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. JACOB JAMES CUNNINGHAM

PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION FOR LEAVE TO FILE A BRIEF IN OPPOSITION TO GOVERNOR GRETCHEN WHITMER'S MOTION FOR PRELIMINARY INJUNCTION

This case involves a claim that state governmental action is invalid

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PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION FOR LEAVE TO FILE A BRIEF IN OPPOSITION TO GOVERNOR GRETCHEN WHITMER'S MOTION FOR PRELIMINARY INJUNCTION

Right to Life of Michigan and the Michigan Catholic Conference move for leave to file a brief in opposition to Governor Whitmer's motion for preliminary injunction under MCR 2.119 and LR 2.119, which is attached as **Exhibit A**. In support, proposed intervenors state the following:

1. Right to Life of Michigan and the Michigan Catholic Conference filed a timely motion to intervene as defendants in this matter and proposed answer on May 4, 2022.

2. On August 3, 2020, Proposed Intervenors renewed their motion to intervene.

3. The earliest hearing that Right to Life of Michigan and the Michigan Catholic Conference were able to obtain on their motion to intervene is August 17, 2022, the same date as the preliminary-injunction hearing in this matter.

4. If Proposed Intervenors are to participate in the preliminary-injunction proceedings, this Court must review their brief in opposition before the August 17, 2022, hearing.

5. This Court's consideration of Proposed Intervenors' brief in opposition to the Governor's preliminary-injunction motion will remedy what has—thus far—been an imbalanced proceedings that favors the pro-abortion side.

6. Granting Proposed Intervenors' motion is in the interests of justice and "fairness." **Exhibit A**, 5/20/22 Order, *Whitmer v Linderman*, S. Ct. No. 164256 (Bernstein, J., concurring).

7. Indeed, "[g]iven the gravity of the issues presented in this case," this Court "should strive to open the courtroom doors to as many voices as possible." *Id.* (Bernstein, J., concurring).

For these reasons, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to grant them leave to file the attached brief in opposition to the Governor's motion for preliminary injunction.

Dated: August 15, 2022

Respectfully submitted,

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EXHIBIT A

Brief In Opposition To Governor Gretchen Whitmer's Motion For Preliminary Injunction

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INTRODUCTION

Governor Whitmer's motion for preliminary injunction urges this Court to recognize a state constitutional right to abortion that violates binding precedent, has no grounding in the Michigan Constitution, and would put all of the pro-life laws that Right to Life of Michigan and the Michigan Catholic Conference have sponsored or defended over the last 50 years in peril. What's more, rather than maintaining the status quo under *Roe v Wade*, 410 US 113; 93 S Ct 705 (1973), the Governor's request to enjoin MCL 750.14 completely would give *any* abortionist—physician or not—free rein to abort *any* unborn child for *any* reason—even after viability. This Court's TRO is already doing irreparable damage, as unborn lives are lost. For the reasons explained herein, the Governor's motion should be denied.

ARGUMENT

I. The Michigan Constitution creates no right to abortion.

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

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

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

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

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

Mahaffey's *stare decisis* effect isn't limited to identical cases. This Court must "reach the same result in a case that presents the same or *substantially similar issues*." *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246, 250 (2014) (per curiam) (emphasis added). At the least, *Mahaffey* rejected a state constitutional right to abortion that is *similar* to the abortion right that Governor Whitmer proposes here. Presumably, that is why the Governor *admitted* that *Mahaffey* bars this Court from recognizing a constitutional right to abortion.[1]

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

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

[1] **Exhibit 1**, 4/7/22 Br in Support of Governor's Exec Message in Whitmer v Linderman, Supreme Court Case No. 164256, p 11.

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

> must take into consideration the times and circumstances under which the State Constitution was formed—the general spirit of the times and the prevailing sentiments among the people. . . . [The State Constitution must be] interpreted in the light of this history, [so as *not]* to be made to express purposes which were never within the minds of the people in agreeing to it. This [history] court[s] must keep in mind when called upon to interpret [the State Constitution]; for their duty is to enforce the law which the people have made, and not some other law which the words of the constitution may possibly be made to express. [*Id.* at 764 (quoting *People v Harding*, 453 Mich 481, 485; 19 NW 155 (1884); *accord League of Women Voters of Mich v Sec of State*, 508 Mich 520, 535; 975 NW2d 840 (2022).]

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

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

First, abortion is not a right traditionally protected in Michigan. "It is the public policy of the state to proscribe abortion." *People* v *Bricker*, 389 Mich 524, 529; 208 NW2d 172 (1973); *accord Larkin v Cahalan*, 389 Mich 533, 540–41; 208 NW2d 176 (1973) (abortion "is a serious crime both at common law and under our statutes"). And, because Michigan's law has not changed, that is just as true now as it was 49 years ago. The Governor's appeal to the prior common law

misses the mark. 8/10/22 Gov Gretchen Whitmer's Br. In Support of Mot for Prelim Injunction ("Mot") at 2. As the U.S. Supreme Court held conclusively, there was no right to abortion under the common law. *Dobbs v Jackson Women's Health Organization*, 142 S Ct 2228, 2248–53 (2022). "[Q]uickening [was] only evidence of life. It [was] not conclusive[ ]" or an "attempt to define a point in time when human life begins." *Larkin*, 389 Mich at 540.

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

Third, Michigan courts must be "reluctant to expand the concept of substantive due process." *Bonner v City of Brighton*, 495 Mich 209, 227; 848 NW2d 380 (2014) (alteration omitted). The Supreme Court places a heavy emphasis on "judicial self-restraint" in this area. *Id.* Yet that is a quality sorely lacking from this Court's TRO, which provides no rationale and *completely enjoins* MCL 750.14's enforcement—a far cry from the status quo under *Roe* and *Bricker*.

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

Governor Whitmer asserts a state constitutional right to abortion grounded in bodily integrity, Mot at 9–10, even though her complaint does not plead such a theory. Michigan's leading case on the right is *Snyder*, 323 Mich App at 58–62, which the Supreme Court "affirmed by equal

division,"[2] *Mays*, 506 Mich 157, 167 (citing MCR 7.315(A)). The controlling decision in *Snyder* recognizes that "'[t]he due process guarantee of the Michigan Constitution is coextensive with its federal counterpart.'" 323 Mich App at 58 (quoting *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013)). That dooms the Governor's bodily-integrity argument.

In *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 857; 112 S Ct 2791 (1992), the U.S. Supreme Court grounded the federal due process right to abortion in "personal autonomy and bodily integrity." *Accord id* at 896. But *Dobbs v Jackson Women's Health Organization*, 142 S Ct 2228 (2022), overruled *Casey* and its substantive due process holding. *Id.* at 2242. After *Dobbs*, no right to abortion "is implicitly protected by *any* [federal] constitutional provision, including . . . the Due Process Clause of the Fourteenth Amendment." *Id.* (emphasis added). Because Michigan courts give Const. 1963, Art. I, § 17 the same meaning, *Snyder*, 323 Mich App at 58, there is no right to abortion under Michigan's Due Process Clause either.

Governor Whitmer's argument also fails on the merits. Bodily integrity is not a limitless right to personal autonomy. If it were, the Michigan Supreme Court would have recognized a constitutional right to assisted suicide based on bodily integrity, rather than rejecting one nearly 30 years ago. *Kevorkian*, 447 Mich 436, 464–82; *accord Glucksberg*, 521 US 702, 723–28.

The constitutional right to bodily integrity is important but limited: it protects against "egregious, nonconsensual entr[ies] *into* the body" that are "without any legitimate governmental objective." *Snyder*, 323 Mich App at 60 (emphasis added, quotation omitted). Competent adults have "the right to *refuse* medical treatment and procedures." *In re Rosebush*, 195 Mich App 675,

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[2] Governor Whitmer relies on a three-Justice opinion in *Mays* that was not joined by a majority of the Supreme Court. Mot at 10. That opinion cannot outweigh the Court of Appeals' controlling analysis of bodily integrity in *Snyder*, which the Supreme Court affirmed by equal division. *Mays*, 506 Mich at 167.

681; 491 NW2d 633 (1992) (emphasis added). As a result, the government usually cannot forcibly pump someone's stomach, compel an individual to take medication, or otherwise veto a competent adult's rejection of medical treatment. *Guertin v State*, 912 F3d 907, 919–20 (CA6, 2019). The right to bodily integrity is a *negative* right—the right to *close* one's body to unwanted entry.

What the Governor seeks is a *positive* right—the right to *open* one's body to wanted entries designed to destroy an unborn child. That claimed right to abortion finds no grounding in bodily integrity. Far from trying to avoid a "*nonconsensual* entry into the body," *Snyder*, 323 Mich App at 60 (quotation omitted and emphasis added), Governor Whitmer pursues a *consensual* entry into a woman's body to end the life of her unborn child. What's more, MCL 750.14 plainly serves a "legitimate governmental objective," *id.* (quotation omitted), to "protect human life," *Larkin*, 389 Mich at 540.[3] So, the Governor has failed to show that bodily-integrity rights are even implicated.

Kevorkian confirms this conclusion. There, the Supreme Court drew a firm line between "action and inaction." *Kevorkian*, 447 Mich at 471. Bodily integrity protects *inaction*, such as "the refusal or cessation of life-sustaining medical treatment [that] simply permits life to run its course," *id.* at 471–72, because "the treatment itself is a violation of bodily integrity." *Id.* at 480 n59. In contrast, the fundamental right to bodily integrity does not apply to "*affirmative act[s*]," such as "end[ing] a life." *Id.* at 471–72 (emphasis added). "When one acts to end [a] life, it is the intrusion of the lethal agent that violates bodily integrity." *Id.* at 480 n59. And that is equally true whether a woman seeks to end her own life or the life of her unborn child. In short, the right to bodily

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[3] Governor Whitmer's motion and the Court of Claims' preliminary injunction rely on *People v Nixon*, 42 Mich App 332; 201 NW2d 635 (1972). Mot. at 4. Crediting *Nixon* is legal error because that opinion is not good law. The Supreme Court took jurisdiction and "remanded to the Court of Appeals for disposition not inconsistent with" *Larkin* and *Bricker*. *People v Nixon*, 389 Mich 809, 809–10; 387 NW2d 921 (1973). On remand, the Court of Appeals did an about-face and reversed Nixon's conviction under *Bricker*. *People v Nixon*, 50 Mich App 38, 40; 212 NW2d 797 (1973). None of the Court of Appeals' pre-*Bricker* analysis remains valid.

integrity is a shield, not a sword: it provides no positive right to end a human life regardless of whether that life is outside the womb or inside it.

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

Lastly, Governor Whitmer suggests that the Court of Appeals' order in *Planned Parenthood of Michigan v Attorney General* confirms Judge Gleicher's preliminary injunction. Mot at 8–9. That is false. The Court of Appeals never reached the merits of the Court of Claims' bodily-integrity ruling.

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

Governor Whitmer admits that *Mahaffey* bars her claim that there is a right to privacy under the Michigan Constitution that covers abortion. Mot at 11. But *Mahaffey* is not the only obstacle. The right to privacy is grounded in substantive due process. And "'[t]he due process guarantee of the Michigan Constitution is coextensive with its federal counterpart.'" *Snyder*, 323 Mich App at 5 (quotation omitted). That means the Supreme Court's substantive-due-process analysis in *Dobbs* applies equally to Michigan's Due Process Clause. Const. 1963, Art. I, § 17.

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

Not only is Governor Whitmer's privacy theory barred by *Mahaffey*, *Snyder*, and *Dobbs*, it is also waived because the Governor's motion fails to develop or support the argument in any meaningful way. Mot at 11. Parties cannot "simply . . . announce a position or assert an error and then leave it up to th[e] Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

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

Governor Whitmer separately says that Michigan's Equal Protection Clause creates a right to abortion. Mot at 11–12. But that argument is also barred by controlling precedent. Just like due process, "Michigan's equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution." *Shepherd Montessori Center Milan v Ann Arbor Charter Township*, 486 Mich 311, 318; 783 NW2d 695 (2010); *accord People v Idziak*, 484 Mich 549, 570; 773 N.W.2d 616 (2009) ("The equal protection clauses of the United States and Michigan Constitutions are coextensive."). In *Dobbs*, the U.S. Supreme Court rejected a federal equal-protection challenge to Mississippi's abortion law, holding "that a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny[.]'" 142 S Ct at 2245.

Under the federal and state Equal Protection Clauses, "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is 'a mere pretext designed to effect an invidious discrimination against members of one sex of the other.'" *Id.* at 2245–46 (quoting *Geduldig v Aiello*, 417 US 484, 496 n20; 94 S Ct 2485 (1974) (alteration omitted). A state's "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women. *Id.* at 2246 (quoting *Bray v Alexandria Women's Health Clinic*, 506 US 264, 273–74; 113 S Ct 753 (1993)). Binding Supreme Court precedent, in conjunction with *Dobbs*, thus precludes this Court from holding that MCL 750.14 warrants heightened scrutiny under Const. 1963, Art. 1, § 2.

There is also no substance to Governor Whitmer's equal-protection claim. First, the Governor fails to posit a sex-based classification. She merely complains that MCL 750.24 "impermissibly burdens women, while subjecting men to no equivalent burden." Mot at 12. Yet men cannot bear children, so they are not similarly situated. *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 192; 387 NW2d 821 (1986) ("When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated.") (quotation omitted). As the Governor's own case explains, "[p]hysical differences between men and women . . . are enduring" and "[t]he two sexes are not fungible." *United States v Virginia*, 518 US 515, 533; 116 S Ct 2264 (1996); *accord* Mot at 12 (quoting 518 US at 532). Pregnancy merely demonstrates this truth.

Second, *Rose v Stokely*, 258 Mich App 283; 673 NW2d 413 (2003), is beside the point. Mot at 12. The statute in that case treated similarly situated men and women differently by requiring unwed fathers to pay for expenses related to unwed mothers' "confinement," regardless of each unwed parent's ability to pay. *Id.* at 287–89. In contrast, MCL 750.14's terms do not apply

to either mothers or fathers, they apply only to abortionists. *In re Vickers*, 371 Mich 114, 117-118; 123 NW2d 253, 254 (1963). And the statute treats *all* abortionists the same, regardless of whether they are male or female, exactly as the Equal Protection Clause requires. *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 439; 105 S Ct 3249 (1985).

Third, it makes no difference that abortion restrictions have a greater impact on women than men. Laws are not "unconstitutional [s]olely because [they have] a . . . disproportionate impact" on a protected class. *Washington v Davis*, 426 US 229, 239; 96 S Ct 2040 (1976). The Equal Protection Clause is implicated only if Governor Whitmer proves that MCL 750.14 is not a genuine abortion regulation but a "'pretext designed to effect an invidious discrimination against [women].'" *Dobbs*, 142 S Ct at 2245–46 (quoting *Geduldig*, 417 US at 496 n20); *accord Crego v Coleman,* 463 Mich 248, 265–66; 615 NW2d 218 (2000) (relying on *Geduldig*).

The Governor cannot make this showing. The U.S. Supreme Court rejected such an untenable theory in *Dobbs*. *Id.* And the Michigan Supreme Court did the same by taking jurisdiction over *Nixon* and remanding for a new decision that complied with *Bricker* and *Larkin*. *Supra* at 6, n 3. In those cases, the Supreme Court (1) upheld MCL 750.14 to the maximum extent possible, rather than invalidating the statute as invidious, *Bricker*, 389 Mich at 531; and (2) acknowledged that Michigan's abortion laws "are designed to protect human life," *Larkin*, 389 Mich at 540. *Accord Mahaffey*, 222 Mich App at 345 (another pro-life law was designed "to protect . . . the life of the fetus"). The Governor cites no evidence of discriminatory intent that is specific to MCL 750.14's terms or enactment, let alone compelling evidence sufficient to overcome the law's presumed constitutionality. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). In fact, 60% of the electorate—including many women—voted to *keep* MCL 750.14 in 1972 when the feminist movement was at its height. And these voters were not motivated by animus.

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

D. Michigan's Retained Rights Clause does not empower courts to recognize and enforce unenumerated constitutional rights, and Governor Whitmer's arguments are both meritless and waived.

Governor Whitmer suggests that the Retained Rights Clause empowers courts to recognize and enforce non-textual rights that would be completely foreign to those who ratified the Constitution in 1963. Mot at 11. Not so. The Retained Rights Clause means what it says: "[t]he enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people." Const. 1963, art I, § 23. In other words, the rights listed in the Michigan Constitution cannot refute or lessen other individual rights. But the clause does not *create* or *elevate* retained rights either. It surely does not promote unenumerated individual rights to constitutional status, as the Governor implies. The clause leaves retained rights completely untouched—neither worse nor better than when the constitution was ratified.

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

What's more, where the Michigan Constitution grants power to the Legislature no individual right is "retained." *Cf Roth v United States*, 354 US 476, 493 (1957) (where there is a

"granted power" to the government any claim to "invasion of those rights[ ] reserved by the Ninth . . . Amendment[ ] must fail"). The Michigan Constitution grants the Legislature power and responsibility to "pass suitable laws for the protection and promotion of the public health," including the health of the unborn. Const. 1963, Art. IV, § 51; *accord City of Ecorse v Peoples Cmty Hosp Auth*, 336 Mich 490, 502 (1953) (recognizing that the Legislature has "a large area of discretion" in health-related matters). Because the Michigan Constitution grants the Legislature explicit authority to enact MCL 750.14, the Governor's retained-rights argument is meritless.

Governor Whitmer's retained-rights claim is also waived. Her preliminary-injunction briefing "is basically formless" and "does not cite a single case" that has ever recognized an unenumerated constitutional right under Const. 1963, art. I, § 23 or its federal counterpart. *Kevorkian*, 248 Mich App at 388. The Court should reject her arguments for this reason alone.

II. MCL 750.14 is subject to rational basis review, a highly deferential form of scrutiny that the statute easily satisfies.

"The right to [abortion] is not only not a fundamental right, it is not a right at all . . . . Therefore, strict scrutiny does not apply." *Phillips*, 470 Mich at 434. This Court must assess MCL 750.14's constitutionality under the rational basis test that "applies to social and economic legislation." *Id.* Under that rubric, the question is whether MCL 750.14 is rationally related to a legitimate government interest. *Id.* The law passes that test.

Courts applying rational-basis review do not "test the wisdom, need, or appropriateness of the legislation." *Id.* (quotation omitted) Nor do they examine its "effects" because the fact that a law "may have profound and far-reaching consequences" is "all the more reason for [a court] to defer to the [Legislature's] judgment." *Id.* at 435. A court's "highly deferential" review is limited to determining whether the law is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Crego*, 463 Mich at 259 (quotation omitted). "[I]f the legislative judgment is

supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable," a court will uphold the statute. *Id.* at 259–60. To prevail, Governor Whitmer must prove that MCL 750.14 is "based solely on reasons totally unrelated to the pursuit of the State's goals," which requires that she "negat[e] every conceivable basis which might support the legislation." *TIG Ins Co, Inc v. Dep't of Treasury*, 464 Mich 548, 558; 629 NW2d 402 (2001) (quotations omitted). The Governor cannot hurdle this high bar.

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

Recently, the U.S. Supreme Court held much the same. *Dobbs* ruled that states have "legitimate interests" for "regulating abortion," including "respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric . . . procedures; [and] the preservation of the integrity of the medical profession." 142 S.Ct. at 2284. Because such "legitimate interests provide a rational basis for [MCL 750.14]," the Governor's "challenge must fail." *Id.* Accordingly, Governor Whitmer is not likely to prevail on the merits and her motion for summary disposition should be denied.

III. The Governor's alleged harms are spurious: it is her requested preliminary injunction that would cause irreparable harm, not preserve the status quo.

Governor Whitmer posits all manner of harms if MCL 750.14 takes effect. Mot at 1, 6–7, 14–17. But none of her unsupported allegations are true. The Attorney General and a long list of county prosecutors have no intention of enforcing MCL 750.14 regardless of any court order. At least seven county prosecutors took that public position before any injunction issued and have reaffirmed it since.[4] Those prosecuting attorneys represent some of Michigan's most-populous counties, including Wayne, Oakland, Genesee, Washtenaw, and Ingham. Because no abortionist prosecutions are viable in these locations, there is no reason to think that abortionists would shut down, especially as Planned Parenthood declined to do so *even after* the Court of Appeals clarified that county prosecutors were never subject to the Court of Claims's jurisdiction.[5] Speculative harms like these cannot justify a preliminary injunction. *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 149; 809 NW2d 444 (2011) (per curiam).

What's more, the Governor's parade of horribles is imagined. Mot at 15. The scope of MCL 750.14 is confined to *intentional* efforts to cause an abortion. And Governor Whitmer cites no one, let alone a county prosecutor, who thinks—for instance—that treating "[e]ctopic pregnancies, nonviable pregnancies, [and] pregnancies resulting in miscarriage" violates the statute. Mot at 15; *accord* MCL 333.2690(4)(a). It is also disingenuous for the Governor to cite the State's duty to "prolong life, and promote the public health" as supporting an unrestrained right

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

[5] **Exhibit 4**, @PPofMI, Twitter (Aug. 1, 2022, 3:00 pm), https://bit.ly/3PiNZCw.

to abortion. Mot at 16 (quotation omitted). Abortion prematurely ends an unborn child's life and destroys any means of advancing that child's health. It runs directly contrary to the State's goals.

It is Governor Whitmer's requested injunction that will cause irreparable harm and radically alter the status quo. The Governor seeks an order enjoining 13 county prosecutors from enforcing MCL 750.14 *completely*, which means striking the statute down. Mot at 2, 7. What the Governor wants—and what this Court's TRO currently provides—is abortion without limits. Only one irreparable harm is sure to result: an unprecedented loss of *even viable* unborn life. Right now in Michigan, a *non-physician* could abort a baby at six months' gestation without consequence. Or one of Planned Parenthood's physicians could abort a baby *at nine months' gestation*, for no medical reason, and there may be little-to-nothing county prosecutors can do. Certainly, there is irreparable harm to the innocent lives that will be lost while MCL 750.14 is enjoined, abortionists enjoy free rein, and Michigan serves as a Mecca for out-of-state abortions. But none of that harm applies to abortion advocates or validates an injunction. Indeed, the real-world harm that does exist compels denying the Governor's motion.

Governor Whitmer's claim that an injunction will leave county prosecutors no worse off than they were before is false. Mot at 1, 13, 17. Before this Court's TRO, there was no history of MCL 750.14 being completely moribund. The statute was in full effect for 42 years. After *Roe v Wade*, the Supreme Court limited MCL 750.14's scope for the next 49 years to (1) nonphysicians who performed abortions, and (2) physicians who performed abortions after viability where it was not necessary, in their medical judgment, to preserve the life or health of the mother. *Bricker*, 389 Mich at 529–30. Yet *Bricker* made clear that "criminal responsibility" continued to "attach[ ]," "except as to those cases defined and exempted under *Roe v Wade* and *Doe v Bolton*." *Id.* at 531; *accord* Mot at 4. The TRO radically altered the status quo by enjoining county prosecutors from

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enforcing MCL 750.14 *in any circumstance*, including against nonphysicians and physicians who abort viable babies for no medical reason.

Governor Whitmer recognizes that "the objective of a preliminary injunction is to maintain the status quo." Mot at 17 (quotation and alteration omitted). But her requested injunction goes far beyond the status quo conditions under *Bricker* and *Roe v Wade*. The Governor asks this Court to create a right to abortion out of whole cloth that effectively nullifies Michigan's pro-life laws and bars the Legislature (or the people) from enacting any abortion restrictions. The extraordinary scope of the Governor's request is reason enough for this Court to deny the injunction.

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

Even if a Michigan court were to ignore all the binding Michigan and U.S. Supreme Court precedent and judicially create a right to abortion that does not exist in the text, tradition, or history of Michigan's Constitution, that made up "right" would be superseded by two separate provisions of the U.S. Constitution.

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

Specifically, the Fourteenth Amendment, like the Civil Rights Act of 1866 it was meant to sustain, codified equality in the fundamental rights of persons as explained in Blackstone's *Commentaries* and leading U.S. treatises. And as the *Commentaries*, treaties, landmark English cases, and state high courts in the years before 1868 make clear, an unborn human beginning

through pregnancy "is a person" and, under "civil and common law," is "to all intents and purposes a child, as much as if born." Br of Amici Curiae Scholars of Jurisprudence, p 3 & n4, *Dobbs v Jackson Women's Health Org, et al*, US No 19-1392, available at https://bit.ly/3JXKgJi. Accordingly, unborn children are constitutional persons entitled to the equal protection of the laws. *Id.* at 4–27 (cataloguing the history and citing scores of relevant cases and statutes establishing the proposition that unborn children are protected by the Fourteenth Amendment as "persons" from the moment of conception).

For example, Blackstone's *Commentaries* taught expressly that unborn human beings are rights-bearing "persons." As the *Commentaries* explain, "An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. … It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born." William Blackstone, *Commentaries on the Laws of England*, pp 129–30. Common-law decisions followed this principle, holding for example, in the years immediately preceding the Fourteenth Amendment's drafting and ratification, that "a child is to be considered *in esse* [in being] at a period commencing nine months previously to its birth." *Hall v Hancock*, 32 Mass (15 Pick) 255, 257–58 (1834). Indeed, "a child will be considered in being, from conception to the time of its birth in all cases where it will be for the benefit of such child to be so considered." *Id.* Accordingly, the original public meaning in 1868 of the phrase "any person" in the Fourteenth Amendment included any living, unborn human beings.

Recognizing that a proper construction of the Fourteenth Amendment includes the protection of the unborn has obvious implications at the state level. It prohibits state courts from enjoining laws that protect unborn, human life. And it authorizes injunctions against state officials who intend to facilitate abortions. Yet the mother's own constitutional rights could require states

to allow doctors to engage in life-saving medical interventions when the mother's life is at stake. The principle requires this Court to deny the Governor's request to enjoin MCL 750.14.

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

When a state judiciary makes up rights that do not exist anywhere in that state's constitution, it has violated the Guarantee Clause. Consider the situation here. The Michigan Legislature enacted and the Governor signed into law MCL 750.14 in 1931. Thirty-two years later, Michigan's citizens adopted the 1963 Constitution yet, as explained above, not a single person believed that document created a state constitutional right to abortion rendering MCL 750.14 invalid in whole or in part. Until the Court of Claims' recent aberrational decision, no Michigan court had recognized such a right in nearly 60 years that have elapsed since the 1963 Constitution went into effect. Any judicial effort to revise or even "reinterpret" the Constitution today to include a right to abortion would necessarily have the hallmarks of legislation, an act that can only be done by the Legislature itself. Such a ruling would *not* be an interpretation or application of Michigan's Constitution in any sense of those words.

If the language of the Guarantee Clause is to be taken seriously, there must be *some* limit on state court authority to overturn legislation by judicial fiat.[6] For example, if the Michigan

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[6] While some suggest that all Guarantee Clause claims are non-justiciable, that claim is belied by the fact that the U.S. Supreme Court has addressed the merits of Guarantee Clause claims without holding them nonjusticiable. *E.g.*, *Attorney General of Mich Ex rel Kies v Lowrey*, 199 US 233

Supreme Court held that the Governor alone has authority to unilaterally enact legislation notwithstanding the Michigan constitutional provisions delegating that authority to the Legislature, there would be no question the federal courts could intervene. Such a decision would subject Michigan's citizens to a dictatorship of the judiciary, one that denigrates the electoral processes the State's citizens have chosen for their self-governance.

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

CONCLUSION

For these reasons, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to deny Governor Whitmer's motion for preliminary injunction.

Dated: August 15, 2022

Respectfully submitted,

ALLIANCE DEFENDING FREEDOM

By *<u>/s/ John J. Bursch</u>*

(1905); *Forsyth v Hammond*, 166 US 506 (1897); *In re Duncan*, 139 US 449 (1891). Indeed, the Court has indicated that while some questions raised under the Guarantee Clause are nonjusticiable, others can be decided. *New York v United States*, 505 US 144, 184 (1992); *Reynolds v Sims*, 377 US 533, 582 (1964). The issue of justiciability is thus "one of 'political questions,' not one of 'political cases,'" one governed by six factors. *Baker v Carr*, 369 US 186, 217 (1962). A case where a state court makes up a constitutional right that is not apparent from the text, history, and tradition of a state constitution is certainly one where the Guarantee Clause would have justiciable effect.

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EXHIBIT 1

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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 No.

Upon Certification From Oakland County Circuit Court

Oakland Circuit Court No. 22-193498-CZ

HON. D. LANGFORD MORRIS

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Governor Whitmer respectfully submits this brief in support of her Executive Message to the Supreme Court, which asks the Court to authorize the circuit court to certify the following controlling questions of public law concerning the right to abortion under the Michigan Constitution and the enforceability of Michigan's criminal abortion ban:

1. Whether the Michigan Constitution protects the right to abortion.
2. Whether Michigan's criminal abortion statute violates the Due Process Clause of the Michigan Constitution.
3. Whether Michigan's criminal abortion statute violates the Equal Protection Clause of the Michigan Constitution.

These questions are of such public moment as to require an early determination.

INTRODUCTION

Governor Whitmer has filed a lawsuit pursuant to her power to enforce compliance with, and to restrain violations of, the Michigan Constitution. Const 1963, art 5, § 8. (Ex. A, Oakland Co. Complaint). That suit seeks to protect the rights of Michigan residents to obtain abortions and to enjoin enforcement of Michigan's criminal abortion statute, which violates the right to abortion guaranteed by the Due Process Clause of the Michigan Constitution, Const 1963, art 1, § 17, and was enacted in violation of the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2. Governor Whitmer also has issued an Executive Message to this Court pursuant to Michigan Court Rule 7.308, asking this Court to authorize the circuit court to certify the questions presented by that case. As explained further herein, these are "controlling question[s] of public law" that are "of such public moment as to require an early determination" by this Court.

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ARGUMENT

This dispute involves a controlling question of public law.

Governor Whitmer's lawsuit seeks to enjoin enforcement of Michigan's criminal abortion statute, MCL 750.14. An injunction is necessary if the statute violates the Michigan Constitution's Due Process Clause or Equal Protection Clause. Thus, resolution of the questions that the Governor asks this Court to answer would be dispositive of the claims in that case.

Michigan's criminal abortion statute makes it a felony for "[a]ny person" to "wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or . . . 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." MCL 750.14. The statute has existed in some form since 1846. See 1846 RS, ch 153, § 34. And like many abortion statutes enacted at that time, Michigan's criminal abortion statute was passed with the intent to enforce traditional marital roles and keep women as mothers in the home. See Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800–1900* (New York: Oxford University Press 1978); Storer, *Why Not? A Book For Every Woman*, pp 75–76 (Boston: Lee and Shepard 1866).

This Court has addressed the scope of MCL 750.14 in only three cases—most recently in 1973, the same year that *Roe v Wade*, 410 US 113 (1973), was decided. In *People v Bricker*, the Court explained that, in light of *Roe*, the criminal abortion statute must be construed "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." 389 Mich 524, 529–530 (1973). And in *Larkin v Calahan*, the Court explained, "[b]y reason of *Roe v Wade*, we are compelled to rule that as a matter of federal constitutional law, a fetus is conclusively presumed not to be viable within the first trimester of pregnancy." 389 Mich 533, 542 (1973).

In neither case did the Court opine on whether the criminal abortion statute was lawful under the Michigan Constitution, or more broadly, whether the Michigan Constitution protects a woman's right to abortion. Those questions are cleanly presented in the Governor's challenge to MCL 750.14 under the Michigan Constitution. Resolution of those questions will control the outcome of this case and provide guidance to all the residents of Michigan as to their rights under state law. If MCL 750.14 violates the Michigan Constitution, then it must be enjoined.

This dispute is of such public moment as to require an early determination by this Court.

The questions presented by this case also require an early determination by this Court because of the significant impact they will have on Michigan residents and because of the risks of litigating in a non-expedited posture. Absent intervention by this Court, there may be months of uncertainty about whether abortion is legal in Michigan, which would cause irreparable injury to the residents of this State.

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Abortion is an extremely common procedure that Michigan women rely on to effectively order their lives. Approximately one in four women in the United States will have an abortion by age 45. Jones & Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States*, 2008–2014, 107 Am J Pub Health 1904, 1907 (Dec 2017). In Michigan, nearly 30,000 women have abortions each year. Michigan Dep't of Health & Human Servs, Induced Abortions in Michigan: January 1 through December 31, 2020 (June 2021). The procedure itself is safe, and complications are rare—much rarer than the risk of complications arising during childbirth. National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States*, p 11 (2018). The availability of abortion provides women the ability to participate fully and equally in society and to make their own decisions about relationships, partnerships, employment, education, healthcare, and family-planning without restrictive laws that put their health and well-being at risk. When women are denied access to safe and legal abortions, they face significant financial and social stress; they may also decide to terminate unintended pregnancies, possibly through unsafe methods. In sum, if safe and legal abortions are not available in this state, Michigan women will suffer irreparable injury.

Even now, Michigan women cannot be sure whether or to what extent abortions are permitted in the State. The right to abortion under federal law has been significantly restricted since *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992), the U.S. Supreme Court retreated from *Roe* and held that states can regulate pre-viability abortions (i.e. abortions in the

first and second trimesters) so long as the regulation does not impose an "undue burden" on the right to choose. Since then, the U.S. Supreme Court has upheld various notification and waiting period requirements for minors seeking abortions, *Hodgson v Minnesota*, 497 US 417 (1990); *Ohio v Akron Center for Reproductive Health*, 497 US 502 (1990), upheld a federal ban on intact dilation and evacuation abortions, *Gonzales v Carhart*, 550 US 124, 133 (2007), upheld a ban on non-physicians performing abortions, *Mazurek v Armstrong*, 520 US 968, 975–976 (1997) (per curiam), and upheld an in-person requirement to receive mifepristone, one of the drugs used for medication abortions, *FDA v American College of Obstetricians & Gynecologists*, __ US __, 141 S Ct 578 (2021). The Sixth Circuit has led the charge to further restrict abortion access, recently upholding a prohibition on abortions obtained because of a fetal Down syndrome diagnosis, *Preterm-Cleveland v McCloud*, 994 F3d 512, 517 (CA 6, 2021), and a requirement that doctors provide women certain information at least 48 hours before performing an abortion, *Bristol Regional Women's Center, PC v Slatery*, 7 F4th 478, 481 (CA 6, 2021). And this steady retreat from *Roe* is likely not at an end: in December of 2021, the U.S. Supreme Court heard oral arguments in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, in which Mississippi specifically asks the Court to overrule *Roe* and *Casey* and uphold the constitutionality of Mississippi's fifteen-week, pre-viability abortion ban.

This uncertainty about the right to abortion under federal law creates substantial uncertainty about the right to abortion in Michigan. This Court has provided no indication as to the impact of these significant changes in federal

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abortion jurisprudence on Michigan's criminal abortion statute, which the Court had explicitly construed in light of the right recognized in *Roe*. Today, it is unclear whether this Court's construction of the criminal abortion statute incorporates this steady erosion of the federal right to abortion. And this uncertainty is heightened by the U.S. Supreme Court's looming decision in *Dobbs*. But waiting for a decision to be released in *Dobbs* would delay resolution of the uncertainty already existing under the law today. And if the U.S. Supreme Court further restricts the federal right to abortion before this Court has opined on the scope of Michigan rights, women would lose the ability to obtain abortions in Michigan for at least some time, as providers may feel the need to restrict access to abortion in order to avoid criminal liability. Abortion is an extremely time-sensitive procedure, and any delay in protecting one woman's right to an abortion may deny that right entirely.

This uncertainty would be resolved if this Court were to hold that the Michigan Constitution independently protects the right to abortion—a question this Court has never addressed. And resolution by this Court cannot wait. In *Mahaffey v Attorney General*, the Michigan Court of Appeals erroneously held that "there is no right to abortion under the Michigan Constitution." 222 Mich App 325, 336 (1997). Because Court of Appeals decisions are binding on lower courts, 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. This case may then linger for months, through trial and appellate review, before this Court can opine on the ultimate questions. Given the risks to Michigan women if such delay were to coincide with a ruling in *Dobbs* that restricted the federal right to abortion in some

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way, this Court should use the avenue provided under the Michigan Court Rules and decide the issues directly.

CONCLUSION

For the foregoing reasons, Governor Whitmer respectfully requests that this Court authorize the circuit court to certify the controlling questions of public law at stake in *Whitmer v Linderman, et al.* and set an expedited briefing schedule on the merits.

Respectfully submitted,

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Dated: April 7, 2022

Attorneys for Governor Gretchen Whitmer

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EXHIBIT 2

NEWS RELEASE

For Immediate Release:
April 7, 2022

Contact: Alexis Wiley
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(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

Carol A. Siemon
Ingham County Prosecutor

Eli Savit
Washtenaw County Prosecutor

David Leyton
Genesee County Prosecutor

Kym L. Worthy
Wayne County Prosecutor

Matthew J. Wiese
Marquette County Prosecutor

Jeffrey S. Getting
Kalamazoo County Prosecutor

EXHIBIT 3

NEWS RELEASE

For Immediate Release:
August 1, 2022

Contact: Alexis Wiley
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(313) 510-7222

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

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

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

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

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

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

Respectfully,

Karen D. McDonald
Oakland County Prosecutor

Carol A. Siemon
Ingham County Prosecutor

Eli Savit
Washtenaw County Prosecutor

David Leyton
Genesee County Prosecutor

Kym L. Worthy
Wayne County Prosecutor

Jeffrey S. Getting
Kalamazoo County Prosecutor

Matthew J. Wiese
Marquette County Prosecutor

EXHIBIT 4

Explore

Settings

Thread

Planned Parenthood of Michigan
@PPofMI

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

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

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

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

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

1 4 17

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

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

#BansOffOurBodies (3/3)

5 13

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

1

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