned Parenthood had no interest in taking the Attorney General up on any of her suggestions as to creating adversity and producing a "defensible result." Def's Resp to Pls' Mot for Prelim Inj at 10. They created a lack of adversity by suing only the Attorney General—an ally and well-known abortion supporter—in the Court of Claims. And they did nothing to remedy that glaring jurisdictional defect.

31. Instead, the ACLU and Planned Parenthood doubled down on their preliminary-injunction request, arguing that "so long as an official-capacity

defendant is an agent of the State and a plaintiff is challenging the validity of a law of the State, the parties are adverse and there is an 'actual controversy' for the Court to resolve." 5/6/22 Pl's Reply to Def's Resp to Pls' Mot for Prelim Inj at 3, attached as **Exhibit 7**. "[T]he Attorney General's overall agreement with Plaintiffs' legal arguments," in their view, made no difference. *Id.* The ACLU and Planned Parenthood failed to note that, absent a threat that the Attorney General would enforce the challenge, the case was not ripe in any event.

32. The ACLU and Planned Parenthood recognized that the Court of Claims lacked an "adversarial briefing process where legal arguments on both sides of a constitutional issue are presented." *Id.* at 9. But they urged "the Court to move expeditiously to rule on their motion for preliminary injunction" anyway. *Id.* at 12.

IV. The Attorney General again declares that the Court of Claims lacks jurisdiction, while refusing to file a motion to dismiss.

33. The Attorney General sought permission to file a sur-reply, arguing again that "[a]bsent a live controversy between litigants who disagree, this Court lacks jurisdiction to rule on the constitutionality of MCL 750.14." Def's 5/12/22 Sur-reply Br to Pl's 5/6/22 Reply at 1, attached as **Exhibit 8**.

34. The Attorney General's sur-reply acknowledged that "[m]erely suing another party does not create the necessary actual controversy" for a court to issue declaratory relief. *Id.* at 2. It is "adversity between the parties [that] creates the controversy" and "it cannot be said that there is a genuine, live controversy between

Plaintiffs and the Attorney General where the Attorney General has admitted the unconstitutionality of MCL 750.14 and that she will not enforce the statute." *Id.*

35. The Attorney General recognized that a key element of adversarial litigation was "[m]issing" from the ACLU and Planned Parenthood's suit. *Id.* at 3. Specifically, "parties who support the constitutionality of MCL 750.14," as their "interests and rights . . . will necessarily be affected by the declaration of unconstitutionality sought by Plaintiffs." *Id.*

36. Because the Court of Claims lacked jurisdiction, the Attorney General argued that it could not issue declaratory or injunctive relief. *Id.*

37. Yet the Attorney General refused to file a motion to dismiss, even though she acknowledged there was a lack of adversity. She also refused to create a firewall in her office, *id.* at 3–6, or "take a substantive position with respect to the merits of Plaintiffs' motion for preliminary injunction." *Id.* at 6.

38. Instead, the Attorney General (again) urged the ACLU and Planned Parenthood to remedy the jurisdictional "defect by amending the complaint to add an appropriate [adverse] party." *Id.* at 3.

V. The Court of Claims preliminarily enjoins the Attorney General—and anyone operating under her supervision—from enforcing MCL 750.14.

39. Without adversarial briefing or argument, without a public hearing, and without jurisdiction or even a ripe controversy, the Court of Claims nonetheless

issued an opinion and order on May 17, 2022, that preliminarily enjoins the Attorney General and anyone operating under her supervision from enforcing MCL 750.14. 5/17/22 Op & Order at 27.

40. The Court of Claims did so because "*Dobbs* presents an opportunity for the United States Supreme Court to overrule *Roe*" and "[a] draft opinion in *Dobbs* purporting to overrule *Roe* was leaked to the press on May 2, 2022," even though the U.S. Supreme Court has not issued a final decision and there has been no change in federal or state law. *Id.* at 6.

41. Without considering or addressing *Vickers*, *Bricker,* and *Higuera*'s narrowing constructions of MCL 750.14, the Court of Claims accepted the ACLU and Planned Parenthood's assertion "that if the United States Supreme Court overrules *Roe v Wade*, abortion will again become illegal in Michigan except when 'necessary to preserve the life of [the] woman.'" *Id.* (quoting MCL 750.14).

42. The Court of Claims admitted that "Defendant Attorney General concurs with plaintiffs' argument that MCL 750.14 is unconstitutional," *id.* at 7, but held the case was "a justiciable declaratory judgment action" regardless. *Id.* at 9.

43. In so doing, the Court of Claims disrespected not only the law but Justice Viviano, whose well-reasoned *League of Women Voters* concurrence the Court of Claims judge wrongly disparaged as a "cut-and-pasted" job that "mischaracterized the meaning and contextual applicability" of an opinion by then-Judge Scalia. *Id.* at 7 n 6.

44. The Court of Claims instead relied on a nonbinding treatise that suggests Michigan courts should not apply "an unduly restrictive construction of the actual controversy requirement." *Id.* at 11 (quotation omitted).

45. As further support for its justiciability holding, the Court of Claims cited *United States v Windsor*, 570 US 744; 133 S Ct 2675 (2013), where jurisdiction turned on the federal government's refusal to refund the plaintiff estate taxes that she allegedly should not have been required to pay and thus created an actual controversy. *Id.* at 12.

46. The plaintiff in *Windsor* had a justiciable case because the United States refused to provide her requested relief, *i.e.*, a refund of the estate taxes that she otherwise would not have paid. *Id.* at 759 ("the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute"). But this case is entirely different. The Attorney General acceded to the ACLU and Planned Parenthood's requested relief, *i.e.*, non-enforcement of MCL 750.14, as a candidate for office *years before* the ACLU and Planned Parenthood filed suit. 5/5/22 Def.'s Resp. to Pls.' Mot. for Prelim. Inj. At 2. What's more, the Attorney General has "never waivered from her commitment to" abortion rights. *Id.* So Planned Parenthood faces no danger of enforcement from the Attorney General.

47. The Court of Claims replaced disagreement on the plaintiff's requested relief, which the Attorney General had already granted, with a mere procedural disagreement on whether the Attorney General should consent to the entry of a preliminary injunction—in a case where adversity, an actual controversy, and

jurisdiction were lacking. But the Attorney General's refusal to take a substantive position on the ACLU and Planned Parenthood's motion for preliminary injunction cannot gin up a justiciable controversy. No preliminary injunction was even necessary because the Attorney General acceded—long ago—to the ACLU and Planned Parenthood's requested relief.

48. Far from "refusing to give [her legal position in regard to MCL 750.14] effect," *id.* at 12 (quoting *Windsor*, 570 US at 756), the Attorney General has promised (repeatedly) not to enforce the law. Planned Parenthood suffered no injury—monetary or otherwise—as there has been no change in abortion law, just hypothetical and anticipatory fears. The ACLU and Planned Parenthood do not claim that anything should be different now. Their suit is simply a ploy to create a right to abortion in the Michigan Constitution free and clear of any opposition.

49. As the Court of Claims recognized, "[a]s of the date this opinion is issued, it is unknown whether the United States Supreme Court will overrule *Roe v Wade*." *Id.* at 13. The court's holding on whether the Michigan Constitution protects a right to abortion (without adversarial briefing or argument) is based on the *possibility* that event may occur and cause *speculative* harm in the future.

50. To rule on this hypothetical dispute and enjoin MCL 750.14's enforcement, the Court of Claims had to end-run this Court's binding decision in *Mahaffey*—the very case which the presiding Court of Claims judge had herself litigated and lost. The Court of Claims attempted to do so by (1) arguing that MCL 750.14 was not specifically at issue in *Mahaffey*, and (2) claiming to locate a right to

abortion in the "right to bodily integrity," a substantive due process concept just like the *Mahaffey* plaintiffs' asserted right to privacy. *Id.* at 15; *accord id.* at 4, 15–16, 19–20.

51. The Court of Claims—citing predominately federal cases like *Rochin v California*, 342 US 165, 72 S Ct 205 (1952), *Cruzan v Director, Missouri Department of Health*, 497 US 261, 110 S Ct 2841 (1990), and *Casey*, *id.* at 22–24—derived from "[a] general liberty interest in *refusing* medical treatment . . . a general liberty interest in *seeking* medical treatment." *Id.* at 22 (emphasis in original).

52. Without any relevant analysis or explanation, the Court of Claims declared that "the right to obtain safe medical treatment is indistinguishable from the right of a patient to refuse treatment. *Id.* at 24.

53. Yet there are obvious differences. Generally, the right to refuse medical treatment physically impacts no one but the patient. But abortion intentionally ends another innocent human life. And, in comparable circumstances where a parent rejects life-saving medical treatment for a minor child, the law often rejects that parent's decision and commands the opposite result. *E.g.*, *In re AMB*, 248 Mich App 144, 183–85; 640 NW2d 262, 284–85 (2001).

54. Because the Court of Claims viewed abortion as medical treatment, rather than the intentional taking of innocent human life, it held that the Michigan Constitution's Due Process Clause likely protects a right to abortion that renders MCL 750.14 invalid, *id.* at 24—25, even though *Mahaffey* rejected that very result and was binding on the Court of Claims.

55. The Court of Claims issued a preliminary injunction that purports to enjoin not only the Attorney General from enforcing MCL 750.14 but also "all state and local officials acting under [her] supervision," including all prosecuting attorneys in the State, even though they are not parties to the action. *Id.* at 27

56. MCR 3.310(C)(4) allows courts to enter injunctions against parties, their officers, agents, servants, employees, attorneys and other persons in active concert or participation with them. But prosecuting attorneys are *not* the Attorney General's agents, servants, or employees, and no one argues that the Attorney General is acting in concert or participation with them.

57. As the Attorney General maintained in her response to the ACLU's and Planned Parenthood's motion for preliminary injunction, "[w]hile the Attorney General generally 'supervise[s] the work of, consult[s] and advise[s] the prosecuting attorneys,' MCL 14.30, county prosecutors have broad discretion with respect to charging determinations. See, e.g., *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683 (1972)." Def's Resp to Pls' Mot for Prelim Inj at 3 n 3.

58. Indeed, Attorney General Nessel stated: "I don't believe that I as attorney general of this state have the authority to tell duly elected prosecutors what they can and what they cannot charge . . . . If that were the case, I don't even know why we would elect our county prosecutors in the first place, if they're not allowed to make their own decisions." Beth LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence*, The Detroit News (May 3, 2022), https://bit.ly/3LrKaZJ, attached as **Exhibit 9**.

VI. The Attorney General refuses to appeal the Court of Claim's ruling

59. Even though the Attorney General consistently argued that the Court of Claims lacked jurisdiction, she immediately touted her loss as a victory, praising the court's rejection of her jurisdictional arguments and issuance of an overly broad preliminary injunction.

60. Attorney General Nessel issued a public statement that reads:

> This injunction is a victory for the millions of Michigan women fighting for their rights. The judge acted quickly in the interest of bodily integrity and personal freedom to preserve this important right and found a likelihood of success in the state law being found unconstitutional. I have no plans to appeal and will comply with the order to provide notice to all state and local officials under my supervision. [5/18/22 Mich Dep't of Att'y Gen, AG Nessel Statement on Court of Claims Order, attached as **Exhibit 10**., https://bit.ly/3wnRnpu]

61. Despite admitting that adversity and an actual controversy are missing, the Attorney General refused to file a motion to dismiss or appeal the Court of Claim's preliminarily injunction order.

62. The Attorney General's actions ensure that no higher court will disturb the Court of Claims's order enjoining enforcement of MCL 750.14, thus locking in the ACLU, Planned Parenthood, and the Attorney General's mutually-desired result unless another State entity seeks to intervene as defendant—an action that would create adversity and the jurisdiction that the Court of Claims lacks. This is an untenable Catch-22 for any State entity considering intervention.

63. Within hours of the issuance of Judge Gleicher's opinion and order, the Attorney General e-mailed all 83 county prosecutors a copy of the opinion and order stating that all Michigan county prosecutors are now enjoined from enforcing MCL 750.14, attached as **Exhibit 11.** This includes Plaintiffs Jarzynka and Becker.

64. But, as the Attorney General admitted, she has no authority to dictate to county prosecutors how they exercise their prosecutorial discretion. 5/5/22 Def.'s Resp. to Pls.' Mot. for Prelim. Inj. at 3 n.3. None of Michigan's 83 county prosecutors are parties to the ACLU and Planned Parenthood's action. They cannot appeal the Court of Claims's unlawful order. What's more, none of Michigan's county prosecutors had an opportunity to be heard, file briefs, attend hearings, or otherwise participate in the litigation.

65. The due process violations inherent in the Court of Claims's preliminary injunction order are striking, as is the court's flouting of MCR 3.310(C)(4). Judge Gleicher designed her injunction order specifically to cover county prosecutors who are not parties to the case and who are not working in concert with the Attorney General—the sole defendant, and did all this in an action lacking adverse parties or even a live controversy.

LEGAL STANDARD

66. This Court may, in its discretion and on terms it deems just, enter any judgment or order and grant any relief that a case may require. MCR 7.216(A)(7); *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273;

761 NW2d 210 (2008), *mandamus gtd* 280 Mich App 801 (2008), *aff'd as to result* 482 Mich 960; 755 NW2d 157 (2008).

67. Complaints for orders of superintending control are "an original civil action designed to order a lower court to perform a legal duty." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 346–47; 675 NW2d 271, 289 (2003). Issuing such an order is appropriate when "a lower court exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, or [otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*, 273 Mich App 594, 598; 733 NW2d 65, 68 (2007). The "plaintiff seeking an order of superintending control bears the burden of establishing the grounds for issuing the order." *In re Gosnell*, 234 Mich App 326, 342; 594 NW2d 90, 98 (1999).

68. To obtain an order of superintending control, the plaintiff must show (1) that a lower court "has failed to perform a clear legal duty" and (2) "the plaintiff is otherwise without an adequate legal remedy." *Id.* A plaintiff is without an adequate legal remedy when it lacks the ability to appeal. *Fort v City of Detroit*, 146 Mich App 499, 503; 381 NW2d 754, 756 (1985).

ARGUMENT

I. The Court of Claims violated a clear legal duty to dismiss the case for lack of jurisdiction and failed to proceed according to law in entering a preliminary injunction that directly contradicted this Court's binding decision in *Mahaffey*.

A. Without adversity between the parties, the Court of Claims lacks jurisdiction to issue declaratory or injunctive relief.

69. As the Michigan Supreme Court held almost 90 years ago, "it is the duty of the court to raise the question of jurisdiction on its own motion." *Halkes v Douglas & Lomason Co*, 267 Mich 600, 602; 255 NW 343, 344 (1934).

70. But, in this case, the Court of Claims was not required to address jurisdiction on its own because the sole defendant, Attorney General Nessel, argued clearly and consistently that a lack of adversity between the parties deprived the court of jurisdiction to issue declaratory or injunctive relief. This should have ended the analysis.

71. Nonetheless, the Court of Claims refused to dismiss the action and issued a preliminary injunction without the benefit of any adversarial briefing, argument, or hearing on the merits of the ACLU and Planned Parenthood's claims, and it did so in contravention of a binding Court of Appeals decision.

72. In so doing, the Court of Claims "exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, [and otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*, 273 Mich App at 598; 733 NW2d at 68.

73. Michigan courts only have jurisdiction over actual controversies arising between adverse litigants. *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 243 (2019) (Clement, J, concurring) (quoting *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), itself quoting *Anway v Grand Rapids Ry Co*, 211 Mich 592, 616; 179 NW 350 (1920)).

74. A "controversy must be real and not *pro forma*," even when a *pro forma* case presents "real questions." *Anway*, 211 Mich at 612; 179 NW 350, 357 (cleaned up).

75. Absent adversity, a lawsuit like the ACLU and Planned Parenthood's suit against the Attorney General is nothing more than "a friendly scrimmage brought to obtain a binding result that both sides desire." *League of Women Voters*, 948 NW2d at 70 (2020) (Viviano, J, concurring).

76. "Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding." *Fox v Board of Regents*, 375 Mich 238, 242 (1965) (citation omitted).

77. "When a court is without jurisdiction of the subject matter, any action with respect to such a cause . . . is absolutely void." *Id.*

78. Because there is no adversity between the parties, the Court of Claims issued a preliminary injunction order without any form of adversarial briefing, argument, or hearing on the critical question of whether the Michigan Constitution protects a right to abortion. There are a multitude of answers to the ACLU and Planned Parenthood's merits arguments. But none of them were ever made by a party before the Court of Claims ruled that the Michigan Constitution likely contains a right to abortion and enjoined a valid Michigan law.

79. What's more, the Court of Claims's invalid preliminary injunction purports to cover non-parties who are neither the Attorney General's agents nor acting in concert with her, in direct contravention of MCR 3.310(C)(4).

80. The Court of Claims exceeded its jurisdiction in multiple respects. This Court should declare the preliminary injunction order null and void, vacate the preliminary injunction, and direct the Court of Claims to dismiss the case.

B. There is no standing; there must be an "actual controversy," not just a hypothetical or anticipatory one.

81. The Court of Claims held "that this matter is a justiciable declaratory judgment action." Op & Order at 9. But that ruling is plainly wrong.

82. In a declaratory judgment action, like this one, a plaintiff has standing "if the requirements in MCR 2.605 are met." *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 373; 792 NW2d 686, 700 (2010).

83. MCR 2.605(A)(1) provides that "[i]n a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment . . . ." (emphasis added).

84. The statute's "essential requirement . . . is an '*actual controversy*,'" which serves as a "condition precedent," *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Trust Bd of Trustees v City of Pontiac No 2*, 309 Mich App 611, 624; 873 NW2d 783, 791 (2015) (emphasis added), or "prerequisite to declaratory

relief." *Welfare Emps Union v Mich Civil Serv Comm'n*, 28 Mich App 343, 350; 184 NW2d 247, 251 (1970).

85. "An actual controversy exists when a declaratory judgment is *needed* to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters*, 506 Mich 561, 586; 957 NW2d 731, 586 (2020) (emphasis added). Michigan courts may rule before injuries occur but "a present legal controversy, not one that is merely hypothetical or anticipated in the future," is needed for a plaintiff to have standing under MCR 2.605. *League of Women Voters,* 506 Mich at 586; 957 NW2d at 744 (quotation omitted).

86. There is no "actual controversy" here. The ACLU and Planned Parenthood's complaint focuses on a theoretical dispute regarding illusory harm that *might possibly* emerge in the future under a certain set of facts that has not occurred and may not occur as they expect. The ACLU and Planned Parenthood "cannot show a present legal controversy rather than a hypothetical or anticipated one." *League of Women Voters,* 506 Mich at 586, 957 NW2d at 744.

87. Even if *Roe* and *Casey* are overturned, in whole or in part, there is still no actual controversy between Planned Parenthood and Defendant Attorney General Nessel.

88. Planned Parenthood is not currently being prosecuted, or even threatened with prosecution, by the Attorney General for an alleged violation of MCL 750.14. To the contrary, the Attorney General has repeatedly proclaimed that she will never prosecute anyone under MCL 750.14.

89. Just as in *League of Women Voters*, where a voting rights group and individual voters lacked standing to challenge a statute governing petition drives when there was no petition drive in process, "[a] declaratory judgment is not *needed* to guide [anyone's] future conduct" here. 506 Mich at 586, 957 NW2d at 744 (emphasis in original). Like those plaintiffs, the ACLU and Planned Parenthood ask "for a declaratory judgment because it *perhaps may be needed* in the future" should a particular chain of events occur. *Id.* (emphasis added).

90. As the Court of Claims recognized, "it is unknown whether the United States Supreme Court will overrule *Roe v Wade*." Op & Order at 13. The ACLU and Planned Parenthood's argument is that *if* the *Dobbs* Court chooses to "modify" *Roe* and *Casey*, *Bricker*'s construction of MCL 750.14 "*may* no longer protect Michigan abortion providers." 4/7/22 Planned Parenthood Verified Compl ¶ 96 (emphasis added). So the ACLU and Planned Parenthood have asked the Court of Claims to preempt this "*potential*[ ] revising" of *Bricker*, which they characterize as an "*uncertainty*." *Id.* at ¶121 (emphasis added).

91. Mays, ifs, and other hypothetical possibilities do not establish an "actual controversy." "There is no specific circumstance that [the ACLU and Planned Parenthood] claim[s] should be different" *right now*. *League of Women Voters*, 506 Mich at 588, 957 NW2d at 744–45. They "only want instruction going forward. And nothing in the relevant caselaw gives [a plaintiff] standing to challenge any [abortion]-related laws at any time." *Id.* This is particularly so where the only named Defendant has emphatically refused to enforce Michigan law.

92. Where an injury is "merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Gov v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546, 553 (2000).

93. At best, the ACLU and Planned Parenthood can cite a draft opinion in *Dobbs* that purports to overrule *Roe*. But as Planned Parenthood and the ACLU noted in response, "This is a draft opinion. . . . but it is not final," @PPFA, Twitter (5/2/22, 9:16 pm), https://bit.ly/3yaRPbV, or "an official decision. . . . Roe is still the law of the land." @ACLU, Twitter (5/2/22, 10:13 pm), https://bit.ly/3P4Z37s (both statements are attached as **Exhibit 12**.

94. Neither draft guidelines nor draft opinions create the "actual controversy" needed for the Court of Claims to issue a declaratory judgment or a preliminary injunction because their "future implications" are too "speculative and hypothetical." *Int'l Union v Cent Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132, 138 (2012). And even if the draft opinion were issued as a final one, there would be no controversy where the only named Defendant has repeatedly promised not to enforce the law against Plaintiff Planned Parenthood or anyone else. 95. "Because there is no actual controversy, the [Court of Claims] lack[ed] jurisdiction to issue a declaratory judgment" or preliminary injunction. *Citizens for Common Sense*, 243 Mich App at 56; 620 NW2d at 553.

C. There was no dispute ripe for judicial decision.

96. Ripeness "focuses on the timing of the action." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192, 201 (2017). "The question is

whether the ACLU and Planned Parenthood's asserted harm "has matured sufficiently to warrant judicial intervention." *In re Reliability Plans of Elec Utils for 2017–2021*, 325 Mich App 207, 218; 926 NW2d 584, 592 (2018), *rev'd on other grounds*, 505 Mich 97; 949 NW2d 73 (2020) (quotation omitted).

97. The plain answer is "no." Ripeness doctrine "is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." 325 Mich App at 217, 926 NW2d at 217. The ACLU and Planned Parenthood's lawsuit is a classic example of speculative claims based on anticipatory harms that are guesswork, not fact.

98. Even if this speculated event occurs and *Roe* is overturned, this matter is still not even potentially ripe unless Attorney General Nessel alters her longstanding position and agrees to enforce MCL 750.14.

99. The ACLU and Planned Parenthood base their claims on speculation that "if the United States Supreme Court overrules *Roe v Wade*, abortion will again become illegal in Michigan except when 'necessary to preserve the life of [the] woman.'" Op & Order at 6 (quoting MCL 750.14).

100. The Court of Claims accepted that assertion in direct conflict with this Court's binding precedent, which establishes that MCL 750.14 must be read in light of *Bricker* and other narrowing constructions imposed by state courts. *Higuera*, 244 Mich App at 432, 625 NW2d at 446.

101. What's more, the ACLU and Planned Parenthood's claims rest, as they forthrightly admit, "upon contingent future events that may not occur as

anticipated, or may not occur at all." *Citizens Protecting Mich Const v Sec of State*, 280 Mich App 273, 282; 761 NW2d 210, 216 (2008).

102. For any real-world injury to occur: (1) a pregnant woman must choose to take her own child's life, (2) in one of the relevant jurisdictions, (3) in violation of MCL 750.14, (4) outside any safe harbor *Vickers*, *Bricker*, *Higuera*, or the final *Dobbs* ruling may provide, (5) an abortionist must either turn the woman away or agree to take her child's life, and, if the latter, (6) the Attorney General must choose to press charges against the doctor, something she has promised not to do.

103. Any one of these prerequisites is conjectural. When taken together, the ACLU and Planned Parenthood's alleged harms are extraordinarily unlikely, especially as the Attorney General is firmly in their corner.

104. Because the ACLU and Planned Parenthood's "challenge is premised on [a chain of] hypothetical future events" leading to equally speculative future harm, this lawsuit is "not ripe for judicial review." *Oakland Cty v State*, 325 Mich App 247, 265 n.2; 926 NW2d 11, 21 n.2 (2018).

105. "A claim that rests on contingent future events is not ripe." *King v Mich State Police Dep't*, 303 Mich App 162, 188, 841 NW2d 914, 928 (2013). And when a lawsuit is not ripe for judicial decision, the case must be dismissed. *Van Buren Charter Twp*, 319 Mich App at 556, 904 NW2d at 203.

D. This dispute is moot.

106. As the Michigan Supreme Court explained in an analogous context:

> a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance

> about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. The only way a disputed right can ever be made subject of judicial investigation is, first, to exercise it, and then, having acted, to present a justiciable controversy in such shape that the disputed right can be passed upon in a judicial tribunal, which can pronounce the right and has the power to enforce it.

League of Women Voters, 506 Mich at 580, 957 NW2d at 740 (quoting *Anway*, 211 Mich at 610; 179 NW at 357).

107. A case is moot if it falls into any of these categories. The ACLU and Planned Parenthood's suit falls into all of them: it is moot in every possible way.

108. First, this case is a "pretended controversy." Attorney General Nessel has exercised no power related to MCL 750.14. The ACLU and Planned Parenthood cannot point to a single person or entity who she has prosecuted under MCL 750.14. In fact, Attorney General Nessel has repeatedly affirmed that she will never enforce MCL 750.14. This case is not a real controversy in any sense of the word.

109. Second, Planned Parenthood seeks a "'decision in advance about a right'" to abortion before it has been actually asserted or contested by anyone. *League of Women Voters*, 506 Mich at 580, 957 NW2d at 740 (quoting *Anway*, 211 Mich at 610; 179 NW at 357). The ACLU and Planned Parenthood do not claim that Attorney General Nessel has violated any Michigander's rights, nor could they, even if the Supreme Court overrules *Roe*.

110. Third, any decision by this Court "cannot have any practical legal effect upon a then existing controversy." *Id*. The ACLU and Planned Parenthood's allegations rely upon a string of hypothetical assumptions, as outlined above, and

no one knows if they will ever occur. In addition, the Court of Claims's injunctive order has no practical effect on Attorney General Nessel in any way. The Attorney General was not enforcing MCL 750.14 prior to the ACLU and Planned Parenthood's lawsuit, and she would continue that non-enforcement today regardless of any ruling by the Court of Claims.

111. Even if the U.S. Supreme Court changes federal abortion jurisprudence, there is no instantaneous controversy because the precise nature of that alteration is unknown, as is the Attorney General response. The Attorney General declines to enforce MCL 750.14 now under *Roe*. If the Attorney General continues refusing to enforce MCL 750.14 without *Roe* (as she has pledged), the ACLU and Planned Parenthood's litigation makes no difference.

112. Fourth, a live case requires a "'disputed right.'" *Id.* (quoting *Anway*, 211 Mich at 610; 179 NW at 357). But the ACLU, Planned Parenthood, and the Attorney General dispute nothing. They all agree that MCL 750.14 violates the Michigan Constitution. Nor does Planned Parenthood claim that anyone (least of all the Attorney General) has sought to violate its rights. As a result, no party has "anything at stake in this dispute," judicial intervention is moot, and the case must be dismissed. 506 Mich at 583, 957 NW2d at 742.

113. "[B]ecause reviewing a moot question would be a purposeless proceeding, appellate courts will *sua sponte* refuse to hear cases that they do not have the power to decide, including cases that are moot." *People v Richmond*, 486 Mich 29, 35, 782 NW2d 187, 190 (2010). "Whether a case is moot is a threshold issue that a court

addresses before it reaches the substantive issues of the case itself." *Id*. But the Court of Claims ignored all these issues.

114. For instance, there are no facts. Attorney General Nessel has not exercised any power relating to MCL 750.14. The ACLU and Planned Parenthood cannot (and do not) allege that the Attorney General has violated the Michigan Constitution. What's more, it is false that Defendant Nessel's non-enforcement of MCL 750.14 presents a "real and imminent danger of irreparable injury" sufficient to warrant injunctive relief. *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 614, 821 NW2d 896, 919 (2012) (quotation omitted). The ACLU and Planned Parenthood have grounded this litigation on the "mere apprehension of future injury" because they believe that *Roe* may hypothetically be struck down. *Sandstone Creek Solar, LLC v Twp of Benton*, 335 Mich App 683,706, 967 NW2d 890, 903 (2021). But such fears "cannot be the basis for injunctive relief," which proves this case is moot and must be dismissed. *Id.*

115. The Supreme Court discerns the same infirmity in Governor Whitmer's part of the three-pronged attack on *Mahaffey*. It ordered her to file a supplemental brief by June 3, 2022, that—among other things—provides "a further and better statement of the questions and the facts." 5/20/22 Order in *In re Exec Message of the Governor*, Sup Ct No 164256, attached as **Exhibit 13**.

E. *Mahaffey* required the Court of Claims to reject the ACLU and Planned Parenthood's claims.

116. The ACLU and Planned Parenthood asked the Court of Claims to declare that various provisions of the Michigan Constitution protect a right to

abortion and enjoin MCL 750.14's enforcement on that basis. *E.g.*, Ver Compl ¶¶ 7, 26, pp. 34–35.

117. The Court of Claims accepted this invitation based on the ACLU's and Planned Parenthood's argument concerning a right to bodily privacy anchored in the Michigan Constitution's Due Process Clause. Ver Compl ¶¶ 125–27.

118. In *Mahaffey*, Michigan courts encountered a similar claim by abortion advocates that a statute requiring pregnant women to receive information about their unborn children and wait 24 hours to decide whether to review that information before obtaining an abortion—and intentionally ending an innocent human life—"violates a woman's [state constitutional] right to privacy and due process." *Mahaffey,* 222 Mich App at 332, 564 NW2d at 108.

119. The *Mahaffey* trial court ruled that "the Michigan Constitution guarantees a right to abortion, which is separate and distinct from the federal guarantee" and that "the proper test for evaluati[ng] [any] legislation related to abortion under state law," whether a broad ban or a narrow regulation, "is strict scrutiny." 222 Mich App at 333, 564 NW2d at 108–09.

120. In *Mahaffey*, this Court answered the trial court's broad ruling under the Michigan Constitution with an expansive holding of its own. It reversed the trial court's grant of summary disposition in the abortion advocates' favor and stated unambiguously "that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." 222 Mich App at 339, 564 NW2d at 111.

121. *Mahaffey*'s holding is clear-cut. This Court ruled that "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, 564 NW2d at 109.

122. A few times the *Mahaffey* Court spoke in terms of "whether the constitutional right to privacy encompasses the right to abortion." *Id.* But none of the Court's reasoning was specific to any constitutional right to privacy.

123. Instead, this Court's *Mahaffey* decision was based on four overarching factors that apply to the 1963 Constitution as a whole:

- First, the Michigan Constitution itself and the debates surrounding it "are silent regarding the question of abortion." 222 Mich App at 335–36, 564 NW2d at 110.
- Second, abortion "was a criminal offense" when the 1963 Constitution was ratified and the ratifiers demonstrated "no intention of altering the existing law." 222 Mich App at 335–36, 564 NW at 109–10. Creating a constitutional right to abortion would have "elicit[ed] major debate among the delegates to the Constitutional convention as well as the public at large." 222 Mich App at 336, 564 NW at 110 (quotation omitted). But no major debate occurred because the 1963 Constitution left Michigan's abortion laws—including MCL 750.14, which predated the constitutional convention by roughly 30 years—untouched. *Id.*

- Third, less than a decade after the constitution was adopted, "essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute." *Id.*
- Last, Michigan's public policy "does not favor abortion" either in 1963 or now. 222 Mich App at 337, 564 NW at 110.

124. MCR 7.215(C)(2) provides that "[a] published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*." As a result, *Mahaffey*'s holding that the Michigan Constitution contains no right to an abortion is controlling precedent for proceedings in the Court of Claims. In short, *Mahaffey* held that the Michigan Constitution does not include a right to abortion. Judge Gleicher ruled that it likely does. That is a violation of *stare decisis*.

125. The "filing of an application for leave to appeal to the Supreme Court," as occurred in *Mahaffey*, "does not diminish the precedential effect of a published opinion of the Court of Appeals." *Id.* What's more, the Supreme Court unanimously denied leave. *Mahaffey v Attorney General*, 456 Mich 948; 616 NW2d 168 (1998).

126. Because *Mahaffey* is "a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals," Judge Gleicher was required to apply *Mahaffey*'s holding to the ACLU and Planned Parenthood's case. MCR 7.215(J)(1). This was so even though then-attorney Gleicher was on the losing side of *Mahaffey*.

127. *Stare decisis* requires courts "to reach the same result in a case that presents the same *or substantially similar issues* as a case that another panel of this Court has decided." *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246, 250 (2014) (emphasis added).

128. *Mahaffey*, at the least, considered substantially similar issues to those presented in the ACLU and Planned Parenthood's suit. As a result, *Mahaffey*'s holding that there is no right to abortion under the Michigan Constitution controls in the Court of Claims and here. *Mahaffey,* 222 Mich App at 334, 564 NW2d at 109.

129. The Court of Claims's refusal to (1) apply *Mahaffey* and (2) reject the ACLU and Planned Parenthood's claims under the Michigan Constitution is a failure to proceed according to law. Op & Order at 15–16. It is an especially egregious failure given that Judge Gleicher was one of the ACLU attorneys who represented the *Mahaffey* plaintiffs, and thus received this Court's unambiguous, published decision that "the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." 222 Mich App at 339, 564 NW2d at 111. This also calls for issuance of an order of superintending control directing the Court of Claims to dissolve its preliminary injunction order, which directly contradicts *Mahaffey*.

II. Plaintiffs are without an adequate legal remedy.

130. Prosecutors Jarzynka and Becker are not parties in the Planned Parenthood case and have their own prosecutorial discretion. They are elected officials and take their own oath of office to faithfully discharge their duties. They

have no recourse or right to appeal Judge Gleicher's unlawful injunctive order and they have no other adequate remedy at law.

131. Right to Life of Michigan is a nonpartisan, nonsectarian, nonprofit organization of caring people, united to protect the precious gift of human life from fertilization to natural death. Right to Life encourages community participation in programs that foster respect and protection for human life. Right to Life gives a voice to the voiceless on life issues like abortion, infanticide, euthanasia, and physician-assisted suicide. Right to Life educates people on these issues and motivates them to action, including support for laws like MCL 750.14.

132. 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.

133. On April 20, 2022, Right to Life of Michigan and the Michigan Catholic Conference filed a motion for leave to file an amicus brief in the Court of Claims, as well as a motion for immediate consideration. 4/20/22 Mot of Right to Life of Michigan and the Michigan Catholic Conference for Leave to File Amicus Curiae

Br, attached as **Exhibit 14**, and 4/20/22 Mot for Immediate Consideration, attached as **Exhibit 15**.

134. The Court of Claims granted Right to Life of Michigan and the Michigan Catholic Conference's motion to file an amicus brief and motion for immediate consideration that same day, and accepted their amicus brief for filing. 4/20/22 Order Granting Leave to File Amicus Curiae Briefing at 1, attached as **Exhibit 16**; *accord* 5/17/22 Op & Order at 7 n.5 ("The Court has had the benefit of two amicus curiae briefs filed in opposition to the relief requested, one signed by Right to Life of Michigan and the Michigan Catholic Conference . . . .").

135. Right to Life of Michigan and the Michigan Catholic Conference's amicus brief maintained that the Court of Claims was obligated to dismiss the ACLU and Planned Parenthood's case for lack of jurisdiction due to (1) a lack of adversity between the parties (because the ACLU, Planned Parenthood, and the Attorney General agree that MCL 750.14 is unconstitutional and should be enjoined), (2) the lack of any actual controversy (because there is no present injury or dispute on which a court could opine), and (3) the lack of ripeness (because the U.S. Supreme Court has not overruled *Roe*). *Id.* at 5-8.

136. Moreover, Right to Life of Michigan and the Michigan Catholic Conference have moved to intervene as defendants in Governor Whitmer's corresponding action in the Michigan Supreme Court, as well as in the Governor's related action in the Oakland County Circuit Court. 4/22/22 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Mot to Intervene, attached as

Exhibit 17; 5/4/22 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Mot to Intervene, attached as **Exhibit 18**.

137. Adversity exists in Governor Whitmer's lawsuit because Prosecutors Jarzynka and Becker contest that MCL 750.14 violates the Michigan Constitution and should be enjoined. If Planned Parenthood wants to challenge MCL 750.14, Governor Whitmer's lawsuit is an appropriate matter in which to do so.

138. The Court of Claims's order enjoining MCL 750.14's enforcement preempts Right to Life of Michigan and the Michigan Catholic Conference's interest in the constitutionality of MCL 750.14 and other abortion laws. Right to Life of Michigan and the Michigan Catholic Conference have worked for decades to see many pro-life measures become law. And they have already moved to intervene in Governor Whitmer's adverse actions to defend MCL 750.14 in court.

139. As non-parties in the Court of Claims, Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference cannot (1) move to dismiss the ACLU and Planned Parenthood's action for lack of jurisdiction, or (2) apply for leave to file an interlocutory appeal of the court's preliminary injunction order.

140. This leaves Prosecutors Jarzynka and Becker, Right to Life of Michigan and the Michigan Catholic Conference without an adequate legal remedy. Filing a complaint for an order of superintending control is their only option.

III. At a minimum, this Court should vacate the preliminary injunction order and correct Judge Gleicher's failure to recuse.

141. Michigan has a compelling interest in maintaining public confidence in the judiciary's fairness and integrity. *Williams-Yulee v Fla Bar*, 575 US 433, 445; 135 S Ct 1656, 1666 (2015).

142. As a result, Canon 2 of the Michigan Code of Judicial Conduct requires judges to "avoid all impropriety and appearance of impropriety." Mich Code of Judicial Conduct, Canon 2, https://bit.ly/3lpRf2r.

143. The Court of Claims judge assigned to *Planned Parenthood of Michigan v Attorney General* is the Hon. Elizabeth Gleicher.

144. On April 14, 2022, the Clerk of the Court of Claims sent a letter to the parties at Judge Gleicher's direction. This letter disclosed that Judge Gleicher makes yearly donations to Planned Parenthood of Michigan—the plaintiff in this action—and that she represented Planned Parenthood as an ACLU attorney—the same firm that represents Planned Parenthood in the Court of Claims. 4/14/22 Letter of Clerk Jerome W. Zimmer, Jr. at 1, attached as **Exhibit 19**.

145. Nonetheless, the letter indicated that Judge Gleicher "is certain that she can sit on this case with requisite impartiality and objectivity." She declined to recuse, continued to preside over the ACLU and Planned Parenthood's lawsuit, and invited the non-adverse parties to file a recusal motion. *Id.*

146. Predictably, the non-adverse parties, who want to enjoin MCL 750.14 under the Michigan Constitution, did not file a MCR 2.003(D) motion.

147. Right to Life of Michigan and the Michigan Catholic Conference's amicus brief in the Court of Claims urged Judge Gleicher to recuse to avoid the

appearance of impropriety, especially given her personal advocacy of the ACLU and Planned Parenthood's legal theories in *Mahaffey*. 4/20/22 Amici Curiae Br of Right to Life of Mich & the Mich Catholic Conference at 2, 9.

148. Right to Life of Michigan and the Michigan Catholic Conference emphasized that recusal analysis is objectively focused on public perception, not a judge's own subjective beliefs. *Id*. at 9–10.

149. The question is whether a judge's conduct "would create *in reasonable minds a perception* that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired," regardless of whether a judge subjectively believes that she can act objectively. *Caperton v A T Massey Coal Co*, 556 US 868, 888; 129 S Ct 2252, 2266 (2009) (quoting ABA Model Code, Canon 2A, Commentary) (emphasis added).

150. Right to Life of Michigan and the Michigan Catholic Conference identified objective reasons why Judge Gleicher should recuse to avoid an appearance of impropriety, several of which the court's letter failed to disclose:

- Judge Gleicher served as a lawyer for the ACLU and represented Planned Parenthood, unsuccessfully arguing that the Michigan Constitution includes a right to abortion in *Mahaffey*, the controlling Court of Appeals decision that Judge Gleicher's preliminary injunction order refused to apply. 4/14/22 Letter of Clerk Jerome W. Zimmer, Jr. at 1; 5/17/22 Op & Order at 15–16.

- Judge Gleicher makes yearly donations to Planned Parenthood and ostensibly continues to do so. *Id.*
- Judge Gleicher received the "Planned Parenthood Advocate Award" from Plaintiff following her advocacy in *Mahaffey*. ICLE *Contributor Directory*, https://bit.ly/3t7WCHZ (**undisclosed**).
- Judge Gleicher served as a lawyer for the ACLU and represented Planned Parenthood in challenging a Michigan law requiring minors to obtain the consent of their parents before obtaining an abortion. UPI, *Judge strikes down parental consent law* (Aug. 5, 1992), https://bit.ly/3lnphV9 (**undisclosed**).
- Judge Gleicher served as a lawyer for the ACLU in challenging a Michigan pro-life law that prohibited the use of public funds to pay for abortion unless abortion was necessary to save the mother's life. *Doe v Dep't of Soc Servs*, 439 Mich 650; 487 NW2d 166 (1992) (**undisclosed**).
- Judge Gleicher served as a lawyer for the ACLU to sue federal officials who tried to prevent a halfway-house resident from taking her baby's life after the first trimester had expired. ACLU of Michigan, *Federal Prisoner Almost Denied Reproductive Rights*, CIVIL LIBERTIES NEWSLETTER, Winter 2001, at 7, https://bit.ly/3sLm5Xm (**undisclosed**).

151. Counsel for Right to Life of Michigan and the Michigan Catholic Conference, John Bursch, received an electronic invitation to a status conference on May 2, 2022, which the non-adverse parties jointly requested right before the Attorney General's response to the ACLU and Planned Parenthood's preliminary injunction motion was due. But Judge Gleicher barred Mr. Bursch from silently observing the status conference and had him ejected from the Zoom meeting shortly after the proceedings began.

152. Judge Gleicher then issued a preliminary injunction order about two weeks later *without* holding the hearing her scheduling order indicated would be held approximately two weeks after the ACLU and Planned Parenthood filed their reply. Her order specifies that "[t]he parties have waived the requirement of a hearing under MCR 3.310(A)(1)," presumably at the status conference from which Judge Gleicher had counsel for Right to Life of Michigan and the Michigan Catholic Conference removed. 5/17/22 Op & Order at 25.

153. Judge Gleicher refused to dismiss the case for lack of jurisdiction even though there is no adversity between the parties or actual controversy, and the ACLU and Planned Parenthood's claims are moot and not ripe.

154. Judge Gleicher purported to find a right to abortion in the Michigan Constitution and enjoined the Attorney General—and all prosecuting attorneys under her "supervision"—from enforcing MCL 750.14. *Id.* at 27. She did so without the benefit of any adversarial briefing, argument, or hearing on the crucial question of whether the Michigan Constitution creates a right to abortion. And her injunction

order purports to bind non-parties who are not acting in concert with the Attorney General, in clear violation of MCR 3.310(C)(4).

155. Judge Gleicher's preliminary injunction order refuses to abide by this Court's published decision in *Mahaffey*, a case she personally litigated and lost on behalf of the same plaintiff, even though it has binding precedential effect under MCR 7.215. 5/17/22 Op & Order at 15–16.

156. Judge Gleicher's deep personal connections with the plaintiff (Planned Parenthood) and plaintiff's counsel (the ACLU), personal role in advocating their legal theories in *Mahaffey* and other cases designed to create an unrestricted right to abortion, as well as her conduct during the present litigation—all combined—creates an objective appearance of impropriety.

157. If this Court does not order the Court of Claims to dismiss this case in its entirety, it should issue an order vacating the Preliminary Injunction order and requiring Judge Gleicher to adhere to the objective appearance-of-impropriety standard and recuse herself from the case.

158. This Court is authorized to grant peremptory relief on preliminary hearing of an original action in lieu of proceeding to a full hearing on the merits. MCR 7.206(B)(4). Given the ongoing harm being caused by the Court of Claims's injunction and refusal to dismiss a collusive action over which it plainly lacks jurisdiction, Plaintiffs request that the Court grant peremptory relief.

CONCLUSION AND RELIEF SOUGHT

Judge Gleicher refused to dismiss the case for lack of jurisdiction even though the Attorney General—a preeminent supporter of abortion rights—admits there is no adversity between the parties or actual controversy because the Attorney General refuses to defend or enforce the challenged law. The ACLU and Planned Parenthood's claims are obviously moot and not ripe.

Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference respectfully ask this Court to issue an order of superintending control requiring the Hon. Elizabeth Gleicher of the Court of Claims to dismiss the case for lack of jurisdiction. Doing so will not prevent *other* adverse cases from moving forward. As the Attorney General noted, "Planned Parenthood would be better off if they were focusing on the governor's case and filing an amicus on behalf of the governor and her actions." Beth LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence*, The Detroit News (May 3, 2022), https://bit.ly/3LrKaZJ.

At a minimum, Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference respectfully ask the Court to issue an order vacating the preliminary injunction order and requiring Judge Gleicher to adhere to the objective appearance-of-impropriety standard and recuse herself.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN RE JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County; CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County; RIGHT TO LIFE OF MICHIGAN; and THE MICHIGAN CATHOLIC CONFERENCE,

Plaintiffs.

_____/

Case No.

COMPLAINT FOR ORDER OF SUPERINTENDING CONTROL

***Planned Parenthood of Michigan v Attorney General*, Court of Claims Case No. 22-000044-MM**

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EXHIBITS TO
COMPLAINT FOR ORDER OF SUPERINTENDING CONTROL

Exhibit	Document
1	4/7/22 Planned Parenthood Verified Complaint
2	4/7/22 Brief in Supp of Plaintiffs' Motion for Preliminary Injunction
3	4/7/22 Attorney General Press Release
4	4/20/22 Briefing Schedule Order
5	5/17/22 Opinion & Order
6	5/5/22 Defendant's Response to Plaintiffs' Motion for Preliminary Injunction
7	5/6/22 Plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Preliminary Injunction
8	Defendant's 5/12/22 Sur-Reply Brief to Plaintiff's 5/6/22 Reply
9	Beth LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence*, The Detroit News (May 3, 2022), https://bit.ly/3LrKaZJ
10	5/18/22 Michigan Department of Attorney General, AG Nessel Statement on Court of Claims Order
11	Nessel Email to Prosecutors
12	PP/ACLU Tweets
13	5/20/22 Order in *In re Exec Message of the Governor*, Sup Ct No 164256
14	4/20/22 Motion of Right to Life of Michigan and the Michigan Catholic Conference for Leave to File Amicus Curiae Brief
15	4/20/22 Motion for Immediate Consideration
16	4/20/22 Order Granting Leave to File Amicus Curiae Briefing
17	4/22/22 Proposed Intervenors Right to Life of Michigan & Michigan Catholic Conference's Mot to Intervene
18	5/4/22 Proposed Intervenors Right to Life of Michigan & Michigan Catholic Conference's Mot to Intervene
19	4/14/22 Letter of Clerk Jerome W. Zimmer, Jr.

EXHIBIT 1

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.

_____/

Case No. 22- -MM

Hon.

VERIFIED COMPLAINT

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ATTORNEYS FOR PLAINTIFFS

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, now between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this court.

/s/
DEBORAH LaBELLE (P31595)

Plaintiffs Planned Parenthood of Michigan (PPMI), on behalf of itself, its physicians, its staff, and its patients, and Sarah Wallett, M.D., M.P.H., FACOG, on behalf of herself and her patients (together, "Plaintiffs"), by and through their counsel, bring this verified complaint for declaratory and injunctive relief against the above-named Defendant and her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, including all persons supervised by the Defendant, all in their official capacities, and in support thereof, allege as follows:

INTRODUCTION

1. A 1931 Michigan statute criminalizes abortion, even in cases of rape, incest, or grave threats to the pregnant person's health. Under this law as written, 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. MCL 750.14 (the "Criminal Abortion Ban").

2. The Criminal Abortion Ban violates the rights to liberty, privacy, bodily integrity, and equal protection guaranteed by the Michigan Constitution and the Elliott-Larsen Civil Rights Act, and it is unconstitutionally vague.

3. Despite the Criminal Abortion Ban's unconstitutionality, the Michigan Supreme Court has never addressed the Ban's legality as a matter of Michigan law. And no Michigan court has ruled on the statute's facial vagueness. While the Michigan Supreme Court in *People v Bricker*, 389 Mich 524, 531; 208 NW2d 172 (1973), construed the Criminal Abortion Ban to be unenforceable to the extent it conflicts with the federal substantive due process right to abortion as set forth in *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), the Court construed the statute as remaining otherwise enforceable, and no injunction currently prevents Michigan prosecutors from initiating prosecutions under the Criminal Abortion Ban as written or otherwise contrary to this construction.

4. In the nearly 50 years since *Bricker*, the Supreme Court of the United States has repeatedly altered and clarified the scope of the federal right to abortion. Any day now, it is likely to do so again in *Dobbs v Jackson Women's Health Organization* ("*Dobbs*"), No 19-1392 (US, docketed June 18, 2020), which squarely presents the question whether *Roe* should be overruled. Once that Court rules, the Michigan Supreme Court's saving construction may no longer protect abortion providers from felony prosecution under the Criminal Abortion Ban. Accordingly, recognition of the Criminal Abortion Ban's unconstitutionality as a matter of Michigan law is both urgently needed and long overdue.

5. Plaintiff PPMI or its predecessors has provided sexual and reproductive health services to people in Michigan for about one hundred years. Today, PPMI provides those services, including abortions, at its 14 health centers. As a Michigan-licensed physician and the Chief Medical Officer at PPMI, Plaintiff Dr. Sarah Wallett provides abortions and other sexual and reproductive health care to patients throughout the state.

6. If the Criminal Abortion Ban were enforced as written, it would have devastating consequences for PPMI's physicians, including Dr. Wallett; its staff; its patients; its patients' families; and communities across Michigan.

7. Accordingly, Plaintiffs bring this lawsuit, on behalf of themselves and others, to enjoin the enforcement of the Criminal Abortion Ban as written; to obtain fair notice of what the Criminal Abortion Ban proscribes; and to declare their patients' right to obtain abortions as protected by the Michigan Constitution and the Elliott-Larsen Civil Rights Act.

JURISDICTION

8. This Court has jurisdiction over Plaintiffs' claims in this action pursuant to MCL 600.6419(1)(a), giving the Court of Claims jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court."

PARTIES

9. Plaintiff PPMI, which itself or through its predecessors has been in operation for at least the last one hundred years, is a not-for-profit corporation operating 14 health centers in Michigan, with headquarters in Ann Arbor. PPMI's mission is to promote healthy communities and the right of all individuals to manage their sexual health by providing reproductive health care and education, and serving as a strong advocate for reproductive justice. PPMI's health centers provide a wide range of reproductive and sexual health services to patients, including testing and treatment for sexually transmitted infections; contraception counseling and provision; HIV prevention services; pregnancy testing and options counseling; preconception counseling;

gynecologic services including menopause care; well-person exams; cervical and breast cancer screening; treatment of abnormal cervical cells; colposcopy; miscarriage management, and abortion. PPMI faces possible criminal prosecution, licensure penalties, and other civil enforcement actions for providing abortions in violation of the Criminal Abortion Ban as written. PPMI sues on its own behalf, on behalf of its physicians and staff, and on behalf of its patients, who are at imminent risk of losing access to abortion in violation of their state constitutional and statutory rights.

10. Plaintiff Sarah Wallett, M.D., M.P.H., FACOG, is a board-certified obstetrician-gynecologist (OB/GYN) licensed to practice medicine in Michigan and a resident of the State of Michigan. Dr. Wallett has been the Chief Medical Officer of PPMI since March 2019. Dr. Wallett is also an adjunct clinical assistant professor at the University of Michigan Medical School in Ann Arbor. Dr. Wallett began providing abortions in 2009. For providing abortions in Michigan, Dr. Wallett would face possible felony criminal prosecution and licensure penalties under the Criminal Abortion Ban as written, should it be enforced. Dr. Wallett sues on her own behalf and on behalf of her patients, who are at imminent risk of losing access to abortion in violation of their state constitutional and statutory rights.

11. Defendant Attorney General of the State of Michigan is the top law enforcement official in the state. She is charged with defending and enforcing the proper laws in the state, as well as supervising all county prosecutors charged with enforcing the criminal statutes of Michigan. MCL 14.28–14.30; Const 1963, art 5, §§ 1, 3. The Attorney General also acts in a representative and advisory capacity with respect to Michigan administrative agencies, including the Michigan Department of Licensing and Regulatory Affairs (LARA), which can impose penalties on Michigan-licensed health care facilities and physicians. See MCL 333.16221(b)(v);

MCL 333.16226(1); MCL 333.20165; MCL 333.20168(1); MCL 333.20177; MCL 333.20199(1). Indeed, "it is universally recognized that among the primary missions of a state attorney general is the duty to give legal advice . . . to . . . agencies of state government." *Sch Dist of City of East Grand Rapids, Kent Co v Kent Co Tax Allocation Bd*, 415 Mich 381, 394; 330 NW2d 7 (1982). The Attorney General is the appropriate defendant in a suit over the constitutionality of the Criminal Abortion Ban. See, e.g., *Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997). The Michigan Attorney General is sued in her official capacity.

FACTS

HISTORY OF MICHIGAN'S 1931 CRIMINAL ABORTION BAN

12. Michigan's Criminal Abortion Ban provides:

> Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.
>
> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed. [MCL 750.14.]

13. Violating the Criminal Abortion Ban is an unclassified felony, punishable by up to four years' imprisonment, a fine of up to $5,000, or both. MCL 750.503. Physicians convicted of violating the Criminal Abortion Ban may also face administrative penalties from LARA, including permanent license revocation. MCL 333.16221(b)(v); MCL 333.16226(1). Michigan-licensed health care facilities that employ physicians who violate the Criminal Abortion Ban may face possible penalties as well, including criminal prosecution, see MCL 750.10; MCL 333.20199(1),

license revocation through administrative enforcement by LARA, see MCL 333.20165; MCL 333.20168(1), or actions to enjoin operation of their licensed facility, MCL 333.20177.

14. As articulated by the Court of Appeals, the Criminal Abortion Ban's predecessor statute, 1846 RS, ch 153, § 34, was enacted in the mid-nineteenth century. *People v Nixon*, 42 Mich App 332, 335 & n 5; 201 NW2d 635 (1972), remanded 389 Mich 809; 387 NW2d 921 (1973), on remand 50 Mich App 38; 212 NW2d 797 (1973). Previously, under common law, it was not a crime to terminate a pregnancy prior to "quickening," *id.* at 335, which was defined as the point in pregnancy when the pregnant person could first sense fetal movement, generally recognized as occurring in the fourth or fifth month of pregnancy, *id.* at 335 n 3, citing Stedman, Medical Dictionary (21st ed), p 1340.

15. The earlier version of the Criminal Abortion Ban made it a misdemeanor to "wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or [to] employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman . . . ." *Id.* at 336 & n 7, quoting 1846 RS, ch 153, § 34. Two companion provisions were passed at the same time as 1846 RS, ch 153, § 34. The first provision established that "[t]he wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." *Nixon*, 42 Mich App at 335 & n 5, citing and quoting 1846 RS, ch 153, § 32.

16. The second provision established that anyone who "administer[ed] to any woman pregnant with a quick child, any medicine, drug or substance whatever, or [who] use[d] or employ[ed] any instrument or other means, with intent thereby to destroy such child," would be guilty of manslaughter if either the "quick child" or the pregnant person died, unless doing so was

necessary to save the pregnant person's life. *Id.* at 336 & n 6, citing and quoting 1846 RS, ch 153, § 33.

17. In 1931, the Michigan Legislature amended and consolidated the abortion statutes, creating two consolidated sections that remain in the Michigan Code today as MCL 750.14 (the Criminal Abortion Ban) and MCL 750.15. A version of 1846 RS, ch 153, § 33 remains in the Michigan Code today as MCL 750.323.

18. The Legislature's 1931 revision makes it a felony to perform an abortion at any point in gestation (termed in the statute as "procur[ing] the miscarriage of any [pregnant] woman"), unless necessary to save the pregnant person's life. MCL 750.14.

19. In 1973, in *Roe v Wade*, the United States Supreme Court held that a Texas statute making it a crime to "procure an abortion," except for the purpose of saving the pregnant person's life, violated the Fourteenth Amendment to the United States Constitution. 410 US at 117–118. The Court held that the Fourteenth Amendment right to privacy barred a state from banning abortion before viability, or after viability where necessary to preserve the pregnant person's life or health. *Id.* at 164–165.

20. Immediately after *Roe* was decided, in *People v Bricker*, the Michigan Supreme Court relied solely on the federal constitution to find the Criminal Abortion Ban unconstitutional to the extent it prohibits abortions protected under *Roe*. *Bricker*, 389 Mich at 531. The Court did not separately address the Criminal Abortion Ban's legality as written or as a matter of Michigan constitutional law. Instead, the Michigan Supreme Court construed the statute not to apply to abortions protected under *Roe*. See *id.*

21. Specifically, *Bricker* held as follows:

> In light of the declared public policy of this state and the changed circumstances resulting from the federal constitutional doctrine

> elucidated in *Roe* and *Doe* [*v Bolton*, 410 US 179; 93 S Ct 739, 35 L Ed 2d 201 (1973)], we construe [the Criminal Abortion Ban] to mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment to preserve the life or health of the mother. . . .
>
> We hold that, except as to those cases defined and exempted under *Roe v Wade* and [its companion case] *Doe v Bolton*, . . . criminal responsibility attaches. [389 Mich at 529–531.]

22. Accordingly, under *Bricker*, the Criminal Abortion Ban does not prohibit pre-viability abortions performed by a physician, or post-viability abortions necessary to preserve the pregnant person's life or health.

23. Because *Bricker* was a criminal appeal, no injunctive relief was requested or considered by the Court in construing the Criminal Abortion Ban. See *Bricker*, 389 Mich 524.

24. Similarly, in *Larkin v Cahalan*, 389 Mich 533; 208 NW2d 176 (1973), the Michigan Supreme Court construed MCL 750.323—one of the companion statutes to the Criminal Abortion Ban, which criminalizes abortions provided after the point of "quickening" as manslaughter—so as not to apply to abortions provided by a physician before viability, in order to preserve that statute's constitutionality under *Roe v Wade*. *Larkin*, 389 Mich at 541–542. As in *Bricker*, the court did not enjoin the statute.[1]

25. The Michigan Supreme Court has never addressed the Criminal Abortion Ban's constitutionality as a matter of Michigan law. While the Michigan Court of Appeals held in *Mahaffey v Attorney General* that the Michigan Constitution does not protect a privacy right to

[1] Accordingly, for all the reasons articulated herein as to MCL 750.14, Plaintiffs also seek declaratory and injunctive relief against MCL 750.323, and any other Michigan statute or regulation to the extent it prohibits abortions.

abortion that is separate and distinct from the federal right, 222 Mich App at 339, 345, *Mahaffey* did not have the legality of the Criminal Abortion Ban before it.

26. The Michigan Supreme Court has also never construed or re-examined the Criminal Abortion Ban in light of subsequent doctrinal changes to the federal substantive due process right to abortion recognized in *Roe*. The United States Supreme Court reaffirmed that federal right in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), but held that states can regulate abortion before viability so long as the regulation does not impose an "undue burden" on the right to abortion, *id.* at 874 (plurality opinion). The United States Supreme Court again reaffirmed the federal right in *Gonzales v Carhart*, 550 US 124, 146; 127 S Ct 1610; 167 L Ed 2d 480 (2007), while also upholding for the first time a law banning a particular abortion method, *id.* at 164–165, 167. In *Whole Women's Health v Hellerstedt*, 579 US 582; 136 S Ct 2292; 195 L Ed 2d 665 (2016), the United States Supreme Court again reaffirmed the federal right to abortion, striking down Texas abortion restrictions because they imposed an undue burden on the right, 136 S Ct at 2310–2311, 2314–2318. Most recently, in *June Medical Services LLC v Russo*, ___ US ___; 140 S Ct 2103; 207 L Ed 2d 566 (2020), the Court struck down a Mississippi law nearly identical to the one it had invalidated in *Whole Woman's Health*, see *June Med*, 140 S Ct at 2129–2130, 2132 (plurality opinion), though it did so in a series of splintered opinions that have been applied differently in the federal courts of appeals, see generally *id.* at 2112–2133 (plurality opinion); *id.* at 2133–2142 (Roberts, C.J., concurring in the judgment). Compare *EMW Women's Surgical Ctr v Friedlander*, 978 F3d 418, 433 (CA 6, 2020) (Sixth Circuit holding that Chief Justice Roberts's concurrence in *June Medical* is controlling), with *Planned Parenthood of Ind & Ky, Inc v Box*, 991 F3d 740, 748

(CA 7, 2021) (Seventh Circuit holding that Chief Justice Roberts's *June Medical* concurrence cannot control), pet for cert docketed, No 20-1375 (US, April 1, 2021).

27. The Michigan Supreme Court's construction of the Criminal Abortion Ban thus appears to incorporate by reference a federal constitutional doctrine that has shifted over time. Beyond *Bricker*'s holding explicitly applying the specific federal protections announced in *Roe*—that the Criminal Abortion Ban could not be enforced against physicians who provide abortions before viability, or after viability where necessary to save the patient's life or health—the parameters of the Criminal Abortion Ban's prohibitions are otherwise unclear, given the changing standards in federal abortion doctrine.

28. This construction is also at risk of significant modification by the United States Supreme Court's forthcoming decision in the *Dobbs* case, which presents the question whether *Roe v Wade*—on which the *Bricker* construction is founded—should be overruled. Brief for Petitioners, at i, *Dobbs v Jackson Women's Health Org*, 2021 WL 3145936, at *i (US, July 22, 2021) (Docket No 19-1392); see also *id.* at 14 ("This Court should overrule *Roe* and *Casey*."); *Dobbs*, 141 S Ct 2619 (granting certiorari). The United States Supreme Court could issue its decision in *Dobbs* any day, endangering the constitutional rights Michiganders have relied on for the past five decades, and further obscuring the scope and prohibitions of the Criminal Abortion Ban in defiance of principles of fair notice.

29. The Criminal Abortion Ban has never been repealed, and the Michigan Court of Appeals has held that it has not been repealed by implication. *People v Higuera*, 244 Mich App 429, 436–437; 625 NW2d 444 (2001).

STATEMENT OF FACTS RELATIVE TO EACH PLAINTIFF

A. PPMI

30. PPMI is a not-for-profit corporation that currently operates 14 health centers across Michigan, in Ann Arbor, Detroit, Ferndale, Flint, Grand Rapids, Jackson, Kalamazoo, Lansing, Livonia, Marquette, Traverse City, Petoskey, and Warren.

31. PPMI or its predecessors have been operating in Michigan since at least 1922.

32. PPMI's health centers provide a wide range of reproductive and sexual health services to patients, including abortion, see *supra* ¶ 9.

33. PPMI's health centers provide medication abortion, where the patient takes a set of pills to end their pregnancy, up to 11 weeks of pregnancy, as measured from the first day of the pregnant person's last menstrual period (LMP).

34. PPMI's Ann Arbor East and Kalamazoo health centers also provide procedural abortion, where a physician uses suction and sometimes instruments to empty the patient's uterus, up to 19 weeks, 6 days LMP, and its Flint health center provides procedural abortion up to 16 weeks, 6 days LMP. Each of these three health centers is licensed as a Freestanding Outpatient Surgical Facility by LARA.

35. Other physicians and hospitals also provide medication abortion and procedural abortion in Michigan.

36. In Fiscal Year 2020, PPMI provided 8,448 abortions. Of those, 6,626 were medication abortions, and 1,822 were procedural abortions.

37. Between July 2020 and June 2021, PPMI saw 615 abortion patients who traveled to its health centers from other states—7% of the total number of abortion patients seen in that

time period. By comparison, in that same time frame, 3% of the patients PPMI saw for *all* health care services (including abortion) came from out of state.

38. PPMI employs full-time physicians and part-time physicians, as well as physicians who perform contracted work through arrangements with teaching hospitals and universities. All physicians employed by PPMI currently have admitting privileges at University of Michigan Hospital in Ann Arbor.

39. At its health centers, PPMI trains medical students, OB/GYN residents, family medicine residents, family medicine fellows, and OB/GYN fellows to provide abortion and other health care.

40. By its terms, the Criminal Abortion Ban outlaws the abortions that PPMI provides.

41. But for the enforcement of the Criminal Abortion Ban, PPMI intends to continue to provide abortions to people in Michigan.

42. If the Criminal Abortion Ban is enforced according to its terms and contrary to *Bricker* and *Roe*, PPMI will be forced to stop providing abortions at its health centers in Michigan.

B. SARAH WALLETT, M.D., M.P.H., FACOG

43. Dr. Wallett is a board-certified OB/GYN licensed in Michigan. Since 2019, she has been the Chief Medical Officer of PPMI. Dr. Wallett is also an adjunct clinical assistant professor at the University of Michigan Medical School.

44. As Chief Medical Officer at PPMI, Dr. Wallett oversees all clinical care and operations. This entails overseeing more than 10 physicians, more than 20 clinicians, licensed and non-licensed health center staff, and a rotating set of medical students, residents, and fellows who come to PPMI to complete training in abortion and other health care. Dr. Wallett is responsible for training, proctoring, and conducting annual assessments of clinical skills for this team.

45. At PPMI, Dr. Wallett provides abortions to people from Michigan as well as people who travel to Michigan from other states.

46. By its terms, the Criminal Abortion Ban outlaws the abortions that Dr. Wallett provides at PPMI.

47. But for the enforcement of the Criminal Abortion Ban as written, Dr. Wallett intends to continue to provide abortions to people in Michigan.

48. If the Criminal Abortion Ban is enforced according to its terms and contrary to *Bricker* and *Roe*, Dr. Wallett will be forced to stop providing abortions at PPMI health centers in Michigan.

PREGNANCY HAS SIGNIFICANT MEDICAL, FINANCIAL, AND PERSONAL CONSEQUENCES

49. To understand why abortion is essential and constitutionally protected health care, it is important first to understand the ways in which pregnancy affects people, both during the pregnancy itself and for years afterward.

50. People experience their pregnancies in a range of different ways. While pregnancy can be a celebratory and joyful event for many families, even an uncomplicated pregnancy challenges a person's entire physiology. Pregnancy can also be a period of physical and personal discomfort; some pregnant people experience significant mental health challenges, including dysphoria.

51. Pregnancy and childbirth carry significant medical risk. Maternal mortality is a serious and worsening problem in the United States. Women of color, and Black women in particular, face heightened risks of maternal mortality and pregnancy-related complications compared to non-Hispanic white women. This disparity between the maternal mortality rates for women of color and non-Hispanic white women has been exacerbated in the past year.

52. Every pregnancy necessarily involves significant physical change. A typical pregnancy generally lasts roughly 40 weeks LMP. During that time, the pregnant person experiences a dramatic increase in blood volume, a faster heart rate, increased production of clotting factors, breathing changes, digestive complications, and a growing uterus.

53. As a result of these changes and others, pregnant individuals are more prone to blood clots, nausea, hypertensive disorders, and anemia, among other complications. Many of these complications are mild and resolve without the need for medical intervention. Some, however, require evaluation and occasionally urgent or emergent care to preserve the patient's health or save their life.

54. Pregnancy may aggravate preexisting health conditions such as hypertension and other cardiac disease, diabetes, kidney disease, autoimmune disorders, obesity, asthma, and other pulmonary disease.

55. Other health conditions, such as preeclampsia, deep-vein thrombosis, and gestational diabetes, may arise for the first time during pregnancy. People who develop a pregnancy-induced medical condition are at higher risk of developing the same condition in a subsequent pregnancy.

56. Many pregnant people seek care in the emergency department at least once during pregnancy. People with comorbidities (including both people with preexisting comorbidities and those who develop comorbidities as a result of their pregnancy), such as asthma, obesity, hypertension, or diabetes, are significantly more likely to seek emergency care.

57. A relatively common complication of pregnancy is ectopic pregnancy, which occurs when a fertilized egg implants anywhere other than in the endometrial lining of the uterus.

If an ectopic pregnancy ruptures, it can kill the pregnant person. Ruptured ectopic pregnancy is a significant cause of pregnancy-related mortality and morbidity.

58. Every pregnancy also carries a risk of miscarriage, as well as a risk of preterm premature rupture of membranes. Complications from miscarriage can lead to infection, hemorrhage, and even death. By comparison, the risk of death following a miscarriage is roughly twice the risk of death following an abortion (the risk of death following abortion is approximately 0.7 deaths per 100,000 procedures).

59. Mental health conditions may emerge for the first time during pregnancy or in the postpartum period. A person with a history of mental illness may also experience a recurrence of their illness during pregnancy. Pregnant people with a prior history of mental health conditions also face a heightened risk of postpartum mental illness.

60. Separate from pregnancy, childbirth itself is a significant medical event. Even a normal pregnancy can suddenly become life-threatening during labor and delivery. During labor, increased blood flow to the uterus places the patient at risk of hemorrhage and, in turn, death; indeed, hemorrhage is the leading cause of severe maternal morbidity.

61. People who undergo labor and delivery can experience other unexpected adverse events such as transfusion, perineal laceration, ruptured uterus, and unexpected hysterectomy.

62. A substantial proportion of deliveries occurs by cesarean section (C-section), an open abdominal surgery requiring hospitalization for at least a few days. While common, C-sections carry risks of hemorrhage, infection, and injury to internal organs.

63. Vaginal delivery often leads to injury, such as injury to the pelvic floor. This can have long-term consequences, including fecal or urinary incontinence.

64. A person carrying a pregnancy to term may also experience post-pregnancy mental health issues.

65. Pregnant people may also face an increased risk of intimate partner violence, with the severity sometimes escalating during or after pregnancy. Homicide has been reported as a leading cause of maternal mortality, the majority caused by an intimate partner.

66. Pregnancy and childbirth are expensive. Pregnancy-related health care and childbirth are some of the costliest hospital-based health services, particularly for complicated or at-risk pregnancies. While insurance may cover most of these expenses, many pregnant patients with insurance must still pay for significant labor and delivery costs out of pocket.

67. The financial burdens of pregnancy and childbirth weigh even more heavily on people without insurance, who are disproportionately people of color, and on people with unintended pregnancies, who may not have sufficient savings to cover pregnancy-related expenses. A costly pregnancy, particularly for people already facing an array of economic hardships, could have long-term and severe impacts on a family's financial security.

68. Almost half of the pregnancies in the U.S. are unintended, and people of color and people with low incomes experience unintended pregnancy at a disproportionately higher rate, in large part due to systemic barriers to contraceptive access.

69. Beyond childbirth, raising a child is expensive, both in terms of direct costs and due to lost wages. On average, women experience a large and persistent decline in earnings following the birth of a child, an economic loss that compounds the additional costs associated with raising a child.

70. Given the impact of pregnancy and childbirth on a person's mental and physical health, finances, and personal relationships, whether to become or remain pregnant is one of the most personal and consequential decisions a person will make in their lifetime.

71. Certainly, many people decide that adding a child to their family is well worth all of these risks and consequences. But if abortion becomes unavailable in Michigan—as might happen any day now—thousands of pregnant people in this state will be forced to assume those risks involuntarily.

ABORTION IS SAFE, COMMON, AND ESSENTIAL HEALTH CARE

72. Abortion is one of the safest and most common medical services performed in the United States today. Indeed, legal abortion carries far fewer risks than childbirth.

73. A woman's[2] risk of death associated with childbirth, specifically, is more than 12 times higher than that associated with abortion, and the total risk of maternal mortality is 34 times higher than the risk of death associated with abortion. Every pregnancy-related complication is more common among women having live births than among those having abortions.

74. Of the 29,669 induced abortions performed in Michigan in 2020, the Michigan Department of Health reports just seven immediate complications.[3] The average three-year rate of immediate abortion complications between 2017 and 2019 was 3.5 per 10,000 induced abortions: just 0.035%.[4]

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[2] Plaintiffs occasionally use "woman" or "women" as a short-hand for people who are or may become pregnant, while recognizing that people of all gender identities may become pregnant and seek abortion services. Plaintiffs also use "woman" or "women" when citing or quoting research that reports its results in terms of "women," to preserve the accuracy of those results.

[3] Mich Dep't of Health, Div for Vital Records & Health Stats, *Table 22, Number, Percent and Rate of Reported Induced Abortions with Any Mention of Immediate Complication by Type of Immediate Complication, Michigan Occurrences, 2020* <https://www.mdch.state.mi.us/osr/abortion/Tab_13.asp> (accessed April 4, 2022).

[4] *Id.*

75. Approximately one in four women in this country will have an abortion by age forty-five.

76. There are two general categories of methods used to provide abortion: medication abortion and procedural abortion.

77. For early medication abortion, patients take a regimen of two prescription drugs approved by the U.S. Food and Drug Administration (FDA). Together, the medications cause the pregnancy to pass in a process similar to miscarriage.

78. This medication abortion regimen is widely used to terminate pregnancies through 11 weeks LMP. After 11 weeks LMP, only procedural abortion is generally available.

79. For procedural abortion, a clinician uses instruments and/or medication to widen the patient's cervical opening and empty the uterus. Procedural abortion is a straightforward and brief procedure almost always performed in an outpatient setting. Although procedural abortion is sometimes referred to as "surgical" abortion, it is not what is commonly understood to be surgery, as it involves no incisions, no need for general anesthesia, and no need for a sterile field.

80. Starting around 18 to 20 weeks LMP, an additional procedure may be performed to ensure that the patient's cervix is adequately dilated for the procedural abortion. This may occur on the same day as the abortion, or the day prior to the abortion.

81. There is no typical abortion patient, and pregnant people seek abortions for a variety of deeply personal reasons.

82. In addition to cisgender women, gender-nonconforming people, transmasculine people, and trans men have abortions.

83. Most abortion patients nationally already have at least one child. Most also report plans to have children (or additional children) at another time in their lives.

84. Nearly three-fourths of abortion patients say they cannot afford to become a parent or to add to their families, and the same proportion also cites responsibility to other individuals (such as children or elderly parents), or that having a baby would interfere with work and/or school, as their reason for ending their pregnancy.

85. Some people decide to have an abortion because they do not want children at all.

86. Some people decide to end their pregnancy because it is dangerous to their mental or physical health, or because it threatens their life.

87. Some people seek abortions because they are experiencing intimate partner violence. Many of these patients fear that carrying the pregnancy to term and giving birth would further tie them to their abusers.

88. Some people seek abortions because the pregnancy is the result of rape.

89. Some people decide to have an abortion because of an indication or diagnosis of a fetal medical condition. Some families feel they do not have the resources—financial, medical, educational, or emotional—to care for a child with special needs, or to do so while providing for the children they already have.

90. Some people decide to have an abortion because of a fetal diagnosis of a condition that means after delivery the baby would never be healthy enough to go home. While some may decide to carry such a pregnancy through delivery, others may decide that they wish to terminate the pregnancy.

91. In summary, the decision to terminate a pregnancy is often motivated by a combination of complex and interrelated factors that are intimately tied to the pregnant person's identity and values, mental and physical health, and economic circumstances.

92. Pregnant people in Michigan need access to safe and legal abortion to exercise autonomy over their lives and to engage fully and equally in society. For centuries, women's roles and lives have been designed by their families, partners, religious leaders, and government, in reliance on the stereotype that pregnancy—or even the capacity to become pregnant—determines the course a person's life can take. This stereotype reinforces the subordination of women. Everyone who can become pregnant has a right to design their own future and to make decisions about their relationships and life opportunities without government interference that puts their health and well-being at risk.

93. In Michigan, women and others who can become pregnant have ordered their lives, organized their intimate relationships, and determined their identities and their place in society in reliance on the right and availability of safe access to abortion. If the Criminal Abortion Ban becomes enforceable as written, contrary to *Roe v Wade* and the Michigan Supreme Court's construction in *Bricker*, it would chill PPMI's and Dr. Wallett's provision of abortion. In turn, it would pose an imminent threat to patients who today justifiably rely upon the right to obtain an abortion, and would deny women the right to participate equally in the economic and social life of this state, facilitated by their ability to control their reproductive lives.

IF ENFORCED AS WRITTEN, THE CRIMINAL ABORTION BAN WILL OUTLAW VIRTUALLY ALL ABORTIONS IN MICHIGAN

94. The Criminal Abortion Ban, as written, prohibits abortions, even in cases of rape, incest, or grave threats to the pregnant person's health. The only exception is for abortions necessary to save the pregnant person's life.

95. For nearly the last 50 years, abortion providers in Michigan have relied on the Michigan Supreme Court's construction of the Criminal Abortion Ban in *Bricker*, which incorporates the federal protections in *Roe* and therefore allows physicians to provide abortion

before viability, or after viability where necessary to save the patient's life or health. But no court order currently enjoins any Michigan official from enforcing the Criminal Abortion Ban.

96. Moreover, should the United States Supreme Court modify those federal protections—which it is likely to do imminently in *Dobbs*—the Michigan Supreme Court's construction of the Criminal Abortion Ban may no longer protect Michigan abortion providers from felony prosecution for providing an abortion in this state.

97. If the Criminal Abortion Ban becomes enforceable, PPMI, its physicians including Dr. Wallett, and their staff and patients will lack clear notice of what the Ban actually prohibits. This will hinder PPMI's and Dr. Wallett's ability to care for their patients, and it will cause confusion and panic among patients themselves.

98. First, it is unclear whether the Michigan Supreme Court's *Bricker* construction imports the full history of federal abortion jurisprudence through its reference to *Roe* and *Doe v Bolton*, or only the specific holding of *Roe* itself. When that federal doctrine is further modified by the United States Supreme Court's decision in *Dobbs*, abortion providers and patients in Michigan will lack notice of the extent to which the Criminal Abortion Ban is enforceable.

99. Second, the Criminal Abortion Ban's plain text fails to provide fair notice of which conduct is prohibited. For example, the word "abortion" is not mentioned in the statute. MCL 750.14. Instead, the statute criminalizes the acts of "[a]ny person" who administers "any medicine, drug, substance or thing whatever" by "any . . . means whatever" to "procure the miscarriage of any [pregnant] woman." *Id.* These terms may be construed broadly or contrary to their commonly understood medical meanings by prosecutors and law enforcement who are

emboldened or even merely confused.[5]

100. In this way, the Criminal Abortion Ban's terms are so indefinite that sheriffs, prosecutors, and courts could have broad discretion to assert that a range of undetermined medical practices are a crime, putting Dr. Wallett and other PPMI staff in the precarious position of not knowing what acts could subject them to criminal investigation or prosecution.

101. Third, the Criminal Abortion Ban as written does not include an exception for abortions necessary to save the pregnant patient's health. While the Michigan Supreme Court read that exception into the Ban based on its understanding of what *Roe* requires, the Ban's text does not recognize this exception. When federal abortion doctrine is modified by the United States Supreme Court's decision in *Dobbs*, abortion providers in Michigan may not know whether they can provide medically necessary abortions to patients, even when doing so is urgently needed to avert grave bodily harm.

102. It is clear, however, that if the Criminal Abortion Ban becomes enforceable as written, it would effectively end access to abortion in Michigan. PPMI and Dr. Wallett would be forced to stop providing abortion under virtually any circumstance—that, or face felony prosecution, licensure penalties, and/or civil enforcement proceedings. PPMI would no longer be able to offer abortion at any of its health centers statewide. The Criminal Abortion Ban would thus have devastating consequences for PPMI's patients, for PPMI, and for Dr. Wallett personally.

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[5] For example, people who lack a complete or accurate understanding of reproductive medicine may interpret the Criminal Abortion Ban to criminalize conduct that is not abortion at all, such as prescribing emergency contraception. Oosting, *A Michigan Abortion Ban Could 'Shock' State Politics Ahead of 2022 Election*, Bridge Mich (February 22, 2022) <https://www.bridgemi.com/michigan-government/michigan-abortion-ban-could-shock-state-politics-ahead-2022-election> (accessed April 4, 2022).

103. People seeking an abortion in Michigan will not know whether they can still come to PPMI for an abortion, or whether they will need to try to make arrangements to travel to another state where the right to abortion is protected, if they have the resources to do so. Those lacking the necessary resources would be forced to seek ways to end their pregnancies without medical supervision, some of which may be unsafe, or to carry a pregnancy to term against their will.

104. Many people would not be able to travel to another state to access abortion, or would be significantly delayed by the cost and logistical arrangements required to do so, such as navigating inflexible or unpredictable work schedules and child care needs.

105. Because abortion becomes more expensive as pregnancy progresses, people trying to save money for an abortion, plus money to pay for the necessary travel out of state, could find themselves in a vicious cycle of trying to raise the necessary funds while the cost grows, resulting in more delay. This delay could, in turn, push some people past the point in pregnancy where abortion is legally or practically available in nearby states, forcing them to carry the pregnancy to term against their will.

106. Delays in accessing abortion, or being unable to access abortion at all, pose risks to patients' health. While abortion is very safe at any point in pregnancy, the risks of abortion increase with gestational age. And because pregnancy and childbirth are far more medically risky than abortion, forcing people to carry a pregnancy to term exposes them to an increased risk of physical harm.

107. If abortion is no longer available, people will instead be forced to remain pregnant and give birth in a health care system that does not adequately keep pregnant people safe, especially pregnant people of color.

108. Further, people who are unable to access abortion will face increased risks to their mental health, their professional prospects, their finances, the well-being of their existing children, and the well-being of the child they are forced to have.

109. Enforcing the Criminal Abortion Ban would most harm pregnant people who are poor or have low incomes, pregnant people living in rural counties or urban areas without access to adequate prenatal care or obstetrical providers, and Black pregnant people in Michigan. As discussed above, pregnancy and childbirth are more dangerous for Black women than for white women. Banning abortion in Michigan would force Black women to bear this disproportionate risk to their health and their lives.

110. Because the Criminal Abortion Ban does not allow exceptions for pregnancies resulting from rape or incest, it would have a uniquely devastating impact on survivors of those crimes, who would be forced either to carry the pregnancy to term or to find a way to access abortion in another state.

111. If the Criminal Abortion Ban becomes enforceable as written, given the barriers to accessing abortion out of state, some people will likely find ways to self-manage abortion in Michigan; some who do may experience one of the rare complications from medication abortion. Against the backdrop of a felony abortion ban, people who experience complications after self-managing their abortions may be too afraid to seek necessary follow-up care.

112. Given the Criminal Abortion Ban's extraordinarily narrow exception for abortions necessary to preserve the pregnant person's life, pregnant people with dangerous medical conditions could be forced to wait to receive an abortion—even an urgently medically necessary abortion—until they are literally dying. This is already happening in Texas, where emergency

room physicians are afraid to terminate patients' pregnancies because they are afraid of being sued for violating Texas's law banning abortion at roughly six weeks.[6]

113. The Criminal Abortion Ban would directly harm PPMI's mission to provide comprehensive sexual and reproductive health care to the communities it serves, and PPMI's standing in the eyes of its patients and supporters. If PPMI could no longer provide abortion to people seeking that care, some might misunderstand why PPMI is no longer providing abortion and think that it is because PPMI no longer wants to, undermining patients' trust in PPMI. Worse, PPMI might no longer be seen as a safe place where people can be open and honest about their health care histories and needs. This would not only harm PPMI's reputation as a health care provider; it would interfere with PPMI's ability to provide other care. Some PPMI staff might leave the organization because they would simply be unable to bear turning patient after patient away in their time of need.

114. Additionally, absent judicial clarification of what the law permits or proscribes, local prosecutors or other state officials with enforcement authority may attempt to use the Criminal Abortion Ban to take action against PPMI or its staff based on an incorrect understanding of reproductive science and medicine. PPMI and Dr. Wallett could be forced to defend against these misguided investigations or charges, and some staff might prefer to leave PPMI rather than work with these threats and risks.

115. Enforcing the Criminal Abortion Ban would also harm Dr. Wallett personally. Her work as an abortion provider is a core part of her identity. It is also her area of professional expertise. If she were no longer able to provide abortions in Michigan, she would be forced to

[6] Nat'l Pub Radio, *Doctors' Worst Fears About the Texas Abortion Law Are Coming True* (March 1, 2022) <https://www.npr.org/2022/02/28/1083536401/texas-abortion-law-6-months> (accessed April 4, 2022).

choose between continuing to provide other medical care to Michigan patients or uprooting her life and her family and moving to a state where abortion remains legal so that she could use her extensive expertise to continue to provide this vitally important health care.

116. Each of these consequences constitutes irreparable harm to PPMI and Dr. Wallett, PPMI physicians and staff, and their patients, and would violate the rights to which pregnant people are entitled under the Michigan Constitution and the Elliott-Larsen Civil Rights Act.

117. Plaintiffs have no adequate remedy at law.

CLAIMS FOR RELIEF

COUNT I

Michigan Constitution – Due Process – Vagueness

118. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

119. By failing to provide fair notice of what conduct it proscribes, and by imposing severe penalties on Plaintiffs, the Criminal Abortion Ban harms Plaintiffs and Plaintiffs' patients because it is unconstitutionally vague in violation of the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17.

120. A statute may be challenged for vagueness if "the statute fails to provide fair notice of the proscribed conduct," or "it is so indefinite that it confers unfettered discretion on the trier of fact to determine whether the law has been violated." *People v Rogers*, 249 Mich App 77, 94–95; 641 NW2d 595 (2001).

121. Because the Michigan Supreme Court's construction of the Criminal Abortion Ban is based on, and seemingly incorporates, federal case law, the meaning of the statute may constantly evolve and change, leaving Plaintiffs and their patients without fair notice of what conduct the statute proscribes at any given moment in time. The United States Supreme Court's

imminent decision in *Dobbs* will further modify that federal doctrine, in turn potentially revising the Criminal Abortion Ban's construction and creating further uncertainty about whether the conduct it proscribes is the same as, or different than, the conduct proscribed when the Michigan Supreme Court construed the statute in *Bricker* in 1973.

122. Additionally, the Criminal Abortion Ban's terms are so indefinite that, if it can be enforced as written, sheriffs, prosecutors, and courts would have such broad discretion to impose criminal liability based on their own beliefs about what constitutes a violation of the Ban that they would put Plaintiffs and their patients in the precarious position of structuring their conduct without knowledge of what acts could subject them to criminal prosecution.

123. As well, the Criminal Abortion Ban as written does not include an exception for abortions necessary to save the pregnant patient's health. When federal abortion doctrine is modified by the United States Supreme Court's decision in *Dobbs*, abortion providers in Michigan may not know whether they can provide medically necessary abortions to patients, even when doing so is urgently needed to avert grave bodily harm.

124. Because it criminalizes conduct of an indeterminate nature, the Criminal Abortion Ban violates the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17.

COUNT II

Michigan Constitution – Due Process – Liberty and Bodily Integrity

125. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

126. By banning abortion, the Criminal Abortion Ban violates Plaintiffs' patients' right to bodily integrity, as guaranteed by the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17.

127. The Michigan Due Process Clause protects the right to bodily integrity. See *Mays v Governor of Mich*, 506 Mich 157, 192–195; 945 NW2d 139 (2020); *Mays v Snyder*, 323 Mich App 1, 59–60; 916 NW2d 227 (2018), aff'd 506 Mich 157; 954 NW2d 139 (2020).

128. The right to bodily integrity underpins the common-law doctrine of informed consent in medical decision-making. See *In re Rosebush*, 195 Mich App 675, 680; 491 NW2d 633 (1992). Animated by this doctrine, Michigan's constitutional right to bodily integrity guards against nonconsensual physical intrusions.

129. The Criminal Abortion Ban infringes the right to bodily integrity by forcing people to remain pregnant without their consent.

130. The Criminal Abortion Ban also infringes the right to bodily integrity by forcing people to remain pregnant and endure labor and delivery, in turn requiring them to face increased medical risk and to undergo more invasive medical interventions without their consent.

131. Because the Criminal Abortion Ban infringes on a fundamental right, it is subject to strict scrutiny.

132. The Criminal Abortion Ban advances no compelling government interest. And even assuming such an interest, the Criminal Abortion Ban is not narrowly tailored to serve it, and therefore is unconstitutional.

COUNT III

Michigan Constitution – Equal Protection

133. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

134. By banning abortion, the Criminal Abortion Ban violates the equal protection rights of Plaintiffs' patients, as guaranteed by the Equal Protection Clause of the 1963 Michigan Constitution, art 1, § 2.

135. The Michigan Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws[.]" *Id.*

136. The Michigan Equal Protection Clause "requires that all persons similarly situated be treated alike under the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

137. The Michigan Equal Protection Clause prohibits the State from denying access to a fundamental right on the basis of a classification that is not narrowly tailored to advance a compelling state interest.

138. The Criminal Abortion Ban deprives pregnant people who choose to terminate their pregnancies of their fundamental right to make decisions about their body, while allowing pregnant people who want to continue their pregnancy the full enjoyment of that fundamental right.

139. The Criminal Abortion Ban advances no compelling government interest. And even assuming such an interest, the Criminal Abortion Ban's classification of pregnant people based on their intention for the pregnancy is neither necessary nor narrowly tailored to serve it. Therefore, the Criminal Abortion Ban is unconstitutional.

140. The Michigan Equal Protection Clause also prohibits the State from employing suspect classifications, including sex-based classifications, that give legal force to stereotypes.

141. By its own terms, the Criminal Abortion Ban creates a sex-based classification in its text; the law specifically and repeatedly singles out the "pregnant *woman*" and "such *woman*." MCL 750.14 (emphases added).

142. By banning abortion, the Criminal Abortion Ban further relies on and entrenches stereotypical, antiquated, and overbroad generalizations about the roles and relative abilities of men and women.

143. The Criminal Abortion Ban is based on paternalistic and archaic notions of what the State believes is best for women rather than respecting pregnant people's bodily autonomy.

144. The Criminal Abortion Ban creates risks to physical and mental health, financial stability, and ability to seek out life opportunities for women and not men, which in turn perpetuates the subordination of women.

145. Because the Criminal Abortion ban is a sex-based classification rooted in paternalistic and stereotypical ideas, it is subject to heightened scrutiny.

146. The Criminal Abortion Ban cannot survive heightened scrutiny because it employs a sex-based classification that is not substantially related to an important government interest.

COUNT IV

Elliott-Larsen Civil Rights Act – MCL 37.2302 – Sex Discrimination in Public Accommodations and Services

147. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

148. By banning abortion, the Criminal Abortion Ban discriminates on the basis of sex in violation of the Elliott-Larsen Civil Rights Act, which is constitutionally mandated implementing legislation, see Const 1963, art 1, § 2, and, protects against discrimination on the basis of sex in the full and equal enjoyment of public accommodations and services, MCL 37.2302(a).

149. By eliminating access to abortion—a vital health care service that gives people the ability to plan their own future—the Criminal Abortion Ban deprives women of the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of public accommodations and public services. These deprivations perpetuate the subordination of women.

150. The Criminal Abortion Ban relies on and entrenches stereotypes about the roles and relative abilities of men and women, which the Elliott-Larsen Civil Rights Act was designed to eliminate.

151. The Criminal Abortion Ban is based on paternalistic and archaic notions of what the State believes is best for women rather than respecting pregnant people's bodily autonomy.

152. The Criminal Abortion Ban creates risks to physical and mental health, financial stability, and ability to seek out life opportunities that perpetuate the subordination of women.

153. The Criminal Abortion Ban thus deprives women of the full and equal enjoyment of public accommodations and services such as education, employment, and housing.

154. Defendant Attorney General of the State of Michigan provides a public service to all Michiganders within the meaning of the Elliott-Larsen Civil Rights Act by serving as the State's top lawyer and law enforcement official, enforcing the laws of the State of Michigan, and supervising and overseeing the work of all county prosecutors.

155. Defendant's enforcement of the Criminal Abortion Ban also violates MCL 37.2302 by denying women the full and equal enjoyment of their right to make decisions about their bodies.

COUNT V

Michigan Constitution – Retained Rights – Liberty and Privacy

156. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

157. By banning abortion, the Criminal Abortion Ban violates the liberty and privacy rights of Plaintiffs' patients to abortion, as guaranteed by the Retained Rights Clause of the 1963 Michigan Constitution, art 1, § 23.

158. The Retained Rights Clause provides that "[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; see also *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10)*, 396 Mich 465, 504; 424 NW2d 3 (1976) (recognizing a right to privacy under the Michigan Constitution).

159. The purposes of the Retained Rights Clause are to "recognize[] that no Declaration of Rights can enumerate or guarantee all the rights of the people—*that it is presently difficult to specify all such rights which may encompass the future in a changing society*," II Official Record, Constitutional Convention 1961–62, p 3365 (emphasis added), and that "*liberty under law is an ever growing and ever changing conception of a living society developing in a system of ordered liberty*," I Official Record, Constitutional Convention 1961–62, p 470 (emphasis added).

160. The Retained Rights Clause anticipates—and authorizes Michigan courts to recognize and enforce—constitutional rights not recognized by the 1963 Constitution's text that are nonetheless necessary in a society that has changed and evolved significantly since then.

161. Society and medicine have changed dramatically since the Criminal Abortion Ban was enacted. The Ban was enacted based on an antiquated belief in the need to control women's bodies for their own good, and required an acceptance of how women's lives, roles, and autonomy would be circumscribed as a result. Today, society recognizes that women and other pregnant people are autonomous individuals with a fundamental right to make decisions about their lives and bodies without undue government interference.

162. Michigan's constitutional rights to privacy and individual liberty therefore encompass a person's right to make decisions about whether or not to terminate a pregnancy.

163. Because the Criminal Abortion Ban infringes on a fundamental right, it is subject to strict scrutiny.

164. The Criminal Abortion Ban advances no compelling government interest. And even assuming such an interest, the Criminal Abortion Ban is not narrowly tailored to serve it, and therefore is unconstitutional.

COUNT VI

Michigan Constitution – Due Process – Liberty and Privacy

165. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

166. By banning abortion, the Criminal Abortion Ban violates the liberty rights of Plaintiffs' patients to abortion, as guaranteed by the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17.

167. The Michigan Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17.

168. Michigan's due process protections are at least coextensive with those of its similarly worded federal counterpart, see, e.g., *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013), and in some circumstances afford individuals more expansive rights than the federal constitution, *People v Vaughn*, 491 Mich 642, 650 n 25; 821 NW2d 288 (2012).

169. The Due Process Clause protects the right to privacy, see *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10)*, 396 Mich at 504–505, citing *De May v Roberts*, 46 Mich 160; 9 NW 146 (1881), which in turn prohibits government interference with activities that are "fundamental to our concept of ordered liberty" unless a "compelling state interest" justifies that interference, *id.* at 505, quoting *Roe*, 410 US at 155.

170. The Due Process Clause's protection of the rights to privacy and individual liberty encompasses a person's right to make decisions about whether or not to terminate a pregnancy.

For decades, Michiganders have relied on the availability of abortion in this state, and Michiganders today have the right to continue to do so.

171. Because the Criminal Abortion Ban infringes on a fundamental right, it is subject to strict scrutiny.

172. The Criminal Abortion Ban advances no compelling government interest. And even assuming such an interest, the Criminal Abortion Ban is not narrowly tailored to serve it, and therefore is unconstitutional.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that MCL 750.14, and any other Michigan statute or regulation to the extent that it prohibits abortion, violates:

a. the Due Process Clause of the Michigan Constitution;

b. the Equal Protection Clause of the Michigan Constitution;

c. the Elliott-Larsen Civil Rights Act; and

d. the Retained Rights Clause of the Michigan Constitution;

B. Issue preliminary injunctive relief enjoining Defendant, her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, including all persons supervised by the Defendant, from enforcing or giving effect to MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person;

C. Issue permanent injunctive relief, enjoining Defendant, her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them,

including all persons supervised by the Defendant, from enforcing or giving effect to MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortion;

D. Award Plaintiffs their costs and reasonable attorneys' fees incurred in bringing this action; and

E. Grant such other relief as this Court deems just and proper.

Respectfully submitted,

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* *Pro hac vice application forthcoming*
** *Student attorney practicing pursuant to MCR 8.120*

Dated: April 7, 2022

VERIFICATION

STATE OF MICHIGAN)
)ss
COUNTY OF WASHTENAW)

I declare that the above statements set forth in this Verified Complaint are true to the best of my knowledge, information, and belief.

Denise Thal

Denise Thal, Interim CEO,
on behalf of Planned Parenthood of Michigan

Subscribed and sworn before me this
5th day of April, 2022.

Signed: Betsy Lee Lewis

Printed name: Betsy Lee Lewis, Notary Public
Ingham Co., MI, Acting in Washtenaw Co., MI
My Commission Expires: 01/23/2027

BETSY LEE LEWIS
Notary Public - State of Michigan
County of Ingham
My Commission Expires Jan 23, 2027
Acting in the County of Washtenaw

VERIFICATION

STATE OF MICHIGAN)
)ss
COUNTY OF WASHTENAW)

I declare that the above statements set forth in this Verified Complaint are true to the best of my knowledge, information, and belief.

Sarah Wallett, M.D., M.P.H., FACOG

Subscribed and sworn before me this
5th day of April, 2022.

Signed: _____

Printed name: Betsy Lee Lewis, Notary Public
Ingham Co., MI, Acting in Washtenaw Co., MI
My Commission Expires: 01/23/2027

BETSY LEE LEWIS
Notary Public - State of Michigan
County of Ingham
My Commission Expires Jan 23, 2027
Acting in the County of Washtenaw

EXHIBIT 2

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.
_____ /

Case No.

Hon.

BRIEF IN SUPPORT OF PLAINTIFFS' APRIL 7, 2022 MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

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**Pro hac vice application forthcoming*
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ATTORNEYS FOR PLAINTIFFS

TABLE OF CONTENTS

INTRODUCTION

A 1931 Michigan statute bans abortion, even in cases of rape, incest, or grave threats to the pregnant person's health. Under this law, 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. MCL 750.14 (the "Criminal Abortion Ban"). No injunction currently bars this statute's enforcement.

In *People v Bricker*, 389 Mich 524, 527–528, 531; 208 NW2d 172 (1973), the Michigan Supreme Court construed the Criminal Abortion Ban to be enforceable only as allowed by *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973). The Court held that, under *Roe*, the Criminal Abortion Ban did not apply to abortions before viability, or after viability where necessary to preserve the patient's life or health. *Bricker*, 389 Mich at 529–530.

But federal case law interpreting *Roe* has changed over time, and *Roe* itself now faces a direct challenge before the United States Supreme Court, leaving not only its contours but perhaps its very existence open to question. See *Dobbs v Jackson Women's Health Org*, ___ US ___; 141 S Ct 2619; 209 L Ed 2d 748 (2021) (mem) (granting certiorari). Because the Criminal Abortion Ban has been construed as incorporating this shifting federal doctrine, it is unclear today what the law precisely allows.

It is clear, however, that the Criminal Abortion Ban *as written* is blatantly unconstitutional. If the Criminal Abortion Ban were enforced against physicians who provide abortion in Michigan, Planned Parenthood of Michigan (PPMI) and its Chief Medical Officer, Sarah Wallett, M.D., M.P.H., FACOG (together, "Plaintiffs"), would be forced to stop providing abortions. People in Michigan would be unable to access abortion under virtually any circumstance. Accordingly, Plaintiffs bring this case, on behalf of themselves and their patients, to establish the Criminal Abortion Ban's unconstitutionality as a matter of Michigan law. The Criminal Abortion Ban is unconstitutionally vague, and it violates the rights to liberty and privacy, bodily integrity, and

equal protection guaranteed by the 1963 Michigan Constitution and the Elliott-Larsen Civil Rights Act (ELCRA).

Plaintiffs seek a preliminary injunction pursuant to MCR 3.310 to maintain the legal status quo that allows people to access abortion in this state. Specifically, the Court should enter a preliminary injunction, consistent with *Bricker*, prohibiting enforcement of the Criminal Abortion Ban and any other Michigan statute or regulation to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person. See *Bricker*, 389 Mich at 529–530. Doing so during the pendency of this case is consistent with the Michigan Supreme Court's construction of the Criminal Abortion Ban in *Bricker*, which has protected access to abortion in Michigan since 1973. Absent injunctive relief, Plaintiffs and their patients risk imminent and irreparable harm.

BACKGROUND AND FACTS

Plaintiffs

Plaintiffs have devoted their lives and livelihoods to ensuring access to reproductive health care in Michigan. For about 100 years, PPMI or its predecessors has provided a wide range of this care to patients in this state. Exhibit 1, Affidavit of Sarah Wallett, M.D., M.P.H., FACOG, in Support of Plaintiffs' April 7, 2022 Motion for Preliminary Injunction ("Wallett Aff") ¶¶ 11–12. These services include testing and treatment for sexually transmitted infections, contraception counseling and provision, HIV prevention services, pregnancy testing and options counseling, preconception counseling, gynecologic services including well-person exams, cancer screening, miscarriage management, and abortion. *Id.* ¶ 12. PPMI employs staff and operates 14 health centers across Michigan. *Id*. ¶¶ 11, 18.

In Fiscal Year 2020, PPMI provided 8,448 abortions. *Id.* ¶ 13. Of those, 6,626 were early

medication abortions (i.e., using medications alone), and 1,822 were procedural abortions.[1] *Id.* At PPMI, between July 2020 and June 2021, 27% of abortion patients had incomes below 101% of the federal poverty level, and an additional 22% had incomes between 100% and 200% of the federal poverty level.[2] *Id.* ¶ 51. The vast majority—93%—of PPMI abortion patients between July 2020 and June 2021 paid for their abortions out of pocket rather than with insurance. *Id.*

PPMI faces possible felony criminal prosecution and licensure penalties for violating the Criminal Abortion Ban, as well as possible actions to enjoin operation of their licensed health centers. See MCL 750.14; MCL 333.20199(1); MCL 333.20165; MCL 333.20168(1); MCL 333.20177; see also MCL 750.10; MCL 333.20109, citing MCL 333.1106. PPMI brings this suit on its own behalf, and on behalf of its physicians, staff, and patients who seek abortions.

Sarah Wallett, M.D., M.P.H., FACOG, is a board-certified obstetrician-gynecologist licensed to practice medicine in Michigan. Wallett Aff ¶ 1. Dr. Wallett has been the Chief Medical Officer of PPMI since March 2019. *Id.* ¶ 9. She is also an adjunct clinical assistant professor at the University of Michigan Medical School in Ann Arbor. *Id.* Dr. Wallett provides abortion to people in Michigan. *Id.* ¶ 2. Dr. Wallett thus faces possible felony criminal prosecution and potential licensure penalties for violating the Criminal Abortion Ban. See *id.* ¶¶ 1, 3–4, 73, 75. Dr. Wallett brings this suit on her own behalf and on behalf of her patients who seek abortions.[3]

[1] In 2020, the most recent year for which statistics are currently available, 29,669 abortions were performed in Michigan. Wallett Aff ¶ 42.

[2] In 2020, 200% of the federal poverty level was $25,520 annually for a household of one, and $34,480 annually for a household composed of one parent and one child. *Id.* ¶ 51.

[3] Plaintiffs' third-party standing to assert claims on their patients' behalf is consistent with longstanding Michigan law. *People v Rocha*, 110 Mich App 1, 17; 312 NW2d 657 (1981) (permitting jus tertii standing to argue the constitutional rights of a third party impacted by a statute where a substantive relationship such as doctor/patient exists); *cf June Med Servs LLC v Russo*, ___ US ___; 140 S Ct 2103, 2118; 207 L Ed 2d 566 (2020) (plurality opinion) (recognizing that the United States Supreme Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challeng[ing] abortion [laws]").

PPMI and Dr. Wallett provide abortion in reliance on the Michigan Supreme Court's ruling construing the Criminal Abortion Ban as not prohibiting abortions that are constitutionally protected under *Roe.* They wish to continue to provide abortions, *id.* ¶¶ 88, 91, consistent with the Court's longstanding interpretation of the Criminal Abortion Ban. But they will be unable to do so if it would place them at risk of arrest, criminal prosecution, *id.* ¶¶ 75, 88, 91, and licensure revocation, *id.* ¶¶ 3, 13, 73. In turn, their patients will be unable to obtain the abortions they seek in Michigan—or at all, *id*. ¶¶ 75–85, putting them at increased risk of physical, mental, and financial harm, *id.* ¶¶ 19–41, 79–86.

Defendant

The Attorney General of the State of Michigan is the top law enforcement official in the state, charged with defending and enforcing the proper laws in the state, as well as supervising all county prosecutors charged with enforcing the criminal statutes of Michigan. MCL 14.28–14.30; Const 1963, art 5, §§ 1, 3. The Attorney General also acts in a representative and advisory capacity with respect to Michigan administrative agencies, including the Michigan Department of Licensing and Regulatory Affairs (LARA), which can impose penalties on Michigan-licensed health care facilities and physicians. See MCL 333.16221(b)(v); MCL 333.16226(1); MCL 333.20165; MCL 333.20168(1); MCL 333.20177; MCL 333.20199(1). Indeed, "it is universally recognized that among the primary missions of a state attorney general is the duty to give legal advice . . . to . . . agencies of state government." *Sch Dist of City of East Grand Rapids, Kent Co v Kent Co Tax Allocation Bd*, 415 Mich 381, 394; 330 NW2d 7 (1982). The Attorney General is the appropriate defendant in a suit over the constitutionality of the Criminal Abortion Ban. See, e.g., *Mahaffey v Attorney General,* 222 Mich App 325; 564 NW2d 104 (1997) (suit against Michigan Attorney General in case challenging constitutionality of Michigan abortion regulation). The Attorney General is sued in her official capacity.

Legal Background

The Criminal Abortion Ban provides in relevant part: "Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony . . . . " MCL 750.14.

Violating the Ban is an unclassified felony, punishable by up to four years' imprisonment, a fine of up to $5,000, or both. MCL 750.503. Physicians convicted of violating the Criminal Abortion Ban may also face administrative penalties from LARA, MCL 333.20104(4), including permanent license revocation, MCL 333.16221(b)(v); MCL 333.16226(1). Michigan-licensed health care facilities that employ physicians who violate the Criminal Abortion Ban may face possible penalties as well, including criminal prosecution, see MCL 333.20199(1); see also MCL 750.10, license revocation through administrative enforcement by LARA, see MCL 333.20165; MCL 333.20168(1); see also MCL 333.20109, citing MCL 333.1106, or actions to enjoin operation of their licensed facilities, MCL 333.20177.

While the Criminal Abortion Ban's constitutionality has been challenged before, the Michigan Supreme Court has not addressed those claims, choosing instead to construe the Ban consistent with *Roe*'s holding that the United States Constitution bars states from prohibiting abortion before viability, or after viability where necessary to save the patient's life or health. *Bricker*, 389 Mich at 529–531. Specifically, *Bricker* held that the Criminal Abortion Ban "shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment to preserve the life or health of the mother. . . . [E]xcept as to

those cases defined and exempted under *Roe v. Wade* . . . , criminal responsibility attaches." *Id*. at 530–531. The Michigan Supreme Court's saving construction thus depends entirely on *Roe*. See *id.* PPMI has relied on and operated under this construction of the Criminal Abortion Ban since 1973. See Wallett Aff ¶¶ 3–4, 11. Because *Bricker* arose as a criminal appeal, the Court in *Bricker* did not enter an injunction reflecting this construction.

Accordingly, under *Bricker*, the legality of abortion has been tied to federal law. The contours of federal law have changed in the decades since *Roe* and *Bricker* were decided, leaving Michigan abortion providers and their patients at risk of state officials attempting new interpretations of the ban. This risk is exacerbated by the United States Supreme Court imminently deciding the question whether *Roe v Wade* should be overruled. See Brief for Petitioners at i, *Dobbs v Jackson Women's Health Org*, 2021 WL 3145936 (US, July 22, 2021) (Docket No. 19-1392); see also *id.* at 14 ("This Court should overrule *Roe* and *Casey*."); *Dobbs v Jackson Women's Health Org*, ___ US ___; 141 S Ct 2619; 209 L Ed 2d 748 (2021) (mem) (granting certiorari). *Dobbs*, argued on December 1, 2021, is already disrupting access to abortion despite nearly fifty years of United States Supreme Court precedent protecting this right.[4] Indeed, it appears

[4] See Zernike, *States Aren't Waiting for the Supreme Court to Tighten Abortion Laws*, NY Times (March 7, 2022) <https://www.nytimes.com/2022/03/07/us/abortion-supreme-court- roe-v-wade.html> (accessed April 4, 2022). On December 10, 2021, in *United States v Texas*, ___ US ___; 142 S Ct 522; 211 L Ed 2d 349 (2021) (per curiam) (mem), the Supreme Court denied the United States's request to enjoin Texas's ban on abortions after six weeks of pregnancy, known as S.B. 8, in direct contravention of *Roe*, 410 US at 164–165, and *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833, 846; 112 S Ct 2791; 120 L Ed 2d 674 (1992), such that the clearly unconstitutional ban has been in effect for more than seven months. The Oklahoma State Legislature is considering two pieces of S.B. 8-style legislation to effectively ban abortion: Senate Bill 1503, which has passed the Oklahoma Senate, see Okla Senate Bill 1503, Reg Sess (2022), and House Bill 4327, which has passed the Oklahoma House, see Okla House Bill 4327, Reg Sess (2022). On October 20, 2021, a so-called "heartbeat" bill was introduced in the Michigan House of Representatives and referred to the Committee on Health Policy. See Mich House Bill 5444, § 6, 101st Leg, Reg Sess (2021) ("HB 5444"); Zivian et al, *'Heartbeat' Abortion Bill Raises Tensions in Michigan*, Mich State Univ Sch of Journalism (December 16, 2021) <https://news.

increasingly likely that *Roe* will either be overruled or its protections severely curtailed,[5] leaving it to state courts to interpret abortion bans in the context of individuals' state constitutional rights.

In Michigan, public officials have added to the confusion by publicly asserting that the Criminal Abortion Ban will become fully enforceable, allowing for arrests and prosecutions, upon the Supreme Court issuing its ruling in *Dobbs*.[6]

While the full consequences of the United States Supreme Court's decision in *Dobbs* cannot be known with certainty until the Court issues its opinion—as it could do any day now—there is little doubt that the Michigan Supreme Court's only existing interpretation of the Criminal Abortion Ban lacks the clarity needed to guide providers, patients, and state actors at a time when the protections of *Roe* have been called into question and may even be extinguished. The Michigan Supreme Court has thus far not addressed whether the Criminal Abortion Ban is void for vagueness, or whether it violates other rights guaranteed by the Michigan Constitution. Because the Criminal Abortion Ban has not been enjoined, nothing prevents overzealous prosecutors from capitalizing on this uncertainty and attempting to enforce the Criminal Abortion Ban the minute a decision in *Dobbs* is announced. Plaintiffs risk criminal prosecution and more, and their patients seeking abortion risk being forced to attempt to travel hundreds of miles for care—which for many

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jrn.msu.edu/2021/12/heartbeat-abortion-bill-raises-tensions-in-michigan/> (accessed April 4, 2022). The bill would make abortions illegal after a fetal "heartbeat" is detected, at approximately six weeks of pregnancy. HB 5444, § 6; Zivian, *supra* note 4.

[5] See Liptak, *Supreme Court Seems Poised to Uphold Mississippi's Abortion Law*, NY Times (December 1, 2021) <https://www.nytimes.com/2021/12/01/us/politics/supreme-court-mississippi-abortion-law.html> (accessed April 4, 2022).

[6] Oosting, *A Michigan Abortion Ban Could 'Shock' State Politics Ahead of 2022 Election*, Bridge Mich (February 22, 2022) <https://www.bridgemi.com/michigan-government/ michigan-abortion-ban-could-shock-state-politics-ahead-2022-election> (accessed April 4, 2022). Three declared candidates for Attorney General in Michigan have asserted they would enforce the Criminal Abortion Ban in Michigan upon a ruling in *Dobbs* abrogating *Roe*. *Id.*

will not be possible, forcing them to carry their pregnancy to term and give birth against their will. By contrast, a preliminary injunction maintaining the status quo would allow Plaintiffs to continue to provide abortion to their patients until the scope and constitutionality of the Criminal Abortion Ban can finally be determined as a matter of Michigan law.

Facts Relating to Pregnancy

The decision whether to become or remain pregnant is one of the most personal and consequential a person will make in their lifetime, Wallett Aff ¶ 41; see also *id.* ¶¶ 19–40, and people experience their pregnancies in a range of different ways, *id.* ¶ 20. While pregnancy can be a celebratory and joyful event for many, even an uncomplicated pregnancy challenges a person's entire physiology. *Id.*; see also *id.* ¶¶ 23–28, 31–32, 39. Pregnancy can also be a period of physical and personal discomfort or even alienation, *id.* ¶ 20; some pregnant people experience significant mental health challenges, *id.* ¶¶ 20, 31, 39.

Pregnancy also carries significant medical risk, *id.* ¶¶ 21–31, as does childbirth, *id.* ¶¶ 32–34. Women of color, and Black women in particular, face heightened risks of maternal mortality and pregnancy-related complications compared to non-Hispanic white women. *Id.* ¶ 22; see also *id.* ¶ 82. This disparity has been exacerbated in the past year. *Id.* A woman's risk of death associated with childbirth, specifically, is more than 12 times higher than that associated with abortion, and the total risk of maternal mortality is 34 times higher than the risk of death associated with abortion. *Id.* ¶ 42. Every pregnancy-related complication is more common among women having live births than among those having abortions. *Id.*

Separate from pregnancy, childbirth itself is a significant medical event. *Id.* ¶ 32; see also *id.* ¶ 42. Even a normal pregnancy can suddenly become life-threatening during labor and delivery. *Id.* ¶ 32. Pregnant people may also face an increased risk of intimate partner violence. *Id.* ¶ 38. Women who have experienced intimate partner violence and who give birth after being unable to

access a desired abortion will, in many cases, face increased difficulty escaping that relationship. *Id.*; see also *id.* ¶ 53. And pregnancy, childbirth, and raising a child can have long-term impacts on a person's financial security. *Id.* ¶¶ 37, 80 & n 77, 81; see also *id.* ¶ 52.

Certainly, many people decide that adding a child to their family is well worth all of these risks and consequences. *Id.* ¶ 41 But if abortion becomes unavailable in Michigan—as might happen any day now—thousands of pregnant people in this state will be forced to assume those risks involuntarily. *Id.*; see also *id.* ¶¶ 76–77.

Facts Relating to Abortion

Abortion is one of the safest and most common medical services performed in the United States today. *Id.* ¶ 42. Indeed, legal abortion carries far fewer risks than childbirth. *Id.* ¶ 42; compare *id.* ¶¶ 19–41, with *id.* ¶¶ 43–58, 80–81. Approximately one in four women in this country will have an abortion by age forty-five. *Id.* ¶ 42.

There are two general types of abortion: medication abortion and procedural abortion. *Id.* ¶ 43. For early medication abortion, patients take a regimen of two prescription drugs approved by the United States Food and Drug Administration. *Id.* ¶ 44. Patients take the first medication, mifepristone, then 0 to 48 hours later, they take the second medication, misoprostol, at a location of their choosing, typically at home. *Id.* Together, the medications cause the pregnancy to pass in a process similar to miscarriage. *Id.* This regimen is evidence-based and widely used to terminate pregnancies through 11 weeks of pregnancy, as measured from the first day of the patient's last menstrual period (LMP). *Id.* ¶ 45. Through 11 weeks LMP, patients wishing to terminate their pregnancies may choose between medication and procedural abortion. *Id.* After 11 weeks LMP, only procedural abortion is available. *Id.*

For procedural abortion, a clinician uses instruments and/or medication to widen the patient's cervical opening and to evacuate the contents of the uterus. *Id.* ¶ 46. Procedural abortion

is a straightforward and brief procedure. *Id.* It is almost always performed in an outpatient setting and may at times involve local anesthesia or conscious sedation to make the patient more comfortable. *Id.* Although procedural abortion is sometimes referred to as "surgical abortion," it is not what is commonly understood to be surgery, as it involves no incisions, no need for general anesthesia, and no need for a sterile field. *Id.* Up to approximately 14 weeks LMP, procedural abortion relies on the aspiration technique. *Id.* ¶ 47. After that point, procedural abortion involves the dilation and evacuation technique. *Id.* Starting around 18 to 20 weeks LMP, an additional procedure may be performed to ensure that the patient's cervix is adequately dilated for the procedural abortion. *Id.* This may occur on the same day as the abortion, or the day prior to the abortion. *Id.*

PPMI's Ann Arbor East and Kalamazoo health centers provide procedural abortion through 19 weeks, 6 days LMP, and its Flint health center provides procedural abortion through 16 weeks, 6 days LMP. *Id.* ¶ 13. All 14 of PPMI's health centers provide medication abortion. *Id*. ¶¶ 11, 13.

There is no typical abortion patient, and pregnant people seek abortions for a variety of deeply personal reasons. *Id.* ¶¶ 49, 58; see also *id.* ¶¶ 52–57. In addition to cisgender women, gender-nonconforming people, transmasculine people, and trans men have abortions. *Id.* ¶ 49. Nearly 60% of abortion patients nationally already have at least one child. *Id.* ¶ 50. Some people have abortions because they conclude that it is not the right time in their lives to have a child or to add to their families. *Id.* ¶¶ 49–50. Some decide to have an abortion because they do not want children at all. *Id.* ¶ 49. Some people seek abortions because they are experiencing intimate partner violence and fear that carrying the pregnancy to term and giving birth would further tie them to their abusers. *Id.* ¶ 53. Some people seek abortions because the pregnancy is the result of rape. *Id.* ¶ 54. Some people decide to have an abortion because of an indication or diagnosis of a fetal

medical condition, including diagnoses that mean after delivery the baby would never be healthy enough to go home. *Id.* ¶ 56. While some may decide to carry such a pregnancy through delivery, others may decide that they wish to terminate the pregnancy. *Id.* Some abortion patients experience pregnancy complications that lead them to end their pregnancies to preserve their own life or health. *Id.* ¶ 57.

The decision to terminate a pregnancy is often motivated by a combination of complex and interrelated factors that are intimately tied to the pregnant person's identity and values, mental and physical health, family circumstances, resources, and economic stability. *Id*. ¶ 58.

The Criminal Abortion Ban Risks Imminent Harm to Plaintiffs and Their Patients

If the Criminal Abortion Ban were enforced, Plaintiffs would be forced to stop offering virtually all abortions—that, or face felony prosecution, *id.* ¶ 75, and more, *id.* ¶¶ 3, 13, 73.[7] The Ban would thus have devastating consequences for Plaintiffs and their patients. See *id.* ¶¶ 75–85. Many people would not be able to travel to another state to access abortion, or would be significantly delayed by the cost and logistical arrangements required to do so. *Id.* ¶ 76.

Delays in accessing abortion, or being unable to access abortion at all, pose risks to people's health. *Id.* ¶ 79. While abortion is very safe at any point in pregnancy, risks increase with gestational age. *Id.* And because pregnancy and childbirth are far more medically risky than abortion, forcing people to carry a pregnancy to term exposes them to an increased risk of physical harm. *Id.*; see also *id.* ¶¶ 19–42. Further, a person's ability to access abortion has consequences not only for that person, but also for their family and community. *Id.* ¶ 80.

Enforcing the Criminal Abortion Ban as written would most harm people who are poor or

[7] Enforcement of any other Michigan statute or regulation to prohibit abortion provided by a licensed physician would have the same effect. PPMI and Dr. Wallett therefore seek preliminary injunctive relief against all such enforcement.

have low incomes, people living in rural counties or urban areas without access to adequate prenatal care or obstetrical providers, and Black people in Michigan. *Id.* ¶ 82. Pregnancy and childbirth are more dangerous for Black women than for white women: as of 2020, the national maternal mortality rate for Black women is approximately three times the rate for white women. *Id.* Banning abortion in Michigan would force Black women to bear this disproportionate risk to their health and their lives. *Id.*

Because the Criminal Abortion Ban as written does not allow exceptions for pregnancies resulting from rape or incest, see MCL 750.14, it would have a uniquely devastating impact on rape and incest survivors, who would be forced either to carry their pregnancies to term or to find a way to access abortion in another state, Wallett Aff ¶ 83.

If abortion is criminalized in Michigan, some people will likely self-manage abortion. *Id.* ¶ 84. Some who do may experience one of the rare complications from medication abortion and may be too afraid to seek necessary follow-up care. *Id.* This could cause serious harm—not because abortion is unsafe, but because the Criminal Abortion Ban has made it unsafe for them to be fully open with their medical providers. *Id.*

Given the Criminal Abortion Ban's extraordinarily narrow exception for abortions necessary to preserve the pregnant person's life, pregnant people with dangerous medical conditions may be forced to wait to receive an abortion—even an urgently medically necessary abortion—until they are literally dying. *Id.* ¶ 85.

The Criminal Abortion Ban would also directly harm PPMI's mission and its standing in the eyes of its patients. *Id.* ¶ 89. Some patients might misunderstand why PPMI is no longer providing abortion and think that it is because its providers no longer want to help them. *Id.* PPMI would no longer be seen as a safe place where people can be open and honest about their health

care histories and needs, not only harming PPMI's reputation as a health care provider, but interfering with its ability to provide other care. *Id.*

Additionally, some PPMI staff may be afraid to continue working at PPMI if the Criminal Abortion Ban were enforced. *Id.* ¶ 90. Given the statute's vagueness, even if PPMI and its staff complied with the Ban, a prosecutor might accuse staff of violating it. *Id.* Some staff might prefer to leave PPMI given this risk. *Id.* Other staff might simply be unable to bear turning patients away. *Id.*

Finally, enforcing the Criminal Abortion Ban as written would harm Dr. Wallett personally, as her work as an abortion provider is both a core part of her identity and her area of professional expertise. *Id.* ¶ 91. If Dr. Wallett were no longer able to provide abortion in Michigan, she would be forced to choose between staying in state and continuing to provide other medical care to Michigan patients, or uprooting her life and her family and moving to a state where abortion remains legal so that she could use her extensive training to continue to provide this vitally important health care. *Id.* Other abortion providers in Michigan would face this same dilemma. *Id.*

Uncertainty about when or whether the Criminal Abortion Ban might become enforceable as written interferes with PPMI's and Dr. Wallett's ability to plan for the months ahead, because they do not know whether they will still be able to provide abortion weeks or months from now. *Id*. ¶ 92.

Unless this Court maintains the status quo and enjoins enforcement of the Criminal Abortion Ban to continue to allow abortions before viability, and after viability where necessary to preserve the patient's life or health, those risks will continue to threaten access to abortion in Michigan.

ARGUMENT

Under *Bricker*, pre-viability abortion, and post-viability abortion when necessary to preserve the patient's life or health, are permitted under the Criminal Abortion Ban. A preliminary injunction maintaining this status quo is necessary to protect Plaintiffs from prosecution during the pendency of this litigation, and to ensure that patients seeking abortion continue to have access to this constitutionally protected health care. "The purpose of a preliminary injunction is to preserve the 'status quo pending a final hearing regarding the parties' rights.'" *Hammel v Speaker of the House of Reps*, 297 Mich App 641, 647–648; 825 NW2d 616 (2012), quoting *Mich AFSCME Council 25 v Woodhaven-Brownstone Sch Dist*, 293 Mich App 143, 145; 809 NW2d 444 (2011); see also *Fancy v Egrin*, 177 Mich App 714, 719; 442 NW2d 765 (1989).

Four factors determine whether a court should issue a preliminary injunction: "(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable injury if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued." *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449; 528 NW2d 778 (1995). In evaluating these factors, the court "balance[s] the benefit of an injunction to [the] plaintiff against the inconvenience and damage to [the] defendant, and grants an injunction . . . as seems most consistent with justice and equity under all the circumstances of the case." *Kernen v Homestead Dev Co*, 232 Mich App 503, 514; 591 NW2d 369, 374 (1998), quoting *Kratze v Indep Order of Oddfellows*, 442 Mich 136, 143 n 7; 500 NW2d 115 (1993). All four factors, especially when considered together, weigh heavily in favor of granting a preliminary injunction here. Granting a preliminary injunction is within the sound discretion of the Court. *City of Grand Rapids v Central Land Co*, 294 Mich 103, 112; 292 NW 579 (1940).

Because the Criminal Abortion Ban can be interpreted in a variety of ways—as written; as allowed under the specific holding of *Bricker*; or as enforceable as construed under the shifting federal abortion caselaw since *Roe*—there is grave uncertainty regarding what conduct is actually permitted and prohibited under the Criminal Abortion Ban. Further, the Michigan Supreme Court has never addressed whether the Criminal Abortion Ban as written violates the Michigan Constitution, which is critical to determining whether safe access to abortion can continue in this state. Since Plaintiffs and their patients do not know how the Ban will be interpreted, preserving the status quo during the pendency of this litigation is appropriate. See, e.g., *Slis v Michigan*, 332 Mich App 312, 359–360, 363–364; 956 NW2d 569 (2020).

This preliminary relief is both legally warranted and necessary today. The Criminal Abortion Ban's legality under the Michigan Constitution is entirely independent of its legality under the United States Constitution, see *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992), so Plaintiffs' request for relief under Michigan law is not contingent on any specific ruling in *Dobbs*. Indeed, awaiting the date of the *Dobbs* decision before addressing Plaintiffs' Michigan constitutional claims will cause irreparable harm, as Plaintiffs face an increasingly chaotic period in which the prohibitions of the Criminal Abortion Ban are uncertain and open to multiple enforcers' varying interpretations.

I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THEIR CLAIM THAT THE CRIMINAL ABORTION BAN IS UNCONSTITUTIONAL

A. The Criminal Abortion Ban Is Unconstitutionally Vague

Given the shifting federal doctrine arguably incorporated through *Bricker*, and the statute's own ambiguity, the Criminal Abortion Ban is unconstitutionally vague.

A statute is unlawfully vague if it "fails to provide fair notice of the proscribed conduct," or if it "is so indefinite that it confers unfettered discretion on the trier of fact to determine whether

the law has been violated." *People v Rogers*, 249 Mich App 77, 94–95; 641 NW2d 595 (2001), citing *Woll v Attorney General*, 409 Mich 500, 533; 297 NW2d 578 (1980); *Plymouth Charter Twp v Hancock*, 236 Mich App 197, 200–201; 600 NW2d 380 (1999). The Criminal Abortion Ban fails this standard for three reasons.

First, the Ban fails to provide fair notice of what conduct it proscribes because it is unclear whether *Bricker*'s construction of the statute froze in place the protections of *Roe* as the *Bricker* Court then understood them, or whether instead the statute's prohibitions are dynamic, shifting automatically as federal constitutional law shifts over time. If the latter, it is also unclear at any given time what the statute prohibits, as the contours of *Roe* and its progeny are continually being litigated and modified, and remain in flux. The right to abortion recognized in *Roe* has been undermined in nearly fifty years of subsequent litigation, and the United States Supreme Court itself has weakened the standard federal courts use to assess abortion restrictions and upheld a number of restrictions not contemplated in *Roe* itself.

The United States Supreme Court first recognized the federal constitutional right to abortion nearly half a century ago, holding that states could not ban abortion before viability, or after viability to save the pregnant person's life or health. *Roe*, 410 US at 163–164. The Court has repeatedly affirmed this central holding. See, e.g., *June Med Servs LLC v Russo*, ___ US ___; 140 S Ct 2103, 2120; 207 L Ed 2d 566 (2020) (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring); *Whole Woman's Health v Hellerstedt*, 579 US 582, ___; 136 S Ct 2292, 2300; 195 L Ed 2d 665 (2016); *Gonzales v Carhart*, 550 US 124, 146; 127 S Ct 1610; 167 L Ed 2d 480 (2007); *Planned Parenthood of Southeastern Pa v Casey*, 505 US 833, 846; 112 S Ct 2791; 120 L Ed 2d 674 (1992). Still, the contours of federal abortion doctrine have shifted significantly. See *Casey*, 505 US at 874 (plurality opinion) (holding that states can regulate pre-viability abortions so long

as they do not impose an "undue burden" on the right to abortion); *Gonzales*, 550 US at 133 (upholding a ban on a particular abortion method); *Whole Woman's Health*, 136 S Ct at 2300; *June Med*, 140 S Ct at 2112 (plurality opinion). Applying these shifting standards, federal courts of appeals have upheld restrictions on abortion not contemplated in *Roe*. See, e.g., *Preterm-Cleveland v McCloud*, 994 F3d 512, 517 (CA 6, 2021) (upholding law that bans abortion based on the patient's reason for having the abortion); *Bristol Reg'l Women's Ctr, PC v Slatery*, 7 F4th 478, 481 (CA 6, 2021) (upholding mandatory 48-hour delay requirement).

Federal abortion doctrine is likely to change again any day now. Last May, the United States Supreme Court granted certiorari in *Dobbs* to examine the constitutionality of Mississippi's ban on abortions after 15 weeks LMP—undisputedly before viability, contrary to *Roe*. The question the Court accepted in *Dobbs* takes aim at the very core of *Roe*, asking "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." Brief for Petitioners at i, *Dobbs*, 2021 WL 3145936; see also *id.* at 14 ("This Court should overrule *Roe* and *Casey*."); *Dobbs*, 141 S Ct 2619 (granting certiorari).

In light of these changing constitutional standards, the Michigan Supreme Court's decision in 1973 to construe the Criminal Abortion Ban through the lens of a federal constitutional doctrine, rather than strike down the statute as unconstitutional or enjoin its enforcement, has left the statute unconstitutionally vague for current providers, patients, and state actors. Arguably, *Bricker* rendered the Criminal Abortion Ban permanently inapplicable to any conduct that *Roe* protected as of the *Bricker* decision in 1973. But some state actors may nonetheless read *Bricker* as incorporating *Roe and its progeny*, and may attempt to enforce the Criminal Abortion Ban against conduct arguably left unprotected by post-*Roe* developments in federal constitutional jurisprudence. And given the imminent decision in *Dobbs*, the Ban as read in the light of changing

federal law is ever less clear. The Ban therefore quintessentially fails to provide fair notice of what it proscribes.

Second, even absent *Bricker*'s federal overlay, the Criminal Abortion Ban's plain text fails to provide fair notice of what conduct is prohibited. For example, the word "abortion" is not mentioned in the statute. MCL 750.14. Instead, the statute criminalizes the acts of "[a]ny person" who administers "any medicine, drug, substance or thing whatever" by "any . . . means whatever" to "procure the miscarriage of any [pregnant] woman." *Id.* The terms "miscarriage" and "pregnant" may be construed contrary to their commonly understood medical meanings by prosecutors and law enforcement who are emboldened or even merely confused.[8] The statute's "any . . . means whatever" catchall clause could similarly be read broadly by prosecutors hoping to initiate investigations into conduct other than providing an abortion. In this way, the Criminal Abortion Ban's terms are so indefinite that prosecutors could have broad discretion to assert that a range of undetermined medical practices are a crime, putting Dr. Wallett and other PPMI staff in the precarious position of not knowing what acts could subject them to criminal investigation or prosecution.

Lastly, the statute is unconstitutionally vague because it is unclear whether it allows abortions to protect a pregnant person's health, or only to preserve their life. On its face, the Ban prohibits abortion in all circumstances except to save a pregnant person's life. MCL 750.14. But *Bricker* recognized an additional exception required by *Roe*, authorizing abortions "necessary, in [the attending physician's] medical judgment to preserve the life or health of the mother." 389 Mich at 529. It is unclear whether *Bricker*'s health exception, premised on the Michigan Supreme

[8] For example, people who lack a complete or accurate understanding of reproductive medicine may interpret the Criminal Abortion Ban to criminalize conduct that is not abortion at all, such as prescribing emergency contraception. Wallett Aff ¶ 74 & n 72; see also, e.g. Oosting, *supra* note 6.

Court's interpretation of *Roe*, would remain if the decision in *Dobbs* further modifies *Roe*'s protections. See MCL 750.14. Additionally, *Bricker*'s interpretation did not address whether a subjective or objective standard governed its imported health exception. Cf *Women's Med Prof Corp v Voinovich*, 130 F3d 187, 205 (CA 6, 1997) ("[T]he combination of the objective and subjective standards without a scienter requirement renders these exceptions unconstitutionally vague, because physicians cannot know the standard under which their conduct will ultimately be judged."); *Summit Medical Assoc, PC v James*, 984 F Supp 1404, 1446–1448 (MD Ala, 1998), aff'd in part, rev'd in part on other grounds 180 F3d 1326 (CA 11, 1999).

The Criminal Abortion Ban as written is thus unconstitutionally vague, and made worse by *Bricker*'s possible incorporation of *Roe*'s shifting—and soon potentially obsolete—federal protections. The statute therefore fails to provide guidance as to what conduct it proscribes and encourages pretextual or discriminatory application.

B. The Criminal Abortion Ban Violates Rights Protected by the Michigan Constitution

Plaintiffs are likely to prevail on the merits of their additional claims that the Criminal Abortion Ban violates their rights under the Michigan Constitution to bodily integrity, equal protection, and liberty and privacy, as well as ELCRA.

Whether the Ban violates the Michigan Constitution "is not dependent on any determination by" the United States Supreme Court. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 283; 761 NW2d 210 (2008), aff'd in part, lv den in part 482 Mich 960 (2008). The Michigan Supreme Court "alone is the ultimate authority with regard to the meaning and application of Michigan law." *Bullock*, 440 Mich at 27. As such, Michigan courts can "interpret the Michigan Constitution more expansively than the United States Constitution . . . ." *Id.* at 28; see also *id*. at 29 n 9 (listing examples); *People v Vaughn*, 491 Mich

642, 650 n 25; 821 NW2d 288 (2012). In *Mahaffey v Attorney General*, the Court of Appeals observed that "the existence of a federal constitutional right to abortion is not necessarily relevant to [the] determination" whether a state constitutional right to abortion exists. 222 Mich App at 333–334 (citation omitted). Quoting *Sitz v Department of State Police*, 443 Mich 744, 761–762; 506 NW2d 209 (1993), the Court of Appeals explained: "[a]ppropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. . . . As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Mahaffey*, 222 Mich App at 334 (omission in original).

Since Michigan's constitution stands independent of the federal constitution, Michigan courts are not bound by the contours of federal constitutional doctrine in applying any given state constitutional guarantee. See *Glover v Mich Parole Bd*, 460 Mich 511, 522; 596 NW2d 598 (1999); *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 185 n 12; 931 NW2d 539 (2019); *Gilmore v Parole Bd*, 247 Mich App 205, 222; 635 NW2d 345 (2001); *Sitz*, 443 Mich at 761–762. Michigan courts are "free to find that an individual has greater rights under a Michigan constitutional provision than under its federal counterpart when compelling reasons to do so exist," *Glover*, 460 Mich at 522, "even where the language is identical," *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004). Further, "'compelling reason' should not be understood as establishing a conclusive presumption artificially linking state constitutional interpretation to federal law." *Sitz*, 443 Mich at 758. As the Court explained in *Sitz*:

> [T]he courts of this state should reject unprincipled creation of state constitutional rights that exceed their federal counterparts. On the other hand, our courts are not obligated to accept what we deem to be *a major contraction of citizen protections* under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government. [*Id.* at 763 (emphasis added).]

Multiple provisions of the Michigan Constitution bar the State from banning abortion. The Due Process Clause, Const 1963, art 1, § 17, protects a right to liberty that includes the right to bodily integrity, which both prohibits the State from forcing a person to become or remain pregnant without their consent, and prevents the State from forcing a pregnant person to face increased medical risks and interventions without their consent. The Equal Protection Clause, Const 1963, art 1, § 2, separately and in conjunction with ELCRA, MCL 37.2101 *et seq*., prevents the State from violating pregnant people's right to equality in the exercise of their fundamental rights to liberty and bodily integrity, and women's[9] right to be free of the sex stereotype that the biological capacity for pregnancy should determine the course of their life—as the Criminal Abortion Ban does by preventing people in Michigan from ending their pregnancies. Finally, separately and together, the Due Process Clause, Const 1963, art 1, § 17, and the Retained Rights Clause, Const 1963, art 1, § 23, protect a right to liberty and privacy that includes the right to abortion.

For all of these reasons, the Criminal Abortion Ban is likely to be found to violate Michigan law and should be preliminarily enjoined.

1. The Criminal Abortion Ban Violates the State Right to Bodily Integrity

Article 1, Section 17 of the Michigan Constitution establishes the right to due process, providing that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The 1850 Michigan Constitution added this language for the first time, see Const 1850, art 6, § 32, and it has appeared in each subsequent version of the state constitution since, see Const 1908, art 2, § 16; Const 1963, art 1, § 17.

[9] While "woman" and "women" are recognized terms in equal protection jurisprudence, and while abortion restrictions have the effect of subordinating women as a class, Plaintiffs recognize that people of all gender identities may become pregnant and seek abortions.

The Due Process Clause of Michigan's Constitution protects a right to bodily integrity.[10] *Mays v Snyder*, 323 Mich App 1, 58–60; 916 NW2d 227 (2018), aff'd 506 Mich 157; 954 NW2d 139 (2020). The state constitutional right to bodily integrity stands independent of the federal constitution's protections. See *Glover*, 460 Mich at 522; *Sitz*, 443 Mich at 763; *Mays v Governor of Mich*, 506 Mich 157, 217; 954 NW2d 139 (2020) (MCCORMACK, C.J., concurring) ("[W]e are separate sovereigns. We decide the meaning of the Michigan Constitution and do not take our cue from any other court, including the highest Court in the land."). The essence of this right is a protection against nonconsensual bodily intrusions. *Mays*, 506 Mich at 192–195. The Criminal Abortion Ban violates that right by forcing people to remain pregnant against their will without sufficient justification, and by forcing pregnant people to face increased medical risk and more invasive medical interventions without sufficient justification.

In *Mays*, a case arising from the Flint water crisis, the Court of Appeals held that the plaintiffs had adequately pled a violation of the right to bodily integrity where they alleged that the state defendants' decision to switch Flint's water source to the Flint River caused "an egregious, nonconsensual entry into the body . . . . " 323 Mich App at 60, quoting *Rogers v City of Little Rock, Ark*, 152 F3d 790, 797 (CA 8, 1998). The Supreme Court affirmed by equal division the Court of Appeals's decision recognizing the state due process right to bodily integrity. *Mays*, 506 Mich at 192–195.

Lack of consent converts an otherwise acceptable or desired intrusion on a person's body, such as voluntarily elected medical treatment, into a violation of bodily integrity. The right to

[10] While the Court of Appeals in *Mahaffey* stated that the Michigan Constitution right to *privacy* does not protect the right to abortion, 222 Mich App at 334, 345, it did not address whether the Michigan Constitution's right to *bodily integrity* separately prohibits the State from forcing a person to remain pregnant against their will, or to endure increased medical risk and more invasive medical interventions without their consent, as the Criminal Abortion Ban does.

bodily integrity underpins the common-law doctrine of informed consent in medical decision-making. As the Court of Appeals recognized in *In re Rosebush*, 195 Mich App 675, 680; 491 NW2d 633 (1992), "Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent." See also *In re Martin*, 200 Mich App 703, 710–711; 504 NW2d 917 (1993); accord *In re AC*, 573 A2d 1235, 1243 (DC, 1990) (en banc). Informed by this common-law doctrine, Michigan's constitutional right to bodily integrity guards against nonconsensual physical intrusions.

Here, the Criminal Abortion Ban infringes the Michigan right to bodily integrity in two ways: first, it prevents people from exercising autonomy over their bodies and in turn the course of their lives; and second, it forces pregnant people to face increased medical risk and to undergo more invasive medical interventions without their consent by requiring them to remain pregnant and endure labor and delivery.

Forcing someone to remain pregnant against their will is a fundamental violation of their right "to the possession and control of [one's] own person." See *Mays*, 506 Mich at 212 (BERNSTEIN, J., concurring), quoting *Union Pacific R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). For a host of reasons, the decision to become or remain pregnant is one of the most personal and consequential a person will make in their lifetime. See *supra* pp 8–9. By preventing pregnant people in Michigan from ending their pregnancies, the Criminal Abortion Ban forces them to submit to nearly ten months of dramatic physical transformation, implicating the most personal aspects of their lives and identities, without their consent. See *supra* pp 8–9. In *Moe v Secretary of Administration & Finance*, 382 Mass 629, 648–649; 417 NE2d 387 (1981), the Supreme Judicial Court of Massachusetts recognized that the state constitutional "right to make the abortion decision privately" was "but one aspect of a far broader constitutional guarantee"

related to, among other things, the "strong interest in being free from nonconsensual invasion of . . . bodily integrity . . . ." (Citation omitted.) Similarly, in *Women of Minnesota v Gomez*, 542 NW2d 17 (Minn, 1995), the Minnesota Supreme Court agreed that "the state constitution protects a woman's right to choose to have an abortion" based on a prior decision recognizing, in the context of involuntary medical treatment, that the "right [of privacy] begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent," such that "the right to be free from intrusive medical treatment is a fundamental right encompassed by the right of privacy under the Minnesota Constitution," *id.* at 27, citing and quoting *Jarvis v Levine*, 418 NW2d 139, 148–150 (Minn, 1988) (alteration in original). Pregnant people in Michigan, too, have a strong liberty interest in being free from the "nonconsensual invasion" of their bodily integrity, and the Criminal Abortion Ban intrudes on it.

The Criminal Abortion Ban also forces pregnant people to endure increased physical risk, including an increased risk of death, and more invasive medical interventions such as delivery by cesarean section. Wallett Aff ¶¶ 21–34, 42. In *Hodes & Nauser, MDs, PA v Schmidt*, 309 Kan 610; 440 P3d 461 (2019) (per curiam), the Supreme Court of Kansas held that a state law banning the most common method of second-trimester abortion was likely to violate the state constitutional right to bodily integrity because it required people seeking abortions at that stage of pregnancy to undergo riskier and more invasive procedures instead, *id.* at 616–618, 646–650, 678.

Because the Criminal Abortion Ban infringes on the right to bodily integrity, it can be justified only if it is narrowly tailored to promote a compelling government interest. *Doe v Dep't of Social Servs*, 439 Mich 650, 662; 487 NW2d 166 (1992); *cf Guertin v State*, 912 F3d 907, 919 (CA 6, 2019) ("[I]ndividuals possess a constitutional right to be free from forcible intrusions on their bodies against their will, absent a compelling state interest." (Citation omitted.)). The

Criminal Abortion Ban has already been found not to advance the state's interest in protecting the health and safety of pregnant people in Michigan. See *People v Nixon*, 42 Mich App 332, 337–339; 201 NW2d 635 (1972), remanded 389 Mich 809 (1973), on remand 50 Mich App 38; 212 NW2d 797 (1973). To the contrary, the Ban exposes pregnant people to an increased risk of illness, serious bodily injury, and death. See *supra* pp 8–11. Accordingly, regardless of whether this interest is deemed "compelling," "important," or "legitimate," it cannot categorically justify the profound physical intrusion of forced pregnancy and childbirth.

2. The Criminal Abortion Ban Violates State Equal Protection Guarantees

The Criminal Abortion Ban violates the Michigan Constitution's Equal Protection Clause, Const 1963, art 1, § 2, for two distinct reasons. First, the law prevents some pregnant people but not others from exercising their fundamental rights to liberty, privacy, and bodily integrity under the Michigan Constitution. Second, the Criminal Abortion Ban is a sex-based classification that enforces antiquated and overbroad generalizations about women and requires women to undertake greater risks than men to their health, financial stability, and ability to exercise personal autonomy over their futures.

"When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether [a] plaintiff was treated differently from a similarly situated entity." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). Then, if the difference in treatment infringes on a fundamental right or is based on a suspect classification, it is subject to heightened scrutiny. *Id.* at 319. Although Michigan courts deciding equal protection cases have employed a mode of analysis "similar" to that of the United States Supreme Court, *Doe*, 439 Mich at 662, "a state court is

entirely free to read its own State's constitution more broadly than [the United States Supreme Court] reads the Federal Constitution, or to . . . favor . . . a different [mode of] analysis of its corresponding constitutional guarantee," *City of Mesquite v Aladdin's Castle, Inc*, 455 US 283, 293; 102 S Ct 1070; 71 L Ed 2d 152 (1982).

Here, the Criminal Abortion Ban both infringes on a fundamental right and is based on a suspect classification. First, the Ban infringes on the exercise of a pregnant person's fundamental rights to liberty, privacy, and bodily integrity, which encompass the right to decide whether to remain pregnant. The Ban treats differently two classes of similarly situated people exercising that fundamental right: pregnant people who seek to terminate their pregnancy, and those who seek to continue their pregnancy to childbirth. Under the Ban, pregnant people who choose childbirth can more fully and without comparable government restriction exercise their rights to liberty, privacy, and bodily integrity by making highly personal decisions about their bodies, while those who seek to terminate their pregnancies are in almost all instances unable to do so. The two groups are similarly situated but treated differently.

Where, as here, legislation that treats similarly situated people differently infringes on a fundamental right, the court must employ strict scrutiny. *Doe*, 439 Mich at 662. When strict scrutiny is the test, it is the state's burden to establish that "the classification drawn is narrowly tailored to serve a compelling governmental interest." *Shepherd Montessori Ctr*, 486 Mich at 319. Assuming that the Criminal Abortion Ban's purported purpose—to protect against unsafe abortions, *Nixon*, 42 Mich App at 337–339—is arguably a compelling one, it is far from narrowly tailored to advance that interest. Abortions provided by licensed clinicians are highly safe, and are in fact safer than giving birth. See *supra* pp 8–9. Not only does the Ban fail to advance an interest

in "the health and safety of the woman," but "it has become counter-productive." *Nixon*, 42 Mich App at 340. By forcing people who do not wish to be pregnant to remain so and endure labor and delivery, the Ban exposes them to more medical risk than abortion. See *supra* pp 8–9. In sum, justifications rooted in a need to protect women or ensure their health and safety fail to stand up to constitutional scrutiny given how safe and common abortion is. See *supra* p 9. Thus, the Criminal Abortion Ban fails strict scrutiny because it is not necessary to further a compelling state interest and is not "precisely tailored" to that end. *Doe*, 439 Mich at 662.

Second, the Criminal Abortion Ban relies on a suspect classification because it is sex-based. On its face it applies only to women, and in operation it enforces the archaic, sex-based stereotype that the biological capacity for pregnancy should determine the course of a person's life.

The Criminal Abortion Ban creates gender-based classifications in its text by specifically and repeatedly singling out the "pregnant *woman*" and "such *woman*." MCL 750.14 (emphases added). Pregnancy-based classifications are sex-based classifications because they are justified by reference to physical differences between men and women. Cf *Mich Dep't of Civil Rights ex rel Jones v Mich Dep't of Civil Serv*, 101 Mich App 295, 304; 301 NW2d 12 (1980). In relying on these physical differences to justify differential treatment, such classifications codify sex-based stereotypes "that reflect[] 'old notions and archaic and overbroad' generalizations about the roles and relative abilities of men and women." *Heckler v Mathews*, 465 US 728, 745; 104 S Ct 1387; 79 L Ed 2d 646 (1984), quoting *Califano v Goldfarb*, 430 US 199, 211; 97 S Ct 1021; 51 L Ed 2d 270 (1977) (plurality opinion). Distinctions drawn on the basis of pregnancy discriminate on the basis of sex.

The Criminal Abortion Ban also evidences discriminatory intent by enforcing sex-based stereotypes that, even if commonplace decades ago, are now obsolete and recognized as harmful and degrading. Principal among these stereotypes was the idea that "the female [was] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v Stanton*, 421 US 7, 14–15; 95 S Ct 1373; 43 L Ed 2d 688 (1975); see also *City of Cleburne, Tex v Cleburne Living Ctr*, 473 US 432, 441; 105 S Ct 3249; 87 L Ed 2d 313 (1985). Such notions "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *United States v Virginia,* 518 US 515, 533–534; 116 S Ct 2264; 135 L Ed 2d 735 (1996), citing with disapproval *Goesaert v Cleary*, 335 US 464, 467; 69 S Ct 198; 93 L Ed 163 (1948), in which a 1945 Michigan statute prohibiting most women from obtaining bartender licenses was upheld, *id.* at 465, 467. By forcing people to carry pregnancies to term, the Criminal Abortion Ban attempts to conscript them to "the home and the rearing of the family," *Stanton*, 421 US at 14, despite the greater risks to their physical and mental health, financial stability, and ability to seek out life opportunities that result, see *supra* pp 11–13, and which are more than what is expected of and endured by men. In this way, the Criminal Abortion Ban perpetuates the subordination of women.

Where legislation creates a classification based on sex or gender, it is reviewed under the "intermediate" or "heightened scrutiny" test and fails constitutional muster unless it is substantially related to an important government interest. *People v Idziak*, 484 Mich 549, 570–571; 773 NW2d 616 (2009); see also *City of Cleburne*, 473 US at 440. Heightened scrutiny requires an "exceedingly persuasive" justification, *Communities for Equity v Mich High Sch Athletic Ass'n*, 459 F3d 676, 692–693 (CA 6, 2006), quoting *Virginia,* 518 US at 531, and "must not rely on

overbroad generalizations about the different talents, capacities, or preferences of males and females," *Virginia*, 518 US at 533.

As discussed previously, the State cannot meet that bar. The State's proffered justification of protecting women from unsafe abortions, see *Nixon*, 42 Mich App at 337–339, not only lacks a basis in fact, see *supra* pp 8–10, but it is also paternalistic—it relies on "overbroad generalizations" about the capacity of women to make their own medical decisions in consultation with trusted health care providers. And because the Criminal Abortion Ban directly undermines the State's purported interest in protecting women's health, see *supra* pp 8–13, it cannot be substantially related to furthering that interest.

3. The Criminal Abortion Ban Violates ELCRA

Michigan's Criminal Abortion Ban violates ELCRA because it deprives women of "the full and equal enjoyment" of public services and accommodations, as well as their ability to exercise their constitutional rights. MCL 37.2302(a). The Supreme Court has recognized that ELCRA: (1) "enlarge[s] the scope of civil rights" to include protection from discrimination on the basis of sex in public accommodations, housing, education, and employment, *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Rec*, 425 Mich 173, 186, 188; 387 NW2d 821 (1986); and (2) protects against "state action violations that amount to constitutional deprivation" in public services, *id.* Both of these components are violated here.

First, the Criminal Abortion Ban, by forcing women to remain pregnant without their consent, will cause them to be deprived of their civil rights in public accommodations, housing, education, and employment because of their sex. The Criminal Abortion Ban enforces a sex stereotype that women are meant to produce and raise children rather than take full advantage of

opportunities in education and employment. Enforcing the statute as written would make abortion virtually unavailable and thereby reduce people's access to education.[11] Similarly, forcing women to carry pregnancies to term limits their access to equal employment opportunities because pregnancy and childrearing significantly impact a woman's wage potential and career trajectory.[12] These denials of equal access violate ELCRA. *Clarke v K Mart Corp,* 197 Mich App 541, 545; 495 NW2d 820 (1992).

Second, because state action enforcing the law is a public service under ELCRA, see *Forton*, 425 Mich at 188, enforcement of the Criminal Abortion Ban will also violate ELCRA by discriminating against women because of their sex. The Attorney General's office performs a public service as a public agency of the State of Michigan. See MCL 37.2301(b). Indeed, services engaged in by government actors, including law enforcement, have long been identified as a public service under ELCRA. See, e.g., *Reed v Detroit*, 2021 WL 3087987, at *2 (ED Mich, July 22, 2021) (Docket No. 2:20-CV-11960) (law enforcement); *Does 11–18 v Dep't of Corrections*, 323 Mich App 479, 485; 917 NW2d 730 (2018) (prisons). By enforcing the Criminal Abortion Ban, the Attorney General or local prosecutors would be performing a public service that discriminates

[11] See Jones, *At a Crossroads: The Impact of Abortion Access on Future Economic Outcomes*, Am Univ Working Paper, pp 14–15 (2021) (finding that "access to abortion from age 15 to 23 increases years of education by 0.80 (6%), increases the probability of entering college by 0.21 (41%) and increases the probability of completing college by 0.18 (72%)"); see also Wallett Aff ¶¶ 49, 52.

[12] See *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am J Pub Health 407, 409 (2018) (finding unemployment rates significantly higher among group forced to carry a pregnancy to term at six months after abortion was sought); see also Wallett Aff ¶¶ 49, 80–81; Jones, *supra* note 11, at 16 ("[A]bortion access increases a woman's earnings later in life by $11,000 to $15,000/year as measured in 2018 USD, about a 37% increase, and increases family income by $6,000 to $10,000/year, a 10% increase."); Malik et al., *America's Childcare Deserts in 2018*, Ctr for Am Progress (December 6, 2018) <https://www.americanprogress.org/issues/early-childhood/reports/2018/12/06/461643/americas-child-care-deserts-2018/> (accessed April 4, 2022); Wallett Aff ¶¶ 40, 80–81.

against women by depriving women of the full and equal privileges of their constitutional rights under the Michigan Constitution. Accordingly, in addition to the Criminal Abortion Ban violating the Michigan Constitution directly, enforcing the Ban would violate ELCRA.

4. The Criminal Abortion Ban Violates the State Constitutional Right to Privacy and Liberty Under the Retained Rights Clause

There is also a fundamental right to abortion under the Michigan Constitution's Retained Rights Clause, Const 1963, art 1, § 23, which provides that "[t]he enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."

This language was added during the 1961–62 Constitutional Convention. I Official Record, Constitutional Convention 1961–62, pp 466, 470. Its purpose was explicit: "The language recognizes that no bill of rights can ever enumerate or guarantee all the rights of the people and that *liberty under law is an ever growing and ever changing conception of a living society developing in a system of ordered liberty*." *Id.* at p 470 (emphasis added); see also II Official Record, Constitutional Convention 1961–62, p 3365 (stating that the section "recognizes that no Declaration of Rights can enumerate or guarantee all the rights of the people—*that it is presently difficult to specify all such rights which may encompass the future in a changing society*" (emphasis added)).

Thus, it is clear that the individual state constitutional rights expressly named in the Declaration of Rights are not exhaustive of the rights recognized in 1963. The Retained Rights Clause clearly anticipates and authorizes courts to recognize, infer, and enforce constitutional rights not textually recognized in 1963.

Similarly, the United States Supreme Court has recognized a right to privacy under the penumbra of rights including the substantive due process right of the Fourteenth Amendment and

the Ninth Amendment's unenumerated rights provision.[13] And the Supreme Court of Kansas recognized a privacy right to abortion based on an "inalienable natural rights" clause in its state constitution, concluding that the clause protects "a woman's right to make decisions about her body, including the decision whether to continue her pregnancy," even though that right was not listed expressly in the constitution's text. *Hodes & Nauser*, 309 Kan at 613.

The Michigan Constitution's Retained Rights Clause similarly protects a pregnant person's fundamental right to abortion. Society and medicine have changed dramatically since 1846 and 1931, when the Criminal Abortion Ban was originally enacted and most recently enacted, respectively. The Ban was enacted based on an antiquated belief that the State should control women's bodies for their own good, no matter how women's lives, autonomy, and roles would be circumscribed as a result. Pregnant people are autonomous individuals with a fundamental right to

[13] See, e.g., *Griswold v Connecticut*, 381 US 479, 484–486; 85 S Ct 1678; 14 L Ed 2d 510 (1965) (recognizing the right of marital privacy and finding the Ninth Amendment is part of the penumbra that creates privacy, along with Fourteenth and other amendments); *id.* at 486 (Goldberg, J., concurring) (emphasizing the importance of the Ninth Amendment in recognizing right to marital privacy); *Roe v Wade*, 410 US 113, 153; 93 S Ct 705; 35 L Ed 2d 147 (1973) (right to privacy "encompass[es] a woman's decision whether or not to terminate her pregnancy," citing the Ninth Amendment as part of the penumbra but basing its holding on the Fourteenth Amendment). See also *Lawrence v Texas*, 539 US 558, 564–566; 123 S Ct 2472; 156 L Ed 2d 508 (2003) (right of same-sex couples to private consensual sexual intimacy, citing, e.g., *Griswold*); *Obergefell v Hodges*, 576 US 644, 663; 135 S Ct 2584; 192 L Ed 2d 609 (2015) (right of same-sex couples to marry, citing, e. g., *Griswold*); *Loving v Virginia*, 388 US 1, 12; 87 S Ct 1817; 18 L Ed 2d 1010 (1967) (personal privacy includes right to marry); *Skinner v Oklahoma ex rel Williamson*, 316 US 535, 541; 62 S Ct 1110; 86 L Ed 1655 (1942) (procreation); *Eisenstadt v Baird*, 405 US 438, 453; 92 S Ct 1029; 31 L Ed 2d 349 (1972) (contraception); *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944) (family relationships and child-rearing); *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10)*, 396 Mich 465, 505–504; 242 NW2d 3 (1976) ("The United States Supreme Court has recognized the presence of constitutionally protected zones of privacy. . . . described as being within penumbras emanating from . . . . the 1st, 3rd, 4th, 5th, 9th and 14th Amendments to the United States Constitution." (Quotation marks omitted.)).

make decisions about their lives and bodies without government interference that puts their health and well-being at risk.

The common law further supports the fundamental right to abortion under the Retained Rights Clause of the Michigan Constitution. Although the common law did not formally recognize a right to reproductive liberty per se, "[i]t is undisputed that at common law, abortion performed before 'quickening'. . . was not an indictable offense." *Roe*, 410 US at 132. "[E]ven post-quickening abortion was never established as a common-law crime." *Id* at 135. So too in Michigan: at common law, abortion was not a crime prior to "quickening." *Nixon*, 42 Mich App at 335 & n 3. Not only was abortion *not* a crime at common law; women had a common law *right* to terminate a pregnancy. As one scholar describes it:

> English and American women enjoyed a *common-law liberty* to terminate at will an unwanted pregnancy, from the reign of Edward II to that of George III. The common-law liberty endured, in England, from 1327 to 1803; in America, from 1607 to 1830 [when states began to criminalize abortion].

Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 NYLF 335, 336 (1971) (emphasis added). The Court in *Roe* characterized the common law as creating a *right* of a woman to terminate a pregnancy. 410 US at 140–141. Recent scholarship thoroughly analyzes the broad common law right to terminate a pregnancy, explaining that "[t]he entitlement to end one's pregnancy before the birth of a child existed in the law of crimes, torts, property, contracts, and equity, read separately and together, long before the United States Supreme Court found it in the Constitution." Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 Buffalo L Rev 1141, 1208 (2015); see also Bernstein, *The Common Law Inside the Female Body* (Cambridge University Press, 2018).

Thus Plaintiffs have shown they are likely to succeed in their claim of constitutional right to abortion under Michigan's Retained Rights Clause.

5. The State Due Process Right to Liberty and Privacy Protects the Right to Abortion

Finally, while lower courts may be bound by the Court of Appeals's holding in *Mahaffey* that the Michigan Constitution's right to privacy does not protect a right to abortion that is separate and distinct from the federal right, 456 Mich App at 334, 345, *Mahaffey* did not have before it the legality of the Criminal Abortion Ban. Moreover, *Mahaffey* insufficiently considered the Michigan Constitution's support for an independent state right to abortion grounded in the liberty and privacy interests protected by the Due Process Clause, Const 1963, art 1, § 17, as detailed below.

It is undisputed that the Michigan Constitution protects a right to privacy. The Michigan Supreme Court "has long recognized privacy to be a highly valued right," and it has stated that "[n]o one has seriously challenged the existence of a right to privacy in the Michigan Constitution." *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10)*, 396 Mich 465, 504; 242 NW2d 3 (1976), citing *De May v Roberts*, 46 Mich 160; 9 NW 146 (1881). The Court has held that protected zones of privacy are found in Article 1 of the Michigan Constitution. *Id.* at 505. And finally, the Court has determined that "[t]he right to privacy includes certain activities which are fundamental to our concept of ordered liberty" and that "[r]ights of this magnitude can only be abridged by governmental action where there exists a 'compelling state interest.'" *Id*., quoting *Roe*, 410 US at 155.

The Michigan Supreme Court has never explicitly addressed whether the state right to privacy includes the right to abortion. See *Doe*, 439 Mich at 669–670 (summarizing arguments on "both sides concerning the existence of a separate state right to an abortion" but finding it "unnecessary to decide [the] issue" given that the federal right to abortion resolved the case); see

also *Bricker*, 389 Mich at 527–528; *People v Nixon*, 389 Mich 809 (1973). However, the Court of Appeals has twice considered whether an independent right to abortion exists under the Michigan Constitution and has come out both ways.

In 1991, the Court of Appeals explicitly found that the Michigan Constitution protects the right to abortion. *Doe v Dir of Dep't of Social Servs*, 187 Mich App 493, 508; 468 NW2d 862 (1991), rev'd on other grounds 439 Mich 650; 487 NW2d 166 (1992). The plaintiff in *Doe* challenged the constitutionality, on due process and equal protection grounds, of a statute prohibiting the use of public funds to pay for an abortion unless necessary to save the pregnant person's life. Although deciding that there was no right to a *funded* abortion, *id.* at 499, 520, 529, the Court of Appeals explicitly concluded that the Michigan Constitution "affords a right to an abortion," *id.* at 508, based on the right to privacy that "[o]ur own Supreme Court acknowledged . . . under the United States Constitution and also found [] to be a right under the Michigan Constitution," *id*. (citing the right to privacy established in *De May*). The Court of Appeals then concluded that the statute violated the Equal Protection Clause of the Michigan Constitution and did not address whether it also violated the state due process right to abortion. *Id.* at 534–535. The Supreme Court reversed that decision but, as it only reviewed the equal protection claims, it did not reach the question whether the Due Process Clause of the Michigan Constitution protects the right to abortion. *Doe*, 439 Mich at 670.

By contrast, in *Mahaffey*, the Court of Appeals concluded that "the right of privacy under the Michigan Constitution does not include the right to abortion." 222 Mich App at 345. Following the Court of Appeals's decision in *Mahaffey*, the Supreme Court denied leave to appeal, 456 Mich 948 (1998), so again it did not address the constitutional question.

Other state courts have recognized a right to abortion stemming from their state constitutional rights to liberty and privacy. See, e.g., *Planned Parenthood of the Heartland ex rel State v Reynolds*, 915 NW2d 206, 237 (Iowa, 2018) (holding that "under the Iowa Constitution, . . . implicit in the concept of ordered liberty is the ability to decide whether to continue or terminate a pregnancy"); *Armstrong v State*, 296 Mont 361, 379; 989 P2d 364 (1999) ("Montana's constitutional right of individual privacy" guarantees "a woman's right to seek and obtain pre-viability abortion"); *Am Academy of Pediatrics v Lundgren*, 16 Cal 4th 307, 327; 940 P2d 797 (1997) (holding that "the right of a pregnant woman to choose whether to . . . have an abortion," is a "right of privacy" under the state constitution); *Hope v Perales*, 83 NY2d 563, 575; 634 NE2d 183 (1994) ("[T]he fundamental right of reproductive choice[] [is] inherent in the due process liberty right guaranteed by our State Constitution . . . ."); *Doe v Maher*, 40 Conn Supp 394, 426; 515 A2d 134 (1986) ("Surely, the state constitutional right to privacy includes a woman's guaranty of freedom of procreative choice.").[14]

This is an unsettled area of Michigan law. Despite the Supreme Court's silence, abortion falls squarely within the zone of privacy that is protected under Michigan's constitution, and the question of whether the right to abortion is part of the state due process right to liberty and privacy is ripe for Michigan Supreme Court review.

Assuming the Michigan Constitution protects a fundamental liberty and privacy right to abortion, the Criminal Abortion Ban's intrusion on that right is unconstitutional unless it is

[14] See also *Valley Hosp Ass'n v Mat-Su Coalition for Choice*, 948 P2d 963, 964, 968–969 (Alas, 1997) (striking down abortion restriction for violating Alaska's "fundamental right to [] abortion . . . encompassed within" the state's right-to-privacy constitutional protection); *In re TW*, 551 So 2d 1186, 1192–1193 (Fla, 1989) ("Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy."); *Right to Choose v Byrne*, 91 NJ 287, 303–304; 450 A2d 925 (1982) (acknowledging a state-law right to choose whether to carry a pregnancy to term or to have an abortion).

narrowly tailored to advance a compelling state interest. *Doe*, 439 Mich at 662; *Phillips v Mirac, Inc*, 470 Mich 415, 432–433; 685 NW2d 174 (2004). The Court of Appeals has already observed that the Criminal Abortion Ban's purpose—to protect pregnant people from unsafe abortions—is insufficient to justify the Criminal Abortion Ban given that abortion is safe as provided by licensed clinicians in Michigan. *Nixon*, 42 Mich App at 339; see also *supra* p 9. Accordingly, Plaintiffs are ultimately likely to prevail on their claim that the Ban does not survive strict scrutiny.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION

The prospective harm to a plaintiff is "evaluated in light of the totality of the circumstances affecting, and the alternatives available to," the party seeking injunctive relief. *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 166–167; 365 NW2d 93 (1984). Plaintiffs here seek relief to maintain the status quo while the courts decide the constitutional questions presented. Absent an injunction, Plaintiffs will face legal uncertainty without protection from investigations, prosecutions, and administrative penalties for providing constitutionally protected abortions, and Plaintiffs' patients will face a risk of irreparable injury from the violation of their constitutional rights. "[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Am Civil Liberties Union of Ky v McCreary Co*, 354 F3d 438, 445 (CA 6, 2003), citing *Elrod v Burns*, 427 US 347, 373; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (holding that in an area of fundamental constitutional rights, the loss of constitutional rights "for even minimal periods of time[] unquestionably constitutes irreparable injury"); see also *Roman Catholic Diocese of Brooklyn v Cuomo*, ___ US ___; 141 S Ct 63, 67; 208 L Ed 2d 206 (2020) (per curiam).

Without fair notice of what the Criminal Abortion Ban prohibits, and given the possibility that the Ban could be enforced any day now, Plaintiffs face irreparable harm including potential

arrest, prosecution, and more for violating the Criminal Abortion Ban. Unless this Court enters injunctive relief preserving the status quo, Plaintiffs may be forced to cease providing abortions altogether, thus depriving people of access to abortion and forcing many to carry their pregnancies to term against their will.

III. AN INJUNCTION WILL NOT INJURE DEFENDANT

Defendant, the Attorney General of the State of Michigan, is responsible for defending and enforcing the laws of the state, as well as supervising all Michigan county prosecutors. MCL 14.28–14.30; Const 1963, art 5, §§ 1, 3; see *Platinum Sports Ltd v Snyder*, 715 F3d 615, 619 (CA 6, 2013) (explaining that "local prosecutors . . . answer to the Attorney General").

In contrast to the harm that Plaintiffs and their patients will suffer absent an injunction, Defendant will incur no harm from an order maintaining the status quo while Michigan courts determine the scope of the Criminal Abortion Ban and its legality under the Michigan Constitution. *Gates v Detroit & M R Co*, 151 Mich 548, 551; 115 NW 420 (1908) ("The object of preliminary injunctions is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either."). An injunction would align with the expectations, reliance, and actions of people in Michigan for nearly fifty years.

Indeed, preserving the status quo benefits all parties. Leaving the Criminal Abortion Ban open to conflicting interpretations while this case is pending could require Defendant and state officials under her direction to expend public resources without the benefit of a ruling on the statute's constitutionality. All parties therefore have an interest in the clarification of their rights and obligations under the Criminal Abortion Ban. Cf *Duke Power Co v Carolina Environmental Study Group, Inc*, 438 US 59, 82; 98 S Ct 2620; 57 L Ed 2d 595 (1978).

IV. THE PUBLIC INTEREST IS SERVED AND NOT HARMED BY AN INJUNCTION

The public interest lies with protecting the rights of Michiganders and ensuring the

vindication of their civil rights. See *Barczak v Rockwell Int'l Corp*, 68 Mich App 759, 765; 244 NW2d 24 (1976) (finding that a "state . . . ha[s] strong public policies in favor of remedying any violation of an individual's civil rights"); *Liberty Coins, LLC v Goodman*, 748 F3d 682, 690 (CA 6, 2014) (recognizing that it is "always in the public interest to prevent the violation of a party's constitutional rights" (citation omitted)).

The public interest is not served by uncertainty regarding Plaintiffs' and their patients' fundamental constitutional rights. Nor would it be served by expending public resources to investigate and prosecute Plaintiffs for providing abortion—safe, common, and essential health care that people in Michigan have relied on for decades. And it is certainly not in the public interest to leave the Criminal Abortion Ban free to be enforced as written, devastating the health and futures of thousands of Michiganders.

CONCLUSION

For the reasons set forth above, the Court should enter a preliminary injunction, consistent with *Bricker*, restraining Defendant, her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, including all persons supervised by Defendant, from enforcing or giving effect to MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person.

Respectfully submitted,

/s/ *Deborah LaBelle*

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ATTORNEYS FOR PLAINTIFFS

Dated: April 7, 2022

EXHIBIT 1

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.
_____/

Case No.

Hon.

AFFIDAVIT OF SARAH WALLETT, M.D., M.P.H., FACOG, IN SUPPORT OF PLAINTIFFS' APRIL 7, 2022 MOTION FOR PRELIMINARY INJUNCTION

I, Sarah Wallett, M.D., M.P.H., FACOG, being duly sworn on oath, do depose and state as follows:

1. I am a board-certified obstetrician-gynecologist licensed in Michigan and the Chief Medical Officer of Planned Parenthood of Michigan (PPMI). Along with PPMI, I am a plaintiff in this case.

2. I went to medical school because I was raised to understand that it was my duty to help people in need. In service of that duty, I began providing abortion to patients in Michigan in 2009, and I continue to do so today. This medical care is life-changing and, in many circumstances, life-saving. Indeed, I believe that providing abortion is the most important thing I will ever do.

3. I understand that a 1931 Michigan statute bans abortion, even in cases of rape, incest, or grave threats to the pregnant person's health. I understand that if this law (the "Criminal Abortion Ban") were enforced as written, I could be criminally prosecuted for providing an

abortion at any point in pregnancy, unless the abortion is necessary to save the pregnant person's life. I understand that the Michigan Supreme Court has said that I cannot be prosecuted for providing pre-viability abortion, but if the Criminal Abortion Ban can be enforced as written, I believe I am at risk of possible prosecution—and at risk of losing my medical license—if I continue to provide abortion to my patients.

4. I understand that the Michigan Supreme Court has discussed this law before and ruled that physicians cannot be prosecuted under the Criminal Abortion Ban because the federal constitution protects the right to choose to terminate a pregnancy, as recognized in *Roe v Wade*. This interpretation is what allows me to provide abortion in Michigan today. But should the United States Supreme Court modify those federal protections—which I understand it may do any day now, in the *Dobbs v Jackson Women's Health Organization* case—the Michigan Supreme Court's decision may no longer protect physicians like me from felony prosecution under the Criminal Abortion Ban.

5. My patients' lives and my own would be profoundly disrupted if the Criminal Abortion Ban were enforced to criminalize abortion in Michigan. So would the lives of other Michigan physicians who provide abortion, and of the staff who assist us in doing so. Accordingly, I submit this affidavit in support of the motion for a preliminary injunction to preserve my patients' access to this essential health care and to protect PPMI, myself, and physicians like me from felony prosecution and other civil and administrative penalties.

6. The facts I state here and the opinions I offer are based on my education, my training, my years of medical practice, my expertise as a doctor and specifically as an abortion provider, my personal knowledge, information obtained through the course of my duties at PPMI, and my familiarity with relevant medical literature and statistical data recognized as reliable in the medical profession.

My Education and Professional Background

7. I graduated from Jefferson Medical College (which has since been renamed Sidney Kimmel Medical College) at Thomas Jefferson University in 2009 and completed my residency in obstetrics and gynecology (OB/GYN) at the University of Michigan Medical School in 2013. After residency, I completed a two-year fellowship in complex family planning at the University of Michigan Medical School. While pursuing this fellowship, I also obtained a Master of Public Health degree from the University of Michigan, focusing specifically on health policy.

8. Following my fellowship, I worked as a professor at the University of Kentucky during the 2015–16 term. I then served as Medical Director at Planned Parenthood of the Greater Memphis Region. When that affiliate merged with another to become Planned Parenthood of Tennessee and North Mississippi, I became the Chief Medical Officer of the newly merged affiliate.

9. I became Chief Medical Officer at PPMI, my current role, in March 2019. I also currently serve as an adjunct clinical assistant professor at the University of Michigan Medical School, training University of Michigan medical students, OB/GYN residents, family medicine residents, family medicine fellows, and OB/GYN fellows on site at PPMI's health centers. Finally, I am the current president of the council of Planned Parenthood affiliate medical directors, which supports medical directors in ensuring high-quality clinical care at Planned Parenthood health centers nationwide.

10. A copy of my *curriculum vitae* is attached as Exhibit A.

Planned Parenthood of Michigan

11. PPMI is a not-for-profit corporation headquartered in Ann Arbor that currently operates 14 health centers across Michigan, in Ann Arbor, Detroit, Ferndale, Flint, Grand Rapids, Jackson, Kalamazoo, Lansing, Livonia, Marquette, Petoskey, Traverse City, and Warren. PPMI or

its predecessors have been operating in Michigan since at least 1922. PPMI is not the only abortion provider in the state; I know that other physicians and hospitals also provide medication abortion and procedural abortion in Michigan.

12. PPMI's health centers provide a wide range of reproductive and sexual health services to patients, including testing and treatment for sexually transmitted infections (STIs), contraception counseling and provision including provision of long-acting reversible contraceptive (LARC) devices, HIV prevention services, pregnancy testing and options counseling, preconception counseling, gynecologic services including menopause care, well-person exams, cervical cancer screening, treatment of abnormal cervical cells, breast cancer screening, colposcopy, miscarriage management, and abortion.

13. PPMI's health centers provide medication abortion through 11 weeks, or 77 days, from the first day of the pregnant person's last menstrual period (LMP). Additionally, PPMI's Ann Arbor East and Kalamazoo health centers provide procedural abortion through 19 weeks, 6 days LMP, and our Flint health center provides procedural abortion through 16 weeks, 6 days LMP. Each of these three health centers is licensed as a Freestanding Outpatient Surgical Facility by the Michigan Department of Licensing and Regulatory Affairs. In Fiscal Year 2020 (October 2019 through September 2020), PPMI provided 8,448 abortions. Of those, 6,626 were medication abortions, and 1,822 were procedural abortions.

14. Michigan law creates multiple obstacles that patients must navigate to access abortion here. For example, patients must receive state-mandated information designed to deter them from deciding to have an abortion, then wait 24 hours before initiating their abortion.[1] Minor patients must obtain either written parental consent or permission from a judge before having an

[1] See MCL 333.17015(3).

abortion.[2] And private insurance and insurance obtained through the health care exchanges under the Affordable Care Act can only cover abortion if the patient's life is endangered (or, for private insurance, if a rider was purchased).[3] As an abortion provider in Michigan, I comply with these requirements because they are mandated by law, but none of the requirements is medically necessary or does anything to make my patients healthier or safer.

15. PPMI employs full-time physicians and part-time physicians, as well as physicians who perform contracted work through arrangements with teaching hospitals and universities. All physicians employed by PPMI currently have admitting privileges at the University of Michigan Hospital in Ann Arbor.

16. As Chief Medical Officer at PPMI, I have clinical, administrative, and managerial responsibilities. On the clinical side, as discussed in more detail below, I provide patients with both medication abortion and procedural abortion. I also provide contraception and contraceptive counseling, STI screening and treatment, and miscarriage management. When a patient presents with a complex contraceptive case or requires certain gynecological procedures such as colposcopy, I provide that care as well.

17. I see abortion patients from Michigan as well as abortion patients who travel to Michigan from other states. Between July 2020 and June 2021, PPMI saw 615 abortion patients who traveled to our health centers from other states—7% of the total number of abortion patients seen in that time period. By comparison, in that same time frame, 3% of the patients PPMI saw for all health care services (including abortion) came from out of state.

18. In addition to caring for patients, as Chief Medical Officer I oversee all clinical care and operations at PPMI. This entails supervising more than 10 physicians; more than 20 clinicians;

[2] MCL 722.903–722.904.
[3] MCL 550.541–550.551.

licensed and non-licensed health center staff; and a rotating set of medical students, residents, and fellows who come to PPMI to complete training in abortion and other health care. I also oversee staff's training, proctoring, and annual assessments of their clinical skills.

Pregnancy Has Significant Medical, Financial, and Personal Consequences

19. To understand why abortion matters, it is important first to understand all the ways in which pregnancy affects a person, both during the pregnancy itself and for years afterward.

20. People experience their pregnancies in a range of different ways. While pregnancy can be a celebratory and joyful event for many families, even an uncomplicated pregnancy challenges a person's entire physiology and stresses most major organs. Pregnancy can also be a period of physical and personal discomfort or even alienation; some pregnant people experience significant mental health challenges. For some, such as pregnant people who are transmasculine, nonbinary, or gender-nonconforming, pregnancy can cause dysphoria, a state of unease or general dissatisfaction with life.

21. Pregnancy and childbirth carry significant medical risk. Maternal mortality is a serious problem in the United States. Although most maternal deaths are preventable, maternal mortality rates in this country are rising.[4] The risk of death associated with childbirth is estimated to be 8.8 deaths per 100,000 live births, and the overall risk of maternal mortality[5] is estimated to

[4] Commonwealth Fund, *Maternal Mortality and Maternity Care in the United States Compared to 10 Other Developed Countries* (2020), available at <https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/maternal-mortality-maternity-care-us-compared-10-countries>.

[5] As used in this statistic, "maternal mortality" refers to "the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and the site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes." Hoyert, *Maternal Mortality Rates in the United States, 2020*, Ctrs for Disease Control & Prevention (CDC), Nat'l Ctr for Health Statistics, Div of Vital Statistics (2022), p 1, available at <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf>.

be 23.8 deaths per 100,000 live births.[6] For comparison, less than one woman dies for every 100,000 abortion procedures.[7]

22. Women of color, and Black women in particular, face heightened risks of maternal mortality and pregnancy-related complications compared to non-Hispanic white women.[8] This disparity between the maternal mortality rates for women of color and non-Hispanic white women has been exacerbated in the past year.[9] Specifically, recent research found that the maternal mortality rate among non-Hispanic Black women was 3.55 times that of non-Hispanic white women, a dramatic increase from previous analysis.[10] Postpartum cardiomyopathy, preeclampsia, and eclampsia were leading causes of maternal death for non-Hispanic Black women, with mortality rates five times those of non-Hispanic white women with the same conditions.[11] Pregnant and postpartum non-Hispanic Black women were also more than two times more likely than non-Hispanic white women to die of hemorrhage or embolism.[12] The study also found that late maternal deaths—those occurring between six weeks and one year postpartum—were 3.5 times more likely among non-Hispanic Black women than non-Hispanic white women.[13] Postpartum cardiomyopathy was the leading cause of late maternal death among all races, with non-Hispanic Black women having a risk of death six times higher than non-Hispanic white women.[14]

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[6] *Id.*

[7] CDC, *Abortion Surveillance — United States, 2019*, 70 Surveillance Summaries 1, 8 (2021), available at <https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf?>.

[8] Hoyert, *supra* note 5, at 1, 3–4.

[9] *Id.* at 3–4.

[10] MacDorman et al, *Racial and Ethnic Disparities in Maternal Mortality in the United States Using Enhanced Vital Records, 2016–17*, 111 Am J Pub Health 1673, 1673, 1676, 1678 tbl 2 (2021).

[11] *Id.* at 1678 tbl 2.

[12] *Id.*

[13] *Id.* at 1676.

[14] *Id.*

23. Every pregnancy necessarily involves significant physical change. A typical pregnancy generally lasts roughly 40 weeks LMP. During that time, the pregnant person experiences a dramatic increase in blood volume, as well as an increase in heart rate and in the amount of blood pumped with each heartbeat. Due to hormonal changes, the pregnant person's body produces more of the substances that cause blood to clot. The depth of each breath increases as well. The enlarging uterus and hormones produced by the placenta slow the patient's gastrointestinal tract and put pressure on the urinary tract.

24. As a result of these changes and others, pregnant individuals are more prone to blood clots, nausea and vomiting, dyspnea (breathing discomfort), hypertensive disorders, urinary tract infections, and anemia, among other complications.[15] Pregnant individuals are also at greater risk of certain infections.[16] Many of these complications are mild and resolve without the need for medical intervention. Some, however, require evaluation and occasionally urgent or emergent care to preserve the patient's health or save their life.

25. Pregnancy may aggravate preexisting health conditions such as hypertension and other cardiac disease, diabetes, kidney disease, autoimmune disorders, obesity, asthma, and other pulmonary disease. In 2020, approximately 14.6% of Michigan women had asthma;[17] an estimated 32.1% of Michigan women have hypertension, or 27.6% when adjusted for age, based on combined data from 2015 and 2017.[18]

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[15] Bruce et al, *Maternal Morbidity Rates in a Managed Care Population*, 111 Obstetrics & Gynecology 1089, 1092 (2008).

[16] See *id.* at 1091 tbl 1.

[17] Tian, *Prevalence Estimates for Risk Factors and Health Indicators, State of Michigan, Selected Tables, Michigan Behavioral Risk Factor Survey, 2020*, Mich Dep't of Health & Human Servs, Lifecourse Epidemiology & Genomics Div (2021), pp 8, 31 tbls 5, 28, available at <https://www.michigan.gov/documents/mdhhs/2020_BRFS_Tables_736718_7.pdf>.

[18] Mich Dep't of Health & Human Servs, *Estimated Hypertension Prevalence among Michigan Adults (2015 and 2017 Combined)*, p 1, available at https://www.michigan.gov/

26. Other health conditions may arise for the first time during pregnancy, such as preeclampsia, pregnancy-induced hypertension, deep-vein thrombosis, and gestational diabetes. Without adequate treatment, preeclampsia places the pregnant person at significant risk of cerebral hemorrhage (stroke), as well as liver dysfunction or failure, kidney failure, temporary or permanent vision loss, coma, and death. Patients with preeclampsia can also experience eclampsia, characterized by grand mal seizures. Many of these pregnancy-induced conditions are more common later in pregnancy. People who develop a pregnancy-induced medical condition are at higher risk of developing the same condition in a subsequent pregnancy.

27. Sometimes the nausea and vomiting commonly associated with "morning sickness" develops into a syndrome known as hyperemesis gravidarum. Hyperemesis gravidarum is characterized by vomiting so severe that it may result in dangerous weight loss; dehydration; acidosis from starvation; or hypokalemia, a potentially dangerous condition caused by a lack of potassium that can trigger psychosis, delirium, hallucinations, and abnormal heart rhythms, among other things. Pregnant people with this condition may require multiple hospital admissions throughout pregnancy.

28. Many pregnant people seek care in the emergency department at least once during pregnancy. People with comorbidities (including both people with preexisting comorbidities and those who develop comorbidities as a result of their pregnancy), such as asthma, obesity, hypertension, or diabetes, are significantly more likely to seek emergency care.

29. A relatively common complication of pregnancy is ectopic pregnancy, which occurs when a fertilized egg implants anywhere other than in the endometrial lining of the uterus, usually in a fallopian tube. If an ectopic pregnancy ruptures, it can kill the pregnant person;

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documents/mdhhs/HTN_Prevalence_MI_Adults_MI_BRFS_2015-2017_699103_7.pdf (accessed April 4, 2022).

ruptured ectopic pregnancy is a significant cause of pregnancy-related mortality and morbidity, and it is the leading cause of obstetric hemorrhage-related mortality. Ectopic pregnancies can also lead to scarring of the fallopian tube, leading in turn to fertility issues, and can compromise other organs.

30. Every pregnancy also carries a risk of miscarriage, as well as a risk of preterm premature rupture of membranes—in other words, the bag of waters surrounding the pregnancy breaking dangerously early. Complications from miscarriage can lead to infection, hemorrhage,[19] and even death. By comparison, the risk of death following a miscarriage is roughly twice the risk of death following an abortion (the risk of death following abortion is approximately 0.7 deaths per 100,000 procedures).[20]

31. Mental health conditions may emerge for the first time during pregnancy or in the postpartum period.[21] A person with a history of mental illness may also experience a recurrence of their illness, likely as a result of the hormonal and neurochemical changes their body is experiencing, and/or as a result of stress and anxiety relating to the pregnancy.[22] Additionally, a person taking medication to manage a mental health condition may choose to discontinue or modify their medication regimen to avoid risking harm to the fetus—thereby increasing the

[19] Am College Obstetricians & Gynecologists (ACOG), Practice Bulletin No 200, *Early Pregnancy Loss* (Nov 2018), p e201, available at <https://static1.squarespace.com/static/5d3a2e1399c0960001b14452/t/5dc2031df1ffb26c011ff481/1572995870418/ACOG+EPL+Bulletin_update.pdf>.

[20] Nat'l Academies of Sciences, Engineering, & Med, *The Safety & Quality of Abortion Care in the United States* (2018), p 75 tbl 2-4.

[21] Yonkers et al, *Diagnosis, Pathophysiology, and Management of Mood Disorders in Pregnant and Postpartum Women*, 117 Obstetrics & Gynecology 961, 963 (2011); see also Bruce et al, *supra* note 15, at 1093.

[22] Yonkers, *supra* note 21, at 964–67.

likelihood that they will experience a recurrence of their mental illness.[23] Pregnant people with a prior history of mental health conditions also face a heightened risk of postpartum mental illness.[24]

32. Separate from pregnancy, childbirth itself is a significant medical event.[25] Even a normal pregnancy can suddenly become life-threatening during labor and delivery, when 20% of the pregnant person's blood flow is diverted to the uterus. This increased blood flow places the patient at risk of hemorrhage and, in turn, death; indeed, hemorrhage is the leading cause of severe maternal morbidity.[26] As mentioned above, during pregnancy—to try to protect against hemorrhage—the body produces more clotting factors, which increases the pregnant person's risk of developing blood clots or embolisms. This heightened risk of blood clots extends past delivery into the postpartum period.

33. People who undergo labor and delivery can experience other unexpected adverse events such as transfusion, perineal laceration, ruptured uterus, and unexpected hysterectomy.

34. In 2017, approximately 31.9% of Michigan deliveries were by cesarean section (C-section),[27] an open abdominal surgery requiring hospitalization for at least a few days. While common, C-sections carry risks of hemorrhage, infection, and injury to internal organs.

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[23] See, e.g., Diav-Citrin et al, *Pregnancy Outcome Following In Utero Exposure to Lithium: A Prospective, Comparative, Observational Study*, 171 Am J of Psychiatry 785, 789–90 (2014) (finding increased risk of cardiovascular anomalies among lithium-exposed pregnancies).

[24] Marcus, *Depression During Pregnancy: Rates, Risks and Consequences*, 16 J Population Therapeutics & Clinical Pharmacology e15, e18–e19 (2009).

[25] See, e.g., Mich Dep't of Health & Human Servs, Div for Vital Records & Health Statistics, *Number of Live Births by Maternal Morbidity and Onset of Labor by Race and Ancestry of Mother, Michigan Residents, 2020* <https://www.mdch.state.mi.us/osr/natality/MorbidityRaceNo.asp> (accessed April 4, 2022); Mich Dep't of Health & Human Servs, *Overview of Severe Maternal Morbidity in Michigan 2011–2019* (2021), available at <https://www.michigan.gov/documents/mdhhs/SMM_Report_Final_10.5.21_737494_7.pdf>.

[26] ACOG, Practice Bulletin No 183, *Postpartum Hemorrhage*, 130 Obstetrics & Gynecology e168, e168 (2017).

[27] CDC, Nat'l Ctr for Health Statistics, *Stats of the State of Michigan* (April 11, 2018) <https://www.cdc.gov/nchs/pressroom/states/michigan/michigan.htm> (accessed April 4, 2022).

Meanwhile, a vaginal delivery often leads to injury, such as injury to the pelvic floor. This can have long-term consequences, including fecal or urinary incontinence.

35. Pregnancy and childbirth are expensive. Pregnancy-related health care and childbirth are some of the costliest hospital-based health services.[28] On average, vaginal birth costs over $15,300, and a C-section costs over $20,400—and costs can be much higher for complicated or at-risk pregnancies.[29] I am aware of physicians in private practice who routinely help their obstetric patients create payment plans to afford the cost of labor and delivery.

36. While insurance may cover most of these expenses, many pregnant patients with insurance must still pay for significant labor and delivery costs out of pocket. A recent study found that 98% of women on employer-sponsored insurance had to pay out-of-pocket costs from childbirth.[30] Out-of-pocket costs today average around $4,314 for vaginal deliveries and $5,161 for C-sections.[31]

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[28] Allsbrook & Ahmed, *Building on the ACA: Administrative Actions to Improve Maternal Health*, (March 25, 2021), Ctr for Am Progress <https://www.americanprogress.org/article/building-aca-administrative-actions-improve-maternal-health>/ (accessed April 4, 2022), citing Wier & Andrews, Healthcare Cost & Utilization Project, Statistical Brief #107, *The National Hospital Bill: The Most Expensive Conditions by Payer, 2008* (2011), available at <https://www.hcup-us.ahrq.gov/reports/statbriefs/sb107.jsp>.

[29] *Id.*, citing Sonfield, *No One Benefits If Women Lose Coverage for Maternity Care*, Guttmacher Institute (2017), available at <https://www.guttmacher.org/gpr/2017/06/no-one-benefits-if-women-lose-coverage-maternity-care>. Some sources show even higher rates for both vaginal delivery and C-section. See, e.g., Truven Health Analytics, *The Cost of Having a Baby in the United States* (2013), p 6, available at <https://www.nationalpartnership.org/our-work/resources/health-care/maternity/archive/the-cost-of-having-a-baby-in-the-us.pdf> (finding the "average total charges for care with vaginal and cesarean births" among "women and newborns with employer-provided Commercial health insurance" to be "$32,093 and $51,125, respectively").

[30] Moniz et al, *Out-of-Pocket Spending for Maternity Care Among Women with Employer-Based Insurance, 2008-15*, 39 Health Affairs 18, 20 (2020).

[31] *Id.*

37. Of course, the financial burdens of pregnancy and childbirth weigh even more heavily on people without insurance, who are disproportionately people of color,[32] and on people with unintended pregnancies, who may not have sufficient savings to cover pregnancy-related expenses.[33] Almost half of the pregnancies in the U.S. are unintended, and people of color and people with low incomes experience unintended pregnancy at a disproportionately higher rate,[34] in large part due to systemic barriers to contraceptive access.[35] According to the Federal Reserve, nearly 40% of Americans cannot cover an unexpected $400 expense.[36] Roughly 14% of people of reproductive age do not have health insurance,[37] and even more are under-insured, meaning they lack full coverage for needed services[38] and may need to pay out-of-pocket. A costly pregnancy, particularly for people already facing an array of economic hardships, could have long-term and severe impacts on a family's financial security.[39]

38. Pregnant people may also face an increased risk of intimate partner violence. According to the American College of Obstetricians and Gynecologists (ACOG), "the severity of

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[32] Allsbrook & Ahmed, *supra* note 28.

[33] *Id.*

[34] Guttmacher Institute, *Unintended Pregnancy in the United States* (2019), p 1, available at <https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf>.

[35] ACOG, Committee Opinion No 615, *Access to Contraception* (2015), p 5, available at <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2015/01/access-to-contraception.pdf>; Sudhinaraset et al, *Women's Reproductive Rights Policies and Adverse Birth Outcomes: A State-Level Analysis to Assess the Role of Race and Nativity Status*, 59 Am J Preventive Med 787, 788 (2020).

[36] Bd of Governors of the Fed Reserve Sys, *Report on the Economic Well-Being of U.S. Households in 2018 - May 2019* (May 28, 2019), available at <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm>.

[37] Adam Sonfield, *Uninsured Rate for People of Reproductive Age Ticked up Between 2016 and 2019*, Guttmacher Institute (April 1, 2021), available at <https://www.guttmacher.org/print/article/2021/04/uninsured-rate-people-reproductive-age-ticked-between-2016-and-2019>.

[38] Allsbrook & Ahmed, *supra* note 28.

[39] See *id.*

intimate partner violence may sometimes escalate during pregnancy or the postpartum period,"[40] and "[h]omicide has been reported as a leading cause of maternal mortality, with the majority perpetrated by a current or former intimate partner."[41] According to the U.S. Centers for Disease Control and Prevention (CDC), 36.1% of Michigan women experience contact sexual violence,[42] physical violence, and/or stalking victimization by an intimate partner in their lifetime.[43] An estimated 51.9% of Michigan women—approximately 2,028,000 women—experience psychological aggression from an intimate partner in their lifetime.[44] Women who have experienced intimate partner violence and who give birth after being unable to access a desired abortion will, in many cases, face increased difficulty escaping that relationship.[45]

39. A person carrying a pregnancy to term may also experience post-pregnancy mental health issues. According to a reported systematic review of the literature, the global prevalence of postpartum depression among healthy women without a history of depression and who give birth to healthy full-term infants is about 17%.[46] In 2018, 13.4% of Michigan women reported experiencing symptoms of depression since giving birth.[47] Similarly, a reported systematic review

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[40] ACOG, Committee Opinion No 518, *Intimate Partner Violence* (2012, reaff'd 2019), p 2, available at <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2012/02/intimate-partner-violence.pdf>.

[41] *Id.*

[42] The CDC defines this term as "a combined measure that includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact." Smith et al, CDC, Nat'l Ctr for Injury Prevention & Control, *The National Intimate Partner and Sexual Violence Survey, 2010–2012 State Report* (2017), p 19, available at <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf.>

[43] *Id.* at 128 tbl 5.7.

[44] *Id.* at 134 tbl 5.9.

[45] See Roberts et al, *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC Med 144, 149 (2014).

[46] Shorey et al, *Prevalence and Incidence of Postpartum Depression Among Healthy Mothers: A Systematic Review and Meta-Analysis*, 104 J Psychiatric Research 235, 238 (2013).

[47] Mich Dep't Health & Human Servs, *Pregnancy-Related Depression* (July 2018), p 1, available at <https://www.michigan.gov/documents/mdhhs/Pregnancy_Related_Depression_APPROVED_alt_text_7.18.2018_628203_7.pdf>.

of the literature examining the prevalence of anxiety disorders among postpartum women estimated that approximately 8.5% of postpartum women experience one or more anxiety disorders.[48]

40. Beyond childbirth, raising a child is expensive, both in terms of direct costs and due to lost wages. On average, women experience a large and persistent decline in earnings following the birth of a child, an economic loss that compounds the additional costs associated with raising a child, which typically exceed $9,000 in annual expenses.[49] In Michigan, the cost of child care for a parent with two children in a Michigan child care center is approximately $18,600 a year—exceeding the average annual cost of rent ($9,900) or a mortgage ($15,000).[50]

41. Given the impact of pregnancy and childbirth on a person's mental and physical health, finances, and personal relationships, whether to become or remain pregnant is one of the most personal and consequential decisions a person will make in their lifetime. Certainly, many people decide that adding a child to their family is well worth all of these risks and consequences. But no one should be forced to assume those risks involuntarily. As discussed below, I am gravely concerned that if abortion becomes unavailable in Michigan—as might happen any day now—thousands of pregnant people in this state will be forced to do so.

Background on Abortion

42. Abortion is one of the safest and most common medical services performed in the United States today. Indeed, abortion carries far fewer risks than childbirth. A woman's risk of

[48] Goodman, Watson, & Stubbs, *Anxiety Disorders in Postpartum Women: A Systematic Review and Meta-Analysis,* 203 J of Affective Disorders 292, 328 & tbl 8 (2016).

[49] Miller, Wherry, & Foster, *The Economic Consequences of Being Denied an Abortion*, NBER Working Paper No 26662 (revised January 2022), p 2, available at <https://www.nber.org/system/files/working_papers/w26662/w26662.pdf>.

[50] Mich League for Pub Policy, *2021 Budget Priority: Help Parents with Low Wages Find Affordable Child Care* (2019), p 1, available at <https://mlpp.org/wp-content/uploads/2019/07/2021-budget-priority-child-care-pat.pdf>.

death associated with childbirth, specifically, is more than 12 times higher than that associated with abortion,[51] and the total risk of maternal mortality is 34 times higher than the risk of death associated with abortion.[52] Every pregnancy-related complication is more common among women having live births than among those having abortions.[53] Of the 29,669 induced abortions in Michigan in 2020, the Michigan Department of Health reported just seven immediate complications.[54] The average three-year rate of immediate abortion complications between 2017 and 2019 was 3.5 per 10,000 induced abortions: just 0.035%.[55] Approximately one in four women in this country will have an abortion by age forty-five.[56]

43. There are two general categories of methods used to provide abortion: medication abortion and procedural abortion.[57]

44. For early medication abortion, patients take a regimen of two prescription drugs approved by the U.S. Food and Drug Administration (FDA): mifepristone, which blocks progesterone, a hormone necessary to continue a pregnancy; and misoprostol, which softens the cervix and causes the uterus to contract and empty. Patients first take the mifepristone, then 0 to

[51] Nat'l Academies of Sciences, Engineering, & Med, *supra* note 20, at 75 tbl. 2-4 (finding a mortality rate of 0.7 per 100,000 procedures for abortion and a mortality rate of 8.8 per 100,000 live births for childbirth).

[52] Hoyert, *supra* note 5, at 1 (finding an overall maternal mortality rate of 23.8 per 100,000 live births).

[53] Raymond & Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 216–17 & fig 1 (2012).

[54] Mich Dep't of Health, Div for Vital Records & Health Stats, *Table 22, Number, Percent and Rate of Reported Induced Abortions with Any Mention of Immediate Complication by Type of Immediate Complication, Michigan Occurrences, 2020* <https://www.mdch.state.mi.us/osr/abortion/Tab_13.asp> (accessed April 4, 2022).

[55] *Id.*

[56] Jones & Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am J Pub Health 1904, 1904, 1908 (2017).

[57] The only other medically-proven method of abortion is induction. Induction abortion uses medications to induce labor in a hospital, but accounts for only a small percentage of abortions in the United States.

48 hours later, they take the misoprostol at a location of their choosing, typically at home. Together, the medications cause the pregnancy to pass in a process similar to miscarriage.

45. The use of mifepristone in combination with misoprostol is evidence-based and widely used to terminate pregnancies through 11 weeks (or 77 days) LMP. Accordingly, through 11 weeks LMP, patients wishing to terminate their pregnancies may choose between medication and procedural abortion. After 11 weeks LMP, only procedural abortion is generally available.

46. For procedural abortion, a clinician uses instruments and/or medication to widen the patient's cervical opening and to evacuate the contents of the uterus. Procedural abortion is a straightforward and brief procedure. It is almost always performed in an outpatient setting and sometimes involves local anesthesia or conscious sedation to make the patient more comfortable. Although procedural abortion is sometimes referred to as "surgical abortion," it is not what is commonly understood to be surgery, as it involves no incisions, no need for general anesthesia, and no need for a sterile field.

47. Up to approximately 14 weeks LMP, procedural abortion relies on the aspiration technique, where the clinician inserts a thin, flexible tube through the patient's cervical opening and uses gentle suction to empty the uterus. After approximately 14 weeks LMP, procedural abortion involves the dilation and evacuation (D&E) technique, where the clinician uses instruments as well as aspiration to empty the uterus. Starting around 18 to 20 weeks LMP, an additional procedure may be performed to ensure that the patient's cervix is adequately dilated for the procedural abortion. This may occur on the same day as the abortion, or the day prior to the abortion.

48. As mentioned above, Michigan law creates additional, medically unnecessary steps that we must follow when providing either a medication abortion or a procedural abortion: patients must receive certain state-mandated information at least 24 hours before the abortion, and patients

who are minors must either obtain written parental consent or obtain permission from a judge through a legal proceeding that can take several days to complete.

49. There is no typical abortion patient, and pregnant people seek abortions for a variety of deeply personal reasons. In addition to cisgender women, gender-nonconforming people, transmasculine people, and trans men have abortions.[58] Some people have abortions because they conclude that it is not the right time in their lives to have a child or to add to their families.[59] Some decide to end a pregnancy because they want to pursue their education[60] or because of the negative impact pregnancy would have on their current employment or employment opportunities. Some people have an abortion because they feel they lack the necessary economic resources or an adequate level of family or partner support or stability to parent a child.[61] Some decide to have an abortion because they do not want children at all.[62] Some people decide to end their pregnancy because it is dangerous to their mental or physical health, including by worsening a pre-existing condition or triggering the onset of a new condition.

50. Nearly 60% of abortion patients nationally already have at least one child.[63] Most also report plans to have children (or additional children)[64] at another time in their lives.

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[58] To reflect this reality, in this affidavit I generally use the phrase "pregnant person" rather than "pregnant woman." I occasionally use "woman" or "women" as a short-hand for people who are or may become pregnant, while recognizing that people of all gender identities may become pregnant and seek abortion services. I also use "woman" or "women" when citing or quoting research that reports its results in terms of "women," to preserve the accuracy of those results.

[59] Biggs, Gould, & Foster, *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health e1, e5–e8 (2013); Finer et al, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual & Reproductive Health 110, 112 (2005).

[60] Biggs, Gould, & Foster, *supra* note 59, at e7; Finer et al, *supra* note 59, at 112.

[61] Biggs, Gould, & Foster, *supra* note 59, at e5–e7; Finer et al, *supra* note 59, at 112.

[62] Biggs, Gould, & Foster, *supra* note 59, at e8.

[63] Jerman, Jones, & Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016), p 7, available at <https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf>.

[64] Henshaw & Kost, *Abortion Patients in 1994–1995: Characteristics and Contraceptive Use*, 28 Family Planning Perspectives 140, 144 (1996), available at <https://www.guttmacher.org/sites/

51. At PPMI, between July 2020 and June 2021, 27% of abortion patients had incomes below 101% of the federal poverty level, and an additional 22% had incomes between 100% and 200% of the federal poverty level.[65] In 2020, 200% of the federal poverty level was $25,520 annually for a household of one, and $34,480 annually for a household composed of one parent and one child.[66] The vast majority—93%—of PPMI abortion patients between July 2020 and June 2021 paid for their abortions out of pocket rather than with insurance.

52. Nearly three-fourths of abortion patients say they cannot afford to become a parent or to add to their families, and the same proportion also cites responsibility to other individuals (such as children or elderly parents), or that having a baby would interfere with work and/or school, as their reason for ending their pregnancy.[67]

53. Some people seek abortions because they are experiencing intimate partner violence. Many of these patients fear that carrying the pregnancy to term and giving birth would further tie them to their abusers. In some circumstances, people experiencing intimate partner violence may face additional risk of violence if their partner learns of their pregnancy or desire for an abortion.

54. Some people seek abortions because the pregnancy is the result of rape.

55. Some people decide to have an abortion because of an indication or diagnosis of a fetal medical condition. Some families feel they do not have the resources—financial, medical,

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default/files/pdfs/pubs/journals/2814096.pdf>.

[65] Because 33% of PPMI abortion patients in that time frame did not report their income level, the actual percentages could be even higher.

[66] See US Dep't of Health & Human Servs, Ass't Secretary for Planning & Evaluation, *2020 Poverty Guidelines* <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2020-poverty-guidelines> (2020) (listing the federal poverty level for a household of one as $12,760 and for a household of two as $17,240) (accessed April 4, 2022).

[67] Finer et al, *supra* note 59, at 112.

educational, or emotional—to care for a child with special needs, or to do so while providing for the children they already have.

56. Some people decide to have an abortion because of a fetal medical diagnosis that means after delivery the baby would never be healthy enough to go home. While some may decide to carry such a pregnancy through delivery, others may decide that they wish to terminate the pregnancy.

57. Some abortion patients with high-risk pregnancies—because of advanced maternal age or some other underlying medical condition—have complications that lead them to end their pregnancies to preserve their own life or health. Such underlying medical conditions include severe cardiovascular disease, sickle-cell disease, congenital heart disease, severe liver or kidney disease, and autoimmune disease. Complications requiring abortion to save the pregnant person's life or health include eclampsia, ectopic pregnancy, and infection resulting from a preterm premature rupture of membranes.

58. In summary, the decision to terminate a pregnancy is often motivated by a combination of complex and interrelated factors that are intimately tied to the pregnant person's identity, values, culture, religion, mental and physical health, family circumstances, and resources and economic stability. The decision is often made with the support of the person's partners, loved ones, family, friends, and other support networks, including support networks that are religious and spiritual.

My Medical Practice as an Abortion Provider

59. Since the first year of my medical residency in the OB/GYN department at the University of Michigan Medical School, I have provided both medication abortion and procedural

abortion. In fact, I first began my abortion training during my rotation at a Planned Parenthood health center here in Michigan, in 2009.

60. At PPMI, I currently provide medication abortion through 11 weeks LMP and procedural abortion through 19 weeks, 6 days LMP.

61. I came to this work rather deliberately. I attended college knowing that I wanted to become a doctor, and I went to medical school knowing that I wanted to help women. I became an OB/GYN knowing that providing abortions was an integral part of the care that women require and deserve.

62. Still, I had not considered becoming an abortion provider myself until I was actually in medical school. I was raised in a Christian home in Lexington, South Carolina. My family went to church regularly and said prayers before meals, and I grew up understanding that it was my duty to leave the world a better place than I found it. Abortion was something we never talked about at home; I had neither negative nor positive feelings about it. But to fulfill my moral responsibility to help people in need, I knew I wanted to take care of women and people who can become pregnant, so I decided to become an OB/GYN, and I came to Michigan for that training.

63. In medical school, I noticed that some of the people who I worked with and respected took care of abortion patients in a way that stigmatized those patients, and it negatively impacted the care that those patients received. The patients themselves often seemed to feel as though they needed to justify their desire to have an abortion in order to receive the care they deserved. I came to understand that providing abortion with respect and compassion was something I could do to make a significant difference in people's lives, particularly when others would not.

64. Once I had the opportunity to start working for Planned Parenthood, it just felt right. It matched my core values, shaped by my faith and upbringing. I could care for people without judgment, and with respect and compassion. Unlike when I was working in other settings, at Planned Parenthood I did not have to justify to anyone why providing abortion is important.

65. Today, abortion constitutes the majority of the clinical care I provide—not because I could not provide other care, but because the need for abortion providers is so great.

66. The patients I see every day are so clearly people in need, and the compassion and empathy I learned from my faith are fundamental to my work. I am proud to provide abortion to people in Michigan, and to train other medical students, residents, and fellows to provide compassionate, respectful, high-quality abortion services.

67. Providing abortion in Michigan is both similar to and different from providing abortion in other parts of the country. At PPMI, I see abortion patients who travel to Michigan from other states, most commonly Ohio and Indiana, but also from Wisconsin. We do not affirmatively ask out-of-state patients why they have come to Michigan to obtain an abortion, but sometimes people volunteer that one of our PPMI health centers was the closest access point for them. Others explain that in their home state, they would have been required to make two separate trips to the health center, and that traveling a farther distance one time was less difficult than making two separate trips in their home state. Recently, I even saw a patient from Texas, who came all the way to Michigan after Texas effectively outlawed abortion after approximately six weeks' gestation through its S.B. 8 law.

68. Michigan has significant barriers to abortion access, most notably travel obstacles: in many parts of the state, people have to drive hours to reach a health center that provides abortion. In the Upper Peninsula, there is only one PPMI health center, and it only provides medication

abortion—meaning patients who are past 11 weeks LMP cannot access abortion there at all. Additionally, in Michigan we do not have a robust public-transportation network. Even in metro Detroit, where there are a number of abortion providers, you could be just as out of luck as in rural parts of the state, because without a personal vehicle or a comprehensive bus system, there is no way for someone to get where they need to be.

69. People who are able to access abortion in Michigan frequently still contend with abortion stigma. For example, in parts of the state without a supportive medical community, I worry all the time that other medical providers will not be kind to our patients in the event that they need follow-up care. Worse, I worry that some of our patients will be scared away from seeking needed medical care at all. We already see this with some of our rural patients—in the rare event that someone needs follow-up care after an abortion, they would rather drive a long distance to see us at PPMI than obtain that care closer to home, simply because they do not want anyone closer to home to know that they have terminated a pregnancy.

70. Of course, what abortion ultimately means for patients is the same no matter where they live. Abortion allows people to have control over their bodies and their futures. It makes it possible for them to care for the families they already have, or to escape a dangerous situation in their own home. It alleviates serious medical risks caused or worsened by pregnancy. It brings peace to people who experience pregnancy as a violation of their truest selves. Put simply, abortion is a life-changing and often life-saving procedure that can be and often is positive, not just for patients but also for their loved ones and their communities.

The Consequences of Banning Abortion in Michigan

71. Though I and other PPMI physicians provide abortion that is outlawed by the text of the Criminal Abortion Ban presently on the books, I understand that a Michigan Supreme Court

decision currently protects me and other abortion providers from being criminally prosecuted under that statute. Still, that protection could disappear any day now, since the United States Supreme Court's decision in the *Dobbs v Jackson Women's Health Organization* case could modify *Roe v Wade*—the case on which the Michigan Supreme Court decision relies.

72. I am not a lawyer, but I know that people seeking abortion in Michigan will be confused and panicked if the law changes and if the Criminal Abortion Ban becomes enforceable, outlawing abortion in the state. My patients will not know whether they can still come to PPMI for care, or whether they need to try to make arrangements to travel out of state. This uncertainty will disrupt our ability to care for our patients even before any government official takes a step to enforce the Ban.

73. In addition to the risk of criminal prosecution, I understand that the Michigan Department of Licensing and Regulatory Affairs could revoke my medical license for providing an abortion in violation of the Criminal Abortion Ban as written.[68] And the insurance company that provides my medical malpractice insurance might cancel my coverage even before the licensing action was finalized.[69] Without my medical license or malpractice insurance, I would no longer be able to provide *any* medical care in Michigan.

74. Furthermore, certain parts of the Criminal Abortion Ban as written are unclear to me, as the statute uses certain terms in a way that is inconsistent with medical terminology. For example, I understand that the law makes it a felony to "procure [a] miscarriage." In medical practice, "miscarriage" is used interchangeably with the terms "spontaneous abortion" and "early

[68] Kaffer, *Opinion: Prosecution Wouldn't Be Only Option for Abortion Foes in a Post*-Roe *Michigan*, Detroit Free Press (March 26, 2022) <https://www.freep.com/story/opinion/columnists/nancy-kaffer/2022/03/26/roe-abortion-supreme-court-michigan/7146616001/> (accessed April 4, 2022).

[69] *Id.*

pregnancy loss," and generally refers to "a nonviable, intrauterine pregnancy with either an empty gestational sac or a gestational sac containing an embryo or fetus without fetal heart activity."[70] Because "miscarriage" is something that happens spontaneously, medical professionals would not describe abortion as "procuring a miscarriage."[71] Moreover, I am aware that in Michigan and elsewhere, people who lack a complete or accurate understanding of reproductive medicine may interpret the Criminal Abortion Ban to criminalize conduct that is not abortion at all, such as prescribing emergency contraception.[72]

75. 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—that, or face felony prosecution and licensure penalties. In turn, PPMI would no longer be able to offer abortion at its health centers. The Ban would thus have devastating consequences for my patients, for PPMI, and for me personally.

76. If abortion were unavailable in Michigan, many people would not be able to travel to another state to access abortion, or would be significantly delayed by the cost and logistical arrangements required to do so. Already, people living in poverty forgo or delay other basic needs, like rent or groceries, to pay for their abortions and all the associated logistical expenses, such as travel costs, childcare, and time away from work. Many people need to borrow money from family

[70] ACOG, Practice Bulletin No 200, *supra* note 19, at e197.

[71] See generally *id.*

[72] E.g., Reilly, *Missouri Lawmakers Pretended IUDs Cause Abortion. They Lost*, ReWire News Grp (June 28, 2021) <https://rewirenewsgroup.com/article/2021/06/28/missouri-lawmakers-pretended-iuds-cause-abortion-they-lost/> (accessed April 4, 2022) (Missouri legislators incorrectly characterizing emergency contraception and IUDs as abortion); Filipovic, *How Ohio Became One of the Worst States for Reproductive Rights in the Country*, Cosmopolitan (June 6, 2014) <https://www.cosmopolitan.com/politics/news/a7129/ohio-abortion-laws/> (accessed April 4, 2022) (same in Ohio); Verlee, *Colorado Debates Whether IUDs Are Contraception or Abortion*, Nat'l Pub Radio (March 5, 2015) <https://www.npr.org/sections/health-shots/2015/03/05/391030821/colorado-debates-whether-iuds-are-contraception-or-abortion> (accessed April 4, 2022) (same in Colorado).

and friends to pay for care, which takes time. Navigating inflexible or unpredictable work schedules and child care needs further delays or prevents our patients accessing care.

77. On top of these existing obstacles, many people traveling long distances to an abortion appointment out of state would need to raise additional money to afford the travel. Many would also need to arrange for childcare and time off work while they are away. The need to travel could thus significantly delay people in accessing care. And because abortion becomes more expensive as pregnancy progresses, people trying to save money for an abortion, plus money to pay for the necessary travel out of state, could find themselves in a vicious cycle: as the process of raising the necessary funds delays them in obtaining care, the amount of money required grows, resulting in more delay. This delay could, in turn, push some people past the point in pregnancy where abortion is legally or practically available in nearby states, forcing them to carry the pregnancy to term against their will.

78. I am mindful that, currently, people travel to Michigan for an abortion because for some it is easier to access abortion here than in surrounding states. If abortion were illegal in Michigan, I worry that both people from Michigan and people from those other states would be unable to access abortion at all.

79. Delays in accessing abortion, or being unable to access abortion at all, pose risks to patients' health. While abortion is very safe at any point in pregnancy, the risks of abortion increase with gestational age.[73] And because pregnancy and childbirth are far more medically risky than abortion, forcing people to carry a pregnancy to term exposes them to an increased risk of physical harm. If abortion is no longer available, people will instead be forced to remain pregnant and give

[73] Nat'l Academies of Sciences, Engineering, & Med, *supra* note 20, at 77–78, 163 & tbl 5-1.

birth in a health care system that does not adequately keep pregnant people safe, especially pregnant people of color.

80. Further, a person's ability to access abortion has consequences not only for that person, but also for their family and community. Longitudinal research assessing the short- and long-term consequences of being denied an abortion demonstrates the negative impacts not only on the person's mental health,[74] on their professional prospects,[75] and on their finances,[76] but also on the well-being of their existing children[77] and of the child the person is forced to have.[78]

81. The COVID-19 pandemic has exacerbated these consequences, as access to affordable child care has been strained and women have been forced out of the workforce to care for children at rates vastly disproportionate to men. Since the start of the pandemic, women have lost a net five million jobs, and 2.3 million women have left the workforce entirely, likely as a result of child care obligations.[79]

82. Enforcing the Criminal Abortion Ban would most harm pregnant people who are poor or have low incomes, pregnant people living in rural counties or urban areas without access

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[74] Biggs et al, *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion*, J Am Med Ass'n Psychiatry E1, E3–E6 (2017).

[75] Upadhyay, Biggs, & Foster, *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC Women's Health e1, e4, e6 (2015).

[76] Miller, Wherry, & Foster, *supra* note 49, at 36.

[77] Foster et al, *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J of Pediatrics 183, 185, 187 (2019); see also Foster et al, *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am J Pub Health 407, 411–12 (2018) (finding that denial of a wanted abortion exacerbates socioeconomic hardships).

[78] Foster et al, *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to An Abortion*, 172 J Am Med Ass'n 1053, 1056–59 (2018); see also Foster et al, *Socioeconomic Outcomes of Women*, *supra* note 77, at 411–12.

[79] Nat'l Women's Law Ctr, *A Lifetime's Worth of Benefits: The Effects of Affordable, High-Quality Child Care on Family Income, the Gender Earnings Gap, and Women's Retirement Security* (2021), p 1, available at <https://nwlc.org/wp-content/uploads/2021/04/Lifetime-Fact-Sheet.pdf>.

to adequate prenatal care or obstetrical providers, and Black pregnant people in Michigan. Nationwide, three out of four abortion patients are poor or live on low incomes (up to 200% of the federal poverty level).[80] A majority of people in Michigan who had an abortion in 2020 identified as Black;[81] in Michigan and nationally, Black patients seek abortions at a higher rate than white patients due to disparities caused by a long history of structural racism—specifically, unequal access to quality family-planning services, economic disadvantage,[82] and other social determinants of health such as limited access to "safe and affordable housing, quality education, healthy food, [and] stable employment."[83] As discussed above, pregnancy is more dangerous for Black women than it is for white women: as of 2020, the national maternal mortality rate for Black women is approximately three times the rate for white women,[84] a consequence of structural and systemic racism. Banning abortion in Michigan would force Black women to bear this disproportionate risk to their health and their lives.

83. Because the Criminal Abortion Ban does not allow exceptions for pregnancies resulting from rape or incest, it would have a uniquely devastating impact on survivors of those crimes, who would be forced either to carry the pregnancy to term or to find a way to access abortion in another state.

84. If abortion were outlawed in Michigan, given the barriers to accessing abortion out of state, I expect that some people would find ways to self-manage abortion. Some who do may

[80] Jerman, Jones, & Onda, *supra* note 63, at 11.

[81] Mich Dep't of Community Health, *Table 11, Number and Percent of Reported Induced Abortions by Race or Hispanic Ancestry of Woman, Michigan Residents, 2020* <https://www.mdch.state.mi.us/osr/abortion/Abortrace.asp> (accessed April 4, 2022).

[82] CDC, *Abortion Surveillance — United States*, *supra* note 7, at 7.

[83] Mich Dep't of Health & Human Servs, *2020 Health Equity Report, Moving Health Equity Forward*, p 4 (2021), available at <https://www.michigan.gov/documents/mdhhs/2020_PA653-Health_Equity_Report_Full_731810_7.pdf>.

[84] Hoyert, *supra* note 8, at 1, 3–4.

experience one of the rare complications from medication abortion. As I described earlier, people in Michigan are already afraid to tell their doctors that they have had a *legal* abortion, and I am deeply concerned that, if the Criminal Abortion Ban is enforced, people who experience complications after self-managing their abortions will be too afraid to seek necessary follow-up care. Those people could be seriously harmed—not because abortion is unsafe, but because the Criminal Abortion Ban has made it unsafe for them to be fully open with their medical providers and prevented them from accessing accurate medical information.

85. Given the Criminal Abortion Ban's extraordinarily narrow exception for abortions necessary to preserve the pregnant person's life, I fear that pregnant people with dangerous medical conditions will be forced to wait to receive an abortion—even an urgently medically necessary abortion—until they are literally dying. I understand that this is already happening in Texas, where emergency-room physicians are afraid to terminate patients' pregnancies even where doing so would avert serious medical risk to the patient because they are afraid of being sued for violating Texas's law banning abortion at roughly six weeks.[85]

86. I recently had a glimpse of what this world might look like when I saw a patient whose pregnancy was past the legal gestational age limit for abortion in Michigan. When I told this patient that I was not able to provide her an abortion, she sobbed in a way I had not heard in a very long time. She did not want to be pregnant, she was not prepared to decide between parenting and adoption, and traveling out of state was not an option. She left my office with resources, but I felt helpless.

[85] Nat'l Pub Radio, *Doctors' Worst Fears About the Texas Abortion Law Are Coming True* (March 1, 2022) <https://www.npr.org/2022/02/28/1083536401/texas-abortion-law-6-months> (accessed April 4, 2022).

87. If I could not provide abortion in Michigan, that is how I would feel with every single patient. Over and over again, I would have to deliver news that would change someone's entire life against their wishes. Despite knowing that I have the resources and the medical training to help them safely, I would have to tell each person *I'm sorry, I can't help you, because it is a crime for me to provide you with the medical care that you need.*

88. Absent enforcement of the Criminal Abortion Ban, PPMI will continue to provide both medication and procedural abortion in Michigan. But if the Criminal Abortion Ban were enforced against physicians who provide abortion in Michigan, PPMI would be forced to stop offering abortion to our patients.

89. The Criminal Abortion Ban would directly harm PPMI's mission to provide comprehensive sexual and reproductive health care to the communities we serve, and PPMI's standing in the eyes of our patients and supporters. Our patients know PPMI as a trusted, nonjudgmental provider. People trust us with their most personal information and questions, and that allows us to provide the highest-quality sexual and reproductive health care. But if we could no longer provide abortion when people come to us and ask for that care, some patients might misunderstand why we are no longer providing abortion and think that it is because we no longer want to. That would badly undermine our patients' trust in us. People might be afraid to tell us that they have self-managed abortion or that they are planning to travel out of state to obtain abortion elsewhere. We would no longer be seen as a safe place where people can be open and honest about their health care histories and needs. This would not only harm our reputation as a health care provider; it would interfere with our ability to provide other care.

90. Additionally, I worry that some PPMI staff would be afraid to continue working at PPMI if the Criminal Abortion Ban were being enforced against abortion providers. Even if we all

complied with the law, a prosecutor somewhere might accuse us of violating it, or open an invasive investigation into PPMI's practices. Some staff might prefer to leave PPMI rather than continue working with those threats hanging over them. Other staff might simply be unable to bear turning patients away in their time of need, over and over again.

91. Finally, enforcing the Criminal Abortion Ban would harm me personally. My work as an abortion provider is a core part of my identity. It is also my area of professional expertise. If I were no longer able to provide abortion in Michigan, I would face the hard choice between staying here and continuing to provide other medical care to Michigan patients, or uprooting my life and my family and moving to a state where abortion remains legal so that I could use my extensive training to continue to provide this vitally important health care. If I stayed in Michigan, I would be forced to stop providing the specific category of medical care that I am trained in and highly skilled at, and I would not be allowed to provide the care that my patients need. It would feel unethical and immoral to deny my patients medical care that they need and that I am highly trained to provide safely. I would find it challenging to provide any other OB/GYN care in such an environment. Other abortion providers in Michigan would face this same choice, and I know that some are already weighing their options. I am also concerned that medical students and residents in Michigan would no longer be able to learn this critical component of medical care for pregnant people. It makes me so sad to contemplate all that collective medical expertise leaving the state, all because our specialized area of practice—care that today we provide safely and routinely, when and where patients need it—would have become illegal.

92. Not knowing when or how the law will change makes it hard for PPMI to plan even a month in advance. For example, while we try to see people for their abortion appointments as soon as the patient is firm in their decision and available, at some of our health centers we must

schedule appointments two to three weeks in advance. If the Criminal Abortion Ban became enforceable next week, I would need guidance on whether that would prevent me from providing abortions entirely, whether it would only prohibit some of the procedures I provide, or something else entirely. In the absence of that clarity, I would have no idea whether I could care for the patients whose appointments are already scheduled for that week or the week after. And when other PPMI physicians and staff ask about the clinical schedule for the months ahead, I do not know what to tell them. I do not know whether we will still be able to provide abortion a month from now, because I do not know when or even whether the existing legal protections for abortion will disappear. Because it is my personal and professional mission to provide safe, compassionate, high-quality care to my patients, of which abortion is an essential part, this uncertainty keeps me up at night.

FURTHER AFFIANT SAYETH NAUGHT.

STATE OF MICHIGAN)
)ss
COUNTY OF WASHTENAW)

I declare that the above statements set forth in this affidavit are true to the best of my knowledge, information, and belief. If sworn as a witness, I can testify competently to the facts stated herein.

Sarah Wallett, M.D., M.P.H., FACOG

Subscribed and sworn before me this
5th day of April, 2022.

Signed: _____
Printed name: Betsy Lee Lewis, Notary Public
Ingham Co., MI, Acting in Washtenaw Co., MI
My Commission Expires: 01/23/2027

BETSY LEE LEWIS
Notary Public - State of Michigan
County of Ingham
My Commission Expires Jan 23, 2027
Acting in the County of Washtenaw

EXHIBIT 3

AG Nessel's Statement on Efforts to Preserve Abortion Rights in Michigan

April 07, 2022

Lynsey Mukomel

Press Secretary

agpress@michigan.gov

LANSING - Michigan Attorney General Dana Nessel issued the following statement Thursday in response to two lawsuits filed challenging Michigan's 1931 abortion statute:

"In 2018, when I campaigned to be Michigan Attorney General, I did so knowing the fate of Roe v. Wade was at stake. Unenforced and antiquated pre-Roe abortion bans and laws, like the 1931 Michigan statute criminalizing abortion, could become de facto state law if Roe is overturned.

"Let me be very clear, I will not use the resources of my office to defend Michigan's 1931 statute criminalizing abortion. As elected prosecutors and law enforcement officials, we have the opportunity to lead and to offer peace of mind to women and health-care professionals who might otherwise be placed in the untenable position of choosing between the exercise of personal health-care choices and the threat of criminal prosecution.

"Abortion care is an essential component of women's health care. As this state's top law enforcement officer, I have never wavered in my stance on this issue, and I will not prosecute women or their doctors for a personal medical decision."

Summary of the lawsuit:

Plaintiffs Planned Parenthood and Dr. Sarah Wallett are challenging Michigan's 1931 criminal abortion law on multiple grounds, including that the law violates Michigan's due process clause because it is unconstitutionally vague and because it violates

principles of bodily integrity also protected by the Due Process Clause. The suit is available through this release posted by the ACLU.

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Press Release

Related News

AG Nessel Joins Bipartisan, Nationwide Coalition Defending Affordable Drug Prices

AG Nessel Joins Bipartisan Coalition Working to Protect Trafficking Survivors

AG Nessel Response to Oxford School Board

AG Nessel Formalizes Credit Card Payment Option for Department FOIAs

Convictions Secured Against Members of The Base

AG Nessel Urges FTC to Consider State Enforcement Efforts while Addressing For-profit Schools' Deceptive Earnings Claims

AG Nessel Statement on Court of Claims Order

Auburn Hills Restaurant, Owners Charged with Tax Fraud

AG Nessel Hosts Human Trafficking Roundtable to Raise Awareness

AG Nessel, Citizens Utility Board Applaud MPSC's Call for Clean Energy Comments

AG Nessel's Statement on Efforts to Preserve Abortion Rights in Michigan

EXHIBIT 4

STATE OF MICHIGAN

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,

-vs-

Case No. 22-000044-MM

Hon. Elizabeth L Gleicher

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

Defendant.
_____/

BRIEFING SCHEDULE

The Court conducted a scheduling conference with counsel on April 20, 2022, to discuss the briefing schedule that will apply to this case. The parties have stipulated, and the Court orders, that the following briefing deadlines shall apply to this case:

Defendant's brief in response to plaintiffs' motion for a preliminary injunction shall be filed no later than **Thursday, May 5, 2022**; and

Plaintiffs' reply to defendant's response shall be filed no later than **Tuesday, May 10, 2022.**

The Court will set a date for oral argument, which will be conducted approximately 14 days after the plaintiffs' reply brief is filed.

The Court anticipates the filing of motions to intervene. The parties shall have **14 days** to respond to intervention motions.

Date: April 20, 2022

Elizabeth L. Gleicher
Judge, Court of Claims

EXHIBIT 5

STATE OF MICHIGAN

COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients, and SARAH WALLET, 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.
_____/

OPINION AND ORDER

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

Plaintiffs Planned Parenthood of Michigan and Sarah Wallett, M.D., M.P.H, FACOG, filed this suit seeking a declaration that MCL 750.14 is unconstitutional under the Michigan Constitution, and requesting preliminary and permanent injunctions barring its enforcement.

The Court hereby concludes that the balancing of the pertinent factors weighs in favor of granting preliminary injunctive relief. The motion for a preliminary injunction is GRANTED as described herein, and defendant is preliminarily enjoined from enforcing MCL 750.14.

I. MICHIGAN'S ABORTION STATUTES AND THEIR INTERPRETATION BEFORE *ROE V WADE*

The common law proscribed abortion only after a mother first felt fetal movement, referred to as "quickening." "[A]t common law, abortion performed before 'quickening'—the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense." *Roe v Wade*, 410 US 113, 132; 93 S Ct 705; 35 L Ed

2d 147 (1973) (citations omitted).[1] See also *Commonwealth v Parker*, 50 Mass 263, 263 (1845) ("It is not a punishable offence, by the common law, to perform an operation upon a pregnant woman, with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child."), and *State v Cooper*, 22 NJL 52, 58 (1849) ("We are of opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently that the mere attempt to commit the act is not indictable.)

Michigan's first abortion statutes, enacted in 1846, distinguished between the abortion of a "quick" fetus, deemed "manslaughter," 1846 RS, ch 153, §32 and an abortion conducted before quickening, punished "by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment." 1846 RS, ch 153, §33. "In other words, the unquickened fetus was not considered to be a separate human being so as to make the destruction of such fetus a killing." *People v Nixon*, 42 Mich App 332, 336-337; 201 NW2d 635 (1972). The *Nixon* majority concluded that the latter statute's "obvious purpose was to protect the pregnant woman" rather than the fetus. *Id.* at 337.

[1] Post-*Roe*, in *Larkin v Cahalan*, 389 Mich 533, 541-542; 208 NW2d 176 (1973), the Michigan Supreme Court interpreted the term "quick child" as "a viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernably moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community."

The 1846 abortion statutes were reenacted with little change until 1931, when the statute at issue in this case became part of Michigan law. MCL 750.14 applies to all abortions and deems all abortions felonious, with the exception of those performed to "preserve" the life of the mother:

> Any a person who shall willfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offence shall be deemed manslaughter.
>
> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

One year before the United States Supreme Court decided *Roe v Wade*, a physician convicted under MCL 750.14 challenged the statute as "vague in the constitutional sense, and because it places an undue restraint upon a physician in the discharge of his professional duties." *Nixon*, 42 Mich App at 334-335. The Court of Appeals held that "a licensed physician is not subject to prosecution for an induced abortion performed in a hospital or appropriate clinical setting upon a woman in her first trimester of pregnancy." *Id.* at 341. For the most part, the opinion rested on policy grounds, not constitutional principles.[2] The majority determined that the state had no legitimate interest in proscribing first-trimester abortions performed by licensed physicians "in an antiseptic environment." *Id.* at 339. The Court observed: "Not only has modern medical science made a therapeutic abortion reasonably safe, but it would now appear that it is safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child." *Id.*

[2] With virtually no analysis, the Court declared the last sentence of the statute unconstitutional because "it impermissibly shifts the burden of proof to the defendant." *Id.* at 344.

The Court of Appeals subsequently concluded that Nixon's "discussion of the constitutionality of the statute under circumstances other than those presented in that case was mere dicta." *Mahaffey v Attorney General*, 222 Mich App 325, 339; 564 NW2d 104 (1997).

II. POST-*ROE* MICHIGAN CASE LAW

In *Roe v Wade*, the United States Supreme Court held that a woman's fundamental due process right to privacy encompasses a right to abortion. *Roe*, 410 US at 153-155. Restrictions on abortion, the Court explained, were subject to strict scrutiny and could be justified only by a demonstration of a compelling state interest. *Id.* at 155. During the first trimester of pregnancy, the Supreme Court declared, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. Before viability, the Supreme Court continued, a state could regulate abortion "in ways that are reasonably related to maternal health." *Id.* After viability, "a state may regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*

Six months after the United States Supreme Court issued *Roe v Wade*, the Michigan Supreme Court held that the United States Constitution's Supremacy Clause precluded the enforcement of MCL 750.14 with regard to abortions performed by physicians. Consistent with "the principles enunciated" in *Roe*, the Court reasoned, Michigan's criminal abortion statute "cannot stand as relating to abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment." *People v Bricker*, 389 Mich 524, 527; 208 NW2d 172 (1973). In *Bricker*, however, the defendant was a non-physician convicted of conspiracy to commit an abortion. Our Supreme Court affirmed the

defendant's conviction, holding that "except as to those cases defined and exempted under *Roe v Wade* and *Doe v Bolton*,[3] ... criminal responsibility attaches." *Id.* at 531. *Bricker* did not consider the constitutionality of MCL 750.14 under the Michigan Constitution.

Over the years following *Roe*, the Michigan Legislature enacted a variety of laws intended "to test its limits." *Planned Parenthood of SE Pennsylvania v Casey*, 505 US 833, 858; 112 S Ct 2791; 120 L Ed 2d 674 (1992). *Casey* discarded the strict scrutiny standard adopted in *Roe*, and in its place introduced an "undue burden" analysis. Pre-*Casey*, the Legislature barred Medicaid funding of abortion, MCL 400.109a; in 1990 the Legislature enacted "the parental rights restoration act," MCL 722.901 *et seq.*; in 1993 the Legislature passed a detailed statute governing the parameters of the informed consent required of adult women undergoing abortion, MCL 333.17015; and in 1996 the Legislature banned "partial birth abortions." MCL 333.17016.

Save for the partial birth abortion ban, these statutes all survived constitutional challenges.[4] In *Mahaffey v Attorney Gen*, 222 Mich App 325, 334; 564 NW2d 104 (1997), the plaintiffs challenged the constitutionality of the informed consent law, MCL 333.17014 *et seq.*, under the Michigan Constitution. The Court of Appeals held that although the Michigan Supreme Court has "long recognized privacy to be a highly valued right" and that "the Michigan Constitution provides a generalized right of privacy," "neither application of traditional rules of constitutional

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[3] 410 US 179; 93 S Ct 739; 35 L Ed 2d 201 (1973)

[4] A federal district court held the "partial birth" abortion ban to be unconstitutionally vague and overbroad, and an undue burden on and overbroad and an undue burden on a woman's right to seek a pre-viability second trimester abortion in *Evans v Kelley*, 977 F Supp 1283 (ED Mich, 1997).

interpretation nor examination of Supreme Court precedent supports the conclusion that there is a right to abortion under the Michigan Constitution." *Id.*

In December 2021, the United States Supreme Court heard oral argument in *Dobbs v Jackson Women's Health Org*, __US__ ; 141 S Ct 2619; 209 L Ed2d 748 (2021). *Dobbs* presents an opportunity for the United States Supreme Court to overrule *Roe*. See, for example, Greenhouse, *The Supreme Court Gaslights Its Way to the End of Roe* <https://www.nytimes.com/2021/12/03/opinion/abortion-supreme-court.html> (accessed May 16, 2022), and *Ziegler*, *The Supreme Court Just Took a Case that Could Kill Ro v. Wade—or Let it Die Slowly*, <https://www.washingtonpost.com/politics/2021/05/18/supreme-court-just-took-case-that-could-kill-roe-v-wade-or-let-it-die-slowly/> (accessed May 16, 2022). A draft opinion in *Dobbs* purporting to overrule *Roe* was leaked to the press on May 2, 2022.

Plaintiffs' complaint correctly posits that if the United States Supreme Court overrules *Roe v Wade*, abortion will again become illegal in Michigan except when "necessary to preserve the life of [the] woman." MCL 750.14. Implicitly recognizing that the Court of Appeals' decision in *Mahaffey* forecloses a constitutional argument premised on the right to privacy found in the Michigan Constitution, plaintiffs challenge the constitutionality of the statute on additional grounds distinct from privacy. Planned Parenthood's complaint preserves a privacy claim and also avers that the statute is unconstitutional because it violates the rights to liberty, … bodily integrity, and equal protection guaranteed by the Michigan Constitution and the Elliott-Larsen Civil Rights Act, and it is unconstitutionally vague." Before considering plaintiffs' arguments, however, the Court must address the threshold question of its jurisdiction.

III. THE JUSTICIABILITY OF THIS ACTION

Defendant Attorney General concurs with plaintiffs' argument that MCL 750.14 is unconstitutional but does not offer any legal analysis in support of her concurrence.[5] Rather, defendant argues that because she has publicly vowed not to defend or to enforce the law "there is at present a lack of adversity" resulting in the absence of this Court's subject-matter jurisdiction. Defendant has not moved to dismiss the action on jurisdictional grounds, however. And as authority for her jurisdictional argument, defendant relies primarily on a non-precedential source: Justice David Viviano's concurrence to an order denying leave to appeal, which in turn relied on two opinions penned by Justice Scalia: a dissent (the majority opinion is discussed below), and a lower court ruling in a legally immaterial context. The relevant language of Justice Viviano's statement is as follows:

> ... In our adversary system, the parties' competing interests lead to arguments that sharpen the issues so that courts will "not sit as self-directed boards of legal inquiry and research ...." *Carducci v Regan*, 230 US App DC 80, 86, 714 F 2d 171 (1983) (Scalia, J.); see also Fuller, The Adversary System, in Berman, ed., Talks on American Law (New York: Vintage Books, 1971), p. 35 ("[B]efore a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the restraints of judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation."). Our role, therefore, is to act as neutral arbiters of real disputes brought by adverse parties. *Carducci*, 230 US App DC at 86, 714 F.2d 171.[6]

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[5] The Court has had the benefit of two amicus curiae briefs filed in opposition to the relief requested, one by signed by Right to Life of Michigan and the Michigan Catholic Conference, and the other offered by Drs. Gianina Cazan-London and Melissa Halvorson. No third parties have moved to intervene in this case, which has been pending since April 7, 2022.

[6] Respectfully, Justice Viviano mischaracterized the meaning and contextual applicability of Justice Scalia's opinion in *Carducci*. The appellant in that case claimed that the application of a federal law had deprived him of a due process right, but he failed to adequately brief the constitutional issue. Justice (then Judge) Scalia declared that the issue was "of major importance to all employees in the federal competitive service," further expressing that "[w]e will not resolve that issue on the basis of briefing and argument by counsel which literally consisted of no more

> Courts cannot fulfill this role when the parties agree on the merits to such an extent that no honest dispute exists. Cf. *United States v Windsor*, 570 US 744, 782; 133 S Ct 2675; 186 L Ed2d 808 (2013) (Scalia, J., dissenting) ("We have never before agreed to speak—to 'say what the law is'—where there is no controversy before us."). [*League of Women Voters of Mich v Sec'y of State*, 506 Mich 905; 948 NW2d 70 (2020) (VIVIANO, J., concurring)].

In response to the Attorney General's subject-matter jurisdiction argument, plaintiffs assert that their allegations meet the "actual controversy" requirement for a declaratory judgment under MCR 2.605(A)(1), that the Attorney General's "personal views and even present-day intentions" are irrelevant to a case against an official who is merely a representative of a state office, and that the current Attorney General may not be the Attorney General of Michigan on January 1, 2023. Plaintiffs stress: "[T]he chilling effect of such a possibility would be paralyzing; Plaintiffs and other providers need to know whether they could be vulnerable to future prosecution for the conduct they undertake now." Further, plaintiffs contend, a court order is required to bind county prosecutors "who operate under the Attorney General's supervision for purposes of their authority to prosecute violations of state law[.]" Because the statute of limitations for a prosecution under MCL 750.14 is six years, plaintiffs urge, plaintiffs may "be forced to cease providing abortions altogether notwithstanding the current attorney general's legal position[.]"

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than the assertion of violation of due process rights, with no discussion of case law supporting that proposition or of the statutory text and legislative history relevant to the central question of the exclusiveness of entitlements set forth in the" statute at issue. *Carducci v Regan*, 714 F2d 171, 177; 230 US App DC 80, 86 (1983). In context, the cut-and-pasted snippet relied on by Justice Viviano has nothing to do with the justiciability issues under consideration in this case, which plaintiffs have exhaustively briefed.

The Court finds that this matter is a justiciable declaratory judgment action. In reaching this conclusion, the Court is guided by Michigan law, but finds persuasive ancillary support in federal jurisprudence.

MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Our Supreme Court has explained that "[a]n actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). "What is essential to an 'actual controversy' under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000) (citation and quotation marks omitted). A merely hypothetical future injury does not give rise to an actual controversy. *Id.*

In determining whether an "actual controversy" exists in this case, it bears emphasis that unlike the federal Constitution, Michigan's Constitution does not contain an equivalent to Article III's case-or-controversy requirement and does not explicitly or implicitly limit the power of a court to decide declaratory judgment actions. In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 364; 792 NW2d 686 (2010), our Supreme Court emphatically rejected that Article III's check on federal judicial power applies to a state court's justiciability analysis under MCR 2.605(A)(1): "…[T]his Court long ago explained that Michigan courts' judicial power to decide controversies was broader than the United States Supreme Court's interpretation of the Article III

case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not."

Lansing Schools involved the standing doctrine, one component of Article III's case-or-controversy requirement. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012) ("MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness."). Nevertheless, *Lansing Schools* establishes the key threshold proposition that Michigan law rather than federal jurisprudence governs whether the Attorney General's legally non-specific concurrence with plaintiff's general contention that MCL 750.14 is unconstitutional eliminates a "case of actual controversy" under MCR 2.605(A)(1).

Logically, defendant's argument is problematic. The Attorney General essentially maintains that if she expresses agreement with a plaintiff's underlying legal position but disagrees with or resists a judicially crafted remedy, a court is automatically divested of subject-matter jurisdiction. Such a rule would destroy an aggrieved party's ability to obtain a meaningful legal ruling with actual effect. According to defendant's thesis, in any case challenging the constitutionality of a statute the Attorney General would be empowered to derail a constitutional challenge by simply communicating a non-specific consonance with the plaintiff's position. "[I]t would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *INS v Chadha*, 462 US 919, 939; 103 S Ct 2764; 77 L Ed 2d 317 (1983). No authority supports the defendant's jurisdictional argument. To the contrary, Michigan law decidedly refutes defendant's position.

"The Declaratory Judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Id.* "It is clear enough that, if a case has progressed to the point where a traditional action for damages or for an injunction could be maintained, declaratory relief will not be denied for lack of an actual controversy." 3 Longhofer, Michigan Court Rules Practice (7th ed), § 2605.3, p. 465. As the Longhofer text urges, the intended purpose of the declaratory judgment rule is "to give relief, in appropriate cases, before injury has occurred or duties have been violated." *Id.* The text continues:

> Typically, these are cases in which a party would like to know its rights or liabilities under a statute … without having to act at the party's own peril. These are the precise situations that declaratory relief was meant to cover, and that intent should not be frustrated by an unduly restrictive construction of the actual controversy requirement. [*Id.*]

The Court of Appeals has repeatedly applied the same reasoning. "An actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct. In such situations, courts are "not precluded from reaching issues before actual injuries or losses have occurred." *City of Huntington Woods v City of Detroit*, 279 Mich App 603; 761 NW2d 127, 136 (2008) (citation and quotation marks omitted). "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW*, 295 Mich App at 495 (citation and quotation marks omitted). Thus, Michigan law supports that despite the Attorney General's view that MCL 750.41 is unconstitutional, because the parties do not agree on a remedy, they remain adverse for the purposes of MCR 2.605(A)(1).

The same result obtains even under the more rigorous standards imposed by Article III of the United States Constitution. A somewhat similar case procedurally, *United States v Windsor*, 570 US 744, 756; 133 S Ct 2675; 186 L Ed 2d 808 (2013), involved whether the federal Defense of Marriage Act barred the respondent from claiming an estate tax exemption as a surviving spouse. Windsor and her wife had been legally married in Canada and resided in New York. After her spouse died, Windsor paid the assessed estate taxes but filed suit challenging the constitutionality of §3 of the DOMA, which defined a "spouse" as "a person of the opposite sex who is a husband or a wife." 1 USC §7. While the case was pending in the district court, the Attorney General of the United States announced that the Department of Justice "would no longer defend the constitutionality of DOMA's §3." *Windsor*, 570 US at 753.

At the outset of its analysis, the Supreme Court considered a jurisdictional "complication" not unlike the one asserted by defendant here, and found that it did not destroy the action's justiciability:

> Even though the Executive's current position was announced before the District Court entered its judgment, the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. [*Id.* at 756].

The Court also rejected an amicus argument that the parties were no longer "adverse" after the Department of Justice's concession: "This position … elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise." *Id.* The Court explained that despite agreeing in principle with Windsor's legal argument, the United States refused to repay the withheld taxes, "thus establish[ing] a controversy sufficient for

Article III jurisdiction." *Id.* at 758. The Court summarized: "It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling." *Id.*

The Attorney General's unwillingness to stipulate to a preliminary injunction or any other relief creates adversity in this case, just as a similar reluctance did in *Windsor*. Furthermore, plaintiff's complaint describes an on-going controversy regarding the constitutionality of MCL 750.41 and a need for a declaration to guide the future conduct of Planned Parenthood's physicians and patients. These allegations suffice to create an actual controversy under MCR 2.605(A)(1).

IV. THE MERITS

As of the date this opinion is issued, it is unknown whether the United States Supreme Court will overrule *Roe v Wade*. Should that occur, an initial question likely to be of interest to our state's citizenry is the power of a state Court to interpret Michigan's Constitution differently than the United States Supreme Court interprets the federal Constitution. To dispel any uncertainty on that subject, the Court offers the following brief review.

The United States Supreme Court has repeatedly endorsed the proposition that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Florida v Powell*, 559 US 50, 59; 130 S Ct 1195; 175 L Ed 2d 1009 (2010) (citation and quotation marks omitted). And the Michigan Supreme Court has accepted that invitation, most notably in *Sitz v Dept of State Police*, 443 Mich 744, 761-762; 506 NW2d 209 (1993). See also *People v Tanner*, 496 Mich 199, 222; 853 NW2d 653 (2014) ("[I]t is this Court's obligation to independently examine our state's

Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].' ")

Sitz involved the constitutionality of sobriety checklanes used by the Michigan State Police. The United States Supreme Court upheld the constitutionality of the checklanes under the Fourth Amendment of the United States Constitution. *Michigan Dep't of State Police v Sitz*, 496 US 444; 110 S Ct 2481; 110 L Ed 2d 412 (1990). On remand, however, a two-judge majority of the Michigan Court of Appeals determined that sobriety checklanes violated art 1, § 11 of the Michigan Constitution. *Sitz v Dep't of State Police (On Remand)*, 193 Mich App 690; 485 NW2d 135 (1992). The Michigan Supreme Court agreed, explaining: "Because there is no support in the constitutional history of Michigan for the proposition that the police may engage in warrantless and suspicionless seizures of automobiles for the purpose of enforcing the criminal law, we hold that sobriety checklanes violate art. 1, § 11 of the Michigan Constitution." *Sitz*, 443 Mich at 747.

In *Sitz*, the Michigan Supreme Court specifically and emphatically addressed its power to interpret Michigan's Constitution more expansively, and in a manner more protective of civil liberties, than the United States Supreme Court had interpreted an analogous provision of the federal constitution:

> [A]ppropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. Indeed, the fragile foundation of the federal floor as a bulwark against arbitrary action is clearly revealed when, as here, the federal floor falls below minimum state protection. As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same. [*Sitz*, 443 Mich at 761-762 (footnotes omitted)].

Regarding due process rather than the Fourth Amendment, the Michigan Supreme Court has made it clear that the Michigan Constitution's due process clause need not be interpreted in lockstep with the Fourteenth Amendment's due process clause: "Although these provisions are

often interpreted coextensively, Const 1963, art 1, § 17 may, in particular circumstances, afford protections greater than or distinct from those offered by U.S. Const Am XIV, § 1." *AFT Mich v Michigan*, 497 Mich 197, 245; 866 NW2d 782 (2015) (footnotes omitted).

Thus, this Court is not constrained to adopt the United States' Supreme Court's analysis of the constitutionality of abortion under the United States Constitution but must instead focus its inquiry on the rights and guarantees conferred by *our* Constitution.

One additional preliminary point bears discussion. This Court acknowledges that the Court of Appeals held in *Mahaffey*, 222 Mich App at 334, that although the Michigan Constitution provides "a generalized right of privacy," the right does not embrace a right to abortion. A circuit court judge is required to follow controlling precedent established by a published decision of the Court of Appeals "until a contrary result is reached by this Court or the Supreme Court takes other action." *Holland Home v Grand Rapids*, 219 Mich App 384, 394; 557 NW2d 118 (1996). Accordingly, *Mahaffey* constitutes binding precedent to which this Court must adhere.

Mahaffey describes as follows the arguments made by the plaintiffs in that case regarding the informed consent statute: "Plaintiffs claimed that the act violates a woman's right to privacy and due process, violates a physician's right to free speech, and is unconstitutionally vague with regard to what constitutes a 'medical emergency.' " *Mahaffey*, 222 Mich App at 332. The plaintiffs also claimed that the act was unconstitutional because, in violation of the Headlee Amendment, the Legislature did not enact a specific appropriation for funding the act." *Id.* The "act" in question was not MCL 750.14, but a series of laws governing the informed consent required for abortion procedures. Plaintiffs' argument in the instant case that MCL 750.14 unconstitutionally infringes on the right to bodily integrity was not considered in *Mahaffey*.

Indeed, the right of bodily integrity was not specifically recognized as a right granted by the Michigan Constitution until 2018, when the Court of Appeals decided *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018).

A. The Right To Bodily Integrity Under the Michigan Constitution

Mays was class action that arose from the Flint water crisis. The plaintiffs were individual and commercial consumers of the contaminated water. Their class action complaint stated three causes of action, including "violation of plaintiffs' due-process right to bodily integrity (Count II)" under the Michigan Constitution. *Id.* at 23. Among other defenses, the defendants asserted that the plaintiffs "failed to allege facts to establish a constitutional violation for which a judicially inferred damage remedy is appropriate." *Id.* This Court (Judge Mark T. Boonstra) found that the plaintiffs "have alleged sufficient facts, when taken as true, to establish a violation of each plaintiff's respective individual right to bodily integrity under the substantive due process component of art I, §17." *Mays v Snyder*, opinion and order of the Court of Claims, issued October 26, 2016 (Docket No. 16-000017-MM), p. 29. Summary disposition was granted on other grounds, and the plaintiffs appealed.

In a thoughtful and detailed examination of the contours of the right of bodily integrity, the Court of Appeals' majority affirmed Judge Boonstra's ruling on that issue, holding that "[p]laintiffs have alleged facts sufficient to support a constitutional violation by defendants of plaintiffs' right to bodily integrity." *Id.* at 62. The defendants applied for leave to appeal to our Supreme Court, which affirmed the Court of Appeals by equal division. The lead opinion, authored by Justice Richard Bernstein, held that "plaintiffs pleaded a recognizable due-process

claim under Michigan's Constitution for a violation of their right to bodily integrity." *Mays v Governor of Michigan*, 506 Mich 157, 195; 954 NW2d 139 (2020) (opinion by BERNSTEIN, J.).

In a separate concurrence focusing on the Michigan Constitution, Justice Bernstein provided a more comprehensive explanation of the origins of the right to bodily integrity:

> The United States Supreme Court has recognized for over a century that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). Plaintiffs allege a substantive due-process claim based on defendants' conduct that caused their severe bodily injuries and impaired their liberty. Plaintiffs frame these allegations as a violation of their constitutional right to bodily integrity. Although this Court has not opined on the right before, I believe that it is one of the most fundamental rights ensured by Michigan's Constitution. The right is implicit in our Due Process Clause and would have been obvious to those who ratified our Constitution. I conclude that common notions of liberty in this state are so inextricably entwined with physical freedom and freedom from state incursions into the body that Michigan's Due Process Clause plainly encompasses a right to bodily integrity. [*Id.* at 212-213.]

Justice Bernstein's citation to *Union Pacific R Co v Botsford* is particularly apt. The issue in that case was whether Clara Botsford could be compelled to submit to a "surgical examination" to pursue a damage action against the railway company for an injury she sustained when a berth fell on her head. *Union Pacific R Co*, 141 US at 251. The United States Supreme Court began its discussion of Botsford's right to what we now call bodily integrity with a citation to Michigan's own Justice Thomas M. Cooley. The United States Supreme Court approvingly declared: "As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.' Cooley, Torts, 29." *Id.* at 251.

Justice Cooley is not merely a former member of our Supreme Court. His wisdom is lauded in many opinions of that Court. See, e.g., *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 462; 952

NW2d 434 (2020) ("Former Michigan Supreme Court Justice Thomas M. Cooley, one of our nation's preeminent jurists and learned scholars …"); *People v Szalma*, 487 Mich 708, 716; 790 NW2d 662 (2010) ("Michigan's own Blackstone, Justice THOMAS M. COOLEY …); *Michigan Dept of Transp v Tomkins*, 481 Mich 184, 207; 749 NW2d 716 (2008) ("our venerable Michigan Supreme Court Justice Thomas M. Cooley,"); and *Michigan Coal of State Employee Unions v Michigan Civil Serv Comm,* 465 Mich 212, 222; 634 NW2d 692 (2001) ("the great constitutional law scholar and member of this Court in the nineteenth century, Justice Thomas M. Cooley …). Justice Cooley's 1879 pronouncement has several critical implications for this case.

First, Justice Cooley's succinct acknowledgment of the right "to be let alone" is now viewed as the foundation for the common law's recognition of the right to bodily integrity.[7] Personal autonomy and bodily integrity have been characterized as essential rights in a multitude of cases predating the adoption of Michigan's 1963 Constitution. See, for example, Justice Cardozo's pronouncement in *Schloendorff v Soc'y of New York Hosp*, 211 NY 125, 129; 105 NE 92 (NY, 1914), overruled in part on other grounds *Bing v Thunig*, 2 NY2d 656; 143 NE2d 3 (1957), that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body," the New Jersey Supreme Court's declaration that "The right of a person to control his own body is a basic societal concept, long recognized in the common law," *Matter of Conroy*, 98 NJ 321, 346; 486 A2d 1209 (NJ, 1985), and the Kansas Supreme Court's 1960 holding that: "Anglo-American law starts with the premise of thorough-going self-determination.

[7] The Michigan Supreme Court is also regarded as the source of the right to privacy. As noted in *Dalley v Dykema Gossett*, 287 Mich App 296, 306; 788 NW2d 679 (2010): "Dean William Prosser has identified a Michigan case, *De May v. Roberts,* 46 Mich 160, 9 NW 146 (1881), as among the first reported decisions allowing relief premised on an invasion of privacy theory. Prosser, *Privacy*, 48 Cal L R 383, 389 (1960)."

It follows that each man is considered to be master of his own body …". *Natanson v Kline*, 186 Kan 393, 406-407; 350 P2d 1093 (Kansas, 1960). And as Justice Brandeis observed in dissent in *Olmstead v United States*, 277 US 438, 478; 48 S Ct 564, 572; 72 L Ed 944 (1928) (BRANDEIS, J, dissenting), "The makers of our Constitution … sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men."[8]

Second, given its historical provenance and widespread judicial acceptance, there can be no doubt but that the right to be let alone—the right to bodily integrity—was understood by the ratifiers of the 1963 Michigan Constitution as a fundamental component of due process. A Michigan court's objective in discerning the meaning of a constitutional provision "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004) (citation omitted). As held in *Mays* and discussed above, the right to bodily integrity is subsumed within our Constitution's due process guarantees.

Mays did not address whether the due process right to bodily integrity qualifies as fundamental—nor did it need to. The Michigan Supreme Court has not articulated a definitive pathway for evaluating whether a constitutional right qualifies as "fundamental" under our state's

[8] The Supreme Court overruled *Olmstead* in *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed2d 576 (1976).

Constitution. Similar to the law governing the interpretation of constitutional meaning, the case law suggests that history and tradition play major roles in the determination. See *People v Kevorkian*, 447 Mich 436, 477; 527 NW2d 714 (1994), in which the Court explored whether the right to commit suicide "arises from a rational evolution of tradition," and its recognition would not constitute "a radical departure from historical precepts" (opinion CAVANAGH, CJ, and BRICKLEY and GRIFFIN, JJ), and *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004), where the Court rejected that that a jury's "right" to assess full damages is "fundamental" under the Michigan Constitution examining whether it represented "an interest traditionally protected by our society" that is "implicit in the concept of ordered liberty." Examined through those lenses, the right to bodily integrity is indisputably fundamental.

Many fundamental due process rights are not mentioned in our constitutional text but are nevertheless central to our freedoms as Americans and Michiganders. Other rights now generally accepted by our society as fundamental include the right to marry the person of our choice, *Loving v Virginia*, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967); the right to have children, *Skinner v Oklahoma ex rel Williamson*, 316 US 535; 62 S Ct 1110; 86 L Ed 1655 (1942); the right to direct the education of our children, *Meyer v Nebraska*, 262 US 390; 43 S Ct 625 67 L Ed 1042 (1923) and *Pierce v Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925); and the right to be free from intrusive and invasive governmental searches, *Rochin v California*, 342 US 165; 72 S Ct 205; 96 L Ed 183 (1952). All of these rights were commonly understood by the ratifiers of the 1963 Constitution as essential components of our state Constitution's concept of due process. Recognition of the right to bodily integrity as fundamental flows naturally from our understanding of the essential nature of these other due process rights.

B. The Right to Bodily Integrity and Abortion

The due process protections we take for granted in 2022 "have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994). The decision to voluntarily terminate a pregnancy "is at the very heart" of the "cluster of constitutionally protected choices" described in the cases cited above. *Carey v Population Services, Intern*, 431 US 678, 685; 97 S Ct 2010; 52 L Ed 2d 675 (1977).

Thirty years ago, the United States Supreme Court explicitly tied a woman's right to abortion with her right to bodily integrity. In prohibiting abortion, a state not only "touche[s] upon the private sphere of the family but upon the very bodily integrity of the pregnant woman." *Casey*, 505 US at 896. Pregnancy implicates bodily integrity because even for the healthiest women it carries consequential medical risks. Pregnant women face the prospect of developing conditions that may result in death, or may forever transform their health, such as blood clots and hypertensive disorders. See the affidavit of Dr. Sarah Wallett, ¶¶24-34. For others,

> carrying a pregnancy to term may aggravate pre-existing conditions such as heart disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. According to these sources, pregnancy also can hamper the diagnosis or treatment of a serious medical condition, as when a pregnant woman cannot receive chemotherapy to treat her cancer, or cannot take psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus. [*New Mexico Right to Choose/NARAL v Johnson*, 975 P2d 841, 855 (NM, 1998)].

Pregnancy and childbirth, particularly if unwanted, transform a woman's psychological well-being in addition to her body. As recognized in *People v Nixon* half a century ago, legal abortion is actually safer than childbirth. *Nixon*, 42 Mich App at 339. Thus, the link between the right to bodily integrity and the decision whether to bear a child is an obvious one.

Among the substantive due process decisions implicating the right to bodily integrity, the cases most conceptually relevant to the connection between the right to bodily integrity and a woman's right to abortion are *Rochin v California*, 342 US 165, 169; 72 S Ct 205; 96 L Ed 183 (1952), and *Cruzan v Director, Mo Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990). In *Cruzan* the Supreme Court considered whether the parents of a young woman in a persistent vegetative state could demand that a hospital withdraw life-sustaining treatment. *Cruzan*, 497 US at 265-269. The Court extensively traced the roots of the informed consent doctrine, drawing on the common law and specifically on cases recognizing the right to bodily integrity: "This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment," *id.* at 269, and "generally encompass[es] the right of a competent individual to refuse medical treatment." *Id.* at 277. Because every medical procedure implicates a person's liberty interests in personal privacy and bodily integrity, the Supreme Court reasoned, there is "a general liberty interest in refusing medical treatment." *Id.* at 278.

A general liberty interest in *refusing* medical treatment inextricably correlates with a general liberty interest in *seeking* medical treatment. The right to bodily integrity inherent in a decision to reject a physician's advice logically embraces the right to make a medical decision to obtain treatment. "Just as the Due Process Clause protects the deeply personal decision of the individual to refuse medical treatment, it also must protect the deeply personal decision to obtain medical treatment, including a woman's decision to terminate a pregnancy." *Casey*, 505 US at 927 (BLACKMUN, J., concurring).

Forced pregnancy, and the concomitant compulsion to endure medical and psychological risks accompanying it, contravene the right to make autonomous medical decisions. If a woman's

right to bodily integrity is to have any real meaning, it must incorporate her right to make decisions about the health events most likely to change the course of her life: pregnancy and childbirth.

In *Rochin*, 342 US 165, the United States Supreme Court reversed a conviction based on evidence obtained by forcibly pumping the accused's stomach. The Supreme Court tethered its holding to the Due Process Clause rather than to the Fifth Amendment's prohibition of compelled self-incrimination, explaining that "[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which … are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' … or are 'implicit in the concept of ordered liberty.' " *Id.* at 169 (citations omitted).

Speaking through Justice Felix Frankfurter, the *Rochin* Court characterized the Due Process Clause as "the least specific and most comprehensive protection of liberties." *Id.* at 170. Those liberties cannot always be precisely labeled or defined, the Court observed, as their meanings are at times garnered from "the deposit of history." *Id.* at 169. In dealing with human rights," however, "the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions." *Id.*

Rochin instructs that as the world changes and history advances, new ideas and perceptions emerge, guiding judicial determinations of "rights." This process is not at odds with judicial humility, Justice Frankfurter advanced; "[t]o believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges." *Id.* at 171. The language of the Due Process Clause "may be indefinite and vague," Justice Frankfurter conceded, but "[i]n each case 'due process of law' requires an

evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, … on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Id.* at 172.

The judicial process described in *Rochin* is not unlike that employed by the Michigan Supreme Court in *Sitz*, yielding a ruling that sobriety checklanes, unknown in 1963, were nevertheless unconstitutional under the 1963 Constitution. In reaching that conclusion, the Supreme Court drew heavily on Michigan jurisprudence surrounding the search and seizure of automobiles, tracing the case law back to 1922. *Sitz*, 443 Mich at 765. After reviewing the case law (including abundant federal authority) in considerable detail, the Court summarized: "[T]the protection afforded to the seizures of vehicles for criminal investigatory purposes has both an historical foundation and a contemporary justification that is not outweighed by the necessity advanced." *Id.* at 778.

The fundamental right to personal autonomy, to be let alone, has an even deeper "historical foundation" than the checklanes struck down in *Sitz*. As pointed out in *Nixon*, the state had no interest in fetal life before quickening until 1931. And after 50 years of legal abortion in Michigan, there can be no doubt but that the right of personal autonomy and bodily integrity enjoyed by our citizens includes the right of a woman, in consultation with her physician, to terminate a pregnancy. From a constitutional standpoint, the right to obtain a safe medical treatment is indistinguishable from the right of a patient to refuse treatment. Based on the due process principles discussed

above, the Court finds a substantial likelihood that that MCL 750.14 violates the Due Process Clause of Michigan's Constitution.[9]

V. INJUNCTIVE RELIEF

Plaintiffs seek preliminary and permanent injunctions barring the enforcement of MCL 750.14. The parties have waived the requirement of a hearing under MCR 3.310(A)(1).

A party seeking a preliminary injunction bears the burden of demonstrating entitlement to relief based on the following factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted).]

This type of relief is "an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Id.* (citation and quotation marks omitted). "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Mich Alliance for Retired Americans v Sec'y of State*, 334 Mich App 238, 262; 964 NW2d 816 (2020) (citation and quotation marks omitted).

The Court finds a strong likelihood that plaintiffs will prevail on the merits of their constitutional challenge, as discussed above. Second, should the United States Supreme Court overrule *Roe v Wade*, plaintiffs and their patients face a serious danger of irreparable harm if

[9] The Court's opinion is not intended to resolve the other grounds raised by plaintiffs in support of their motions for declaratory judgment and injunctive relief. Those arguments remain outstanding.

prevented from accessing abortion services for the reasons set forth in Dr. Wallett's affidavit. The inability to exercise a fundamental constitutional right inherently constitutes irreparable harm. See *Planned Parenthood of Minnesota, Inc v Citizens for Cmty Action*, 558 F2d 861, 867 (CA 8, 1977) ("Planned Parenthood's showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury.")[10] Dr. Wallett also averred that the current uncertainty regarding *Roe* and *Dobbs* is frustrating the ability of plaintiffs to carry out their organizational goals, which itself can be a form of irreparable harm. See *Santa Cruz Lesbian & Gay Comm Ctr v Trump*, 508 F Supp 3d 521, 545-546 (ND Cal, 2020). Third, the balancing of hardships strongly weighs in plaintiff's favor. MCL 750.14 criminalizes virtually all abortions, and if enforced, will abruptly and completely end the availability of abortion services in Michigan. Maintenance of the status quo will not harm the Attorney General. Finally, a preliminary injunction furthers the public interest, allowing the Court to make a full ruling on the merits of the case without subjecting plaintiffs and their patients to the impact of a total ban on abortion services in this State. Maintenance of the status quo preserves public's interest in the stability and predictability of the law. Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc v Michigan Liquor Control Com'n*, 23 F3d 1071, 1079 (CA 6, 1994).

VI. CONCLUSION

[10] Because it is impossible to predict when the United States Supreme Court will issue a decision in *Dobbs*, the Court finds that the issuance of immediate preliminary injunctive relief warranted to avoid the necessity of another motion and further briefing. Should *Dobbs* not overrule *Roe*, or result in a ruling that calls into question any portion of the Court's analysis, the parties will be expected to advise the Court of the need for additional briefing and a hearing.

The Court **GRANTS** Plaintiffs' motion for a preliminary injunction and further **ORDERS:**

(1) Defendant and anyone acting under defendant's control and supervision, see MCL 14.30, are hereby enjoined during the pendency of this action from enforcing MCL 750.14;

(2) Defendant shall give immediate notice of this preliminary injunction to all state and local officials acting under defendant's supervision that they are enjoined and restrained from enforcing MCL 750.14;

(3) Other laws in effect *regulating* abortion in this State shall remain in full effect;

(4) The parties shall inform the Court within the next thirty (30) days whether there is a need to schedule a trial on the merits;

(5) This preliminary injunction shall remain in effect until this Court resolves the case in full.

This is not a final order and it does not resolve the last pending claim or close the case.

Date: May 17, 2022

Elizabeth L. Gleicher
Judge, Court of Claims

EXHIBIT 6

STATE OF MICHIGAN
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.

No. 22-000044-MM

HON. ELIZABETH GLEICHER

DEFENDANT ATTORNEY GENERAL DANA NESSEL'S MAY 5, 2022 RESPONSE TO PLAINTIFFS' APRIL 7, 2022 MOTION FOR PRELIMINARY INJUNCTION

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DEFENDANT ATTORNEY GENERAL DANA NESSEL'S MAY 5, 2022 RESPONSE TO PLAINTIFFS' APRIL 7, 2022 MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

The right to access safe abortion services in Michigan is now more than ever of significant and grave concern. Plaintiffs' lawsuit places that legal question squarely before the Court in their challenge to the constitutionality of Michigan's criminal abortion statute. It is a rare occasion that the Attorney General declines to defend the constitutionality of a duly enacted law. But this is such an occasion.

Since taking office, and even before then during her candidacy, the Attorney General has been vocal in her support of reproductive rights and in her stance that the criminal abortion statute is unconstitutional. As an elected, executive official, the Attorney General has discretion to defend a law, and she declines to do so here. Defending this archaic and harmful law will not serve the interests of the public and would conflict with her oath to uphold Michigan's Constitution.

Because the parties' interests are aligned, the Court is now confronted with the question of its jurisdiction to hear this matter. For jurisdiction to exist, there must be a live, actual controversy between adverse litigants. Given the Attorney General's decision not to defend the statute, there is presently a lack of adversity sufficient to support jurisdiction. When a court lacks jurisdiction, it loses its power to hear the case. But that need not happen here. Plaintiffs can amend their lawsuit to add an appropriate party to ensure adversity exists. The Attorney General has offered to stipulate to such an amendment. Plaintiffs may then continue to press, and this Court can resolve, the substantial legal questions presented by this case and so important to the women of Michigan.

STATEMENT OF FACTS AND PROCEEDINGS

Attorney General Nessel was elected by the people of Michigan as the State's 54th Attorney General. As a candidate, the Attorney General made clear she would not enforce Michigan's criminal abortion statute, MCL 750.14, and shortly after taking office in January 2019, she reconfirmed that commitment at a conference held by Plaintiff Planned Parenthood of Michigan. (Ex A, Detroit News, 4/16/19, *Nessel: I'd never enforce Michigan abortion ban or let 'women be butchered'.*) The Attorney General has never wavered in her commitment to reproductive freedom, taking numerous actions to protect these rights.[1]

Despite the Attorney General's staunch position and Planned Parenthood's knowledge of that position, on April 7, 2022, Plaintiffs filed the instant complaint against only the Attorney General, seeking a declaration that Michigan's criminal abortion statute is unconstitutional and to enjoin her from enforcing the statute should the United States Supreme Court overrule *Roe v Wade*, 410 US 113 (1973).[2] Notably, on the same day, Governor Gretchen Whitmer, on behalf of the State of

[1] For instance, the Attorney General has joined amicus briefs in numerous lawsuits to defend access to reproductive health care. See *Whole Woman's Health Alliance, et al v Rokita, et al*, Case Nos. 21-2480 & 21-2573, US Court of Appeals for the Seventh Circuit; *Whole Woman's Health, et al v Jackson, et al* and *US v Texas, et al*, Case Nos. 21-463 & 21-588, US Supreme Court; *Dobbs v Jackson Women's Health Organization, et al*, No. 19-1392, US Supreme Court; *Preterm-Cleveland, et al v Himes,* Case No. 18-3329, US Court of Appeals for the Sixth Circuit; *American College of Obstetricians and Gynecologists v US Food & Drug Admin, et al*, Case Nos. 20-1784, 20-1824, & 20-1970, US Court of Appeals for the Fourth Circuit; *Planned Parenthood South Atlantic v Wilson,* Case No. 21-1369, US Court of Appeals for the Fourth Circuit.

[2] Presently, based on *People v Bricker,* 389 Mich 524 (1973), the statute, MCL 750.14, must be interpreted consistent with *Roe* and other federal precedents.

Michigan, filed suit in Oakland County Circuit Court against 13 county prosecutors, likewise seeking a declaration that the criminal abortion statute is unconstitutional and to enjoin the defendant prosecutors from enforcing the statute. (Ex B, *Whitmer v Linderman, et al*, 22-193498-CZ.)[3] Governor Whitmer further requested that the Michigan Supreme Court authorize the trial court to certify to the Supreme Court the question of the constitutionality of MCL 750.14. (Ex. C, Executive Message.)

The Attorney General swiftly responded to news of Plaintiffs' filing here, publicly stating that she " 'will not use the resources of [her] office to defend Michigan's 1931 statute criminalizing abortion.' " (Ex. D, 4/7/22 Press Release.) In light of her decision, legal counsel for the Michigan House of Representatives and the Michigan Senate were advised of both the Attorney General's intent and that she would not oppose the Legislature's intervention in the lawsuit. Legislative counsel acknowledged receipt of these communications and advised that the matter remains under review.

[3] The duty to enforce Michigan's criminal laws falls principally on the elected prosecutors in the state's 83 counties. See Const 1963, art 7, § 4; MCL 49.153. See also *People v Graves*, 31 Mich App 635, 636 (1971) ("The prosecuting attorney is the chief law enforcement officer of his county. The ultimate police power reposes in the hands of this civilian law enforcement officer who was elected by the people.") While the Attorney General generally "supervise[s] the work of, consult[s] and advise[s] the prosecuting attorneys," MCL 14.30, county prosecutors have broad discretion with respect to charging determinations. See, e.g., *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683 (1972).

ARGUMENT

I. Attorney General Nessel agrees with Plaintiffs that Michigan's criminal abortion statute, MCL 750.14, is unconstitutional.

Plaintiffs' complaint powerfully and persuasively alleges that Michigan's criminal abortion statute, MCL 750.14, violates several provisions of the Michigan Constitution, including the Due Process Clause, art 1, § 17, and the Equal Protection Clause, art 1, § 2. The Attorney General agrees that the statute is unconstitutional under the theories alleged by Plaintiffs.[4] And because she agrees, the Attorney General will not exercise her discretion to defend the statute, a point she made clear the day the lawsuit was filed. This lack of adversity between the parties implicates this Court's subject matter jurisdiction.

A. The Attorney General is not required to defend the constitutionality of every statute, and she has exercised her to discretion not to do so here.

The Attorney General is an elected, executive official. Const 1963, art 5, §§ 3, 21. As the State's chief legal officer, the Attorney General is endowed with common law and statutory duties and powers. *Mundy v McDonald*, 216 Mich 444, 440-451 (1921). The " 'most basic purpose of [the Attorney General's] office is to litigate matters on behalf of the people of the state.' " *Fieger v Cox*, 274 Mich App 449, 465 (2007), quoting *In re Certified Question (Wayne Co v Philip Morris, Inc),* 465 Mich 537, 543 (2002); *Attorney General v Public Service Comm*, 243 Mich App 487, 497 (2000). See also MCL 14.28, MCL 14.29, MCL 600.6416. This duty to provide

[4] The complaint also includes a novel claim under the Elliott-Larsen Civil Rights Act; however, since MCL 750.14 is unconstitutional, it is unnecessary for the Court to address the statutory claim, as the statute will be unenforceable.

representation in the Michigan Supreme Court and to state agencies "when in [her] own judgment the interests of the state require it," MCL 14.28, frequently involves defending the constitutionality of challenged statutes.

But there is no requirement in Michigan law, statutory or otherwise, that the Attorney General defend the constitutionality of *every* challenged statute in *every* case. Indeed, "it is universally recognized that among the primary missions of a state attorney general is the duty to give legal advice, including advice concerning the constitutionality of state statutes, to members of the legislature, and departments and agencies of state government." *Sch Dist of City of E Grand Rapids, Kent Cty v Kent Cty Tax Allocation Bd*, 415 Mich 381, 394 (1982) (noting that former Attorney General had rendered opinion declaring challenged statute unconstitutional). And with respect to litigation, the Attorney General has broad authority to determine the course and disposition of any litigation. See, e.g., *In re Certified Question from US Dist Ct for E Dist of Michigan*, 465 Mich at 547 ("the Attorney General has broad authority to sue and settle with regard to matters of state interest".) See also 7 Am Jur 2d, Attorney General, §§ 27, 29. Further, no client has asked her to defend here because there is no state agency in this case—the lawsuit names only the Attorney General. And the Governor has already spoken "on behalf of the State of Michigan" that MCL 750.14 is unconstitutional. (Ex. B, Whitmer Compl.) See also *Lucas v Bd of Cty Rd Comm'rs of Wayne Cty*, 131 Mich App 642, 663 (1984) ("The Attorney General, albeit a constitutional officer, is a member of the executive branch and thereby constitutionally subservient to the

Governor as repository of the executive power of the state.")

Additionally, the "paramount duty" of the Attorney General is "to protect the interests of the general public." 7A CJS, Attorney General, § 28. See also MCL 14.101 (authorizing intervention by Attorney General in "any action . . . in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state."); *Michigan State Chiropractic Ass'n v Kelley,* 79 Mich App 789 (1977) (The Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed." (citations omitted).

Here, it would be inconsistent with her duty to protect the public to defend a statute that so plainly violates Michigan's Constitution. See, e.g., *Commonwealth ex rel Beshear v Commonwealth of Kentucky, Office of the Governor, et al*, 498 SW3d 355, 364 (2016) ("[T]he Attorney General must defend duly adopted statutory enactments *that are not unconstitutional*.") (emphasis added). Defending an unconstitutional statute also places the Attorney General at odds with her oath to "support . . . the constitution of this state[.]" Const 1963, art 11, § 1. See, e.g., *Berry v School Dist of City of Benton Harbor*, 467 F Supp 630, 634-635 (WD Mich, 1978) (noting that while the Attorney General "swears to support" the Michigan Constitution, the former Attorney General had failed to "fulfill his constitutional duties" to remedy or prevent unconstitutional school segregation.)

The exercise of an executive officer's discretion to decline to defend a statute is, and should be, a rare occurrence; but it is one that has been exercised at the

highest levels of government. See, e.g., *California v Texas*, US Supreme Court Nos. 19-840 & 19-1019 (federal government declined to defend Patient Protection & Affordable Care and instead argued portions of the Act were unconstitutional).

For these reasons, it is well within the Attorney General's discretion to decline to defend the constitutionality of a statute, especially one that threatens the lives and well-being of Michigan women. See, e.g., *Humphrey v Kleinhardt*, 157 FRD 404, 405 (WD Mich 1994) ("[T]he authority of the Attorney General of the State of Michigan is to be liberally construed, and [her] discretion in determining which matters are ones of appropriate concern should only be interfered with where [her] actions are found to be clearly inimicable to the people's interest.") And, respectfully, this Court does not have the power to order the Attorney General to do otherwise. See 7A CJS, Attorney General, § 30; Const 1963, art 3, § 2. See also, *Fieger,* 274 Mich App at 466-467 ("[T]he judiciary generally may not second-guess executive-branch decisions" involving "discretionary actions by the executive branch."); *Hicks v Ottewell*, 174 Mich App 750, 757 (1989) ("The district court and the circuit court lack jurisdiction to compel a discretionary act by an officer in the executive branch of the government.")

B. The lack of adversity between the parties implicates this Court's subject matter jurisdiction.

" 'Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any

stage of the proceeding.' " *Fox v Board of Regents,* 375 Mich 238, 242 (1965) (citation omitted). See also *Yee v Shiawassee Co Bd of Com'rs,* 251 Mich App 379, 399 (2002) ("[A] court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford[.]") "When a court is without jurisdiction of the subject matter, any action with respect to such a cause . . . is absolutely void." *Fox*, 375 Mich at 242.

Given the Attorney General's exercise of discretion not to defend MCL 750.14, there is at present a lack of adversity. Before the Court can order any declaratory or injunctive relief, there must first be an actual, live controversy before the Court. See *League of Women Voters (LWV II) v Secretary of State*, 506 Mich 561, 585-586 (2020); MCR 2.605(A)(1) ("In a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment [.]") (emphasis added). And for there to be a controversy, there needs to be adversity between the parties, which does not presently exist in this case. See *League of Women Voters, et al (LWV I) v Secretary of State*, 506 Mich 905 (2020) (Viviano, J., concurring). See also *Anway v Grand Rapids R Co,* 211 Mich 592, 616 (1920) ("The judicial power . . . is the right to determine actual controversies arising between *adverse* litigants . . . .") (quotation marks and citation omitted; emphasis added); *Gleason v Kincaid*, 323 Mich App 308, 314 (2018) ("It is our duty to decide actual cases and controversies, that is, actual controversies arising between adverse litigants.") (citation omitted). It is plain an additional party must be brought into this lawsuit to create the

necessary adversity and stave off claims that the suit is nothing more than a "friendly scrimmage brought to obtain a binding result that both sides desire." *League of Women Voters (LWV I)*, 506 Mich at 905 (Viviano, J., concurring).

League of Women Voters (LWV II) v Secretary of State is instructive on this point. There, the Michigan Supreme Court held that where executive branch officials decline to defend a statute, the Michigan Legislature has standing to defend the challenged statute and to intervene for the purpose of doing so. 506 Mich at 578-579 ("[W]e agree the Legislature has a sufficient 'interest in defending its own work' and can fill the breach left by the Attorney General. Therefore, when the Attorney General does not defend a statute against a constitutional challenge by private parties in court, the Legislature is aggrieved and, upon intervening, has standing to appeal.").

Under a similar rationale, an appropriate defendant could be added through amendment of the complaint under MCR 2.118. The various joinder rules also permit the addition of parties to litigation. See MCR 2.205; MCR 2.206; MCR 2.207. It is unclear, however, whether these rules may be used to remedy a jurisdictional defect. Regardless, the Attorney General is prepared to stipulate to the addition of an appropriate party in an appropriate manner. But to be clear, the Attorney General does not agree to and opposes the addition or joinder of staff from her office

to create a team to argue the constitutionality of MCL 750.14—in other words, to create controversy that currently does not exist.[5]

At times, the Attorney General will erect a conflict wall within her office and appoint two separate teams of attorneys to argue opposing views. A recent example is the case of *League of Women Voters, et al (LWV III) v Secretary of State, et al*, ___ Mich ___; 2022 WL 211736 (Jan 24, 2022, Mich), where attorneys intervened on behalf of the Department of Attorney General to defend the constitutionality of various election statutes. But the decision to appoint a conflict team, like the decision to defend a statute, is entirely within the Attorney General's discretion. And here, the Attorney General declines to appoint such a team. The Attorney General firmly believes that the criminal abortion statute is unconstitutional and that there are no defensible arguments to the contrary. Further, it would not be in the public interest, or consistent with her oath, to use either the weight of her office or the resources of this state to defend this archaic and harmful law.

The legal issues in this case are important. For that reason, the Attorney General will not move to dismiss the action. But the matter must be vigorously litigated to ensure a defensible result. This will not happen given the present posture of the case. Plaintiffs, with full knowledge of the Attorney General's

[5] Nor does the Attorney General believe that when controversy is lacking at the outset of a case, it can be created through amicus briefing, although she believes amicus briefs generally assist the Court in arriving at a just resolution. See, e.g., *League of Women Voters (LWV I)*, 506 Mich at 905 (Viviano, J., concurring) (expressing doubt that impressing amici to defend the constitutionality of a statute is an appropriate measure to cure the lack of an actual controversy between parties).

longstanding position regarding this statute, chose to name only her as a defendant. But as the "masters" of their complaint, Plaintiffs can amend to add an additional party to ensure this Court has jurisdiction to hear and resolve the case. See, e.g, *The Fair v Kohler Die & Specialty Co*, 228 US 22, 25 (1913) (Holmes, J.) ("Of course the party who brings a suit is master to decide what law he will rely upon. . . ."). See also *Alexander v Electronic Data Sys Corp*, 13 F3d 940, 943-944 (CA 6, 1994) (asserting in the context of the well-pleaded complaint rule that "the plaintiff is the master of his complaint").

CONCLUSION AND RELIEF REQUESTED

Because the Attorney General has exercised discretion not to defend MCL 750.14, she declines to take a substantive position with respect to the merits of Plaintiffs' motion for a preliminary injunction. This declination should not be viewed as a concurrence in the motion.

Respectfully submitted,

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Dated: April 5, 2022

PROOF OF SERVICE

Heather S. Meingast certifies that on April 5, 2022, she served a copy of the above document in this matter on all counsel of record via MiFILE.

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EXHIBIT 7

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.**, on her own behalf and on behalf of her patients,

Plaintiffs,

v

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

Defendant.
_____/

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' APRIL 7, 2022 MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

INTRODUCTION

Defendant's suggestion that the Court lacks subject-matter jurisdiction over this case because of an allegation that there is no adversity between the parties is wrong. This Court's jurisdiction is not tethered to or dependent upon the parties' arguments and positions on questions of law, but rather their status and standing under the law. Simply put, the Attorney General's overall asserted agreement with Plaintiffs' legal arguments or claims is not the same as a lack of adversity between the parties. As explained below, even though the current attorney general apparently personally agrees with Plaintiffs' position that the Criminal Abortion Ban is unconstitutional, adversity remains because the Attorney General is being sued as an agent of the State and Plaintiffs are challenging the constitutionality of a state statute, seeking relief that can be obtained only through judicial review and a court order.

There is no time to lose. As revealed by the recent leak of a draft majority opinion in *Dobbs v Jackson Women's Health Organization*, the United States Supreme Court is poised to overrule *Roe v Wade* and *Planned Parenthood v Casey*; its decision will likely be released in a matter of weeks, perhaps days. Preliminary injunctive relief is needed now to preserve the status quo. Accordingly, the Court should conclude that it has subject-matter jurisdiction over an actual controversy, proceed to decide Plaintiffs' motion on its merits, and enter a preliminary injunction.

ARGUMENT

I. THE ATTORNEY GENERAL IS ADVERSE TO PLAINTIFFS AS A MATTER OF LAW BECAUSE PLAINTIFFS ARE CHALLENGING THE CONSTITUTIONALITY OF A STATE STATUTE AND THE ATTORNEY GENERAL IS BEING SUED AS AN AGENT OF THE STATE

Michigan courts have subject-matter jurisdiction over actions seeking declaratory relief where, as here, plaintiffs satisfy the "actual controversy" requirement of MCR 2.605(A)(1) by

demonstrating "an adverse interest necessitating the sharpening of the issues raised," and that "a declaratory judgment is necessary to guide [their] future conduct in order to preserve legal rights." *UAW v Cent Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012).

As a threshold matter, there is adversity between the parties in this case because such adversity is created by operation of law. Michigan's Court of Claims Act provides that "[t]he attorney general . . . *shall* appear for and represent the interests of the state in all matters before the court." MCL 600.6416 (emphasis added). "The Legislature's use of the term 'shall' indicates a mandatory and imperative directive." *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 601; 822 NW2d 159 (2012). Because the Attorney General is legally required to represent the interests of the State, and "a State clearly has a legitimate interest in the continued enforceability of its own statutes," *Maine v Taylor*, 477 US 131, 137; 106 S Ct 2440; 91 L Ed 2d 110 (1986), the Attorney General's legal position is necessarily adverse to that of any non-state actor challenging the constitutionality of a state law. Indeed, just last fall, in a filing in this Court, Defendant candidly acknowledged: "The Attorney General does not dispute that she may be sued, even solely, in a lawsuit crafted to challenge the constitutionality of state law." Defendant's 9/24/2021 Reply Brief, *Mothering Justice v Attorney General* (Court of Claims Docket No. 21-000095-MM), p 2 [attached as Exhibit A]. As a jurisdictional matter, this case is no different.

The fact that the Attorney General may personally agree with Plaintiffs' position on the constitutionality of the Criminal Abortion Ban is irrelevant to the question of whether the parties are adverse for jurisdictional purposes. Where, as here, the Attorney General is sued in her official capacity, it is the office of the attorney general that is being sued as a stand-in for the State, and the personal views and even present-day intentions of the current office-holder are

irrelevant for purposes of whether there is adversity between the parties as a matter of law. "Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent." *Carlton v Dep't of Corrections*, 215 Mich App 490, 500–501; 546 NW2d 671 (1996). The Attorney General is an agent of the State, and Plaintiffs' suit challenges the validity of a duly enacted law of the State. The Ban's mere existence, and the Attorney General's official position as the State's agent, creates adversity between the parties as a matter of law, regardless of what the present individual office-holder's current personal opinion happens to be.

Defendant's contention that the Attorney General's overall agreement with Plaintiffs' legal arguments "implicates" this Court's subject-matter jurisdiction (Def's Response, pp 4, 7) finds no support in the law. Defendant relies primarily on a statement by a single justice, concurring in an order denying reconsideration of the denial of an application for leave to appeal, stating that in a future case the Court "may" need to consider the jurisdictional question. See *League of Women Voters of Mich v Secretary of State*, 506 Mich 905, ___; 948 NW2d 70, 72 (2020) (VIVIANO, J., concurring). The remaining authorities cited by Defendant all relate to true jurisdictional issues such as standing or mootness that are not at issue here. In fact, Defendant fails to cite a single case in which a governmental office-holder's mere personal agreement with a plaintiff regarding the unconstitutionality of a law deprived a court of subject-matter jurisdiction over the case. To the contrary, so long as an official-capacity defendant is an agent of the State and a plaintiff is challenging the validity of a law of the State, the parties are adverse and there is an "actual controversy" for the Court to resolve.

II. THERE IS ADVERSITY BETWEEN THE PARTIES BECAUSE PLAINTIFFS SEEK RELIEF THAT THE ATTORNEY GENERAL IS UNWILLING OR UNABLE TO PROVIDE WITHOUT A COURT ORDER

Unsurprisingly, this is not the first time an attorney general or executive official has agreed with a plaintiff's legal claim that a statute is unconstitutional, but such alignment on a question of law does not deprive a court of subject-matter jurisdiction, particularly where the parties disagree as to the requested relief. For example, in *United States v Windsor*, 570 US 744; 133 S Ct 2675; 186 L Ed 2d 808 (2013), the Obama administration took the legal position that the Defense of Marriage Act was unconstitutional, but this plaintiff-defendant alignment as to the federal statute's unconstitutionality did not require the United States Supreme Court to dismiss the case. Rather, the Court concluded that it still had jurisdiction to decide the case because the plaintiff sought a tax refund that the government would not provide without a court order. See *id*. at 756–761.

In Michigan, a similar issue arose in *League of Women Voters of Michigan v Secretary of State*, 333 Mich App 1; 959 NW2d 1 (2020), where the parties agreed that a statute governing the deadline for a clerk's receipt of absent-voter ballots was unconstitutional. The Court of Appeals, far from dismissing the lawsuit based on a lack of adversity, undertook its own independent analysis as to the constitutionality of the statute, and ruled on the merits of that issue. See *id*. at 9–12. Chief Justice McCormack later explained why continuing to adjudicate the case was appropriate: "[T]he statute remain[ed] binding, and the plaintiffs' purported injury" stood. *League of Women Voters*, 948 NW2d at 75 n 4 (MCCORMACK, C.J., dissenting). Specifically, local clerks would be required to apply the statute, and the Secretary of State, although having supervisory control over local election officials, see MCL 168.21, had not directed the local clerks to disregard the statute. *League of Women Voters*, 333 Mich App at 5, 9.

The upshot of both these cases is that a governmental defendant's agreement with a plaintiff regarding the unconstitutionality of a challenged statute does not destroy adversity between the parties or deprive a court of subject-matter jurisdiction over the case when such agreement fails to provide a plaintiff with all the relief the plaintiff seeks. Indeed, if any proper defendant could deprive a court of jurisdiction to adjudicate serious claims simply by asserting lack of adversity, plaintiffs could be left to suffer injury without recourse. In *Windsor*, the requested tax refund remained outstanding. And in *League of Women Voters*, subordinate local officials would continue to be bound by the statute. In both cases, the requested relief, which the defendants either did not or could not provide without a court order, maintained adversity between the parties, leaving no question as to the court's jurisdiction. As detailed below, the same is true in this case.

A. The Judgment of a Court Is Needed to Bind the Attorney General's Successors in Office

As in *Windsor* and *League of Women Voters*, the Attorney General's overall agreement with Plaintiffs' legal claims regarding the unconstitutionality of the Criminal Abortion Ban does not provide Plaintiffs with the relief they seek or need. Specifically, Plaintiffs seek a judgment that will bind the present attorney general's successors in office.

It is well established that, in an official-capacity suit, a judgment providing declaratory or injunctive relief against an executive official is binding on that official's successors in office. See *Salt River Project Agr Imp & Power Dist v Lee*, 672 F3d 1176, 1180 (CA 9, 2012); *Brownwell Corp v Carney*, 290 Mich 82, 84; 287 NW 387 (1939); see also MCR 2.202(C); Fed R Civ P 25(d). Absent such a judgment or some other enforceable instrument, the current office-holder's legal or policy positions generally do not bind her successors. Accordingly, the fact that the Attorney General currently agrees with Plaintiffs' legal position regarding the unconstitutionality

of the Criminal Abortion Ban does not provide the complete relief Plaintiffs sought in their complaint (see Compl, pp 34–35), or the relief Plaintiffs need to vindicate their constitutional rights and those of their patients.

This is not just a matter of Plaintiffs choosing to litigate the case now when they could just as easily do so later. The Criminal Abortion Ban has a statute of limitations of six years, MCL 767.24(10), which means that even if the current attorney general has no intention of enforcing the ban during her time in office, a future attorney general who supports the ban could prosecute a provider for conduct that occurred during the current attorney general's term.[1] Obviously, the chilling effect of such a possibility would be paralyzing; Plaintiffs and other providers need to know whether they could be vulnerable to future prosecution for the conduct they undertake now. Indeed, the very purpose of a declaratory judgment action such as this one is to "guide or direct future conduct . . . before actual injuries or losses have occurred." *UAW*, 295 Mich App at 495. Unless a judgment is entered that is binding on the Attorney General's successors, the current office-holder's assertion that she agrees with Plaintiffs is, as a practical matter and as a legal matter, cold comfort.

In sum, there is a live controversy between the parties because the Attorney General's mere agreement with Plaintiffs' legal position does not provide the relief that Plaintiffs will need to continue providing abortion: a judgment of the Court that binds both the Attorney General and her successors in office.

[1] Such a scenario is far from hypothetical. Matthew DePerno, the likely Republican candidate for attorney general this fall, "has vowed to enforce the state ban should it take effect." Oosting, *If Roe v. Wade Falls, Expect Michigan Abortion Clinic Closures, Legal Fights*, Bridge Michigan, May 3, 2022 <https://www.bridgemi.com/michigan-government/if-roe-v-wade-falls-expect-michigan-abortion-clinic-closures-legal-fights>. Indeed, in a recent call with reporters, Attorney General Nessel "acknowledged that . . . her successor . . . could still choose to pursue criminal charges if the old state law is reinstated," including up to six years after an abortion. *Id.*

B. The Judgment of a Court Is Needed to Bind County Prosecutors Who Act as State Agents Under the Attorney General's Supervision

In addition to binding the Attorney General's successors in office, a court order is needed so that county prosecutors, who operate under the Attorney General's supervision for purposes of their authority to prosecute violations of state law, will be bound by a judgment of the Court that the Criminal Abortion Ban is unconstitutional.[2] As with her successors in office, the current attorney general's mere assertion that she agrees with Plaintiffs' view of the law does not bind prosecutors and therefore does not provide the relief Plaintiffs seek and need to vindicate their constitutional rights and those of their patients. (See Compl, pp 34–35, seeking relief enjoining "all persons supervised by the Defendant".)

Under Michigan law, a litigant need not sue the prosecuting attorneys of all 83 counties to ensure that an unconstitutional law will not be enforced. Instead, because Michigan law provides that the Attorney General "shall supervise the work of . . . the prosecuting attorneys, in all matters pertaining to the duties of their offices," MCL 14.30, a judgment against the Attorney General regarding the enforceability of a state criminal law is binding on county prosecutors. A county prosecutor, although elected at the local level, "act[s] as a state agent when prosecuting state criminal charges." *Cady v Arenac Co*, 574 F3d 334, 343 (CA 6, 2009); see also *id*. at 345. Indeed, the caption in all such cases states that the named-party plaintiff is the People of the State of Michigan. So prosecutors acting in the name of the people of this State are bound by judgments against the state official who supervises them.

[2] Similarly, Plaintiffs need a judgment that binds the Department of Licensing and Regulatory Affairs (LARA), which can enforce the Criminal Abortion Ban through administrative action. Because the Attorney General acts in a representative and advisory capacity as to state agencies like LARA, MCL 14.29, 14.32; *Sch Dist of E Grand Rapids v Kent Co Tax Allocation Bd*, 415 Mich 381, 394; 330 NW 2d 7 (1982), declaratory and injunctive relief in a suit against the Attorney General would afford Plaintiffs necessary relief. (See Compl, pp 4–5.)

The United States Court of Appeals for the Sixth Circuit confirmed the binding effect of injunctions regarding state criminal laws in *Platinum Sports Ltd v Snyder*, 715 F3d 615 (CA 6, 2013). The plaintiff in *Platinum Sports* filed a lawsuit to enjoin enforcement of a Michigan law that had already been enjoined in a previous lawsuit brought by a different set of plaintiffs. *Id*. at 616. The Sixth Circuit explained that the new plaintiff could not obtain additional relief because local prosecutors were bound by the permanent injunction against state officials that was already in place:

> The "executive power" of Michigan is "vested in the governor," Mich. Const. art. V, § 1, and the Attorney General, as the top legal official in the State, is bound by a permanent injunction against his top client: the Governor. As for local prosecutors, they answer to the Attorney General, who is obligated to "supervise the work of . . . prosecuting attorneys." Mich. Comp. Laws § 14.30. Any effort by a prosecutor at this point to enforce the statutes—keeping in mind that no one has threatened any such thing—would be *ultra vires*. [*Id*. at 619.]

In this case, the binding effect on prosecutors of a judgment of the court is "necessary to guide [plaintiffs'] future conduct in order to preserve legal rights," *UAW*, 295 Mich at 495, and it is relief that cannot be obtained from the Attorney General's mere assertion that she agrees with Plaintiffs that the Criminal Abortion Ban is unconstitutional—particularly given the Attorney General's express refusal to concur in Plaintiffs' requested relief (see Def's Response, p 11). This places her in much the same position as the Secretary of State in *League of Women Voters*, discussed above. Although the Secretary agreed with the plaintiffs in that case that the statute governing the deadline for a clerk's receipt of absent-voter ballots was unconstitutional, local clerks would be required to apply the statute, and the Secretary—although having supervisory control over local election officials, see MCL 168.21—had not directed the local clerks to disregard the statute. See *League of Women Voters*, 333 Mich App at 5, 9; see also *League of Women Voters*, 948 NW2d at 75 n 4 (MCCORMACK, C.J., dissenting) ("Notwithstanding the

Secretary of State's position, the statute remains binding, and the plaintiffs' purported injury stands.").[3]

In sum, the Attorney General's mere agreement with Plaintiffs' legal position does not provide the relief that Plaintiffs will need to continue providing abortion: a judgment of the Court that binds local prosecutors and their successors in office, in addition to the Attorney General and her successors. Accordingly, this Court has subject-matter jurisdiction over the case and can proceed to adjudicate it on the merits.

III. PRUDENTIAL CONSIDERATIONS THAT WEIGH IN FAVOR OF AN ADVERSARIAL PROCESS WITH BRIEFING ON BOTH SIDES OF AN ISSUE ARE NON-JURISDICTIONAL AND CAN BE SATISFIED IN A NUMBER OF WAYS THAT SHOULD NOT DELAY ADJUDICATION OF PLAINTIFFS' URGENT MOTION

The parties' agreement about the unconstitutionality of the Ban presents potential challenges for the Court that are prudential, not jurisdictional. See *Windsor*, 570 US at 759–760. To be sure, courts are accustomed to, and benefit from, an adversarial briefing process where legal arguments on both sides of a constitutional issue are presented. See *id*. However, "[P]laintiffs here should [not] be penalized by the [Attorney General's] acquiescence in their argument, a position over which the plaintiffs have no control." *League of Women Voters*, 948 NW2d at 75 n 4 (MCCORMACK, C.J., dissenting). "Closing the courthouse doors to a party in an important case for that reason . . . [is] particularly bitter medicine." *Id.* Indeed, if a case could be dismissed for that reason alone, cynical and disingenuous government officials could insulate

[3] Although Attorney General Nessel suggested in a recent public statement that she is unable to control local prosecutors, see Pluta, *Nessel Says She Can't Stop Abortion Prosecutions if Roe Is Reversed*, WCMU Public Radio (May 4, 2022) <https://radio.wcmu.org/local-regional-news/2022-05-04/nessel-says-she-cant-stop-abortion-prosecutions-if-roe-is-reversed>, in fact the attorney general's office, in a case challenging an abortion restriction, has previously taken the opposite position in court, see *Northland Family Planning Clinic, Inc v Cox*, 487 F3d 323, 338 (CA 6, 2007) ("[T]he Attorney General argues that he can bind local prosecutors . . . ."). Ultimately, this Court need not decide whether Defendant is unable, or simply unwilling, to bind local prosecutors, as an injunction of this Court will do so. See *Platinum Sports*, 715 F3d at 619.

unconstitutional statutes from judicial review merely by disclaiming any disagreement with litigants, while simultaneously depriving them of the relief they seek and to which they are entitled.

Instead, the prudential concerns raised by the absence of adversarial briefing in a case can be addressed by the Court taking action to ensure the issues are fully briefed:

> It could invite amici curiae to file briefs, including the Legislature—an entity that certainly has an interest in defending its own work. The Court could also appoint an attorney to act as amicus curiae to defend the judgment below—a measure the United States Supreme Court takes regularly. See, e.g., *Seila Law, LLC v CFPB*, ___ US ___; 140 S Ct 2183; 207 L Ed 2d 494 (2020) (noting that the Court appointed Paul Clement as amicus curiae to defend the judgment below because the parties agreed on the merits of the constitutional questions). [*Id.*][4]

The Court could also order the Attorney General to split her office, erect a conflict wall, and assign two teams of attorneys to brief both sides of the case—an order to which the Attorney General stipulated in another case before this Court just one month ago upon determining that she was "aligned with Plaintiffs as to the unconstitutionality" of a challenged statute. See 4/5/2022 Stipulated Order, *Mothering Justice v Attorney General* (Court of Claims Docket No. 21-000095-MM), p 2.

Defendant's objections to these options are unfounded. For example, Defendant asserts that the Attorney General does not want to "use the resources" of her office or the state to defend the Criminal Abortion Ban. (Def's Response, pp 3, 10.) One solution here would be to appoint an unpaid special assistant attorney general to undertake the task of adversarial briefing. "There is no requirement that [such] an assistant be paid by the Attorney General." *Sprik v Regents of Univ*

[4] See also Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 Cornell L Rev 1533, 1547 (2016), available at <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4708&context=clr>.

of Michigan, 43 Mich App 178, 184; 204 NW2d 62 (1972), aff'd 390 Mich 84 (1973). Defendant also contends that this Court does not have the power to order her office to defend the statute. (Def's Response, p 7.) Although it is rare for a court to select counsel over the objection of a party, there is authority for courts doing so under unusual circumstances. See *Attorney General v Mich Pub Serv Comm'n*, 243 Mich App 487, 519 n 7; 625 NW2d 16 (2000) (concluding that a court may appoint an independent special assistant attorney general).

Defendant's preferred solution, for Plaintiffs to amend their complaint to add the Michigan Legislature as a defendant, has no foundation. Neither the Michigan Legislature nor its agents enforce the law, so there is no basis for Plaintiffs to seek injunctive relief against it. Nor is there any meaningful connection between this Legislature and the enactment of the Criminal Abortion Ban, which occurred in 1931. Defendant cites no authority to support the suggestion that the Legislature would be a proper defendant as to a claim challenging the constitutionality of a state law, and Plaintiffs can find none. To the contrary, it is well established that, "to the extent plaintiffs seek to have [a] court declare various state laws unconstitutional, the . . . legislature is not a proper party in such a lawsuit." *Preskar v United States*, 248 FRD 576, 585 (ED Cal, 2008). If Plaintiffs were to sue the Legislature to challenge the constitutionality of a statute, the Legislature could raise its own jurisdictional defenses about whether it is a proper defendant, or simply choose not to defend the statute—leaving the case in the same position it is in now.

Defendant offers that *League of Women Voters of Michigan v Secretary of State*, 506 Mich 561; 957 NW2d 731 (2020), is "instructive." (Def's Response, p 9.) But that case involved the decision by the Legislature to seek permissive intervention to defend the constitutionality of a statute, not a lawsuit in which a plaintiff sued the Legislature as a defendant in the first instance. See *id*. at 575. Nor did *League of Women Voters* involve any finding or assertion that the

Legislature was a necessary party to the case. See MCR 2.205. This Court could certainly invite the Legislature to intervene here; but if the Legislature chooses not to, Plaintiffs do not believe they have an independent cause of action against the Legislature such that they should name the Legislature as a defendant in their complaint.

Whatever steps the Court chooses to take prior to adjudicating this case fully on the merits, Plaintiffs request that the Court move expeditiously to rule on their motion for preliminary injunction. As revealed by the recent leak of a draft majority opinion in *Dobbs v Jackson Women's Health Organization* (U.S. No. 19-1392),[5] we are almost certainly weeks or days away from a full-blown crisis in Plaintiffs' ability to provide abortion to patients throughout the state. Health care providers are already struggling to prepare for "shockwaves throughout the . . . industry," including an inability to recruit quality physicians for OB-GYN programs, an uptick in emergency room visits and maternal mortality, and other irreparable harms. Walsh, *FAQ: Tough Questions for Health Care If Abortion Becomes Illegal in Michigan*, Crain's Detroit Business (May 3, 2022) [attached as Exhibit B]. Preliminary injunctive relief is needed as soon as possible to preserve the status quo.

CONCLUSION

For the foregoing reasons, the Court should conclude that it has subject-matter jurisdiction over this case and proceed to decide Plaintiffs' motion on its merits. The Court should further grant Plaintiffs' motion for a preliminary injunction and enter an order restraining Defendant, her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, including all persons supervised by Defendant, from

[5] Shear & Liptak, *Leaked Supreme Court Draft Would Overturn Roe v. Wade*, New York Times (May 2, 2022) <https://www.nytimes.com/live/2022/05/02/us/roe-v-wade-abortion-supreme-court#roe-v-wade-abortion-supreme-court>.

enforcing or giving effect to MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: May 6, 2022

EXHIBIT A

STATE OF MICHIGAN
COURT OF CLAIMS/

MOTHERING JUSTICE, MICHIGAN ONE FAIR WAGE, MICHIGAN TIME TO CARE, RESTAURANT OPPORTUNITIES CENTER OF MICHIGAN, JAMES HAWK, and TIA MARIE SANDERS,

Plaintiffs,

v

DANA NESSEL, in her official capacity as Attorney General and head of the Department of Attorney General,

Defendant.

No. 21-000095-MM

HON. CYNTHIA D. STEPHENS

9/24/2021 REPLY TO PLAINTIFFS' 7/19/21 RESPONSE TO DEFENDANT ATTORNEY GENERAL DANA NESSEL'S 06/07/2021 (C)(8) MOTION FOR SUMMARY DISPOSITION IN CASE NO. 21-000095-MM

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DEFENDANT'S 9/24/2021 REPLY TO PLAINTIFFS' 7/19/21 RESPONSE TO ATTORNEY GENERAL NESSEL'S 6/7/21 MOTION FOR SUMMARY DISPOSITION

Plaintiffs' attempts to call the Attorney General's professional integrity into question are not well taken. The Attorney General knows how to fulfill her duties and understands her Office's role in defending state law. To that end, the Department of Attorney General has defended hundreds of state laws in the past two years, regardless of whether the arguments and defenses have aligned with the Attorney General's personal views.

The Attorney General is also an enthusiastic proponent of having her Office brief both sides of an issue. Indeed, she has welcomed that path when courts have asked. E.g. *In re Independent Citizens Redistricting Comm'n*, Mich Sup Ct No 162891. And recently, as an intervening party, she asked the federal district court to allow her Office to brief both sides of a statutory interpretation question when it was certified to the Michigan Supreme Court. See *AFT v Project Veritas*, ED Mich Case No. 4:17-cv-13292-LVP-EAS, 10/19/20 Amended Certified Question to the Michigan Supreme Court, ¶ 12. If this case had been properly pled and the appropriate parties present, she would have welcomed that opportunity here as well.

In responding to the Attorney General's motion, Plaintiffs paint with a broad brush and ignore the contours of their own complaint. To begin, they argue that dozens of lawsuits have been filed against Attorneys General, some of them solely against an Attorney General. (Pls' Resp, p 1.) True enough. But as this Court knows, each case is postured differently, and as Plaintiffs chose to plead *this* case, it is not viable. Contrary to Plaintiffs' assertion, this lawsuit has not simply "follow[ed] the model of dozens of cases" filed against only the Attorney General over the last 50 years. (Pls' Resp, p 2.) This lawsuit—not the Attorney General's motion for summary judgment (Pls' Resp, p 1)—is *sui generis*.

While Plaintiffs cite to many cases where the Attorney General was the sole defendant, most were cases where the lawsuit challenged the constitutionality of Michigan law, not an AG

Document received by the MI Court of Claims.

Opinion. E.g., *Priorities USA v Nessel*, 462 F Supp 392 (ED MI 2020); *Welch Foods v Atty Gen*, 213 Mich App 459 (1995) (per curiam); *Hobbins v Atty Gen*, 205 Mich App 194 (1994), rev'd, 447 Mich 436 (1994); *Doe v Atty Gen*, 194 Mich App 432 (1992); *DeMido v Atty Gen*, 100 Mich App 254 (1980) (per curiam). The Attorney General does not dispute that she may be sued, even solely, in a lawsuit crafted to challenge the constitutionality of state law. Indeed, as Plaintiffs note—rather bitingly—prior to being elected Attorney General, Dana Nessel herself named then-Attorney General Schuette as a defendant in *DeBoer v Snyder and Schuette*, ED Mich No. 12-CV-10285. (Pls' Resp, p 5.) But then again, that lawsuit challenged the constitutionality of a state law, not an Attorney General Opinion.

As to the three cases Plaintiffs cite involving AG Opinions against only the Attorney General, each is distinguishable, underscoring this case's improper posture.

In *Michigan Beer & Wine Wholesalers Association v Attorney General*, the plaintiff sued only the Attorney General, alleging that he improperly acted outside the scope of his authority, exercising legislative and judicial powers, in issuing AG Opinions 6033 and 6051, which opined on Liquor Commission rules. 142 Mich App at 299 (1985). The Court of Appeals rejected this argument outright, and notably, *on its own motion added the Liquor Control Commission as party defendant,* since the commission had been enforcing the rules. *Id.* at 300.

Plaintiffs also cite *Jurva v Attorney General*, a case in which AG Kelley was sued after he issued an Opinion in which he opined that a board of education may not agree in a collective-bargaining agreement to provide supplemental retirement benefits beyond those established by the statutory public school retirement system. 419 Mich 209, 213–214. Plaintiffs' characterization of the posture of the case is misleading. AG Kelley filed a cross-complaint against the board, so the board was also a cross-defendant. The case also differs in that the AG

Opinion construed the School Code in place at the time and the application of a constitutional provision; it did not opine on *possible* legislation in advance of its enactment. *Id.* at 212.

Plaintiffs similarly rely on *Traverse City School District v Attorney General*, 384 Mich 390 (1971), which involved an AG Opinion that construed a constitutional provision rather than opining in advance of legislation. The question there was whether there was an alternative constitutional construction to the one adopted in the AG Opinion that also preserved the purpose of Proposal C was consonant with a common understanding of the Proposal's language. The State Board of Education and the Acting Superintendent of Public Instruction were also Defendants, and the court noted that the case was "brought . . . against the Attorney General, *and joined by all the appropriate parties in interest*, to test the validity of the Attorney General's opinion, (OAG 4715)...." *In re Proposal C*, 384 Mich 390, 403 (1971) (emphasis added). The State Board of Education had already announced its intention to follow the opinion of the Attorney General, which, the court noted, "led to the Traverse City School District challenging the validity of the Attorney General's interpretation of Proposal C." *Id.* at 407. What these three cases underscore is that the appropriate parties have not been sued here.

To the next point—the nature of Plaintiffs' claims demonstrates that the complaint is not viable. This is not simply a challenge to the constitutionality of PA 368 and PA 369. Rather, Plaintiffs are suing AG Nessel for "allow[ing] unconstitutional 2018 PA's 368 and 369 to be enacted and enforced by issuing and refusing to supersede or rescind" a prior opinion of her predecessor. (Compl ¶ 9.) Again, the Legislature does not need the Attorney General's permission to pass laws—an error in understanding that undergirds the complaint. (See, e.g., Compl ¶ 18.) And the rescission of the Opinion was neither necessary nor the source of the injuries Plaintiffs allege. AG opinions are not binding on the Legislature, *Michigan Beer &*

Wine Wholesalers Ass'n, 142 Mich App at 301–302, and in voting on PA 337 and 338 the Legislature could have followed the conclusion of AG No. 7306 *or* of the previously rescinded AG Opinion, No. 4303.

Plaintiffs claim that AG Nessel has not just "doubled down" on OAG No. 7306 but "tripled down on it, first refusing to issue a superseding opinion . . . and then refusing to rescind it," thus leaving it binding on state agencies. (Pls' Resp, p 5.) They claim that she could have "halted the injury to Plaintiffs and millions of Michigan workers" by superseding or rescinding OAG No. 7306. (*Id.*) This, too, reflects a misunderstanding of what the Attorney General could have remedied. Had the Attorney General rescinded AG Opinion No. 7306 and issued an opinion concluding that PAs 368 and 369 were *un*constitutional, that would not have prevented any injury. See *Sch Dist of E Grand Rapids v Kent Cty*, 415 Mich at 393–394 ("[T]the opinion of the Attorney General that a statute is unconstitutional does not have the force of law" and "does not compel agreement by a governmental agency."). And had the Attorney General simply rescinded No 7306, it would have left in place the earlier AG Opinion, No. 4303. Again, because that Opinion concluded that adopt and amend was unconstitutional, and by application, PAs 368 and 369 were unconstitutional, that Opinion also would not have necessarily prevented any injury. *See id.* Plaintiffs' alleged injuries simply are not a direct result of AG Nessel not having rescinded and superseded AG Opinion No. 7306.

All of this is, of course, academic to Plaintiffs, who believe it is "irrelevant" whether the AG has caused no injury—all the while asserting the extent to which she has caused injury. Nor are the alleged injuries redressable through the Attorney General—an issue that Plaintiffs, tellingly, do not even address in their response.

Document received by the MI Court of Claims.

Plaintiffs also cite MCR 2.207 for the proposition that "[m]isjoinder of parties is not a ground for dismissal of an action." True as far as it goes, but implicit in that rule is that if a case is not dismissed for misjoinder, it is because the better course is to allow the proper parties to be added. But Plaintiffs have never proposed to add any parties to this case—not in the motion to vacate, nor in the "brief in support," nor in the response to the Attorney General's motion. Instead, they repeatedly insist that the Attorney General alone *is* the proper party.

For these reasons and those raised in the Attorney General's 6/7/2021 C(8) motion, Attorney General Dana Nessel respectfully requests that this Court dismiss this action.

Respectfully submitted,

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Dated: September 24, 2021

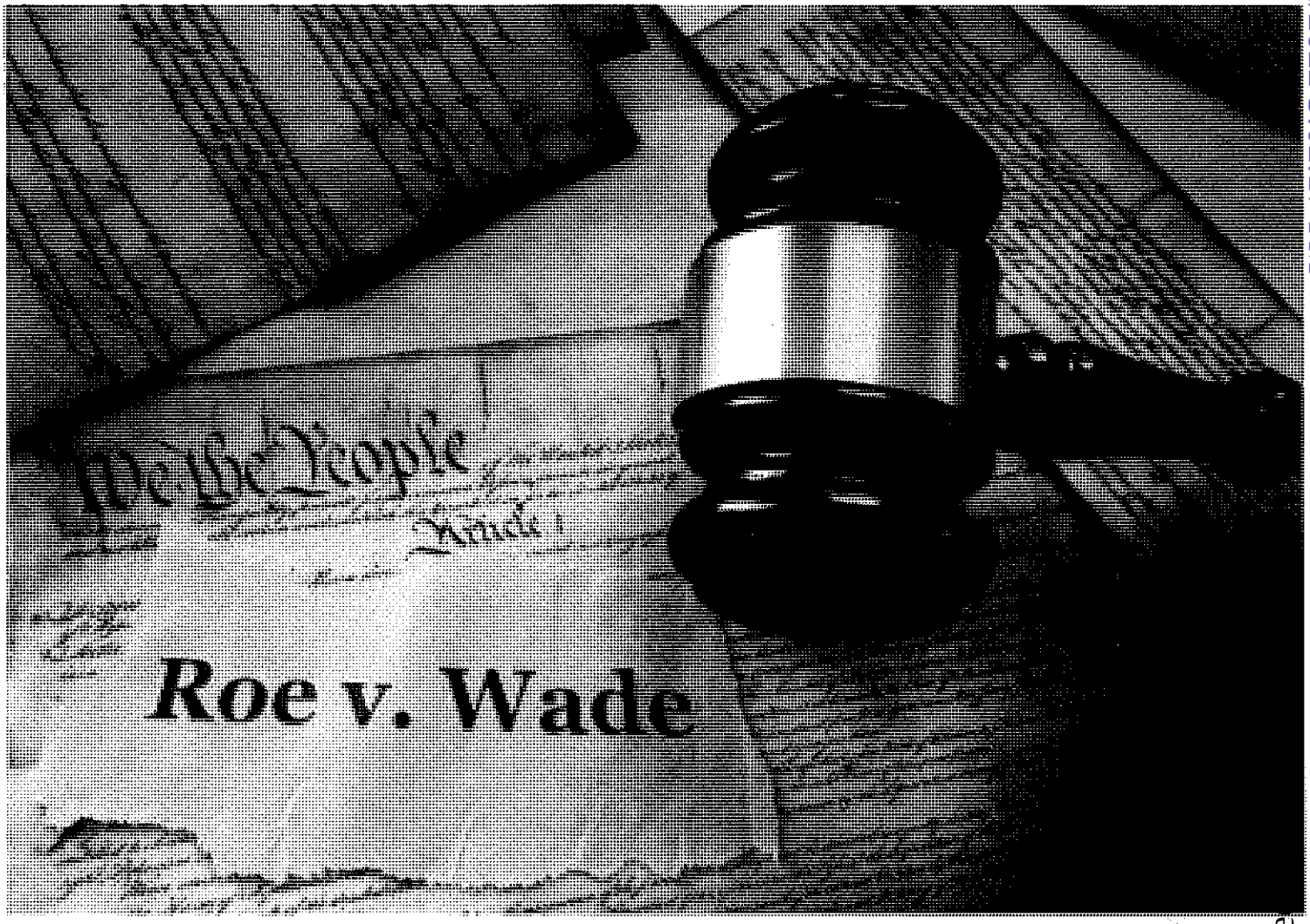
EXHIBIT B

CRAIN'S DETROIT BUSINESS

April 15, 2022 09:42 AM | UPDATED 10 HOURS AGO

FAQ: Tough questions for health care if abortion becomes illegal in Michigan

DUSTIN WALSH



Getty Images/iStockphoto

Gov. Grethen Whitmer filed a lawsuit this week for the Michigan Supreme Court to overturn a 1931 law in the state that also bans abortion — which is currently superceded at the federal level. If the law remains in place, abortions would be illegal in Michigan the moment Roe v. Wade is overturned.

The potential for the U.S. Supreme Court to overturn Roe v. Wade is sending shockwaves throughout the health care industry.

Gov. Gretchen Whitmer filed a lawsuit last month asking the Michigan Supreme Court to overturn a 1931 law in the state that also bans abortion — which is currently superseded federally because of the Supreme Court decision. If the law remains in place, abortions would be illegal in Michigan if Roe is overturned.

On Monday night, after a leaked opinion from the High Court indicated the case would be overturned, the governor said she would "fight like hell," to protect abortion rights in Michigan.

All of this uncertainty has doctors and administrators planning for care without abortions, a complicated circumstance with nearly 30,000 abortions performed in 2020 in Michigan — many of which are performed to prevent life-threatening complications.

Banning abortion in the state would also likely affect health care business operations, talent recruitment and mental health.

It's a controversial issue with little middle ground.

Brian Peters, CEO of the Michigan Health and Hospital Association, said hospitals that offer abortion care are considering their path forward should the law of the land change, but many legal experts and hospital administrators declined to discuss their planning.

RELATED ARTICLE

Draft opinion jolts Michigan, where abortion ban is on books

The U.S. Supreme Court is expected to rule in June on the case that concerns a Mississippi law that bans abortions after 15 weeks of pregnancy.

"Michigan hospitals and health systems will be monitoring the developments of Dobbs v. Jackson Women's Health Organization and the potential for a ruling that could overturn Roe v. Wade," Peters told Crain's in an email earlier this month. "If such a decision occurs, it will likely have practical consequences that will impact hospital operations. Hospitals are evaluating what changes may need to occur to operations if the Supreme Court overturns the current law."

Crain's talked to Lisa Harris, an obstetrician and gynecologist at Michigan Medicine in Ann Arbor and associate chair of the obstetrics and gynecology department at the University of

Michigan medical school, about these consequences and their impact on the state.

Harris and her team have met regularly in the last few months to discuss operating within the scope of an abortion ban and the moral and ethical obligations of providing care.

"We have to plan for the potential eventuality that the governor may not succeed (in protecting reproductive rights)," Harris said. "We will have patients asking us for help, and we have to figure out how to help within the confines of the law."

Here are some factors that will likely need to be considered if abortion is banned in Michigan:

Abortion basics

In 2020, the most recent data available, 29,669 induced abortions were recorded in Michigan, an 8.5 percent increase over 2019. However, abortions generally have been decreasing over the past 35 years. Induced abortions in Michigan are down nearly 40 percent since the record high year of 1987, according to data from the Michigan Department of Health and Human Services.

Women who have already had children remain the majority of those seeking abortions, with 67 percent of abortions in 2020 performed on women who had a previous pregnancy go to term. More than half of all women who got an abortion in Michigan in 2020 had not previously had an abortion.

Of the total, 89 percent were performed at 12 weeks of pregnancy or earlier.

OB-GYN talent could be diminished

UM is ranked as the fourth-best OB-GYN medical program in the nation, according to U.S. News & World Report rankings. Harris said about 40 percent of the program's graduates remain in Michigan to practice. However, making abortion illegal could cause an immediate decline in the quality of candidates the medical school receives and, eventually, reduce OB-GYN quality overall in the state, she said. That's because top-quality OB-GYN's have abortion care training, Harris said.

"If we can't provide care, we can't train future physicians in this care," Harris said. "It would definitely impact who wants to come to Michigan to train. When OB-GYN programs do abortion training, the quality of their applications increases, so will we remain a top program in this country?"

Labor and delivery units, ERs could be stretched

Health care continues to struggle with a labor shortage. In fact, maternity wards have closed in record numbers across the U.S. during the pandemic, particularly in rural communities.

In Texas, which passed a restrictive abortion law last year, labor shortages in maternity wards have led to ward closures — only 40 percent of rural hospitals in the state offer labor and delivery services.

The trend is likely to impact Michigan as well. And with 100,000 babies born in Michigan annually and the potential for another 30,000 not aborted joining the total, will Michigan's labor and delivery infrastructure be able to handle the increased volume?

Also, at least some women with unintended pregnancies will "self-manage" their own abortion attempts, Harris said.

"Those with means can afford to travel to another state but others will self-manage," Harris said. "Some will take unsafe methods ... Our ERs have to be ready for that, and we (medical professionals) will have to learn to whether it's legal to advise people on safe methods but also be prepared for emergencies."

Medical treatments would need a new legal framework

Patients with life-threatening complications or other potential issues requiring the termination of a pregnancy would likely be sent to other states — Illinois, for instance, allows for abortions at the state level — to provide abortion care. The legality of that would also become complicated.

Will Michigan ambulance services be able to transfer abortion patients across state lines? If a patient gets a medical abortion (prescribed medication) in Illinois, will they have to remain in Illinois until the pregnancy has ended or can a Michigan OB-GYN doctor treat them until the pregnancy is terminated? If they do, will there be legal consequences, such as the proposed bill in Oklahoma would do?

"There are many, many unclear legal questions," Harris said.

Many Michigan hospitals that are faith-based — Ascension and Trinity health systems operate hospitals in metro Detroit — already have a general ban on abortions. These health systems follow the Ethical and Religious Directives for Catholic Health Care Services (ERDs), published by the United States Conference of Catholic Bishops. Under these guidelines, abortions are allowed in rare circumstances to save the life of the mother, but each hospital ethics committee differs in its interpretation of what constitutes enough of a health risk before the procedure can be approved.

"Operations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman are permitted when they cannot be safely postponed until the unborn child is viable, even if they will result in the death of the unborn child," according to the directives.

Four of the 10 largest hospital systems in the U.S are Catholic-based, and they control one in six acute care beds, according to a 2020 study by Community Catalyst, a national nonprofit advocacy organization.

Maternal mortality rate would likely climb

According to the state data, about 90 percent of abortions were performed in hospitals or freestanding clinics, like Planned Parenthood.

Harris said her unit at Michigan Medicine deals primarily with women who are either critically ill or have complications that could make it deadly to give birth.

Removing legal abortion would immediately jeopardize the survival of many women, Harris said, unless a new legal framework is drafted to allow for abortions in those cases.

"Who decides what is the acceptable risk of dying in the setting of a pregnancy?," Harris said. "How do you even define what the baseline risk is? I would hope we would be able to define a group of patients we could care for emergent and urgent care. These can be life or death cases."

A 2021 study by researchers at Tulane University found that states with more restrictive abortion policies have higher maternal mortality. States with tighter abortion rules saw a 7 percent increase in maternal mortality, according to the study.

Women who are forced to carry a pregnancy to term are also likely to delay prenatal care, causing health problems for the baby and mother that could lead to increased deaths, the study said.

Inline Play

Source URL: *https://www.crainsdetroit.com/health-care/tough-questions-health-care-if-abortion-becomes-illegal-michigan*

EXHIBIT 8

STATE OF MICHIGAN
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.

No. 22-000044-MM

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/

DEFENDANT'S 5/12/22 SUR-REPLY BRIEF TO PLAINTIFFS' 5/6/22 REPLY BRIEF

Plaintiffs are right to be worried about MCL 750.14. But the importance of this case is no license to disregard the fundaments of litigation. Absent a live controversy between litigants who disagree, this Court lacks jurisdiction to rule on the constitutionality of MCL 750.14. Amici briefing, no matter how fulsome, is no replacement for adverse parties. And ignoring the separation of powers between the executive and judicial branches needlessly inserts a constitutional question into what should be a straightforward legal battle between two sides, with *opposing* views of MCL 750.14.

I. This action presently lacks the requisite level of adversity required to vest this Court with jurisdiction to grant declaratory relief.

Plaintiffs argue that the "mere existence" of MCL 750.14 "and the Attorney General's official position as the State's agent, creates adversity between the parties as a matter of law, regardless of what the present individual office-holder's current personal opinion happens to be." (Plf's Reply, p 3.) This fundamentally misunderstands how our adversarial system works.

"T[he] judicial power ... is the right to determine *actual* controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Anway v Grand Rapids R Co,* 211 Mich 592, 616 (1920) (citation omitted) (emphasis added). See also Const 1963, art 6, § 1. MCR 2.605 thus requires the existence of an "actual controversy" before a court may exercise its judicial power and grant declaratory relief. Indeed, "MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012). The "existence of an actual controversy is," therefore, "a condition precedent to the invocation of declaratory relief." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 127 (2006) (quotation marks and citation omitted). "In the absence of an actual

controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment." *Leemreis v Sherman Twp*, 273 Mich App 691, 703 (2007).

Merely suing another party does not create the necessary actual controversy; rather, adversity between the parties creates the controversy:

> Properly understood . . . the actual controversy requirement is simply a summary of justiciability as the necessary condition for judicial relief. . . . Thus, . . . *if the issue is not justiciable because it does not involve a genuine, live controversy between interested persons asserting adverse claims,* the decision of which can definitively affect existing legal relations, a court may not declare the rights and obligations of the parties before it. [*Allstate Ins Co v Hayes*, 442 Mich 56, 66 (1993) (citations omitted).][1]

Here, it cannot be said that there is a genuine, live controversy between Plaintiffs and the Attorney General where the Attorney General has admitted the unconstitutionality of MCL 750.14 and that she will not enforce the statute. The current parties are not adverse. See, e.g., *Anway*, 211 Mich at 593 (rejecting request for declaratory relief where the named defendant admitted the allegations in the complaint; there was no claim that the rights of any party had been invaded; there was no threat of invasion of the rights of any party; and there was no threat of damage).

Also relevant here is *Lansing Schools Educ Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506 (2011), in which the Court of Appeals denied declaratory relief where interested parties were missing from the case. There, the Court noted that "[t]he declaration of rights [sought by the plaintiffs] would necessarily affect the rights of the students whose expulsion plaintiffs seek to compel, and those students are not parties to this action." *Id*. at 517. Thus, "in

[1] Plaintiffs similarly argue that adversity exists because they require court orders to accomplish the relief they seek. (Plf's Brf, pp 4-9.) But the purpose of a declaratory judgment action is to obtain an order from a court declaring the rights and relations of the parties. MCR 2.605. Merely requesting relief through an order does not, itself, create an actual controversy.

light of the implications of the students' absence from this action, [the Court] conclude[d] that [the] plaintiffs failed to present an actual controversy under MCR 2.605(A)(1)." *Id.*

Missing here are the parties who support the constitutionality of MCL 750.14, and the interests and rights of those persons will necessarily be affected by the declaration of unconstitutionality sought by Plaintiffs. Accordingly, as the case is presently postured, Plaintiffs fail to present an actual controversy. But Plaintiffs can remedy this defect by amending the complaint to add an appropriate party. See *Skiera v Nat'l Indemnity Co*, 165 Mich App 184, 188-189 (1987) ("defect [of missing interested parties] could presumably have been cured by amending the pleadings and joining the necessary parties").

In short, a court has discretion to grant declaratory relief only where an actual controversy exists. *PT Today*, 270 Mich App at 126. But where there is no genuine, live controversy between adverse parties, as is the case here, the Court lacks such discretion.[2]

II. Ordering the Attorney General to defend MCL 750.14 would violate the separation of powers doctrine.

Article 3, § 2 of Michigan's Constitution provides that "[n]o person exercising powers of one branch [of government] shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Under this provision, "each branch of government is sovereign in its own sphere." *People v Ford*, 417 Mich 66, 91 (1982). Plaintiffs nevertheless suggest that "[t]he Court could also order the Attorney General to split her office, erect a conflict wall, and assign two teams of attorneys to brief both sides of the case[.]" (Pls' Br, p 10.) Such an order would violate the separation of powers doctrine.

[2] The lack of an adverse party also implicates the Court's ability to grant injunctive relief. See, e.g., *Coalition to Defend Affirmative Action v Granholm*, 473 F3d 237 (CA 6, 2006) (staying stipulated injunction where injunction failed to account for all interested parties).

In deciding whether a separation of powers violation would result, Article 5 of the 1963 Constitution, which provides that "[t]he single executives heading principal departments shall include . . . an attorney general" and those single executives shall "perform duties *prescribed by law*[,]" Const 1963, Art 5, §§ 3, 9 (emphasis added),[3] requires a review of the Attorney General's statutorily prescribed duties. As for suits against the State, those duties "prescribed by law" are found in MCL 14.28, MCL 14.29, and MCL 600.6416, and generally require the Attorney General to, upon request, appear for and represent the State in actions filed in the courts.

This statutory duty has been met here. Departmental attorneys filed appearances on the Attorney General's behalf and responded to Plaintiffs' complaint. Plaintiffs are thus displeased with *how* the Attorney General is performing her duty here, not *whether* she has performed it. This complaint does not give rise to the extraordinary relief Plaintiffs suggest in their reply brief.

As discussed by the Court of Appeals in *Fieger v Cox*, an Attorney General's exercise of statutorily prescribed duties is not subject to judicial review unless it is illegal or ultra vires:

> A circuit judge does not enjoy supervisory power over a prosecuting attorney[.] He may not properly substitute his judgment for that of the magistrate or prosecuting attorney as if he were reviewing the magistrate's decision *de novo* or acting in a supervisory capacity with respect to the prosecuting attorney. For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. Accordingly, unless there is some reason to conclude that the prosecution's acts were unconstitutional, illegal, or ultra vires, the prosecutor's decision whether to proceed with a case is exempt from judicial review. [274 Mich App 449, 446–447 (2007) (internal citations and quotation marks omitted).]

[3] The People's use of the phrase "prescribed by law," as opposed to "provided by law," in article 5, § 9 reflects an intent to provide executive officers, like the Attorney General, with discretion in carrying out their duties. See, e.g., *Beech Grove Inv Co v Civil Rights Comm'n*, 380 Mich 405, 418–419 (1968).

The same analysis applies here. This Court lacks supervisory authority over the Attorney General and cannot order her to create a conflict wall and assign a separate team of attorneys to defend MCL 750.14—particularly where, as here, her response to the lawsuit is not illegal or otherwise ultra vires. And this is especially true where the Attorney General maintains that defending the statute would cause her to violate her oath of office. See Const 1963, Art 11, § 1.

This Court similarly lacks the authority to appoint, or to compel, the Attorney General to appoint an unpaid special assistant attorney general (or "SAAG") to defend the statute, ironically exemplified by the authorities Plaintiffs cite in support of this suggestion. See *Attorney Gen v Michigan Pub Serv Comm'n*, 243 Mich App 487, 519 n 7 (2000) (observing that in light of "the well-established authority of the Attorney General to appoint special assistant attorneys general, . . . the Attorney General is the appropriate party to select independent counsel"); *Sprik v Regents of Univ of Michigan*, 43 Mich App 178, 184 (1973) ("the Attorney General has the power to appoint assistants as [s]he deems necessary"). See also OAG, 1977-1978, No. 5156, p 66 (March 24, 1977) (The State and its officers "may be represented only by the Attorney General or [her] duly designated assistants.").

Ultimately, just as "[t]he executive is forbidden to exercise judicial power[,]" the courts are, "by the same implication[,]" prohibited under the separation of powers doctrine from "tak[ing] upon themselves [the executive's] duties." *People ex rel Sutherland v Governor*, 29 Mich 320, 325 (1874). And the mere fact that the Attorney General has previously agreed to exercise her discretion to create separate teams of attorneys to both defend and challenge the constitutionality of a statute, (see Pls' Br, p 10) does not mean that the Court may compel the Attorney General to do so here or in any other case. Put simply, what Plaintiffs seek from the

Court is plainly prohibited by Article 3, § 2 of Michigan's Constitution. And this Court should accordingly decline their request.

CONCLUSION AND RELIEF REQUESTED

As stated in her initial response brief, because the Attorney General has exercised discretion not to defend MCL 750.14 because she believes it to be unconstitutional, she declines to take a substantive position with respect to the merits of Plaintiffs' motion for preliminary injunction. And although this decision implicates the Court's jurisdiction over the instant action, the Court lacks the authority to order or otherwise dictate how the Attorney General responds to Plaintiffs' complaint and motion.

Respectfully submitted,

Fadwa A. Hammoud (P74185)
Solicitor General

/s/ Heather S. Meingast
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Dated: May 12, 2022

PROOF OF SERVICE

Heather S. Meingast certifies that on May 12, 2022, she served a copy of the above document in this matter on all counsel of record via MiFILE.

/s/Heather S. Meingast
Heather S. Meingast

EXHIBIT 9

The Detroit News

MICHIGAN

Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence

Beth LeBlanc
The Detroit News

Published 4:48 p.m. ET May 3, 2022 | **Updated 7:47 p.m. ET May 3, 2022**

Attorney General Dana Nessel on Tuesday reiterated her refusal to prosecute physicians or women under Michigan's abortion ban, but criticized a lawsuit filed against her department seeking to overturn the 1931 ban.

Nessel said she believes the lawsuit brought by Planned Parenthood of Michigan should be dismissed for a lack of jurisdiction because there is no case or controversy — or active prosecution — that could serve as a basis for the suit, nor will there ever be while she's in office.

It's unlikely the Democratic attorney general would file a motion to dismiss the case on those grounds since she's vowed not to expend the resources of her office to defend the 1931 law.

At the same time, Nessel noted it would be inappropriate for her to stipulate to any orders or preliminary injunctions with Planned Parenthood given her decision not to defend the case.

"Frankly, I believe that the case should be dismissed for lack of jurisdiction because there's no case or controversy," Nessel told media in a Tuesday Zoom press conference, noting her office is not investigating or prosecuting any cases under the law nor could it without a final decision from the U.S. Supreme Court.

"I've pledged multiple times that I will not enforce this law and unless Planned Parenthood just doesn't believe me and thinks that I'm misrepresenting what my position is, I don't understand why I would need to stipulate to anything," she said.

"Planned Parenthood would be better off if they were focusing on the governor's case and filing an amicus on behalf of the governor and her actions," Nessel said, adding that

prosecutors named in Whitmer's suit could create a case or controversy down the road should Roe be overturned.

Planned Parenthood of Michigan responded by noting Nessel's response to their complaint was due in court Thursday and that she had a "duty to defend."

"We don't litigate our case in the press and will respond in court to their arguments," said Ashlea Phenicie, a spokeswoman for Planned Parenthood Advocates of Michigan.

"PPMI has properly brought suit against the attorney general who by law has a duty to defend and is looking forward to having the merits of their claims evaluated and ruled upon by this court, which as stated in the pleadings has proper jurisdiction in this matter."

John Bursch, the state's solicitor general under Republican former Attorney General Bill Schuette, had made similar arguments to Nessel's in the Planned Parenthood case. He is representing Right to Life of Michigan and the Michigan Catholic Conference as amici in the case on behalf of Alliance Defending Freedom.

"Attorney General Nessel agrees with Right to Life of Michigan and the Michigan Catholic Conference that the Court of Claims lacks jurisdiction and should dismiss the case immediately," Bursch said. " We hope that happens as quickly as possible so this senseless proceeding can come to a quick close."

The clash between Nessel and Planned Parenthood came a day after a leaked U.S. Supreme Court opinion indicated the 1973 federal abortion right was likely to be overturned. It also followed by nearly a month Planned Parenthood and Gov. Gretchen Whitmer filing separate suits seeking to overturn Michigan's 1931 ban on performing abortions — a law that would take full effect if 1973's landmark Roe v. Wade decision is overturned.

Whitmer, who is being represented by Nessel's office, filed her suit in Oakland County Circuit Court April 7 against 13 county prosecutors who would be able to enforce the law at abortion clinics in their counties.

Planned Parenthood filed its case the same day against the attorney general as the state's top law enforcement official tasked with "defending and enforcing" the state's laws and "supervising all county prosecutors."

Nessel on Tuesday took issue with Planned Parenthood's posit that she had any authority to prohibit county prosecutors from charging individuals under the existing 1931 law.

"I don't believe that I as attorney general of this state have the authority to tell duly elected prosecutors what they can and what they cannot charge," Nessel said. "If that were the case, I don't even know why we would elect our county prosecutors in the first place, if they're not allowed to make their own decisions."

She called on the GOP-led Legislature to step in and defend the law if Republican lawmakers are concerned about the future of Michigan abortion statutes, noting an early House budget passed through committee last month included about $750,000 for lawmakers to use to defend the law.

"Come on in and you defend this law," Nessel said of the Legislature. "Because I've made it very clear I think it's unconstitutional, I think it is unethical for me to defend it."

The Planned Parenthood case has drawn criticism from anti-abortion groups who have alleged the litigation is a "friendly suit" in which both the plaintiff and defendant agree on the issue in question but seek a court opinion to change state law.

The suit drew further scorn when it was randomly assigned to a state Court of Claims judge, Elizabeth Gleicher, who disclosed she is a donor to Planned Parenthood of Michigan and represented the group in a 1998 abortion law challenge that will be an integral case in deliberations over the current case.

Gleicher declined to recuse herself and said through a court clerk that she could remain impartial.

Planned Parenthood of Michigan, Nessel's office, and Gleicher had a closed-door scheduling conference via Zoom Monday. The Court of Claims, through the State Court Administrative Office, said the conferences are usually conducted in chambers and would not allow members of public or media into the online proceeding.

So far, Right to Life of Michigan and the Michigan Catholic Conference are the only groups to have sought intervention in the case as amici parties.

In Whitmer's case, Right to Life of Michigan, the Michigan Catholic Conference and state House and Senate Democrats have sought to file as amici.

eleblanc@detroitnews.com

EXHIBIT 10

AG Nessel Statement on Court of Claims Order

May 17, 2022

Lynsey Mukomel

Press Secretary

agpress@michigan.gov

LANSING – Michigan Attorney General Dana Nessel issued the following statement in response to the Court of Claims order in *Planned Parenthood of Michigan v Attorney General of the State of Michigan*:

"This injunction is a victory for the millions of Michigan women fighting for their rights. The judge acted quickly in the interest of bodily integrity and personal freedom to preserve this important right and found a likelihood of success in the state law being found unconstitutional. I have no plans to appeal and will comply with the order to provide notice to all state and local officials under my supervision."

###

Press Release

Related News

AG Nessel Joins Bipartisan, Nationwide Coalition Defending Affordable Drug Prices

AG Nessel Joins Bipartisan Coalition Working to Protect Trafficking Survivors

AG Nessel Response to Oxford School Board

AG Nessel Formalizes Credit Card Payment Option for Department FOIAs

Convictions Secured Against Members of The Base

AG Nessel Urges FTC to Consider State Enforcement Efforts while Addressing For-profit Schools' Deceptive Earnings Claims

Auburn Hills Restaurant, Owners Charged with Tax Fraud

AG Nessel Hosts Human Trafficking Roundtable to Raise Awareness

AG Nessel, Citizens Utility Board Applaud MPSC's Call for Clean Energy Comments

AG Nessel Statement on Court of Claims Order

EXHIBIT 11

Subject: FW: Planned Parenthood et al v Nessel - notice to prosecutors

From: "Bruinsma, Cheri (PACC)" <BruinsmaC@michigan.gov>
Date: May 17, 2022 at 4:29:43 PM EDT
Subject: Planned Parenthood et al v Nessel - notice to prosecutors

Good afternoon,

Please see the below email that I was asked to forward to your attention.

Cheri L. Bruinsma
Executive Director
Prosecuting Attorneys Coordinating Council
116 W. Ottawa
Lansing, MI 48913
517-334-6060 ext. 501

To All Prosecutors,

On May 17, 2022, in Planned Parenthood of Michigan et al v Attorney General, Case No. 22-000044-MM, the Court of Claims issued an opinion on Plaintiffs Planned Parenthood and Dr. Sarah Wallet's motion for a preliminary injunction and ordered as follows: "[The Attorney General] and anyone acting under [her] control and supervision, see MCL 14.30, are hereby enjoined during the pendency of this action from enforcing MCL 750.14." (Opinion & Order, p 27.)

For reference, MCL 750.14, the statute at issue in the Court's opinion and order, reads in full as follows:

Administering drugs, etc., with intent to procure miscarriage—Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

Further, in light of the Court's instruction that the Attorney General "give immediate notice of this preliminary injunction to all state and local officials acting under [her] supervision that they are enjoined and restrained from enforcing MCL 750.14," a copy of the Court's May 17, 2022 opinion and order is enclosed. For further information, contact Division Chief Heather S. Meingast, Civil Rights & Elections Division, 517.335.7659.

Sincerely,

Dana Nessel
Attorney General

<20220517 Opin and Ord.pdf>

EXHIBIT 12

Thread

Planned Parenthood ✓
@PPFA

Let's be clear: This is a draft opinion. It's outrageous, it's unprecedented, but it is not final.
Abortion is your right — and it is STILL LEGAL.

politico.com
Exclusive: Supreme Court has voted to overturn abortion rights, draft opinion s…
"We hold that Roe and Casey must be overruled," Justice Alito writes in an initial majority draft circulated inside the court.

9:16 PM · May 2, 2022 · Twitter Web App

5,752 Retweets **399** Quote Tweets **14.6K** Likes

Planned Parenthood ✓ @PPFA · May 2
Replying to @PPFA
While abortion is still legal, tonight's report makes clear that our deepest fears are coming true. We have reached a crisis moment for abortion access. We don't have a moment to spare — we must act now:

plannedparenthoodaction.org
Bans Off Our Bodies
By this summer, 26 states could move to ban abortion. But we're not backing down. Politicians …

74 613 1,350

vaccinated shelbz @shelbbbybee · May 2
Replying to @PPFA
Feeling broken 😞

7 2 18

Waukesha County Dems 🇺🇸 @Waukeshadems · May 2
Replying to @PPFA
The ONLY way we protect abortion is to elect more Democrats to pass legislation.

Ron Johnson is target one to expand our Senate majority and defeating him goes through Waukesha County.

Donate here to help us take the Senate:

ACLU @ACLU · May 2

If the Supreme Court does indeed issue a majority opinion along the lines of the leaked draft authored by Justice Alito, the shift in the tectonic plates of abortion rights will be as significant as any opinion the Court has ever issued

> **POLITICO** @politico · May 2
>
> The Supreme Court has voted to strike down Roe v. Wade, according to an initial draft majority opinion written by Justice Samuel Alito and obtained by POLITICO.
>
> "We hold that Roe and Casey must be overruled," Alito writes. politico.com/news/2022/05/0…
>
> Show this thread

120 1,055 3,578

ACLU @ACLU · May 2

This opinion would deprive half the nation of a fundamental, constitutional right that has been enjoyed by millions, for over 50 years.

The breach in protocol at the Court pales in comparison to the breach in constitutional freedoms that the Court is charged with upholding.

963 791 1,963

ACLU @ACLU · May 2

However the decision ultimately comes down, the ACLU will never stop fighting for the right to choose when and if to have a child

Thread

ACLU
@ACLU

REMINDER: The draft opinion leaked to Politico is not an official decision. Abortion is a right and Roe is still the law of the land.

10:13 PM · May 2, 2022 · Twitter for iPhone

835 Retweets **60** Quote Tweets **3,080** Likes

Bradley Dlatt @bdlatt · May 2
Replying to @ACLU
*for now

4

nancy c @FT1965 · May 2
Replying to @ACLU
Not for long.

1

Jencey needs a vacation @jencey_ · May 2
Replying to @ACLU
For now

1 4

EXHIBIT 13

Order

Michigan Supreme Court
Lansing, Michigan

May 20, 2022

Bridget M. McCormack,
Chief Justice

164256 & (3)(7)(8)(9)(10)(15)

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

In re EXECUTIVE MESSAGE OF THE GOVERNOR REQUESTING THE AUTHORIZATION OF A CERTIFIED QUESTION.

(GRETCHEN WHITMER, Governor v JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, *et al*.)

SC: 164256

_____/

On order of the Court, the motions for immediate consideration and motions for leave to respond or reply are GRANTED. The Executive Message of the Governor pursuant to MCR 7.308(A)(1) was received on April 7, 2022, requesting that this Court direct the Oakland Circuit Court to certify certain questions for immediate determination by this Court. Having received responses from several county prosecutors, as well as amici briefs, we direct the Governor to file a brief with this Court within 14 days of the date of this order, providing a further and better statement of the questions and the facts. MCR 7.308(A)(1)(b). Specifically, the Governor shall address: (1) whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination; (2) whether there is an actual case and controversy requirement and, if so, whether it is met here; (3) given the infrequent application of the Executive Message process by current and former governors, what is required under MCR 7.308(A) and, specifically, whether the question is of "such public moment as to require an early determination"; (4) whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question; and (5) whether the questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here.

The county prosecutors may file responsive briefs. Amici who have filed briefs with the Court to date are invited to file supplemental briefs addressing the questions identified in this order. Other persons or groups interested in the determination of the

issues presented in this case may move the Court for permission to file briefs amicus curiae. All responsive and amicus curiae briefs shall be filed within 14 days of the Governor's brief.

The Executive Message, motion to intervene, and motion to dismiss remain pending.

BERNSTEIN, J. (*concurring*).

Given the gravity of the issues presented in this case, I believe we should strive to open the courtroom doors to as many voices as possible. In the interest of fairness, I strongly prefer to allow the county prosecutors, as well as any other persons or groups interested in these issues, the same two-week briefing period that we are giving the Governor. While I believe an expedited briefing schedule is warranted under the circumstances, the schedule we have set in our order balances our interest in timely considering these issues while giving everyone a full and fair opportunity to participate.

CAVANAGH, J. (*concurring in part and dissenting in part*).

I join the Court's order granting further briefing in this case on these important threshold procedural questions. I dissent only with regard to the briefing schedule. Given the potential urgency underlying the issues in this case, I would have ordered that the supplemental briefing be completed within two weeks. If the injunction issued by the Court of Claims gives the Governor the relief she seeks, the timing will not matter. If not, and if this Court believes we should grant the Governor's request to authorize the circuit court to certify the questions posed by the Governor in the pending lawsuit, the schedule the majority has set here may leave insufficient time to determine the merits of the case. Although I echo Justice BERNSTEIN's sentiment that we should strive to allow all interested persons the opportunity to have their voices heard, operating on an expedited basis—as we are often called on to do—in no way closes the courtroom doors to any interested voices. Because I believe the Court's order today fails to treat this case with the urgency it deserves, I respectfully dissent from the majority's refusal to expedite this supplemental briefing schedule.

MCCORMACK, C.J., and WELCH, J., join the statement of CAVANAGH, J.

EXHIBIT 14

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.
_____/

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 amicus curiae brief (1) in support of dismissal for lack of jurisdiction, (2) for recusal, and (3) if necessary, a briefing schedule

THIS CASE INVOLVES A CLAIM THAT A MICHIGAN STATUTE IS UNCONSTITUTIONAL

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Counsel for Planned Parenthood

Right to Life of Michigan and the Michigan Catholic Conference respectfully move this Court under MCR 2.119 for leave to file the attached *amici curiae* brief. In support of this motion, Right to Life and the Michigan Catholic Conference state as follows:

1. Right to Life of Michigan is a nonpartisan, nonsectarian, nonprofit organization of caring people, united to protect the precious gift of human life from fertilization to natural death. Right to Life encourages community participation in programs that foster respect and protection for human life. Right to Life gives a voice to the voiceless on life issues like abortion, infanticide, euthanasia, and physician-assisted suicide. Right to Life educates people on these issues and motivates them to action, including support for laws like MCL 750.14, the subject of this case.

2. 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.

3. This collusive litigation, filed by Plaintiff Planned Parenthood and its medical director, is nominally brought against Defendant Attorney General who not

only publicly endorses Plaintiffs' legal position but has vowed not to fulfill her duty to defend the valid Michigan statute at issue. It raises issues of great significance to *amici*, and indeed, the whole State.

4. As set forth more fulsomely in the attached, proposed *amici curiae* brief, Right to Life and the Michigan Catholic Conference are deeply concerned about this litigation, which attempts to challenge a longstanding, Michigan pro-life law based on legal events that have not yet happened, and involves parties—Planned Parenthood and the Michigan Attorney General—who lack adversity because they both agree on the outcome they desire.

5. Right to Life and the Michigan Catholic Conference are also deeply concerned that this case has been assigned to a Michigan Court of Claims judge who has not yet recused but previously, in private practice, represented parties in litigation to invalidate Michigan pro-life laws while working with Plaintiffs' counsel, the ACLU; who has received an award from Planned Parenthood; and who remains an annual and longtime contributor to Plaintiff Planned Parenthood. Remarkably, this will result in a judge indirectly funding the very action over which she presides.

6. "In cases of public importance, where the Attorney General is assigned the job of advocating both positions, *amici curiae* can play a valuable gap-filling role for the court." Michael F. Smith, *Amicus Curiae Briefs*, *in* MICH APPELLATE HANDBOOK § 10.2, 309 (Shannon & Gerville-Réache eds, 3d ed, Jan 2021 update), citing *In re Request for Advisory Op Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011) (cleaned up). So too, here. In this case of

undeniable public importance, where the Attorney General has decided to shirk her constitutional and statutorily assigned role and has adopted the same position as Plaintiffs, *amici* have a similarly important gap-filling role to play for the Court.

7. Right to Life and the Michigan Catholic Conference respectfully ask the Court to grant leave to file the attached *amici curiae* brief addressing these important issues and other procedural issues in this highly unusual case, and to accept the attached proposed *amici curiae* brief attached as **Exhibit 1**.

8. Pursuant to Court of Claims Rule 2.119(A)(2), counsel for *amici* requested concurrence of counsel for Plaintiffs and for Defendant on April 19, 2022. Concurrence was expressly denied by both sides.

WHEREFORE, Right to Life of Michigan and the Michigan Catholic Conference respectfully request that this Court grant their request to participate as *amici curiae* in this case and accept the attached proposed brief for filing.

Respectfully submitted,

Dated: April 20, 2022

ALLIANCE DEFENDING FREEDOM

By */s/ John J. Bursch*

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Attorneys for proposed amici curiae Right to Life of Michigan and the Michigan Catholic Conference

EXHIBIT 1

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.
_____/

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

Proposed Amici Curiae Brief of Right to Life of Michigan and the Michigan Catholic Conference (1) in support of dismissal for lack of jurisdiction, (2) for recusal, and (3), if necessary, a briefing schedule

THIS CASE INVOLVES A CLAIM THAT A MICHIGAN STATUTE IS UNCONSTITUTIONAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over a matter that lacks an actual controversy and adverse parties.

Amici answer: No.

2. Whether a disinterested observer would question the presiding judge's partiality where she previously represented Plaintiff while working for Plaintiff's counsel, litigating substantially similar issues as those presented here, and where the presiding judge has, since taking the bench, continued to make annual donations to Plaintiff.

Amici answer: Yes.

3. Assuming that the presiding judge declines to recuse and refuses to dismiss a case that lacks any actual controversy or adverse parties, whether a briefing schedule should be set so that Amici may seek to intervene as plaintiffs and to file a disqualification motion.

Amici answer: yes.

STATEMENT OF INTEREST

Right to Life of Michigan is a nonpartisan, nonsectarian, nonprofit organization of caring people, united to protect the precious gift of human life from fertilization to natural death. Right to Life encourages community participation in programs that foster respect and protection for human life. Right to Life gives a voice to the voiceless on life issues like abortion, infanticide, euthanasia, and physician-assisted suicide. Right to Life educates people on these issues and motivates them to action, including support for laws like MCL 750.14, the subject of this case.

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.

INTRODUCTION

Amici Right to Life of Michigan and the Michigan Catholic Conference urge this Court to immediately dismiss this action for lack of jurisdiction.

On April 7, 2022, Governor Gretchen Whitmer took the extraordinary action of filing a lawsuit in Oakland County Circuit Court to invalidate MCL 750.14, a Michigan law on the books since 1931 and which the Governor is supposed to faithfully enforce. See Const 1963, art 5, § 8 (Governor must take care "that the laws be faithfully executed"). The same day, the Governor sent an Executive Message requesting that the Michigan Supreme Court authorize the circuit court to certify the questions that the case presents. Yet still on the same day, Planned Parenthood, represented by ACLU attorneys, filed the present lawsuit in this Court against Attorney General Dana Nessel, seeking substantively identical relief under virtually indistinguishable legal theories. The Attorney General promptly issued a prepared public statement declaring that she would not defend MCL 750.14—even though that is her job—unless a court orders her to do so. And all three legal actions are founded on an event that has not happened yet: the possibility that the U.S. Supreme Court may overturn *Roe v Wade*, 410 US 113 (1973). Governor Whitmer then used her flouting of Michigan law to initiate a national fundraising campaign.

Any one of these factors should cause a court to pause and question whether it is being used as a political football in a matter which should be pursued through the democratic process—either a legislative enactment or a ballot initiative. (In fact, Plaintiff Planned Parenthood is already supporting such an initiative that is gathering signatures right now.) But this Court need not get involved for a more

basic reason: it lacks jurisdiction. Where, as here, there is no adversity of parties nor an actual case or controversy, the case cannot move forward. Full stop.

Amici Right to Life of Michigan and the Michigan Catholic Conference also file this brief for a second reason: to respectfully suggest that recusal is warranted. The presiding judge, who in private practice used to represent Planned Parenthood on behalf of the ACLU in seeking to invalidate Michigan pro-life laws, who has received an award from Planned Parenthood, and who continues to make annual contributions to Planned Parenthood since taking the bench, seeks to preside over a case where the ACLU represents Planned Parenthood, seeking to invalidate all of Michigan's pro-life laws and to create a non-existent right to abortion in Michigan's Constitution. Because any reasonable, disinterested observer would question the appearance of the judge's impartiality in such circumstances, recusal is required under Michigan's Code of Judicial Conduct.

If the presiding judge declines to recuse and further declines to dismiss an unripe case that lacks adverse parties, the People of Michigan will reasonably ask whether the Michigan judiciary really serves as an independent arbiter of justice or is instead merely a tool for parties to obtain political goals they have been unable to achieve through ordinary, democratic processes. In that unlikely event, Right to Life of Michigan and the Michigan Catholic Conference respectfully request that the Court set a briefing schedule so that they and others can (1) move to intervene as plaintiffs in this case, seeking a declaration that MCL 750.14 and any other Michigan statute or regulation that protects innocent, unborn life is valid as a matter of Michigan and federal constitutional law, and (2) move to disqualify.

BACKGROUND

In 1931, Michigan legislators enacted MCL 750.14, a law that makes it a felony for any person in Michigan to perform an abortion unless necessary to save the life of the mother. The law does not target women, only medical professionals or others who seek to take innocent, unborn life or who endanger the health and safety of women. The 91-year-old law has existed side-by-side peaceably with the Constitution that Michigan citizens ratified in 1963. And in a case personally litigated by the presiding judge, the Michigan Court of Appeals has already held that Michigan's Constitution does *not* secure a right to abortion independent of the abortion right that the U.S. Supreme Court found in the constitutional "penumbras" in *Roe v Wade*. *Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997) (per curiam). The Michigan Supreme Court in *People v Bricker*, 389 Mich 524; 208 NW2d 172 (1973), judicially modified the statute so that it would comport with *Roe*.

Against this backdrop, the Governor, Attorney General, and Planned Parenthood have concocted an extraordinary, three-pronged attack on Michigan law, of which this lawsuit represents one part. All three attacks are premised on a hypothetical future event: that the U.S. Supreme Court in *Dobbs v Jackson Women's Health Org*, No 19-1392, may overrule *Roe*. See, e.g., V Compl ¶¶ 27–28 ("The Michigan Supreme Court's construction of" MCL 750.14 incorporates a federal constitutional abortion doctrine that is "at risk of significant modification by the United States Supreme Court's forthcoming decision in the *Dobbs* case, which presents the question whether *Roe v Wade*—on which the *Bricker* construction is founded—should be overruled." "The United States Supreme Court could issue its

decision in *Dobbs* any day….") (citation omitted); see also Br in Supp of Governor's Exec Message at 10–11, *Whitmer v Linderman*, No 164256 (Mich Sup Ct Apr 7, 2022) (same concerns about "U.S. Supreme Court's looming decision in *Dobbs*").

Because these are anticipatory lawsuits, there are no facts or even controversies presented on which a court could opine. For example, if a Michigan state court were to "find" a constitutional right to abortion in Michigan's 1963 Constitution—which is just as silent about the subject as is the federal Constitution—the Court would have to articulate the contours of that right. Does that purported right prevent laws that reasonably require medical providers to notify the parents of minor children before performing an abortion procedure? Does it stop the State from imposing requirements that protect the health and safety of women undergoing hospital procedures, such as admission privileges at a nearby hospital? Does it cut short the State's ability to require that a mother is adequately informed before she consents to have the life of her baby taken? It is impossible to answer these questions without facts and an actual controversy.

What's more, there are no adverse parties here. After Plaintiff Planned Parenthood filed this suit, Defendant Attorney General Nessel announced that she will not defend Michigan law nor create a firewall that would allow other members of the Attorney General's office to do so unless ordered by a court. Dave Boucher, *Nessel cites own abortion, says AG's office won't defend Michigan in lawsuit*, Detroit Free Press (Apr 7, 2022), https://bit.ly/3vwxyL1. And while every Michigan Attorney General's primary duty is to defend Michigan laws, it would be inappropriate for a court to force the Attorney General to perform a discretionary act.

ARGUMENT

I. This Court should dismiss this case for lack of jurisdiction.

This Court lacks jurisdiction to resolve Plaintiffs' complaint for three, fundamental reasons: (1) the lack of adverse parties, (2) the lack of an actual case or controversy, and (3) the lack of ripeness. The case should be dismissed.

The Michigan Constitution vests Michigan courts with "the judicial power of the state." Const 1963, art 6, § 1. The Michigan Supreme Court has "described that power as 'the right to determine *actual controversies* arising between *adverse litigants*, duly instituted in courts of proper jurisdiction." *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 243 (2019) (Clement, J, concurring) (emphasis added) (quoting *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), itself quoting *Anway v Grand Rapids Ry Co*, 211 Mich 592, 616; 179 NW 350 (1920)). So, even when a party seeks a declaratory judgment, the case must present "adverse interest[s]" that form an actual controversy. *Associated Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 126; 693 NW2d 374 (2005), overruled on other grounds by *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372 n20; 792 NW2d 686 (2010); MCR 2.605 (requiring an actual controversy).

Absent adversity, a lawsuit like this one is nothing more than "a friendly scrimmage brought to obtain a binding result that both sides desire." *League of Women Voters v Sec'y of State*, 506 Mich 905; 948 NW2d 70, 70 (2020) (Viviano, J, concurring). Except whereas a "scrimmage" has two opposing sides—as did the *League of Women Voters* case—this proceeding lacks any. It consists of Plaintiffs

and a Defendant who all agree on what they would like the Court to do. Accordingly, the Court "must instead wait for an 'actual controversy where the stakes of the parties are committed and the issues developed *in adversary proceedings*.'" *In re Constitutionality of 2018 PA 368 & 369*, 936 NW2d at 241 (Clement, J, concurring) (cleaned up) (quotation omitted).

Start with first principles. The U.S. Supreme Court has long recognized that it lacks authority to adjudicate a case when both sides of the "dispute" want the same result. *E.g.*, *Moore v Charlotte-Mecklenburg Bd of Educ*, 402 US 47, 47–48 (1971) (per curiam) (dismissing case involving a plaintiff and defendant who agreed a law was valid and should be upheld). The U.S. Supreme Court has done the same even as to agreed-upon *issues*, despite the existence of adversity on other claims in the case. For example, in *Webster v Reproductive Health Servs*, 492 US 490 (1989), the Court dismissed one of multiple claims because the appellees abandoned their argument as to that claim, *id.* at 512–13. And in *Williams v Zbaraz*, the Court reached several issues in the case but vacated a lower-court judgment in part for lack of jurisdiction based on the lack of party adversity as to that issue. 448 US 358, 367 (1980).

The reason for all this is because courts cannot fulfill the judicial role absent party adversity:

> [A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court. [*Lord v Veazie*, 49 US (8 How) 251, 255 (1850).]

Any other practice turns courts into "self-directed boards of legal inquiry and research." *Carducci v Regan*, 714 F2d 171, 177 (CA DC, 1983) (Scalia, J).

Michigan state-court jurisdiction is no different, being "limited to determining rights of persons or of property, *which are actually controverted* in the particular case before it." *Anway*, 211 Mich at 615 (emphasis added) (cleaned up). A "controversy must be real and not *pro forma*," even when a *pro forma* case presents "real questions." *Id.* at 612 (cleaned up). Otherwise, "the most complicated and difficult questions of law … might be settled … when no real controversy or adverse interests exist." *Id.* (cleaned up). Indeed, the "actual controversy" requirement that MCR 2.605(A)(1) imposes on declaratory-judgment actions "subsume[s] the limitations on litigants' access to the courts imposed by [the Michigan Supreme] Court's standing doctrine." *Associated Builders & Contractors*, 472 Mich at 126.

Here, Plaintiffs and the Attorney General are not adverse; they are in lockstep. The Attorney General will not defend this lawsuit or MCL 750.14 unless a court orders her to do so. And it would be inappropriate for a court to order the Attorney General to defend a law that she believes to be unconstitutional, even if that belief is erroneous. Such an order amounts to mandamus, an extraordinary remedy that can only be used to compel governmental acts that are ministerial in nature. *Citizens for Protection of Marriage v Bd of State Canvassers,* 263 Mich App 487, 492; 688 NW2d 538 (2004) (per curiam). Accordingly, this Court should "wait for an actual controversy where the stakes of the parties are committed and the issues developed in adversary proceedings." *In re Constitutionality of 2018 PA 368 & 369*, 936 NW2d at 241 (Clement, J., concurring) (quotation omitted).

The Court also lacks jurisdiction because this case is not ripe. In addition to a case or controversy with adverse parties, justiciability requires a ripe dispute. A Michigan "court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Anway*, 211 Mich at 615. Ripeness prevents courts from adjudicating hypothetical claims before any actual injury has taken place. Accordingly, a claim is not ripe if it depends on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v Union Carbide Agric Prods Co*, 473 US 568, 580–81 (1985) (citation omitted); see also *Dep't of Soc Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 389; 455 NW2d 1 (1990) (mem) (declining to decide whether state law violated the defendants' free-exercise and freedom-of-association claims because the State had not exercised its statutory authority, "making these issues unripe for review"); *In re Indep Citizens Redistricting Comm'n for State Legis and Cong Dist's Duty to Redraw Dists by Nov 1, 2021*, 507 Mich 1025; 961 NW2d 211, 213 (2021) (Welch, J., concurring) ("a majority of this Court believes that the anticipatory relief sought is unwarranted").

Here, Plaintiffs are under no imminent threat of prosecution. *Roe* has protected their conduct in taking innocent, human life for nearly half a century. It is not clear how the U.S. Supreme Court will rule in *Dobbs*. And even if *Dobbs* eventually overturns *Roe* in whole or in part, a prosecutor would still need to make the decision to enforce MCL 750.14 against these Plaintiffs. This case is not ripe.

II. The presiding judge should recuse herself.

Under the Michigan Court Rules, a judge should recuse herself when, "based on objective and reasonable perceptions," she "has either (i) a serious risk of actual bias impacting the due process rights of a party, as enunciated in *Caperton v Massey*, 556 US 868 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." MCR 2.003(C)(1)(b) (cleaned up). That means that a judge must "accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Michigan Code of Judicial Conduct Canon 2A.

Here, the presiding judge has served as an ACLU lawyer for Plaintiff Planned Parenthood in challenging a Michigan pro-life law requiring informed consent before an abortion procedure may take place. *Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997) (per curiam). The presiding judge has served as a lawyer for the ACLU in challenging a Michigan pro-life law that prohibited the use of public funds to pay for abortion unless abortion was necessary to save the mother's life. *Doe v Dep't of Soc Servs*, 439 Mich 650; 487 NW2d 166 (1992). The presiding judge has served as a lawyer for the ACLU and represented Planned Parenthood in challenging a Michigan pro-life law requiring minors to obtain the consent of their parents before obtaining an abortion. UPI, *Judge strikes down parental consent law* (Aug. 5, 1992).[1] The presiding judge has served as a lawyer for the ACLU and represented a halfway-house resident against federal

[1] https://www.upi.com/Archives/1992/08/05/Judge-strikes-down-parental-consent-law/3640712987200/

officials who tried to prevent the resident from taking her baby's life after the first trimester had expired. ACLU of Michigan, *Federal Prisoner Almost Denied Reproductive Rights*, CIVIL LIBERTIES NEWSLETTER, Winter 2001, at 7.[2] The presiding judge received the "Planned Parenthood Advocate Award" in 1998. ICLE, *Contributor Directory*.[3] And the presiding judge disclosed that she makes "yearly contributions to Planned Parenthood of Michigan." Letter from Jerome W. Zimmer, Jr., Clerk of Mich Court of Claims, to Counsel (Apr 14, 2022). Notably, the presiding judge did not disclose her work in the several additional matters noted above, or her Planned Parenthood award.

This action is brought by the ACLU on behalf of Planned Parenthood. And while the presiding judge may believe "she can sit on this case with requisite impartiality and objectivity," Clerk Zimmer Letter, the test is whether the judge's conduct "would create in reasonable minds *a perception* that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Caperton*, 556 US at 888 (quoting ABA Model Code, Canon 2A, Commentary) (emphasis added). Given her long history of working with the ACLU in support of Planned Parenthood and its allies on substantially similar matters—both the matter the judge disclosed and those noted above—and the fact that her charitable contributions are effectively helping fund this litigation, there can be no doubt this conduct would create in reasonable minds a perception that the judge's ability to rule with impartiality has been compromised. Recusal is warranted.

[2] https://www.aclumich.org/sites/default/files/pdfs/winter01.pdf
[3] https://www.icle.org/modules/directories/contributors/bio.aspx?Pnumber=P30369

III. At a minimum, this Court should set a briefing schedule for amici to file a motion to intervene and a motion to recuse.

If the presiding judge declines to recuse and decides to move forward with this case despite the lack of a case or controversy, the absence of adverse parties, and the want of a ripe dispute, then amici Right to Life of Michigan and the Michigan Catholic Conference respectfully request that the Court set a briefing schedule for them, and others, that would allow for the filing of motions to intervene as plaintiffs, defendants, or intervenors in support of neither party, and motions to disqualify under MCR 2.003. (Because amici are not parties, they cannot file a disqualification motion now.)

Defendant Attorney General Dana Nessel, as well as Michigan's Governor, have both made crystal clear their belief that MCL 750.14 violates Michigan's Constitution. If this Court has jurisdiction to declare that MCL 750.14—as well as "any other Michigan statute or regulation to the extent that it prohibits abortion"—is unconstitutional at Plaintiffs' request, see V Compl, Relief Requested, then it certainly has jurisdiction to declare that MCL 750.14 is constitutional, either because Michigan's Constitution is completely silent about a right to abortion, or because the Fourteenth Amendment to the U.S. Constitution prohibits any state from depriving "any person of life" without due process, and medical science definitively establishes that life begins at conception. But there is no need for this Court to reach those merits issues given the lack of justiciability in this premature and improper case.

CONCLUSION

In recently agreeing that a case should be dismissed for lack of an actual case or controversy and the absence of adverse parties, Michigan Supreme Court Justices Cavanagh and Bernstein observed that "Michigan's citizens follow the law. And they will, undoubtedly, continue to follow the existing laws unless those laws are held to be unconstitutional by order of this Court in an actual case or controversy." *In re Constitutionality of 2018 PA 368 & 369*, 936 NW2d at 260. Their confidence is equally well-placed here. The Court should dismiss this case for lack of jurisdiction and decline to wade into a hotly contested political issue that the Michigan Constitution does not address until a case is filed with actual facts, an actual controversy, and actual, adverse parties.

Respectfully submitted,

Dated: April 20, 2022

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EXHIBIT 15

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.
_____/

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

Motion for Immediate Consideration of Motion of Right to Life of Michigan and the Michigan Catholic Conference for leave to file amicus curiae brief (1) in support of dismissal for lack of jurisdiction, (2) for recusal, and (3) if necessary, for a briefing schedule

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 immediate consideration of their motion for leave to file an *amici curiae* brief. In support of this motion, Right to Life and the Michigan Catholic Conference state as follows:

1. This collusive litigation, filed by Plaintiff Planned Parenthood and its medical director, is nominally brought against Defendant Attorney General Nessel, who not only publicly endorses Plaintiffs' legal position but has vowed not to fulfill her duty to defend the valid Michigan statute at issue. It raises issues of great significance to *amici*, and indeed, the whole State.

2. As set forth more fulsomely in the proposed *amici curiae* brief attached to their motion for leave, Right to Life of Michigan and the Michigan Catholic Conference are deeply concerned about this litigation, which attempts to challenge a longstanding, Michigan pro-life law based on legal events that have not yet happened, and involves parties—Planned Parenthood and the Michigan Attorney General—who lack adversity because they both agree on the outcome they desire.

3. Right to Life and the Michigan Catholic Conference are also deeply concerned that this case has been assigned to a Michigan Court of Claims judge who has not yet recused but previously, in private practice, represented parties in litigation to invalidate Michigan pro-life laws while working with Plaintiffs' counsel, the ACLU; who has received an award from Planned Parenthood; and who remains an annual and longtime contributor to Plaintiff Planned Parenthood. Remarkably, this will result in a judge indirectly funding the very action over which she presides.

4. This Court must address the issues of recusal and justiciability before considering any motion practice, including Plaintiffs' premature motion for a preliminary injunction. Accordingly, this Court should give immediate consideration to Plaintiffs' motion for leave to file an amicus curiae brief (1) in support of dismissal for lack of jurisdiction, (2) for recusal, and (3) if necessary, for a briefing schedule.

WHEREFORE, Right to Life of Michigan and the Michigan Catholic Conference respectfully request that this Court immediately consider their request to participate as *amici curiae* in this case.

Respectfully submitted,

Dated: April 20, 2022

ALLIANCE DEFENDING FREEDOM

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EXHIBIT 16

STATE OF MICHIGAN

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

Case No. 22-000044-MM

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

Hon. Elizabeth L. Gleicher

Defendant.

_____/

ORDER GRANTING LEAVE TO FILE AMICUS CURIAE BRIEFING AND STANDING ORDER TO ACCEPT FOR FILING ALL AMICUS BRIEFING RECEIVED BY TUESDAY, MAY 10, 2022

Pending before the Court is Right to Life of Michigan and the Michigan Catholic Conference's motion for leave to file amicus curiae briefing. Also before the Court at this time is a motion for immediate consideration of the motion for leave to file amicus briefing. The motions are hereby GRANTED and the briefing submitted by Right to Life of Michigan and Michigan Catholic Conference is accepted for filing.

In addition, and recognizing that other individuals or groups may wish to submit amicus briefing in the future, the Court hereby orders the Clerk of this Court to accept for filing all amicus briefing that is received by **Tuesday, May 10, 2022**. The named parties in this action shall have **seven (7) days** to respond to any amicus briefing received by that time. No replies by amici will be permitted.

IT IS SO ORDERED.

Date: April 20, 2022

Elizabeth L. Gleicher
Judge, Court of Claims

EXHIBIT 17

STATE OF MICHIGAN
IN THE SUPREME COURT

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, DAVID S. LEYTON, Prosecuting Attorney of Genesee County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants.

Supreme Court Case No. 164256

PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION TO INTERVENE PURSUANT TO MCR 2.209 AND MCR 7.311

This case involves a claim that state governmental action is invalid

Oakland Circuit Court No. 22-193498-CZ

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PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION TO INTERVENE PURSUANT TO MCR 2.209 AND MCR 7.311

Right to Life of Michigan and the Michigan Catholic Conference, pursuant to MCR 2.209 and MCR 7.311, move to intervene in the action pending before this Court as Docket No. 164256, and to ask that the Court deny Plaintiff Gretchen Whitmer's request for certification filed pursuant to MCR 7.308. In support of its motion, Right to Life of Michigan and the Michigan Catholic Conference state as follows.

1. This case involves the constitutionality of MCL 750.14, 1931 PA 328, which prohibits "wilfully administer[ing] to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman," unless doing so was "necessary to preserve the life of [the] woman."

2. MCL 750.14, which had already been on the books for 32 years when the current version of the Michigan Constitution was ratified in 1963, has co-existed peaceably with that Constitution for nearly 60 years. Indeed, the 1963 Constitution is completely silent about abortion. And on information and belief, there is no public record suggesting that those who drafted and ratified Michigan's 1963 Constitution believed that they were invalidating MCL 750.14. The one time a litigant raised the issue in the 1990s, the Court of Appeals definitively held that "there is no right to abortion under the Michigan Constitution." *Mahaffey v Attorney General*, 222 Mich App 325, 336; 564 NW2d 104 (1997). It would be extraordinary for anyone to claim today that hidden somewhere in the 1963 Constitution's silence is a right to abortion that renders MCL 750.14 invalid.

3. Yet here we are. Despite the Michigan Constitution's demand that the Governor take care "that the laws be faithfully executed," Const 1963, art 5, § 8, Governor Whitmer, on behalf of the State of Michigan, filed on April 7, 2022, a Complaint for Declaratory and Injunctive Relief in the Oakland County Circuit Court, Case No. 22-193498-CZ, seeking a determination that MCL 750.14 violates the Michigan Constitution's Due Process and Equal Protection Clauses. Const 1963, art 1, §§2, 17.

4. The same day, Governor Whitmer submitted an Executive Message to this Court, asking it, under MCR 7.308, to authorize the Oakland County Circuit Court to certify three questions for this Court's review: (1) whether the Michigan Constitution protects the right to abortion; (2) whether Michigan's abortion statute violates the Due Process Clause of the Michigan Constitution; and (3) whether Michigan's abortion statute violates the Equal Protection Clause of the Michigan Constitution. Along with her Executive Message, Governor Whitmer filed a brief in support and a Motion for Immediate Consideration.

5. The same day, a plaintiffs group represented by Planned Parenthood filed still another action, this one in the Michigan Court of Claims. *Planned Parenthood of Michigan v Attorney General of the State of Michigan*, Court of Claims No 22-000044-MM. The Attorney General promptly issued a prepared public statement declaring that she would not defend MCL 750.14—even though that is her job—unless a court orders her to do so.

6. All three legal actions are founded on an event that has not happened yet: the possibility that the U.S. Supreme Court may overturn *Roe v Wade*, 410 US 113 (1973). Governor Whitmer then used her flouting of Michigan law to initiate a national fundraising campaign.

7. The Governor's request for certification remains pending in this court.

8. Right to Life of Michigan and the Michigan Catholic conference now bring this Motion to Intervene in Supreme Court Case No. 164256, under MCR 2.209 and MCR 7.311.

9. MCR 2.209(A)(3) provides that, on timely application, a party "has a right to intervene in an action…when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated so that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

10. Put simply, MCR 2.209(A)(3) "allows an intervention of right in cases in which the intervenor's interests are not adequately represented by the parties." *Estes v Titus*, 481 Mich 573, 583; 751 NW2d 493 (2008).

11. Similarly, MCR 2.209(B) provides that, on timely application, a party "may intervene in an action…when an applicant's claim or defense and the main action have a question of law or fact in common." Under that rule, "common question[s] of law and fact alleged should be the basis for granting the motion for leave to intervene unless the court in [its] discretion determines that the intervention

would unduly delay or prejudice the adjudication of the rights of the original parties." *Burg v B&B Enters, Inc*, 2 Mich App 496, 499; 140 NW2d 788 (1966); *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 575; 957 NW2d 731 (2020).

12. "The rule for intervention should be liberally construed to allow intervention where the applicant's interests *may be* inadequately represented." *Hill v LF Transp, Inc*, 277 Mich App 500; 746 NW2d 118 (2008) (emphasis added and citations omitted).

13. A party seeking intervention isn't required to definitively prove that its interests are inadequately represented. Instead, "the *concern* of inadequate representation of interests need only exist." *Vestevich v West Bloomfield Tp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001) (emphasis added).

14. "[T]here need be no positive showing that the existing representation is in fact inadequate. All that is required is that the representation by existing parties *may be inadequate*." *Mullinix v City of Pontiac*, 16 Mich App 110, 115; 167 NW2d 856 (1969) (emphasis added); *Karrip v Cannon Twp*, 115 Mich App 726, 731-732; 321 NW2d 690 (1982) (citations omitted) ("The proposed intervenors satisfied the second requirement by establishing that their representation is or *may be* inadequate.")

15. The possibly-inadequate-representation rule "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *D'Agostini v City of Roseville*, 396 Mich 185, 188-189; 240 NW2d 252 (1976), quoting *Trbovich v. United Mine Workers of Am*, 404 US 528, 538 n 10; 92 S Ct 603; 30 L Ed 2d 686 (1972).

16. In this case, Right to Life of Michigan and the Michigan Catholic Conference satisfy all the requirements for intervention by right under MCR 2.209(A)(3).

17. First, this motion is timely. Governor Whitmer sued on April 7 and this motion is being filed two weeks later, before any issues have been decided or any procedural Rubicons have been crossed.

18. Second, Right to Life of Michigan and the Michigan Catholic Conference's interests may be inadequately represented by the parties. At least seven Defendants have already stated publicly that they will not defend the law. And even if a couple of Defendants decide to defend, they could be replaced in a future election by elected officials who change position and decline to defend. What's more, as explained below, Right to Life of Michigan and the Michigan Catholic Conference's interests are different than those of Defendants, all of whom are public officials. So Right to Life of Michigan and the Michigan Catholic Conference are almost certain to advance different legal arguments than Defendants.

19. 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 fertilization 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.

20. 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.

21. As advocates for the rule of law, Right to Life of Michigan and the Michigan Catholic Conference pursued passage of a Human Life Amendment and other laws that promote and protect innocent life, including the lives of the unborn. They also oppose passage of laws that destroy and devalue life, including those that encourage abortion. As part of these efforts, Right to Life of Michigan and the Michigan Catholic Conference have dedicated significant human and financial resources to combating efforts like the misnamed Michigan "Reproductive Freedom for All" Initiative (2022) that seek to undo almost a century of Michigan law by creating a right to take the life of an unborn child at any stage, right up to the moment he or she emerges through the birth canal, while voiding longstanding Michigan laws that (1) ensure women's health and (2) that mothers are fully informed before making

the decision to take their own child's life. Given the resources that they have expended defending the rights of the unborn, Right to Life of Michigan and the Michigan Catholic Conference have a substantial interest in advocating for and defending pro-life legislation, including the 1931 statute the Governor seeks to invalidate.

22. The parties here do not adequately represent Right to Life Michigan and the Michigan Catholic Conference's pro-life interests. Governor Whitmer asks this Court to create a right to an abortion and hold MCL 750.14 unconstitutional. So she is adverse to—and cannot adequately represent—Right to Life of Michigan and Michigan Catholic Conference's interests.

23. As for the prosecutors named as Defendants—seven have already publicly agreed with Governor Whitmer's contention that MCL 750.14 is "unconstitutional" and have declined to defend her lawsuit.[1] Even if some of the remaining prosecutors choose to defend MCL 750.14 and oppose Governor Whitmer's attempt to undermine a Michigan law she is tasked with enforcing, they may not adequately represent Right to Life of Michigan and the Michigan Catholic Conference's interests.

24. To begin, a Defendant who defends this lawsuit could be replaced in an election by a prosecutor who shares Governor Whitmer's views. That would leave this case without the adversity of parties necessary for the courts even to exercise jurisdiction over this matter.

[1] **Exhibit 1**, April 7, 2022 Statement by Seven Michigan Prosecutors.

25. In addition, the Governor's lawsuit places all Defendants in a difficult political and legal position. In the Governor's (and the Attorney General's) view, silence in Michigan's Constitution creates a right to abortion that invalidates MCL 750.14, which has been on the books since before the Constitution's ratification. And, because two of Michigan's constitutional officers have taken the position that MCL 750.14 is unconstitutional, any Defendant who argues that MCL 750.14 is valid will likely be attacked politically—however unfairly—for failing to uphold Michigan's Constitution. Right to Life of Michigan and the Michigan Catholic Conference will have no such constraints on their advocacy.

26. What's more, a prosecutor acts on existing law and concrete facts to make a charging decision. As things stand today, *Roe v Wade* is still good law, and there are no set of facts that would result in a prosecutor charging someone with a violation of MCL 750.14 that *Roe* protects. That reality makes it difficult for a prosecutor to articulate the government's interests in a case like this. In contrast, Right to Life of Michigan and the Michigan Catholic Conference are not constrained to make arguments consistent with hypothetical charging decisions.

27. Most important, Right to Life of Michigan and the Michigan Catholic Conference will advance alternative arguments in this case. For example, if this Court accepts the Governor's contention that a silent Michigan Constitution creates a right to an abortion, then Right to Life of Michigan and the Michigan Catholic Conference will demonstrate to this Court—and to the U.S. Supreme Court if necessary—that the U.S. Constitution supersedes that right because the Fourteenth

Amendment protects all life beginning at conception. And if this Court were to take seriously the Governor's claim that MCL 750.14 has been invalid since the moment the Michigan Constitution became effective in 1963, then Right to Life of Michigan and the Michigan Catholic Conference response will be that the U.S. Constitution's Republican Form of Government Clause requires this Court—and the U.S. Supreme Court if necessary—to honor the language and the silence of Michigan's Constitution rather than imposing language and rights that the People of Michigan never endorsed or ratified through the democratic process.

28. Michigan courts have regularly allowed Right to Life of Michigan to intervene in lawsuits challenging the constitutionality of abortion laws. See, e.g., *Doe v Dep't of Social Services*, 439 Mich 650; 487 NW2d 166 (1992) (Right to Life of Michigan permitted to intervene as defendant in action challenging constitutionality of statute prohibiting use of public funds to pay for abortion unless abortion is necessary to save a woman's life); *Ferency v Bd of State Canvassers*, 198 Mich App 271; 497 NW2d 233 (1993) (Right to Life of Michigan permitted to intervene as defendant in action challenging the constitutionality of proposed legislation entitled "The Parental Rights Restoration Act"). This Court should allow Right to Life Michigan and the Michigan Catholic Conference to intervene by right here.

29. Alternatively, this Court should allow Right to Life of Michigan and the Michigan Catholic Conference to intervene by permission under MCR 2.209(B).

30. In addition to seeking intervention in the proceedings before this Court, Right to Life of Michigan and the Michigan Catholic Conference intend to intervene

in Governor Whitmer's trial court action, pending in the Oakland County Circuit Court as Case No. 22-193498-CZ, to both defend against the Governor's claims for declaratory and injunctive relief and, if necessary, assert their own claims for declaratory relief. Those claims and defenses have "question[s] of law or fact in common" with the issues raised in Plaintiff's request for certification.

31. Permitting Right to Life of Michigan and the Michigan Catholic Conference to intervene will not "unduly delay or prejudice the adjudication of the rights of the original parties." *Kuhlgert v Michigan State University*, 328 Mich App 357, 378-379; 937 NW2d 716 (2019) (citations omitted). The Governor's lawsuit and request for certification are in their infancy. Neither this Court nor the trial court have ruled on any motions, held any hearings, or even set any briefing schedules. So the original parties won't be prejudiced if Right to Life of Michigan and the Michigan Catholic Conference are permitted to intervene.

32. So, in addition to being entitled to intervene by right under MCR 2.209(A)(3), Right to Life of Michigan and the Michigan Catholic Conference should also be permitted to intervene under MCR 2.209(B).

For these reasons, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to: (1) grant this motion and enter an order allowing Right to Life of Michigan and the Michigan Catholic Conference to intervene in Case No. 164256; (2) accept for filing the attached brief in opposition to Governor Whitmer's request for certification under MCR 7.308; and (3) alternatively, hold that, consistent

with longstanding precedent, the Michigan Constitution does not create a right to abortion and thus MCL 750.14 is a valid exercise of the Legislature's authority.

Respectfully submitted,

Dated: April 22, 2022

ALLIANCE DEFENDING FREEDOM

By */s/ John J. Bursch*

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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 18

STATE OF MICHIGAN
IN THE 6TH JUDICIAL CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, DAVID S. LEYTON, Prosecuting Attorney of Genesee County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO,
Prosecuting Attorney of Macomb County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY,
Prosecuting Attorney of Wayne County, in their official capacities,

Defendants.

Case No. 22-193498-CZ
Hon. Edward Sosnick

PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION TO INTERVENE PURSUANT TO MCR 2.209

This case involves a claim that state governmental action is invalid

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Counsel for Governor Gretchen Whitmer

PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION TO INTERVENE PURSUANT TO MCR 2.209

Right to Life of Michigan and the Michigan Catholic Conference, pursuant to MCR 2.209, move to intervene in the action pending before this Court as Docket No. 22-193498-CZ. In support of its motion, Right to Life of Michigan and the Michigan Catholic Conference state as follows.

1. This case involves the constitutionality of MCL 750.14, 1931 PA 328, which prohibits "wilfully administer[ing] to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman," unless doing so was "necessary to preserve the life of [the] woman."

2. MCL 750.14, which had already been on the books for 32 years when the current Michigan Constitution was ratified in 1963, has co-existed peaceably with that Constitution for nearly 60 years. Indeed, the 1963 Constitution is completely silent about abortion. And on information and belief, there is no public record suggesting that those who drafted and ratified Michigan's 1963 Constitution believed that they were invalidating MCL 750.14. The one time a litigant raised the issue in the 1990s, the Court of Appeals definitively held that "there is no right to abortion under the Michigan Constitution." *Mahaffey v Attorney General*, 222 Mich App 325, 336; 564 NW2d 104 (1997) (per curiam). It would be extraordinary for anyone to claim today that hidden somewhere in the 1963 Constitution's silence is a right to abortion that renders MCL 750.14 invalid.

3. Yet here we are. Despite the Michigan Constitution's demand that the Governor take care "that the laws be faithfully executed," Const 1963, art 5, § 8, Governor Whitmer, on behalf of the State of Michigan, filed on April 7, 2022, a Complaint for Declaratory and Injunctive

Relief in this Court seeking a determination that MCL 750.14 violates the Michigan Constitution's Due Process and Equal Protection Clauses. Const 1963, art 1, §§2, 17.

4. The same day, Governor Whitmer submitted an Executive Message to the Michigan Supreme Court, asking it, under MCR 7.308, to authorize this Court to certify three questions for its review: (1) whether the Michigan Constitution protects the right to abortion; (2) whether Michigan's abortion statute violates the Due Process Clause of the Michigan Constitution; and (3) whether Michigan's abortion statute violates the Equal Protection Clause of the Michigan Constitution. Along with her Executive Message, Governor Whitmer filed a brief in support and a Motion for Immediate Consideration.

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7. The Governor's complaint remains pending in this court.

8. Right to Life of Michigan and the Michigan Catholic Conference now bring this Motion to Intervene in this case, No. 22-193498-CZ, under MCR 2.209.

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16. In this case, Right to Life of Michigan and the Michigan Catholic Conference satisfy all the requirements for intervention by right under MCR 2.209(A)(3).

17. First, this motion is timely. Governor Whitmer sued on April 7 and this motion is being filed a few weeks later, before any issues have been decided or any procedural Rubicons have been crossed.

18. Second, Right to Life of Michigan and the Michigan Catholic Conference's interests may be inadequately represented by the parties. At least seven Defendants have already stated publicly that they will not defend the law. And even if a couple of Defendants decide to defend, they could be replaced in a future election by elected officials who change position and decline to defend. What's more, as explained below, Right to Life of Michigan and the Michigan Catholic Conference's interests are different than those of Defendants, all of whom are public officials. So Right to Life of Michigan and the Michigan Catholic Conference are almost certain to advance different legal arguments than Defendants.

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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.

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and the Michigan Catholic Conference have a substantial interest in advocating for and defending pro-life legislation, including the 1931 statute the Governor seeks to invalidate.

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27. Most important, Right to Life of Michigan and the Michigan Catholic Conference will advance alternative arguments in this case. For example, if this Court accepts the Governor's contention that a silent Michigan Constitution creates a right to an abortion, then Right to Life of Michigan and the Michigan Catholic Conference will demonstrate to this Court—and to the U.S. Supreme Court if necessary—that the U.S. Constitution supersedes that right because the Fourteenth Amendment protects all life beginning at conception. And if this Court were to take seriously the Governor's claim that MCL 750.14 has been invalid since the moment the Michigan Constitution was adopted in 1963, then the response of Right to Life of Michigan and the Michigan Catholic Conference will be that the U.S. Constitution's Republican Form of Government Clause requires this Court—and the U.S. Supreme Court if necessary—to honor the language and the silence of Michigan's Constitution rather than imposing language and rights that the People of Michigan never endorsed or ratified through the democratic process.

28. Michigan courts have regularly allowed Right to Life of Michigan to intervene in lawsuits challenging the constitutionality of abortion laws. See, e.g., *Doe v Dep't of Soc Servs*, 439 Mich 650; 487 NW2d 166 (1992) (Right to Life of Michigan permitted to intervene as defendant

in action challenging constitutionality of statute prohibiting use of public funds to pay for abortion unless abortion is necessary to save a woman's life); *Ferency v Bd of State Canvassers*, 198 Mich App 271; 497 NW2d 233 (1993) (per curiam) (Right to Life of Michigan permitted to intervene as defendant in action challenging the constitutionality of proposed legislation entitled "The Parental Rights Restoration Act"). This Court should allow Right to Life Michigan and the Michigan Catholic Conference to intervene by right here.

29. Alternatively, this Court should allow Right to Life of Michigan and the Michigan Catholic Conference to intervene by permission under MCR 2.209(B).

30. In addition to seeking intervention in the proceedings before this Court, Right to Life of Michigan and the Michigan Catholic Conference have moved to intervene in Governor Whitmer's Michigan Supreme Court action, Case No. 164256.

31. Right to Life Michigan and the Michigan Catholic Conference's move to intervene in this Court to defend against the Governor's claims for declaratory and injunctive relief and, if necessary, assert their own claims for declaratory relief. Their proposed answer raises defenses that have "question[s] of law or fact in common" with the issues raised in Governor Whitmer's complaint.

32. Permitting Right to Life of Michigan and the Michigan Catholic Conference to intervene will not "unduly delay or prejudice the adjudication of the rights of the original parties." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 378-379; 937 NW2d 716 (2019) (citations omitted). The Governor's lawsuit and request for certification are in their infancy. Neither this Court nor the Michigan Supreme Court have ruled on any motions, held any hearings, or even set any briefing schedules. So the original parties won't be prejudiced if Right to Life of Michigan and the Michigan Catholic Conference are permitted to intervene.

33. So, in addition to being entitled to intervene by right under MCR 2.209(A)(3), Right to Life of Michigan and the Michigan Catholic Conference should also be permitted to intervene under MCR 2.209(B).

For these reasons, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to: (1) grant this motion and enter an order allowing Right to Life of Michigan and the Michigan Catholic Conference to intervene in Case No. 22-193498-CZ; and (2) accept for filing their proposed answer.

Respectfully submitted,

Dated: May 4, 2022

ALLIANCE DEFENDING FREEDOM

By */s/ John J. Bursch*

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Attorneys for proposed intervenors Right to Life of Michigan and the Michigan Catholic Conference

EXHIBIT 1

MOMENT
STRATEGIES

NEWS RELEASE
For Immediate Release:
April 7, 2022

Contact: Alexis Wiley
AlexisWiley@momentstrategies.com
(313) 510-7222

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

STATE OF MICHIGAN MI Oakland County 6th Circuit Court	PROOF OF ELECTRONIC SERVICE	CASE NO. 2022-193498-CZ

Case title
WHITMER,GRETCHEN,, vs. LINDERMAN,JAMES,R,

1. MiFILE served the following documents on the following persons in accordance with MCR 1.109(G)(6).

Type of document	Title of document
MOTION	Proposed Intervenors Right to Life of Michigan's Motion to Intervene Pursuant to MCR 2.209
MISCELLANEOUS	Proposed May 4, 2022 Answer of Intervening Defendants Right to Life of Michigan to Complaint for Declaratory and Injunctive Relief

Person served	E-mail address of service	Date and time of service
Linus Banghart-Linn	Banghart-linnL@michigan.gov	05/04/2022 2:12:36 PM
Christina Grossi	grossic@michigan.gov	05/04/2022 2:12:36 PM
Christopher Allen	AllenC28@michigan.gov	05/04/2022 2:12:36 PM
Kyla Barranco	BarrancoK@michigan.gov	05/04/2022 2:12:36 PM
Brooke Tucker	btucker@co.genesee.mi.us	05/04/2022 2:12:36 PM

2. I, John Bursch, initiated the above MiFILE service transmission.

This proof of electronic service was automatically created, submitted, and signed on my behalf by MiFILE. I declare under the penalties of perjury that this proof of electronic service has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

05/04/2022
Date

/s/John Bursch
Signature

Bursch Law PLLC
Firm (if applicable)

EXHIBIT 19

State of Michigan
Court of Claims

April 14, 2022

Deborah LaBelle
221 N. Main St., Ste. 300
Ann Arbor, MI 48104

Mark Brewer
17000 W. 10 Mile Rd.
Southfield, MI 48075

Fadwa A. Hammoud
Heather S. Meingast
Office of the Attorney General
P.O. Box 30736
Lansing, MI 48909

Case Name: **Planned Parenthood of Michigan v Attorney General**
Case No.: **2022-000044-MM**

Dear Counsel:

When this case was initiated, it was randomly assigned to Chief Judge Elizabeth L. Gleicher using the assignment algorithm in the Court's case management system. Upon receiving this assignment, Judge Gleicher asked me to notify all counsel of record that she makes yearly contributions to Planned Parenthood of Michigan, a 501(c)(3) organization, and she represented Planned Parenthood as a volunteer attorney for the ACLU in 1996-1997, in *Mahaffey v Attorney General*, 222 Mich App 325 (1997). While Judge Gleicher does not believe this warrants her recusal, and is certain that she can sit on this case with requisite impartiality and objectivity, she believes that this letter of disclosure is appropriate.

If any party disagrees with Judge Gleicher's assessment, an appropriate motion may be filed in accordance with MCR 2.003(D). If you have any questions, please feel free to contact me.

Sincerely,

Jerome W. Zimmer Jr.
Clerk

Cc: Chief Judge Gleicher

EXHIBIT 3

STATE OF MICHIGAN
IN THE 6TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, DAVID S. LEYTON, Prosecuting Attorney of Genesee County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants.

Oakland Circuit Court No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

This case involves a claim that state governmental action is invalid

ORDER GRANTING TEMPORARY RESTRAINING ORDER

ORDER GRANTING TEMPORARY RESTRAINING ORDE

At a session of Court on August _1_, 2022
In Pontiac, Michigan at _____
Honorable James J. Cunningham
Circuit Court Judge

This matter came before the Court on Plaintiff's Ex Parte Motion for Temporary Restraining Order.

The Court has considered the Emergency Ex Parte Motion for Temporary Restraining Order, the supporting Affidavit, and the Certification by Plaintiff's Counsel under MCR 3.310(B)(1).

The Court finds:

1. The Plaintiff's Motion seeks a Temporary Restraining Order prohibiting Defendants from enforcing MCL 750.14, which bans nearly all abortions in the State of Michigan.

2. A Temporary Restraining Order is necessary to preserve the last actual, peaceable, uncontested status quo pending further order from the Court.

3. The last actual, peaceable, uncontested status quo was that abortion was legal in Michigan under the framework provided in the United States Supreme Court decision *Roe v Wade*, as provided by *People v Bricker*.

4. The Plaintiff has established that Defendants' public statements that they will consider a case against an abortion provider should a law enforcement officer bring one to them, coupled with the Michigan Court of Appeals' August 1, 2022 decision that County prosecutors are not bound by Judge Gleicher's May 17,

2022 preliminary injunction, poses a threat of immediate and irreparable injury to the people of the State of Michigan.

5. A Temporary Restraining Order is necessary to prevent the immediate and irreparable injury that will occur if Defendants are allowed to prosecute abortion providers under MCL 750.14 without a full resolution of the merits of the pending cases challenging that statute.

NOW THEREFORE, pursuant to MCR 3.310(B), it is hereby ordered that Defendants must:

A. Refrain from enforcing MCL 750.14 until further Order of the Court.

IT IS FURTHER ORDERED, parties are ordered to appear via Zoom videoconferencing for a hearing on this matter on Wednesday, August 3, 2022, at 2:30 p.m. Zoom meeting ID: 248 858 0365.

Circuit Judge James J. Cunningham

MY

EXHIBIT 4

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

Case No. 2022-193498-CZ
Hon. JACOB JAMES CUNNINGHAM

-vs-

JAMES R. LINDERMAN, *et al.*,

Defendants.
_____/

ORDER REGARDING TEMPORARY RESTRAINING ORDER HEARING ON AUGUST 3, 2022

At said session of the Sixth Circuit Court held in the County of Oakland, City of Pontiac, State of Michigan, on this 3rd day of August 2022.

The Court issued a temporary restraining order on August 1, 2022, restraining Defendants from enforcing MCL 750.14 in all respects. The Court heard in-person oral argument on the temporary restraining motion and order on August 3, 2022. The hearing was limited to only whether the temporary restraining order entered on August 1, 2022, should remain in place pending an evidentiary hearing on whether a preliminary injunction should issue in this matter. See MCR 3.310(A) and (B).

Prior to oral argument, the Court addressed a technical issue which caused a delay in the issuance of the addendum order issued on August 2, 2022. Defense counsel was offered the opportunity to adjourn the matter until August 4, 2022, to allow further opportunity to file responses given the delay. Counsel did

not avail themselves to the offer and requested the Court proceed with argument on the motion. The Court did have an opportunity to review and considered Defendants' respective responses, if filed, prior to the hearing.

As an initial matter, regarding the alleged procedural defects in the order entered August 1, 2022, the Court finds no alleged defects change the appropriateness or the effectiveness of the August 1, 2022, order and denies Defendants' request to rescind the temporary restraining order on those grounds.

In consideration of oral argument, the underlying briefs, response briefs, and the Court file, and the case law before it, the Court finds it appropriate to extend the temporary restraining order, pending the evidentiary hearing or further order of this Court or a higher court. The Defendants are enjoined from enforcement of MCL 750.14.

Pursuant to MCR 3.310(C), the Court finds extending the temporary restraining order is appropriate. Specifically, the Court made the following findings setting forth the reasons for the issuance of the temporary restraining order: The Court finds the moving party made the required demonstration of irreparable harm; the harm to Plaintiff on behalf of the People of the State of Michigan, absent such an injunction, outweighs the harm it would cause to the adverse party; the moving party showed that it is likely to prevail on the merits; and, there will be harm to the public interest if an injunction is issued. *Detroit Fire Fighters Assn, IAFF Local 344 v City of Detroit,* 482 Mich 18 (2008). Further, the temporary restraining order continues until the scheduled evidentiary hearing on whether a preliminary injunction should issue. The temporary restraining order

specifically restrains Michigan County Prosecutors from charging or enforcing action against any individual or organization under MCL 750.14. MCR 3.310(C).

THEREFORE, Plaintiff shall have seven (7) days from entry of this order to file a motion for a preliminary injunction. MCR 3.310(A). Any responsive briefs, filed by named parties, must be filed by 12:00 p.m. on August 16, 2022. All briefs must be in conformance with MCR 2.119.

The Court schedules an in-person evidentiary hearing on August 17, 2022, at 2:00 p.m. on whether a preliminary injunction should issue pending trial. Plaintiff and Defendants are limited to three (3) witnesses each for purposes of the evidentiary hearing. See MCR 3.310(A).

IT IS SO ORDERED.

Date: AUG 03 2022

Hon. JACOB JAMES CUNNINGHAM
Circuit Court Judge MY

EXHIBIT 5

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GRETCHEN WHITMER,
on behalf of the State of Michigan,

Plaintiff,

Case No. 2022-193498-CZ
Hon. JACOB JAMES CUNNINGHAM

-vs-

JAMES R. LINDERMAN, *et al.*,

Defendants.
_____/

ORDER OF PRELIMINARY INJUNCTION

For the reasons set forth on the record, the Court hereby orders a Preliminary Injunction enjoining all of the parties and their agents, in their official capacities, from any and all enforcement of MCL 750.14.

The Court finds that Plaintiff has met all four prongs of the test establishing the basis for the issuance of this Preliminary Injunction.

The Court set the in-person pretrial conference date on November 21, 2022, at 9:30 a.m. MCR 3.310(A)(5).

IT IS SO ORDERED.

Date: AUG 19 2022

HON. JACOB JAMES CUNNINGHAM
CIRCUIT COURT JUDGE