STATE OF MICHIGAN

IN THE COURT OF APPEALS

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, and JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, in their official capacities,

Defendants,

and

DAVID S. LEYTON, Prosecuting Attorney of Genesee County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants-Appellees,

and

Court of Appeals Docket No. _____

Oakland County Circuit Court
Case No. 22-193498-CZ

RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL OR PEREMPTORY REVERSAL OF DENIAL OF THEIR MOTION TO INTERVENE

This case involves a claim that state governmental action is invalid

RIGHT TO LIFE OF MICHIGAN AND
MICHIGAN CATHOLIC
CONFERENCE,

Proposed Intervenors-Appellants.

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Right to Life of Michigan and the Michigan Catholic Conference (together, "Proposed Intervenors") request that this Court grant leave to appeal, expedite this matter, and peremptorily reverse the Circuit Court's August 16, 2022, order denying their motion to intervene in *Whitmer v. Linderman*, Oakland Cnty No. 2022-193498-CZ (attached as **Exhibit 1**).

STATEMENT OF JURISDICTION

This Court has jurisdiction to grant a timely application for leave to appeal from a Circuit Court order denying intervention, MCR 7.203(B)(1), and has authority to grant peremptory relief under MCR 7.216(A)(7). This application is timely because it is filed less than 21 days after the Circuit Court's order. MCR 7.205(A)(1)(a).

The Court rules require a copy of the trial court register of actions and, if there is no trial court record to be transcribed, an attorney affidavit stating as much. MCR 7.205(B)(2); MCR 7.205(B)(4). Both are attached. **Exhibit 17**, Register of Actions; **Exhibit 18**, Attorney Affidavit re: No Record to Be Transcribed.

STATEMENT OF THE QUESTIONS INVOLVED

1. MCR 2.209(A)(3) provides that a person has a right to intervene when their application is timely, the applicant claims an interest that may be impaired by the action, and the applicant's interests may not be adequately represented by existing parties. Proposed Intervenors satisfy all these requirements; in particular, laws that they have helped defend and shepherd into existence are at risk of being invalidated by the proceedings below. Did the Circuit Court abuse its discretion in denying Proposed Intervenors' motion for intervention of right?

Circuit Court's Answer: No.
Appellee Prosecutors Answer: No.
Proposed Intervenors Answer: Yes.

2. MCR 2.209(B)(2) provides that a person may intervene when their application is timely, the applicant's defense and the main action share common questions of law or fact, and intervention would not unduly delay or prejudice the adjudication of the rights of the original parties. Proposed Intervenors timely moved to intervene to defend the law challenged in this action, and no other person has sought to intervene. Did the Circuit Court abuse its discretion in denying Proposed Intervenors' motion for permissive intervention?

Circuit Court's Answer: No.
Appellee Prosecutors Answer: No.
Proposed Intervenors Answer: Yes

INTRODUCTION

This case is one of numerous fronts in the battle being fought at nearly all levels of the Michigan court system, by parties who largely agree with one another and wish to exclude anyone—such as Proposed Intervenors—who would present genuine adversity. It involves a matter of life and death: the constitutionality of MCL 750.14, 1931 PA 328, a longstanding Michigan law that 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."

Proposed Intervenors Right to Life of Michigan and Michigan Catholic Conference have a keen interest in the issue, and this litigation, that is unmatched. It was the Complaint for Superintending Control they filed in this Court (along with two county prosecutors) that led this Court to declare that prosecutors are not bound by the Court of Claims May 2022 injunction barring enforcement of MCL 750.14 – which led the Circuit Court here to spring into action, granting improper *ex parte* TRO relief only hours later. Moreover, the Circuit Court, only two days after rejecting Proposed Intervenors' motion to intervene, went on to manufacture a right to abortion out of whole cloth, permanently enjoining MCL 750.14. That ruling, which remains in force as of this writing, threatens to undo decades of Proposed Intervenors' pro-life advocacy, upend existing laws protecting unborn children, and impede future efforts to protect the most vulnerable members of our community.

Proposed Intervenors timely moved to intervene as defendants to defend MCL 750.14's constitutionality and oppose Governor Whitmer's motions for a temporary restraining order and preliminary injunction completely enjoining enforcement of that law. Although Proposed Intervenors satisfy all the requirements for intervention, the Circuit Court adjourned their motion for over two months. After this Court on August 1, 2022, held that prosecutors are free to enforce MCL 750.14, the Circuit Court in a matter of hours and on an *ex parte* basis issued a TRO without giving Michigan's top pro-life advocates a chance to participate in a case threatening their most vital interests. The Circuit Court then denied Proposed Intervenors' renewed motion without argument, two days before issuing a preliminary injunction extending its halt on enforcement of this validly enacted, longstanding statute.

The Circuit Court manifestly erred and abused its discretion in denying intervention. Proposed Intervenors diligently and promptly filed their motion to intervene and proposed answer less than a month after the complaint was filed, strictly complying with MCR 2.209. No one else requested to intervene. Yet the Circuit Court applied the wrong intervention standard and denied Proposed Intervenors' motion, refusing to countenance *their* motion to intervene based on the delay or prejudice that *other* motions to intervene might "hypothetically" cause in the future. It directed Proposed Intervenors to file *amici curiae* briefs in the Michigan Supreme Court instead.

This Court should grant leave to appeal and peremptorily reverse the Circuit Court. This case involves a substantial question regarding the constitutionality of a

longstanding Michigan law protecting countless vulnerable and voiceless unborn children, involves principles of major significance to the State's jurisprudence, and raises issues of significant public interest. MCR 7.305. The Circuit Court's decision is outside the range of principled outcomes and causes material injustice to Proposed Intervenors, along with countless unborn children in Michigan. And if left in place, the decision is likely to leave many backers and defenders of Michigan legislation—conservatives, liberals, progressives, and libertarians alike—sitting on the sideline in future litigation that will decide the fate of their hard work. Leave to appeal is warranted.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In 1931, the Legislature enacted MCL 750.14 to protect unborn children by making all abortions illegal, except when necessary to preserve the life of the mother. *See* MCL 750.14. The law has remained on the books, both before and after the current version of the Constitution was ratified in 1963, co-existing peaceably with that Constitution for nearly 60 years. Indeed, the 1963 Constitution is silent about abortion. No one who ratified that Constitution believed that they were invalidating MCL 750.14, which had already been on the books for 32 years. In fact, the same generation who ratified the Constitution voted to keep MCL 750.14 when they overwhelmingly rejected Proposal B in 1972. The one time a litigant raised the abortion issue in the 1990s, this Court 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) (emphasis added).

I. The Governor's Circuit Court Lawsuit

On April 7, 2022, despite this Court's holding in *Mahaffey* and the Michigan Constitution's demand that the Governor take care "that the laws be faithfully executed," Const 1963, art 5, § 8, Governor Whitmer filed a Complaint for Declaratory and Injunctive Relief in the Circuit Court on behalf of the State of Michigan, seeking a determination that MCL 750.14 violates the Michigan Constitution's Due Process and Equal Protection Clauses. On May 4, 2022, Proposed Intervenors filed a motion to intervene in the Circuit Court action (attached as **Exhibit 2**) and a proposed Answer to the Complaint (attached as **Exhibit 3**).

On the same day that Governor Whitmer filed suit in the Circuit Court, she submitted an Executive Message to the Michigan Supreme Court, asking it, under MCR 7.308, to authorize the Circuit Court to certify three questions for the Supreme 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. *Whitmer v Linderman*, S Ct No. 164256. On April 22, 2022, Proposed Intervenors filed a motion to intervene in the Supreme Court. On May 20, 2022, the Supreme Court requested briefing on five questions, but to date, it has not ruled on the Governor's certification request or on Proposed Intervenors' motion to intervene.

On May 24, 2022, shortly after the Supreme Court requested briefing on its five questions, the Circuit Court issued an order adjourning Proposed Intervenors' original motion to intervene, cancelling the hearing, and removing the case from its

motions docket, indicating that it would await guidance from the Supreme Court (attached as **Exhibit 4**).

II. Planned Parenthood's Court of Claims Lawsuit

On April 7, 2022, the same day that Governor Whitmer filed suit in the Circuit Court and submitted her Executive Message to the Supreme Court, Planned Parenthood and one of its doctors filed another action challenging MCL 750.14 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 unless a court orders her to do so. Though as private parties they could not intervene as defendants in the Court of Claims action, Right to Life of Michigan and Michigan Catholic Conference on April 20, 2022, filed a proposed *amici curiae* brief and motion for leave with the Court of Claims, which granted leave and accepted the brief the same day. But when counsel for Proposed Intervenors received a notice of a Zoom status conference in the case and attended, the Court of Claims judge shut off his microphone and then disconnected him from the Zoom meeting.

On May 17, 2022, without a hearing or any opposition on the merits from the Attorney General, the only named defendant, the Court of Claims granted Planned Parenthood's request for a preliminary injunction enjoining MCL 750.14's enforcement. The Court of Claims' injunction purported to apply not just to the Attorney General's Office but to every county prosecutor in the state.

On May 20, 2022, Proposed Intervenors, along with Jackson County Prosecutor Jerard M. Jarzynka and Kent County Prosecutor Christopher R. Becker, filed a

complaint for order of superintending control in this Court, asking the Court to order the Court of Claims to dismiss the case or vacate its preliminary injunction. On August 1, 2022, this Court concluded that the Court of Claims lacked jurisdiction over county prosecutors because they are local—not state—officials. *In re Jarzynka*, unpublished Order of the Court of Appeals, issued Aug. 1, 2022 (Docket No. 361470) (attached as **Exhibit 5**). Thus, the Court of Claims' preliminary injunction did not apply to local prosecutors and Prosecuting Attorneys Jarzynka and Becker were free to enforce MCL 750.14. *Id.* This Court dismissed the complaint based on the standing doctrine. *Id.*[1]

III. The Circuit Court's TRO and Proposed Intervenors' renewed motion

On August 1, 2022, just hours after this Court issued its order holding that the Court of Claims' injunction did not bind local prosecutors, Governor Whitmer filed a motion for an *ex parte* TRO in the Circuit Court. Although the Circuit Court action had been pending for months without any substantive action, the parties and their counsel were known and available to respond on short notice, and this Court's published decision in *Mahaffey* establishes that there is no right to abortion under the Michigan Constitution, the Governor's *ex parte* motion asserted that the Michigan Constitution creates a right to abortion and that local prosecutors must be enjoined from enforcing MCL 750.14. An hour after the Governor filed her *ex parte* motion, and

[1] Planned Parenthood has sought leave to appeal this Court's ruling that county prosecutors are local officials, and Proposed Intervenors have sought leave to appeal this Court's ruling that they lacked standing to file a complaint for order of superintending control.

without the opportunity for a response by any Defendant, including Prosecutors Jarzynka and Becker, the Circuit Court issued a TRO prohibiting the county prosecutor defendants from enforcing MCL 750.14.

Since it was then apparent that the Circuit Court was no longer suspending proceedings to await guidance from the Supreme Court, Proposed Intervenors on August 3, 2022, filed a renewed motion to intervene in the Circuit Court action (attached as **Exhibit 6**). The Governor and seven defendant prosecutors filed briefs opposing Proposed Intervenors' renewed motion to intervene. (**Exhibits 7** and **8**).

IV. The Circuit Court denies intervention, grants preliminary injunction

On August 3, 2022, the Circuit Court issued an order continuing the TRO and scheduling an evidentiary hearing for August 17, 2022, to address whether a preliminary injunction should issue pending trial (attached as **Exhibit 9**). On August 10, 2022, the Governor filed a motion for preliminary injunction to prohibit enforcement of MCL 750.14. On the same day, Proposed Intervenors filed a motion for leave to file a reply in support of their motion to intervene, along with their proposed reply (attached as **Exhibit 10**). On August 15, 2022, Proposed Intervenors filed a motion for leave to file a brief in opposition to the Governor's motion for preliminary injunction, along with their proposed brief (attached as **Exhibit 11**).

On August 16, 2022, the day before the hearing on Proposed Intervenors' renewed motion to intervene and Governor Whitmer's motion for preliminary injunction, the Circuit Court precipitously cancelled the Zoom hearing scheduled for the renewed intervention motion and issued three orders denying Proposed

Intervenors all the relief requested. The Circuit Court denied their renewed motion to intervene (**Exhibit 1**), denied their motion for leave to file a reply in support of intervention (attached as **Exhibit 12**), and denied their motion for leave to file a brief opposing the preliminary injunction (attached as **Exhibit 13**).

The Circuit Court then held a three-day evidentiary hearing on the Governor's motion for preliminary injunction from August 17–19, 2022. Counsel for Proposed Intervenors was not allowed to speak or participate in the hearing. On August 19, 2022, the Circuit Court issued an order granting a preliminary injunction enjoining 13 county prosecutors from enforcing MCL 750.14 (order attached as **Exhibit 14**). The order also sets a pretrial conference date of November 21, 2022.

STANDARD OF REVIEW

This Court reviews a decision to deny a motion to intervene for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012). Accordingly, "this Court reviews de novo whether the trial court correctly selected, interpreted, and applied the law." *Gay v Select Specialty Hosp*, 295 Mich App 284, 291; 813 NW2d 354 (2012).

ARGUMENT

I. The Circuit Court manifestly erred and abused its discretion in denying Proposed Intervenors' motion for intervention.

MCR 2.209(A)(3) provides that "[o]n timely application a person 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 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." "[T]he rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Precision Pipe & Supply, Inc v Meram Constr, Inc.*, 195 Mich App 153, 156; 489 NW2d 166 (1992).

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 Sec'y of State*, 506 Mich 561, 575; 957 NW2d 731 (2020).

The Circuit Court's three-page order mentions only three reasons for denying intervention, and all of them constitute manifest error and abuse of discretion. First, although no one but Proposed Intervenors has moved to intervene, the Circuit Court

reasoned that "[t]o allow intervention for *any* special interest group at the trial level invites intervention for *all* interest groups," speculating about the "potential" that hypothetical intervention by other interest groups could result in delay. Order, Ex. 1 at 2–3. Second, the Circuit Court denied intervention in *that* court because Proposed Intervenors may serve as mere amici before a *different* court. *Id.* at 1. Third, in a single sentence without explanation, the Circuit Court misapplied the intervention standard and stated that Proposed Intervenors had not established that their interests are inadequately represented by existing parties. *Id.* at 2. This Court should reverse the Circuit Court's order and remand with instructions to grant intervention.

A. The Circuit Court abused its discretion by rejecting Proposed Intervenors' motion based on speculation about harms that would be caused by hypothetical future intervenors.

The Circuit Court categorically rejected intervention by "*any* third party interest group" without reference to MCR 2.209's controlling standard or Proposed Intervenors' specific motion. Order, Ex. 1 at 2 (emphasis in original). It reasoned that "given the underlying issues presented by this case, there are *many* potential interest groups in various forms who can allege a claim for intervention." *Id.* at 3 (emphasis in original). The Court speculated that the "[p]otential" categories of interest groups that "may" request intervention range from religious to governmental actors. *Id.* "To allow intervention for *any* special interest group at the trial level invites intervention for *all* interest groups," and if the Court were to allow such mass intervention, delay and prejudice could result. *Id.* (emphasis in original).

The Circuit Court manifestly erred and abused its discretion in at least two ways.

First, the Circuit Court disregarded MCR 2.209 by categorically rejecting intervention by an entire classification of interested persons regardless of whether their application is timely, whether they have substantial interests in the action, whether their interests are adequately represented by existing parties, or whether their motion is accompanied by a pleading stating the claim or defense for which intervention is sought. Order, Ex. 1 at 2. That holding contradicts the intervention rule's text, which provides that some persons—including interest groups—have a *right* or at least an *opportunity* to intervene. MCR 2.209(A), (B). Time and again, this Court has held that a trial court abuses its discretion by failing to correctly apply the elements of the intervention rule. *E.g.*, *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 615; 773 NW2d 267 (2009); *Hill v LF Transp, Inc*, 277 Mich App 500, 504; 746 NW2d 118 (2008) (per curiam). The Circuit Court manifestly erred and abused its discretion by categorically excluding an entire category of interested persons from intervening under MCR 2.209. This is especially true when, as the Court recognized, the "underlying issues involved in this case" are so important and sweeping that persons beyond the existing parties have a substantial interest in the outcome of the litigation. *See* Order, Ex. 1 at 3.

Second, the Circuit Court improperly denied Proposed Intervenors' motion by ignoring their particular circumstances and speculating about delay *not* attributable to their intervention, but rather, based on hypothetical and counterfactual

intervention by countless unknown others. Rather than address the sole intervention motion before it, the Circuit Court rejected intervention by "*any* third-party interest group," speculating about the "potential" that intervention by *any* interest group "may" invite intervention by many other interest groups, and, if that speculative chain of events came to pass, delay and prejudice would result. *Id.* at 2–3. The Circuit Court's holding strains credulity and constitutes a clear abuse of discretion, particularly as the number of any hypothetical future intervenors is a matter squarely within the court's own control.

To be sure, a court may deny a motion to intervene if it finds that "the intervention would unduly delay or prejudice the adjudication of the rights of the original parties." *Burg,* 2 Mich App at 499. But here, "the intervention" refers exclusively to the sole motion filed by Proposed Intervenors, not hypothetical intervention by others at some future point. Because *no one else has filed a motion to intervene*, none of the Circuit Court's stated concerns are real.

The Circuit Court did not consider, find, or even suggest that undue delay or prejudice might result from granting Proposed Intervenors' motion. *See* Order, Ex. 1 at 2–3. Neither did the Circuit Court supply any basis for its speculation that many other interest groups would attempt to intervene, or that such intervention would cause delay or prejudice. *See id.* Governor Whitmer's lawsuit has been pending for four months and no other group had sought to intervene, let alone filed a well-supported motion and associated pleading as have Proposed Intervenors.

It is palpably unjust to deny intervention based on future delay it would supposedly cause, when it was the trial court itself that put the case on hold for months, after the Supreme Court issued its list of five questions. Further, once the Circuit Court sprang into action upon this Court issuing its August 1 order, it received briefs, took three days of testimony, and issued a bench ruling enjoining the statute over two weeks—before again returning the case to the deep freeze until after the November election. Thus, the Circuit Court manifestly erred and abused its discretion by denying the first and only motion to intervene on the basis of delay or prejudice that "may" result, not from Proposed Intervenors' motion but from speculative future motions that the court could easily deny as untimely, unsupported, or both. This Court should grant leave and peremptorily reverse.

B. The Circuit Court abused its discretion by denying intervention in *that* court because Proposed Intervenors may serve as amici before a *separate* court.

In denying intervention, the Circuit Court reasoned that "proposed intervenors have been invited to advocate their position as *amicus curiae*" in Governor Whitmer's litigation pending before the Michigan Supreme Court. Order, Ex. 1 at 1. "Thus, from [the Circuit] Court's perspective, proposed intervenors' positions are not only well preserved in the Supreme Court's concurrent action and record, but also, that their instant request [for intervention] is more appropriate for consideration in that forum as *amici curiae* as a practical matter." *Id.* This is erroneous for at least two reasons.

First, the Circuit Court was required to consider—and grant—Proposed Intervenors' motion to intervene *in that court and action* regardless of whether it believes, "as a practical matter," it would be "more appropriate" for them to advocate

as mere amici in a different "forum." *Id.*; *see* MCR 2.209(A). This is particularly true because the immediate impairment of Proposed Intervenors' interests—temporary restraining orders and preliminary injunctions—are currently being litigated in and issued by the Circuit Court, not the Supreme Court. Michigan's intervention rule provides a clear framework for evaluating whether a person has a right—or should be permitted—to intervene in *that* action. See MCR 2.209. The Circuit Court abused its discretion by holding that advocacy in a separate court deprives Proposed Intervenors of a right to intervene in the Circuit Court. In essence, the Circuit Court kicked Proposed Intervenors out of the stadium, locked the gates behind them, then proceeded to have a contest in which Intervenors' interest was significantly impaired—all based on the possibility of them serving as amici in the Supreme Court, where nothing is happening.

Moreover, the Circuit Court's factual premise is incorrect, twice over. Intervenors have not been "invited" to press their position in the Supreme Court or any other forum; that court simply granted them leave to file an amici brief. *In re Exec Message of Governor Requesting Authorization of a Certified Question*, 973 NW2d 613 (2022) (Mem). And the Supreme Court has not ruled on Proposed Intervenors' motion to intervene in that court, which remains pending. *Id* ("The Executive Message, motion to intervene, and motion to dismiss remain pending."). Because the Supreme Court has not decided whether to grant the Governor's certification request or taken any substantive action, there has been no need for that court to rule on Proposed Intervenors' intervention request. In stark contrast, the

Circuit Court ignored *Mahaffey* and recognized a state constitutional right to abortion, first granting a TRO and then preliminarily enjoining MCL 750.14's enforcement completely. Proposed Intervenors were not allowed to file merits briefs, present oral arguments, or present witnesses in any of the Circuit Court proceedings, which were dominated by pro-abortion advocates. Being shut out of the Circuit Court proceedings materially harmed Proposed Intervenors' unique interests and harmed the case for upholding MCL 750.14's constitutionality.

Second, amicus advocacy is no substitute for intervention, which renders the applicant a *party* in the action with corresponding rights to file substantive motions, make oral arguments, present witnesses, and appeal. *See* MCR 2.101(D)(5). Allowing Proposed Intervenors to participate as amici curiae does not adequately protect their interests (though the Circuit Court refused to accept Proposed Intervenors' brief opposing the Governor's preliminary injunction motion, even as an amici brief). Generally speaking, "amicus curiae cannot raise an issue that has not been raised by the parties." *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 173, 744 NW2d 184, 193 (2007) (quotation omitted). What's more, the Circuit Court refused to allow any participation by amici curiae, limiting the proceedings to the named parties. Unless Proposed Intervenors obtain intervention, the Circuit Court will not consider their arguments, preserve their defenses, or resolve key state and federal questions. And that disability will carry over to this Court in any post-judgment appeal, since amici briefs are limited to issues the parties raise. *See* MCR

7.212(H); *see also Estate of Ketchum v Health & Human Servs*, 314 Mich App 485, 498 n 8; 887 NW2d 226 (2016).

By adjourning and then denying their motion to intervene, the Circuit Court deprived Proposed Intervenors of party status, and they have suffered material prejudice as a result. By sitting on their original motion to intervene and adjourning the motion before suddenly granting an ex parte TRO months later, then sitting on their renewed motion until days before holding hearings and granting a preliminary injunction, the Circuit Court denied Proposed Intervenors any meaningful opportunity to oppose Governor Whitmer's motions for TRO and preliminary injunction. Indeed, the Circuit Court prohibited counsel for Proposed Intervenors from speaking or *even making a record* in opposition to Governor Whitmer's motion for a TRO. And the Circuit Court refused to consider Proposed Intervenors' timely brief opposing Governor Whitmer's motion for a preliminary injunction, or their timely reply brief on their renewed motion to intervene – even though they had properly filed a motion for leave. The Circuit Court abused its discretion in holding that intervention is unnecessary and inappropriate simply because Proposed Intervenors might serve as amici elsewhere. This Court should reverse.

C. The Circuit Court abused its discretion by applying the wrong standards for intervention.

In a single sentence without explanation, the Circuit Court held that Proposed Intervenors had not demonstrated that "their respective and collective interests *are* inadequately represented by a named party to this litigation warranting intervention." Order, Ex. 1 at 2 (emphasis added). This holding misstates and

misapplies the legal standard for intervention, which automatically constitutes an abuse of discretion. *Waterstone*, 296 Mich App at 132.

Michigan law is clear: a party seeking intervention isn't required to prove that its interests *are* inadequately represented. Rather "[t]he rule for intervention should be liberally construed to allow intervention where the applicant's interests *may be* inadequately represented." *Hill*, 277 Mich App at 508 (emphasis added and citations omitted). "[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); *accord Karrip v Cannon Twp*, 115 Mich App 726, 731-732; 321 NW2d 690 (1982) (per curiam) (citations omitted) ("The proposed intervenors satisfied the second requirement by establishing that their representation is or *may be* inadequate") (court's emphasis).

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 (1972). Indeed, "the *concern* of inadequate representation of interests need only exist." *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001) (per curiam) (emphasis added).

The Circuit Court manifestly erred and abused its discretion by applying an incorrect standard for evaluating whether existing parties adequately represent relevant interests. As explained in detail below, *infra* Section II.C, Proposed Intervenors plainly satisfy the correct standard. This Court should reverse.

D. The Circuit Court abused its discretion to the extent that it required Proposed Intervenors to show independent standing.

The Circuit Court only explained three reasons for denying intervention, and as explained above, each constitutes an abuse of discretion. But the Circuit Court concluded its order by stating, "[f]or all these reasons, and for the additional reasons argued in Defendants' response in opposition to Right to Life of Michigan and Michigan Catholic Conference's renewed motion to intervene pursuant to MCR 2.209, the motion is DENIED." Order, Ex. 1 at 3. In addition to matters already addressed by the Circuit Court, that opposition brief argued that Proposed Intervenors could not intervene because they lack independent standing. *See* Prosecuting Attorney Defendants' Response in Opposition to Proposed Intervenors' Renewed Motion to Intervene, Ex. 8 at 4–6.

To the extent the Circuit Court may have incorporated but not discussed the Defendants' argument regarding independent standing, it was wrong. "[A] party seeking to intervene need not possess the standing necessary to initiate a lawsuit." *Purnell v City of Akron*, 925 F2d 941, 948 (CA 6, 1997); *accord Priorities USA v Nessel*, 978 F3d 976, 979 (CA 6, 2020) ("[A] party may generally intervene in a district court proceeding *without* showing that it would have standing . . . .") (emphasis added). Because there is an actual controversy between an existing "plaintiff and defendant,"

there is "no need to impose a standing requirement on . . . would-be intervenor[s]." *Purnell*, 925 F2d at 948 (quoting *U.S. Postal Serv v Brennan*, 579 F2d 188, 190 (CA 2, 1978)); *accord Providence Baptist Church v Hillandale Comm, Ltd*, 425 F3d 309, 315 (CA 6, 2005).

As intervening defendants, Proposed Intervenors have the "ability to ride 'piggyback' on the [defending county prosecutors'] undoubted standing." *Diamond v Charles*, 476 US 54, 64; 106 S Ct 1697 (1986). That "at least one [Defendant] has standing" is enough. *Dodak v State Admin Bd*, 441 Mich 547, 551; 495 NW2d 539 (1993); *accord id.* at 561. Courts "need not consider whether [all Defendants] have standing." *Horne* v *Flores*, 557 US 433, 446; 129 S Ct 2579 (2009).

The *only* situations in which Proposed Intervenors must show independent standing is if: (1) they seek broader relief than the defendant invoking the court's jurisdiction, *Little Sisters of the Poor Saints Peter & Paul Home v Pennsylvania*, 140 S Ct 2367, 2379 n6 (2020); or (2) they appeal without the defendant they originally intervened to support, *Cherry Hill Vineyards, LLC v Lilly*, 553 F3d 423, 428–29 (CA 6, 2008). Because Proposed Intervenors and the defending county prosecutors sought the same relief in the trial court, there is no plausible argument that Proposed Intervenors must prove independent standing to intervene.

To counsel's knowledge, the only published cases in which Michigan courts have required an intervenor to show independent standing involve a lone intervenor appealing without the original defendant. *E.g.*, *League of Women Voters of Mich*, 506 Mich at 575 ("[N]either of the losing parties below filed a timely appeal . . . ."; *Mich*

Alliance for Retired Ams v Sec'y of State, 334 Mich App 238, 251; 964 NW2d 816 (2020) ("The Legislature . . . is essentially taking the place of defendants in this case."); *Federated Ins Co v Oakland Cnty Road Comm'n*, 475 Mich 286, 290; 715 NW2d 846 (2006) ("[T]he Attorney General . . . sought to appeal in this Court, even though neither of the losing parties in the Court of Appeals sought timely leave to appeal."). That is not the case here. Some county prosecutors are defending MCL 750.14's constitutionality, and Proposed Intervenors sought to intervene in the trial court, not on appeal.

The pro-abortion prosecutors' opposition brief below conflated the criteria for standing and intervention, comparing apples to oranges. A showing of unique and *concrete* injury may be necessary for standing, but the same is not true of intervention, which requires only a *possibility* of inadequate representation. *Compare Lansing Schs Educ Ass'n*, 487 Mich at 372 (demanding a "special injury or right . . . that will be detrimentally affected in a manner different from the citizenry at large" for standing), *with Vestevich*, 245 Mich App at 762 (requiring a "concern of inadequate representation," not that the inadequately "be definitely established," for intervention).

The bar is higher for standing than for intervention. *Chapman v Tristar Prods, Inc*, 940 F3d 299, 307 (CA 6, 2019); *Providence Baptist Church*, 425 F3d at 318. Consequently, standing arguments do not answer—let alone defeat—Proposed Intervenors' timely and well-supported motion to intervene.

Nor is the pro-abortion prosecutors' reliance on the Court of Appeals' unpublished order in *Planned Parenthood of Michigan v Attorney General* convincing.[2] This Court scrutinized Proposed Intervenors' independent standing because it previously concluded that the Court of Claims' injunction *did not apply* to Prosecuting Attorneys Jarzynka and Becker—co-plaintiffs who joined the complaint for order of superintending control. Accordingly, the county prosecutors lacked standing to challenge the injunction, and without the ability to "piggyback" on those prosecutors' standing, Proposed Intervenors' independent standing became relevant. The exact opposite is true here. All agree that the Circuit Court's TRO and subsequent preliminary injunction *do apply* to Defendants Jarzynka and Becker—two named defendants. So here, Proposed Intervenors may piggyback on Defendants Jarzynka and Becker's undoubted standing. There is no need to examine whether Proposed Intervenors have standing too.

Accordingly, the Circuit Court manifestly erred and abused its discretion to the extent that it denied Proposed Intervenors' motion to intervene by finding that they lacked independent standing.

[2] This Court's unpublished order on Proposed Intervenors' standing is both nonprecedential and, as of today, non-final. The Court of Appeals issued the order on August 1, 2022. Planned Parenthood on Aug. 3, 2022, filed a combined application for leave and complaint for mandamus with the Supreme Court, SC No. 164656, and under MCR 7.215(F)(1)(a), that order does not take effect until the Supreme Court resolves that matter and any other timely challenges that may be filed, including Proposed Intervenors' own application for leave to appeal this Court's ruling that they lacked independent standing to file a superintending-control complaint. Any reliance by the Circuit Court on a nonprecedential order that is non-final and may be reversed was reversible error.

II. Proposed Intervenors are entitled to intervention of right.

Under MCR 2.209(A)(3), a person is *entitled by right* to intervene upon establishing three elements: (1) timely application; (2) the applicant claims an interest relating to the action and is so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest; and (3) the applicant's interests may be inadequately represented by existing parties. MCR 2.209(A)(3); *see Oliver v Dep't of State Police*, 160 Mich App 107, 114-115; 408 NW2d 436 (1987). "The rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Precision Pipe & Supply, Inc v Meram Constr, Inc*, 195 Mich.App 153, 156; 489 NW2d 166 (1992); *Estes v Titus*, 481 Mich 573, 583; 751 NW2d 493 (2008).

Because Proposed Intervenors satisfy every requirement for intervention of right, they are entitled to intervention and the Circuit Court abused its discretion by denying their motion.

A. The application was timely.

The first requirement for intervention of right is satisfied by a timely application. MCR 2.209(A). Michigan Courts have not articulated a bright line rule, but an application is generally timely so long as it is filed within a reasonable time. *American States Ins Co v Albin*, 118 Mich App 201, 209; 324 NW2d 574 (1982). Neither the Circuit Court nor the existing parties dispute that Proposed Intervenors' application was timely. Nor could they. Governor Whitmer sued on April 7, 2022, and Proposed Intervenors filed their original motion to intervene and proposed answer just 27 days later, on May 4, 2022. The Circuit Court adjourned that motion, staying

proceedings to await direction from the Supreme Court. Order Adjourning Motion, Ex. 5 at 1. When the Circuit Court reactivated the case months later by granting Governor Whitmer's ex parte TRO motion on August 1, 2022, Proposed Intervenors promptly filed a renewed motion to intervene just two days later, on August 3, 2022. Thus, their application was timely.

B. Proposed Intervenors claim an interest relating to the action, and disposition of the action may impair or impede their ability to protect that interest.

The second requirement for intervention of right is satisfied when the applicant "claims" an interest relating to the action and is so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest. MCR 2.209(A)(3). Proposed Intervenors plainly claim an interest in promoting, enacting, and defending Michigan's pro-life laws, and that interest would be impaired and impeded if Governor Whitmer is successful in manufacturing a right to abortion and permanently enjoining MCL 750.14, as well as other longstanding pro-life statutes.

Courts 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 v Miller*, 103 F3d 1240, 1245 (CA 6, 1997); *accord id.* at 1245–47. Much like the Legislature itself, interest groups "certainly [have] an interest in defending [their] own work. *Mich Alliance for Retired Ams v Sec'y of State*, 334 Mich App 238, 250; 964 NW2d 816 (2020). This is especially true when they seek to "defend[ ] the constitutionality of several of [their] statutes," which gives them a unique and

"significant interest in [the case]. Indeed, it is difficult to envision interests that would assure more sincere and vigorous advocacy." *Id*. The interests of such groups are apparent when they: (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).

Proposed Intervenors satisfy all of these factors. Right to Life of Michigan is a nonprofit organization whose members across Michigan are dedicated to protecting human life from conception to natural death. To that end, it provides educational resources to Michiganders and encourages community participation in programs that foster respect and protection for human life. 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 has a strong interest in maintaining laws that promote life throughout Michigan, including MCL 750.14.

The Michigan Catholic Conference is 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. The Michigan Catholic Conference has a deep, abiding interest in the dignity and sanctity of all human life. The Conference is dedicated to preserving and protecting human life at all stages, including by

supporting laws like MCL 750.14. The Michigan Catholic Conference was the lead voice against Proposal B in 1972, a referendum that sought to invalidate MCL 750.14 and legalize abortion up to the 20th week of pregnancy. The Conference led the campaign against Proposal B, which saw 61% of the People vote "No."

Proposed Intervenors 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 laws that destroy life, including those that encourage abortion. As part of these efforts, Proposed Intervenors have dedicated significant human and financial resources to combating efforts like the misnamed Michigan "Reproductive Freedom for All" Initiative (2022) that seeks to undo almost a century of Michigan law by creating a right to abortion at any stage while voiding longstanding Michigan laws that protect women's health and ensure that mothers are fully informed before making a decision to take their child's life. Given the resources that they have expended defending the rights of the unborn, Proposed Intervenors have a substantial interest in advocating for and defending pro-life legislation, including the 1931 statute the Governor seeks to invalidate – and which the Circuit Court, after excluding Proposed Intervenors from the proceedings, suspended.

Further, Proposed Intervenors regularly work with the Michigan Legislature to enact pro-life legislation, strive to enact pro-life laws through ballot initiatives, and defend pro-life laws in court. Just some of the pro-life legislation that Proposed Intervenors have helped shepherd into law includes: the Parental Rights Restoration Act (MCL 722.901–08), the informed consent law (MCL 333.17015), laws regulating

the teaching of or referring for abortion in public schools (MCL 380.1507 & MCL 388.1766), laws forbidding public funding of abortion (MCL 400.109a), laws protecting infants intended to be aborted but born alive (MCL 333.1071–73), and the Abortion Insurance Opt-Out Act (MCL 550.541–51).

What's more, Proposed Intervenors were instrumental in enacting bans on delivering a substantial portion of a living child outside her mother's body and then killing the child by crushing her skull or removing her brain by suction, a procedure known as partial birth abortion (MCL 750.90g & MCL 333.1081–85). Proposed Intervenors were actively involved in litigation defending the Legal Birth Definition Act, as well as other pro-life laws. The staggering breadth of the Circuit Court's injunction and the sweeping scope of the constitutional right to abortion it envisions, as announced from the bench, *imperils every one of those efforts*.

Recognizing these interests, Michigan courts have regularly allowed Proposed Intervenors 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 allowed to intervene in action challenging the constitutionality of proposed legislation entitled "The Parental Rights Restoration Act").

Simply put, Proposed Intervenors plainly claim a vital interest at issue in the Circuit Court action, and disposition of the action could not only invalidate laws enacted as a direct result of Proposed Intervenors' efforts but could forever impede their interests in promoting pro-life laws. It is no accident the Circuit Court entered its trio of orders slamming the door on Proposed Intervenors, and denying them so much as a reply brief, one day before it began the hearing that culminated in its unprecedented injunction barring elected county prosecutors from enforcing a longstanding statute of unquestionable constitutionality. Proposed Intervenors have much more than a mere preference regarding the outcome of this case. They have a concrete interest relating to the action and are so situated that the disposition of the action may impair or impede their ability to protect that interest. MCR 2.209(A)(3).

C. Proposed Intervenors have unique interests and arguments that may not be adequately represented by existing parties.

The third requirement for intervention of right is that existing parties may not adequately represent the applicant's interests. MCR 2.209(A)(3). "[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*, 16 Mich App at 115 (emphasis added); *Hill*, 277 Mich App at 508 (emphasis added and citations omitted) ("The rule for intervention should be liberally construed to allow intervention where the applicant's interests *may be* inadequately represented") ; *Karrip*, 115 Mich App at 731-732 (same). 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*, 396 Mich at 188-189, quoting *Trbovich*, 404 US at 538 n 10. Indeed, "the *concern* of inadequate representation of interests need only exist." *Vestevich*, 245 Mich App at 761-762 (emphasis added).

Here, existing parties may not adequately represent Proposed Intervenors' interests. The sole plaintiff, Governor Whitmer, asks the Circuit Court to create a right to an abortion and hold MCL 750.14 unconstitutional, so she is adverse to—and cannot adequately represent—Proposed Intervenors' interests. And of the prosecutors named as Defendants, seven have publicly agreed with Governor Whitmer's contention that MCL 750.14 is "unconstitutional" and have declined to defend her lawsuit. *See* April 7, 2022, Statement by Seven Michigan Prosecutors (attached as **Exhibit 15**); August 1, 2022, Prosecutors' Statement (attached as **Exhibit 16**). These defendants are also adverse and cannot adequately represent Proposed Intervenors' interests, as evidenced by the response in opposition they filed to the renewed motion to intervene. *See* Ex. 8.

A few of the remaining prosecutors currently defend MCL 750.14, but they may not adequately protect Proposed Intervenors' interests for at least seven reasons.

First, Proposed Intervenors have already raised different legal arguments for upholding MCL 750.14's constitutionality than the defending prosecutors. For example, there are material and wide-ranging differences between their proposed brief opposing Governor Whitmer's motion for a preliminary injunction (**Exhibit 8**) and Defendants Jarzynka and Becker's brief opposing the Governor's motion (attached as **Exhibit 15**). The two briefs are not even close to the same. Proposed

Intervenors' brief focuses on the Governor's merits arguments, whereas Defendants Jarzynka and Becker's brief focuses more on procedural, standing, and mootness issues. Before the Circuit Court was direct evidence that Proposed Intervenors' interests and arguments were not, *in fact*, adequately represented, when only a *possibility* of inadequate representation is required.

Second, unlike the existing defendants, Proposed Intervenors will advance and preserve different arguments and interests regarding civil laws. The existing defendants are county prosecutors, who have no ability to enforce—and no interest in defending—civil laws. Many of the provisions that Proposed Intervenors have shepherded into law are civil in nature. For example, they were instrumental in enacting the Parental Rights Restoration Act (MCL 722.901–08) and informed consent law (MCL 333.17015), violations of which could serve as a predicate for civil actions regarding a lack of informed consent or interference with family relations. MCL 722.907. The Governor's asserted constitutional right to abortion will impact the enforceability of *all* pro-life laws—not just MCL 750.14—and the prosecutor defendants have no interest in the civil variety.

Third, unlike the existing defendants, Proposed Intervenors will advance and preserve alternative arguments regarding the constitutionality of abortion that defendants may choose not or be unable to raise all the way to the U.S. Supreme Court. For example, if the Circuit Court accepts the Governor's contention that a silent Michigan Constitution creates a right to an abortion, then Proposed Intervenors will argue—to the U.S. Supreme Court, if necessary—that that the U.S. Constitution supersedes that right

because the Fourteenth Amendment protects all life beginning at conception. Proposed Intervenors alone raised this affirmative defense in their Proposed Answer.

Fourth, unlike the existing defendants, Proposed Intervenors will advance and preserve additional constitutional arguments to rebut Governor Whitmer's legal theories that defendants may choose not or be unable to raise all the way to the U.S. Supreme Court. For example, if the Circuit 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 Proposed Intervenors will argue that the U.S. Constitution's Republican Form of Government Clause requires Michigan Courts 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. Proposed Intervenors alone raised this affirmative defense in their Proposed Answer.

Fifth, the few defendants who actually chose to defend MCL 750.14 could be replaced in an election by a prosecutor who shares Governor Whitmer's views. That may eliminate *any* defense of MCL 750.14 and could leave the case without the adversity of parties necessary for the courts to exercise jurisdiction.

Sixth, as prosecutors, the existing defendants act on existing law and concrete facts to make charging decisions. This reality makes it difficult for prosecutors to articulate the State's interests in a case like this. But Proposed Intervenors' commitment to protecting innocent life is universal and unflinching, regardless of which party occupies a particular prosecutor's office or the Governor's mansion, and they are not constrained to make arguments consistent with hypothetical charging decisions.

Seventh, the Governor's lawsuit places all of the prosecutor 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, as well as two trial courts, any defendant who argues that MCL 750.14 is valid will likely be attacked politically—however unfairly—for "failing to uphold" Michigan's Constitution. Proposed Intervenors have no such constraints on their advocacy.

For all of these reasons, the existing parties *may* not (and do not) adequately represent Proposed Intervenors' interests. Because Proposed Intervenors satisfy all of the requirements for intervention of right, the Circuit Court manifestly erred and abused its discretion in denying their motion.

III. Proposed Intervenors also satisfy the requirements for permissive intervention.

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 Sec'y of State*, 506 Mich at 575.

Here, Proposed Intervenors' application was timely. *See supra*, Section II.A. And intervention is proper under MCR 2.209(B) because Proposed Intervenors' proposed answer raises defenses that "have a question of law or fact in common" with Governor Whitmer's suit. Proposed Intervenors have pleaded, directly contrary to the Governor's claims, that "[t]he Michigan Constitution does not create a right to abortion." Proposed Answer, Ex. 3 at 45. And they raise federal defenses that are directly related to the legal questions presented here but which the existing parties have not so preserved or emphasized, including: (1) the Fourteenth Amendment to the U.S. Constitution protects human life from the moment of conception, superseding any state constitutional right to abortion, and (2) any state court declaration that the Michigan Constitution protects a right to abortion would violate article IV, section 2 of the U.S. Constitution, which guarantees a Republican form of government. Proposed Answer, Ex. 3 at 45–46.

Finally, as explained above in Section I.A, the Circuit Court did not consider, find, or even suggest that undue delay or prejudice might result from intervention by Proposed Intervenors. It could not because Proposed Intervenors filed a motion and proposed brief opposing the Governor's motion for preliminary injunction *before* the briefing deadline for the defending prosecutors. So, the Circuit Court speculated only about the "potential" results of hypothetical intervention by "all" interest groups, which has not—and will never—come to pass. See Order, Ex. 1 at 2–3. Because Proposed Intervenors satisfied the requirements for permissive intervention and

their inclusion would not result in delay or prejudice, the Circuit Court should have granted permissive intervention.

CONCLUSION

The Circuit Court manifestly erred and abused its discretion in denying Proposed Intervenor's motion to intervene. This Court should grant peremptory reversal, or in the alternative, grant leave to appeal, and direct that Proposed Intervenors be allowed to intervene.

Dated: September 6, 2022

Respectfully submitted,

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, and JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, in their official capacities,

Defendants,

and

DAVID S. LEYTON, Prosecuting Attorney of Genesee County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants-Appellees,

and

Court of Appeals Docket No. _____

Oakland Circuit Case No. 22-193498-CZ

APPENDIX OF EXHIBITS TO RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S EMERGENCY APPLICATION FOR LEAVE TO APPEAL OR PEREMPTORY REVERSAL OF DENIAL OF THEIR MOTION TO INTERVENE

This case involves a claim that state governmental action is invalid

RIGHT TO LIFE OF MICHIGAN AND
MICHIGAN CATHOLIC
CONFERENCE,

Proposed Intervenors-Appellants.

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EXHIBIT 1

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 RE: PROPOSED INTERVENORS', RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE, MOTION TO INTERVENE

Non-Parties proposed intervenors, Right to Life of Michigan and Michigan Catholic Conference, filed a motion and corresponding praecipe for Wednesday, August 17, 2022, at 8:30 a.m. The Court considers the motion and dispenses with oral argument. MCR 2.119(E)(3).[1]

As an initial matter, the Court notes proposed intervenors have been invited to advocate their position as *amicus curiae*, in *Whitmer v Linderman,* Supreme Court docket number 164256 simultaneously with the instant litigation before this trial Court.[2] Thus, from this Court's perspective, proposed intervenors' positions are not only well preserved in the Supreme Court's concurrent action and record, but also, that their instant request is more appropriate for consideration in that forum as *amici curiae* as a practical matter.

[1] MCR 2.119(E)(3) provides: a court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of and in opposition to a motion. See also, *Banta v Serban*, 370 Mich 367, 368 (1963).
[2] See *Whitmer v Linderman,* Order of the Michigan Supreme Court, docket number 164256, dated June 15, 2022.

At this juncture, this trial Court finds it inappropriate to allow *any* third-party interest group outside the named parties to intervene in this litigation. See MCR 2.209.[3] Additionally, proposed intervenors have failed to persuade the Court they have established their burden of satisfactorily demonstrating their respective and collective interests are inadequately represented by a named party to this litigation warranting intervention. See e.g., *United States v Michigan*, 424 F3d 438, 443 (CA 6, 2005); MCR 2.209.

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[3] MCR 2.209 provides:

(A) Intervention of Right. On timely application a person has a right to intervene in an action:

(1) when a Michigan statute or court rule confers an unconditional right to intervene;

(2) by stipulation of all the parties; or

(3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated 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.

(B) Permissive Intervention. On timely application a person may intervene in an action

(1) when a Michigan statute or court rule confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(C) Procedure. A person seeking to intervene must apply to the court by motion and give notice in writing to all parties under MCR 2.107. The motion must

(1) state the grounds for intervention, and

(2) be accompanied by a pleading stating the claim or defense for which intervention is sought.

(D) Notice to Attorney General. When the validity of a Michigan statute or a rule or regulation included in the Michigan Administrative Code is in question in an action to which the state or an officer or agency of the state is not a party, the court may require that notice be given to the Attorney General, specifying the pertinent statute, rule, or regulation.

The Court notes, given the underlying issues presented by this case, there are *many* potential interest groups in varying forms who can allege a claim for intervention. Potential categories of interest groups that may request intervention could range from other governmental, religious, vocational, educational, and institutional organizations and bodies, to name only some. To allow intervention for *any* special interest group at the trial level invites intervention for *all* interest groups which certainly would "unduly delay or prejudice the adjudication of the rights of the original parties" at this juncture. MCR 2.209(B). And, as previously noted, this relief has been granted in the Supreme Court docket with no indication the instant proposed intervenors, or intervenors that have not yet made a similar request, will be prejudiced in any way by the trial Court deferring intervention or participation as *amici curiae* to the Supreme Court.

For all these reasons, and for the additional reasons argued in Defendants' response in opposition[4] to Right to Life of Michigan and Michigan Catholic Conference's renewed motion to intervene pursuant to MCR 2.209, the motion is DENIED.

IT IS SO ORDERED.

Dated: 08/16/2022

Hon. JACOB JAMES CUNNINGHAM
Circuit Court Judge MY

[4] See Defendants McDonald, Savit, Leyton, Siemon, Getting, Weise, and Worthy's joint response filed August 11, 2022.

EXHIBIT 2

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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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.

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 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.

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 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 Sec'y 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, 508; 746 NW2d 118 (2008) (per curiam) (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 W Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001) (per curiam) (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) (per curiam) (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 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.

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) see 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.

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

[1] **Exhibit 1**, April 7, 2022 Statement by Seven Michigan Prosecutors.

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 is 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 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
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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

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 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,

RIGHT TO LIFE OF MICHIGAN; MICHIGAN CATHOLIC CONFERENCE

Proposed Intervening Defendants.

Case No. 22-193498-CZ

Hon. Edward Sosnick

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Counsel for Plaintiff

PROPOSED MAY 4, 2022 ANSWER OF INTERVENING DEFENDANTS RIGHT TO LIFE OF MICHIGAN AND THE MICHIGAN CATHOLIC CONFERENCE TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Intervening Defendants, Right to Life of Michigan and the Michigan Catholic Conference, by and through its attorneys Alliance Defending Freedom, the Smith Appellate Law Firm, and Smith Haughey Rice & Roegge for their Answer to Plaintiff Gretchen Whitmer's Complaint for Declaratory and Injunctive Relief state as follows:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Governor brings this action pursuant to her power to enforce compliance with, and to restrain violations of, the Michigan Constitution. Const 1963, art 5, § 8. Specifically, the Governor brings this action to protect the right of Michigan women to obtain abortions, as guaranteed by the Due Process Clause of the Michigan Constitution, Const 1963, art 1, § 17, and to enjoin enforcement of Michigan's criminal abortion statute, which was enacted in violation of the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2, based on the following allegations:

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Procedurally, there is no alleged violation of the Michigan Constitution for the Court to restrain. Governor Whitmer bases this lawsuit solely on speculative future harm. Because her claims lack any factual basis—indeed, there is no factual predicate at all—and are anticipatory, non-justiciable, and unripe for judicial decision, the Court should dismiss this case. On the merits, MCL 750.14 does not violate the Due Process or Equal Protection Clauses of the Michigan Constitution.

INTRODUCTION

1. The Michigan Constitution guarantees the right to abortion and to equal protection of the laws.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. The Michigan Constitution does not protect a right to abortion. And even though Const 1963, art I, § 2 guarantees the equal protection of the laws, Governor Whitmer's claims do not implicate that provision.

2. Michigan's criminal abortion statute, section 14 of the Michigan Penal Code, MCL 750.14, violates both those state constitutional rights.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny this allegation. MCL 750.14 does not violate any state constitutional right.

3. The statute makes it a felony for "[a]ny person" to provide an abortion, except where "necessary to preserve the life of [the pregnant] woman." MCL 750.14. If the abortion procedure results in death of the pregnant woman, the offense is deemed manslaughter. *Id.*

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. The Michigan Supreme Court has construed MCL 750.14 "to mean that the prohibition . . . 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). Right to Life of Michigan and the Michigan Catholic Conference admit that MCL 750.14 classifies the accidental death of a woman who has procured an abortion as manslaughter.

4. In 1973, the Michigan Supreme Court construed the statute to avoid its unconstitutionality under federal law by exempting abortions protected under the then recently decided *Roe v Wade,* 410 US 113 (1973). See *People v Bricker*, 389 Mich 524, 529–530 (1973). In the Court's words, the 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." *Id.*

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny that the U.S. Constitution protects a right to abortion or requires a narrowing construction of MCL 750.14. But they admit that *Bricker* construed MCL 750.14 to comport with the U.S. Supreme Court's decision in *Roe*. Importantly, *Bricker*'s construction of MCL 750.14 is still operative and remains unchanged, which shows (1) there is no harm or actual controversy here, (2) the case is not ripe, and (3) Governor Whitmer's lawsuit should be dismissed.

5. But it has been nearly 50 years since *Bricker*, and nearly 50 years since *Roe*. The contours of the right to abortion protected by the U.S. Constitution have shifted. The protections secured by *Roe*—the foundation for *Bricker*'s narrowing construction of MCL 750.14—have been eroded.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that *Roe* and *Bricker* were decided nearly 50 years ago but deny the remainder of these allegations. *Roe* did not purport to decide all (purported) federal constitutional questions related to abortion. To the extent Governor Whitmer suggests there have been meaningful changes in the U.S. Supreme Court's abortion jurisprudence in recent months or years, Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue.

6. And the Michigan Supreme Court has never addressed whether the Michigan Constitution protects the right to abortion, leaving unreviewed the erroneous decision of the Michigan Court of Appeals, which held that "there is no right to abortion under the Michigan Constitution." *Mahaffey v Att'y General*, 222 Mich App 325, 336 (1997), *lv den* 456 Mich 948 (1998).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that the Michigan Supreme Court denied leave to appeal in *Mahaffey* and did not resolve the questions raised in that case. But they deny that the Michigan Court of Appeals' decision in *Mahaffey* was erroneous. *Mahaffey* is correct that the Michigan Constitution does not protect a right to abortion.

7. As a result, there is substantial uncertainty about whether MCL 750.14 is presently enforceable or the scope of impairment of the right to abortion that statute permits. In the absence of a clear and authoritative pronouncement from the Michigan Supreme Court about whether, or to what extent, MCL 750.14 is valid under the Michigan Constitution, the exercise of the right to abortion is impaired. It is necessary and appropriate to resolve that uncertainty, which chills the right to abortion and currently affects the decisions of Michiganders seeking abortions. See *Citizens Protecting Michigan's Const v Sec'y of State*, 280 Mich App 273, *aff'd in relevant part* 482 Mich 960 (2008); *Michigan United Conservation Clubs v Sec'y of State*, 463 Mich 1009 (2001).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. There is no substantial uncertainty about MCL 750.14's enforceability. Because the Michigan Supreme Court's decision in *Bricker* remains binding, nothing has changed, and no Michigan woman's purported right to abortion is chilled or impaired. It is unnecessary and

inappropriate for a court to decide Governor Whitmer's speculative claims, which are non-justiciable and unripe for judicial decision.

8. MCL 750.14 is unconstitutional under the Michigan Constitution, and thus unenforceable today, for two reasons. First, Michigan's Due Process Clause provides a right to privacy and bodily autonomy that is violated by the state's criminalization of abortion. Second, Michigan's Equal Protection Clause forbids discriminatory laws like MCL 750.14, an early twentieth-century sex-based classification based on paternalistic justifications and overbroad generalizations about the role of women in the workforce and in families.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. MCL 750.14 does not violate the Michigan Constitution. The Michigan Due Process Clause protects no right to abortion. And MCL 750.14 is not a sex-based or discriminatory law that implicates the Michigan Equal Protection Clause. MCL 750.14's purpose is not to enforce gender roles. Instead, the statute protects human life and the most vulnerable among us, as well as the ethical principle that medical professionals should "do no harm."

9. The Governor brings this action in the name of the state to safeguard the constitutional rights of the state's residents and to restrain the unconstitutional abridgement of their right to obtain safe and lawful abortions. By this suit, the Governor requests that the court restrain enforcement of MCL 750.14 and declare it invalid under the Due Process and Equal Protection Clauses of the Michigan Constitution. The Governor also seeks a declaration that the Michigan Constitution protects the right to abortion.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that Governor Whitmer purports to bring this action in the name of the state but denies that her claims relate to any alleged or actual violation of Michiganders' constitutional rights. *Bricker*

substantially limits MCL 750.14's application and abortion law in Michigan remains unchanged. Right to Life of Michigan and the Michigan Catholic Conference admit that Governor Whitmer's complaint seeks the relief specified in paragraph 9.

PARTIES

10. Plaintiff Gretchen Whitmer is the Governor of Michigan. The Governor "shall take care that the laws be faithfully executed" and is authorized under Michigan's Constitution to "initiate court proceedings in the name of the state to enforce compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty, or right by any officer, department or agency of the state or any of its political subdivisions." Const 1963, art 5, § 8.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that Gretchen Whitmer is the Governor of Michigan and that her complaint accurately quotes Const 1963, art 5, § 8. But they deny that there is any violation of the Michigan Constitution for a court to restrain.

11. The Governor has standing to bring the claims asserted in this complaint because the challenged law infringes on the state constitutional rights to abortion and equal protection. The Michigan Constitution provides that the Governor can sue in the name of the state to enforce compliance with any "constitutional . . . mandate or to restrain violations of any constitutional . . . right." Const 1963, art 5, § 8. This provision authorizes the Governor to seek both declaratory and injunctive relief.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Governor Whitmer alleges no actual controversy, change in law, or harm to anyone. Instead, Governor Whitmer's claims rely on speculation about hypothetical future actions

by the U.S. Supreme Court that may never happen. None of Governor Whitmer's hypothetical claims are justiciable or ripe for adjudication. Accordingly, the Court should dismiss this case.

12. Defendants are the Prosecuting Attorneys in counties where providers offer abortion care. As Prosecuting Attorneys, Defendants are required to "appear for the state or county, and prosecute or defend in all 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." MCL 49.153. As such, Defendants are charged with prosecuting violations of MCL 750.14. Defendants are sued in their official capacities.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that Governor Whitmer has sued prosecuting attorneys in counties where abortions are performed and that she has sued these prosecutors in their official capacities. But they deny that any prosecutor in the State of Michigan will bring charges under MCL 750.14 that run afoul of the Michigan Supreme Court's ruling in *Bricker*.

13. Defendant James Linderman is the Prosecuting Attorney of Emmet County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

14. Defendant David Leyton is the Prosecuting Attorney of Genesee County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

15. Defendant Noelle Moeggenberg is the Prosecuting Attorney of Grand Traverse County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

16. Defendant Carol Siemon is the Prosecuting Attorney of Ingham County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

17. Defendant Jerard Jarzynka is the Prosecuting Attorney of Jackson County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

18. Defendant Jeffrey Getting is the Prosecuting Attorney of Kalamazoo County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

19. Defendant Christopher Becker is the Prosecuting Attorney of Kent County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

20. Defendant Peter Lucido is the Prosecuting Attorney of Macomb County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

21. Defendant Matthew Wiese is the Prosecuting Attorney of Marquette County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

22. Defendant Karen McDonald is the Prosecuting Attorney of Oakland County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

23. Defendant John McColgan is the Prosecuting Attorney of Saginaw County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

24. Defendant Eli Savit is the Prosecuting Attorney of Washtenaw County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

25. Defendant Kym Worthy is the Prosecuting Attorney of Wayne County, a county in which at least one abortion provider is located.

ANSWER: On information and belief, Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

JURISDICTION AND VENUE

26. Jurisdiction is conferred on this Court by Article 5, § 8 of the Michigan Constitution, which provides, "The governor may initiate court proceedings in the name of the state to enforce

compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its political subdivisions."

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. This Court lacks jurisdiction because Governor Whitmer is not seeking to restrain any violation of a putative or actual constitutional right or enforce compliance with any constitutional right. This lawsuit is a theoretical exercise based on several hypothetical, future events that may not happen, including the U.S. Supreme Court's overruling *Roe*, a pregnant woman choosing to take her own child's life in one of the relevant jurisdictions, a doctor in that same jurisdiction agreeing to help the mother take her child's life, and a Michigan county prosecutor willing to press charges against the doctor. Because *Roe* and *Bricker* are still good law, there is no actual controversy involving particular facts, this case is not justiciable, and Governor Whitmer's claims are not ripe. Accordingly, the Court should dismiss this case.

27. The Governor's claims for declaratory and injunctive relief are authorized by MCR 2.605(A), as well as by the general equitable powers of this Court. A declaratory judgment is necessary to "sharpen[ ] the issues raised" by this action and guide Michiganders' future conduct in order to preserve their constitutional rights. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012). "[B]y granting declaratory relief in order to guide or direct future conduct, courts are not precluded from reaching issues before actual injuries or losses have occurred." *Id*.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Neither MCR 2.605(A) nor the Court's general equitable powers authorize Governor Whitmer to file this suit. MCR 2.605(A) and the Court's general equitable powers both require an "actual controversy" and there is none here. The issues raised in Governor Whitmer's

complaint are purely speculative and have no basis in fact. Michiganders' future conduct is not in doubt. And *UAW v Central Michigan University Trustees*, 295 Mich App 486, 496, 815 NW2d 132, 138–39 (2012), which requires an "actual controversy," rather than helping Governor Whitmer, confirms the Court should dismiss her lawsuit.

28. This Court has personal jurisdiction over the county prosecutors because they represent political subdivisions of the state.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

29. Venue is proper in Oakland County because Defendant McDonald exercises governmental authority and has her principal office in this county, *see* MCL 600.1615, and venue is proper as to all defendants "to prevent a multiplicity of suits," *Hoffman v Bos*, 56 Mich App 448, 456 (1974).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit these allegations.

FACTUAL ALLEGATIONS

30. On its face, MCL 750.14 is a sweeping prohibition on abortion. The statute, by its terms, deprives Michigan residents of a safe and necessary medical procedure by making 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.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny that MCL 750.14, as construed by *Bricker*, is sweeping, or that abortion is safe or necessary. They admit that paragraph 30 quotes a partial excerpt from MCL 750.14.

31. The current version of the statute is nearly identical to its 1846 predecessor, which was rooted in an effort to enforce antediluvian marital roles.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. The Michigan Legislature did not intend MCL 750.14 to enforce "antediluvian marital roles." The statute's clear purpose is to value human life and protect it from the moment of conception, the point at which the life of a completely unique and distinct human being begins.

A. The History of MCL 750.14

32. Michigan's criminal abortion statute was enacted amidst a flurry of new legislation restricting abortions across the country in the mid-nineteenth century.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference are without sufficient information or knowledge to form an opinion about the truth of this allegation.

33. Before that wave of legislation, at common law, abortion of an unquickened fetus was not a punishable offense at all. "Quickening" is the point at which the mother first perceives fetal movement, and it typically takes place midway through gestation. See Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800–1900* (New York: Oxford University Press 1978), p 3 (*Abortion in America*). American courts that adjudicated prosecutions for abortions at common law consistently observed this distinction.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. The common law and American court decisions safeguarded human life from

the moment of conception. Quickening was just an evidentiary rule designed to mark the point at which the reality of unborn human life could be perceived externally. It was not a substantive rule designed to exclude human life from protection at an earlier point when more advanced knowledge and technology became available. Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv JL & Pub Pol'y 539, 553–54 (2017). In fact, states abandoned quickening and afforded greater protection to unborn life as medical knowledge and information about life's early stages improved. *Id.* at 554–59.

34. In the years preceding enactment of Michigan's anti-abortion law, safe abortion became increasingly more accessible. See *Abortion in America*, pp 45–46. After 1840, there was a "dramatic upsurge in abortion rates," which was largely attributed to white Protestant middle- and upper-class women who either wanted to delay having children or did not want to have more children. *Id.* at p 74; *see id.* at pp 46–47, 75–76, 86–88, 90, 117–118. These women, who sought to take control of their reproductive healthcare, were viewed as "domestic subversives." See *id.* at pp 105, 108.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Abortion was not and is not safe, and there is no accurate information regarding who procured abortions in the 1840s or women's reasons for doing so. In addition, Right to Life of Michigan and the Michigan Catholic Conference deny that women who procured abortions were viewed as "domestic subversives." It is also unclear that attitudes in the mid-19th century had anything to do with the law at issue here.

35. One of the first abortion restrictions enacted during this time period, in New York, was motivated by both "[d]istress over falling birthrates" and the view that "[w]omen had to be saved from themselves." *Abortion in America*, pp 128, 129.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. New York's abortion law was motivated by the desire to protect innocent human life and to uphold medical professionals' ethical duty to "do no harm." It is also not clear that attitudes in New York in the mid-19th century had anything to do with the law at issue here.

36. Michigan's 1846 law closely tracks the law that New York passed just the year before. See *Abortion in America*, pp 129–130.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny this allegation as untrue. Governor Whitmer's complaint does not provide the text of New York's law. But "New York placed itself in the minority of states by adopting a section bringing the woman within the abortion prohibition and prescribing a sentence of three months to one year." Samuel W. Buell, *Criminal Abortion Revisited*, 66 NYU L Rev 1774, 1785 (1991). And it is not clear that attitudes in New York in the mid-19th century had anything to do with the law at issue here.

37. The 1846 law provided that "[e]very person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ an 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, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction be 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, § 34.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference are without sufficient information or knowledge to form an opinion about the truth of this allegation. And it is unclear what the 1846 law has to do with the law at issue here.

38. At the same time, the Legislature enacted two other provisions unique to abortions of "quickened" fetuses, imposing greater penalty (manslaughter) for an abortion involving a quick child and even greater penalty (murder) if such abortion resulted in the death of the mother. See 1846 RS, ch 153, § 33 ("Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."); 1846 RS, ch 153, § 32 ("The 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" constituted manslaughter).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference are without sufficient information or knowledge to form an opinion about the truth of this allegation. It is also unclear what these 1846 laws have to do with the law at issue here.

39. After Michigan enacted this statute, the movement against abortion only grew. Physicians launched a concerted effort to restrict abortions and increase criminal penalties, largely motivated by a desire to keep women in their "natural" place as mothers in the home. Physicians asserted that abortion undermined the fundamental relationship between men and women, "as a willingness to abort signified a wife's rejection of her traditional role as a housekeeper and child raiser." *Abortion in America*, p 108.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Efforts to ban abortion were motived by a desire to uphold the value of human life, safeguard the most vulnerable among us, and uphold physicians' duty under the

Hippocratic Oath to "do no harm," avoiding the coarsening of the medical profession and society when medical professions intentionally take an innocent, human life. It is also unclear what the cited "motivations" have to do with the law at issue here.

40. The physician who led the coordinated campaign to ban abortion, Dr. Horatio Storer, claimed that childbearing was "the end for which [married women] are physiologically constituted and for which they are destined by nature." Storer, *Why Not? A Book For Every Woman* pp 75–76 (Boston: Lee and Shepard 1866); *Abortion in America*, pp 78, 89, 148. Similarly, the American Medical Association's 1871 *Report on Criminal Abortion* denounced a woman who ended a pregnancy, saying that "[s]he becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract." O'Donnell & Atlee, *Report on Criminal Abortions*, 22 Transactions Am Med Ass'n 239, 241 (1871).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the quotation attributed to Dr. Storer. Right to Life of Michigan denies that Dr. Horatio Storer's view are relevant to this case, as he was a Massachusetts physician who never lived or practiced medicine in Michigan. Right to Life of Michigan and the Michigan Catholic Conference admit that women are biologically constituted to be able to conceive and bear children. Additionally, Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the American Medical Association's 1871 report but note that the report postdates Michigan's 1846 law, and it is unknown whether the 1871 report—or the feelings of Dr. Horatio Storer—had any influence on the law at issue here.

41. Michigan physicians also championed restrictions on women's ability to decide to postpone childbirth or to limit the size of their families. In an 1881 report by Michigan's State

Board of Health, the Special Committee on Criminal Abortion wrote that "to take away the responsibility of motherhood is to destroy the greatest bulwarks of female virtue." Cox, Hitchcok, French, Michigan State Board of Health, Ninth Annual Report of the Secretary, 166 (1881). And in the Peninsular Journal of Medicine, Detroit doctor J.J. Mulheron lamented the willingness of women to seek abortions. "[T]he maternal affections have apparently lost much of their old-time intensity. Time was when it was a wife's proudest ambition to present her husband with a large family of healthy, rollicking children. . . . Time was when sterility was the greatest misfortune which could befall a woman, but now-a-days the barren woman is an object of envy." Mulheron, *Foeticide*, The Peninsular Journal of Medicine, 387 (Sept 1874).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the truth of these allegations. But they note that all of these quotations postdate Michigan's 1846 law and that Governor Whitmer does not allege that the 1931 Michigan Legislature was motivated by medical reports and journals from the 1870s and 1880s. In addition, Right to Life Michigan and the Michigan Catholic Conference note that these allegations are irrelevant because Governor Whitmer has not claimed that the Michigan Constitution protects a right to birth control, or that it is even hypothetically possible the U.S. Supreme Court will overrule *Griswold v Connecticut*, 381 US 479 (1965), and *Eisenstadt v Baird*, 405 US 438 (1972), at some future point.

42. Between 1860 and 1880, at least forty anti-abortion statutes were passed in the United States, most of them criminalizing abortion at any point during gestation. By 1900, every state had enacted an anti-abortion law, save for Kentucky, where state courts outlawed the practice. See *Abortion in America*, pp 200, 229–230.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the truth of these allegations. It is also unclear what the enactment of these laws in other states has to do with the law at issue here.

43. In that time period, the Michigan Legislature amended the criminal abortion statute to put the burden on the abortion provider to prove that the abortion was necessary to preserve the life of the woman, making it harder for a defendant to avoid liability. See MCL 7544 (1871) ("In case of prosecution . . . it shall not be necessary for the prosecution to prove that no such necessity existed, or that the advice of two physicians was not given.").

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the truth of these allegations. It is also unclear what the 1871 law has to do with the law at issue here.

44. In 1931, the Legislature again amended Michigan's criminal abortion statute, in line with revisions of criminal abortion statutes around the country during this time period.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that the Michigan Legislature amended the abortion statute in 1931 but deny that these changes were done in lock step or "in line" with other states. Michigan has always forged its own way.

45. The 1931 revision eliminated the distinction between an unquickened and quickened fetus (consistent with the statutory law of most states); made abortion a felony; made the death of a pregnant woman resulting from an abortion manslaughter; and removed the defense that two physicians had advised that an abortion was necessary to save the life of the woman. It also consolidated the abortion statutes, creating MCL 750.14.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that the 1931 law does not distinguish between a quickened or unquickened unborn child and that the plain text of the statute makes intentionally performing—not a woman procuring—an abortion a felony unless an abortion is "necessary to preserve the life of [a] woman." MCL 750.14. They also admit that the 1931 law makes the accidental death of a woman as a result of an abortion manslaughter, in keeping with the lack of intent to cause her death. But they deny Governor Whitmer's implication that the 1931 law's exception for abortions "necessary to preserve the life of [a] woman" is—in real-world effect—narrower than the 1846 law's preserve-the-life exception.

B. The Michigan Supreme Court's interpretation of MCL 750.14

46. The Michigan Supreme 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.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the truth of these allegations.

47. First, in *In re Vickers*, the Court held that the statute permitted prosecutions only of abortion providers and not individuals receiving an abortion. 371 Mich 114 (1963).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that the Michigan Supreme Court confirmed in *Vickers* what MCL 750.14 plain language declares: those performing an abortion upon a woman are subject to penalty but the woman procuring an abortion is not. They deny this allegation to the extent it suggests *Vickers* adds to, or puts a gloss on, MCL 750.14's text.

48. The other two cases followed the United States Supreme Court's 1973 decision in *Roe*, which held that the Due Process Clause does not permit a state criminal abortion statute that, like

MCL 750.14, "excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved." 410 US at 164. *Roe* further held that: (1) during the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," *id.*; (2) during the second trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health," *id.*; and (3) "[f]or the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, 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.* at 164–165.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. *Roe* does not speak in terms of the first and second trimesters but in terms of "the stage prior to *approximately* the end of the first trimester" and "the stage subsequent to *approximately* the end of the first trimester." 410 US at 164 (emphasis added). They admit the remainder of paragraph 48 accurately quotes *Roe* but notes that all of the allegations in paragraph 48 are irrelevant because the U.S. Supreme Court abandoned *Roe's* trimester framework 30 years ago in *Planned Parenthood v Casey*, 505 US 883 (1992), a fact the Governor largely ignores.

49. In one post-*Roe* challenge to MCL 750.14, *Bricker*, the Michigan Supreme Court construed the statute to avoid its patent unconstitutionality under the U.S. Constitution. Specifically, the court held that, in light of *Roe*, MCL 750.14 did not apply to "abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in [the] exercise of his medical judgment." *Bricker*, 389 Mich at 527. And it held that MCL 750.14 did not apply to abortions after viability "where necessary" in the physician's "medical judgment to

preserve the life or health of the mother." *Id.* at 530. But, the Court said, the statute could criminalize abortions performed by anyone other than licensed physicians even under *Roe*. *Id.* at 531. 50. In the other post-*Roe* challenge, the Michigan Supreme 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." *Larkin v Calahan*, 389 Mich 533, 542 (1973).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that *Bricker* construed MCL 750.14 to conform with *Roe* but denies that *Roe* is a valid interpretation of the U.S. Constitution or that MCL 750.14 violates the U.S. Constitution. They admit that paragraph 49 accurately quotes excerpts from *Bricker* and *Larkin* but deny that either of these cases was rightly decided.

51. The Michigan Supreme Court has not addressed the statute since *Bricker* and *Larkin*. Neither decision addressed the scope of the Due Process Right or Equal Protection Right under the Michigan Constitution. And neither enjoined enforcement of MCL 750.14.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. After the Michigan Supreme Court construed MCL 750.14 to comply with *Roe,* there was no legal or factual basis for (1) a plaintiff raising due process or equal protection claims similar to Governor Whitmer's, or (2) enjoining MCL 750.14's enforcement.

52. In 2001, the Michigan Court of Appeals clarified that to be guilty of violating the statute, the prosecution must prove that the defendant physician subjectively believed the fetus to be viable and did not hold the subjective belief or medical judgment that the procedure was necessary to preserve the life or health of the mother. *People v Higuera*, 244 Mich App 429, 449 (2001). The court said it was necessary to construe the statute to include those requirements

because *Bricker* "contemplates deference to the subjective good-faith medical judgment of the physician." Id.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. *Higuera* recognized that *Bricker* placed an authoritative gloss on MCL 750.14 and accurately held that courts "are obliged to read the statute in light of" that decision. 244 Mich App 429, 432–33, 625 NW2d 444, 447 (2001). The *Higuera* Court refused to find MCL 750.14 repealed by implication or unconstitutionally vague, or *Bricker*'s reasoning dictum. Though MCL 750.14 contains no explicit "mens rea requirement," the *Higuera* Court ruled that *Roe* mandated one and held that to convict under MCL 750.14 "the information must allege, and . . . the prosecution must prove, that the fetus was . . . was viable, that defendant himself subjectively believed that the fetus was . . . 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 at 449, 625 NW2d at 455–56. This further narrowing of MCL 750.14 does not help Governor Whitmer's claims. It just shows a lack of harm to the purported abortion right that Governor Whitmer seeks to uproot from *Roe* and transplant into the Michigan Constitution.

53. The right to abortion under the U.S. Constitution recognized in Roe has been gravely undermined over fifty years of federal-court litigation about abortion rights. Since *Roe*, the Supreme Court has weakened the standard by which federal courts assess restrictions on abortion and upheld numerous restrictive laws limiting access to reproductive care. It is unclear where that leaves MCL 750.14 as a matter of federal constitutional law, since *Bricker* based its narrowing construction on the federal right to abortion as articulated in *Roe*. But MCL 750.14 has always been unlawful as a matter of Michigan constitutional law.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. *Roe* did not purport to answer all questions related to abortion and that decision has not been "gravely undermined" but reinforced by the U.S. Supreme Court multiple times. Governor Whitmer does not allege that *Bricker*'s construction of MCL 750.14 is no longer controlling. There is no controversy regarding MCL 750.14's legality under *Roe* and its progeny. Further, the Michigan Constitution did not, and does not, render MCL 750.14 unconstitutional. As *Mahaffey* explained, "there is no right to abortion under the Michigan Constitution." 222 Mich App at 336, 564 NW2d at 110.

54. After Roe, the Supreme Court approved of notification requirements for minors seeking abortions. In *Hodgson v Minnesota*, the Court concluded that a state may require a minor seeking an abortion to either notify both parents and undergo a 48-hour waiting period or seek permission from a judge. 497 US 417, 497 (1990) (Kennedy, J., concurring) (plurality opinion). Similarly, in *Ohio v Akron Center for Reproductive Health*, the Supreme Court upheld a law that required a physician to notify the parents of a minor seeking an abortion when the minor did not have consent from one parent or court authorization. 497 US 502, 519 (1990).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that *Hodgson* and *Akron Center for Reproductive Health* upheld parental notification requirements but they deny Governor Whitmer's implication that *Roe* said anything about such laws.

55. A few years later, in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992), the Court limited the due process right recognized in *Roe*. The Court 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, while reaffirming *Roe*'s holding that states can proscribe post-viability abortions "'except where it is necessary, in

appropriate medical judgment, for the preservation of the life or health of the mother.' " *Id.* at 879 (quoting *Roe*, 410 US at 164–165). The plurality opinion defined an "undue burden" as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. The *Casey* court went on to uphold the informed consent, 24-hour waiting period, and parental consent provisions of Pennsylvania's abortion statute. *Id.* at 887, 899.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny that *Casey* undermined *Roe*, rather than "reaffirming [its] central holding," 505 US at 853, but they admit that *Casey* substituted the undue burden standard in place of *Roe*'s trimester framework, and that paragraph 55 excerpts some of *Casey*'s language and broadly summarizes *Casey*'s result.

56. Over time, the Supreme Court has substantially eroded *Casey*'s "undue burden" standard and upheld numerous, onerous restrictions on abortion. For example, the Supreme Court has upheld a federal ban on intact dilation and evacuation abortions. *Gonzales v Carhart*, 550 US 124, 133 (2007). The Court also has held that states can restrict the performance of abortions to licensed physicians. *Mazurek v Armstrong*, 520 US 968, 975–976 (1997) (per curiam). And amid the coronavirus pandemic, before vaccines were widely available, the Court allowed the federal government to enforce 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).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. The U.S. Supreme Court has not substantially eroded *Casey*'s undue burden standard or upheld numerous, onerous restrictions on abortion. Recently, the Court struck down even commonsense hospital-admitting-privileges requirement for abortion doctors in *June*

Medical Services LLC v Russo, 140 S Ct 2103 (2020). There is nothing new or onerous about requiring licensed physicians (rather than lesser trained medical personnel) to perform abortions, and the U.S. Supreme Court's grant of a temporary stay is not a decision on the merits or binding precedent. In fact, the *American College of Obstetricians & Gynecologists* case, which Governor Whitmer cites, has been voluntarily dismissed as moot, presumably because the FDA settled and agreed to the medical association's pro-abortion demands. *Am College of Obstetricians & Gynecologists v. Indiana*, Nos. 20-1784, 20-1824, 20-1970, 2021 WL 3276054, at *1 (CA 4, May 19, 2021).

57. The Sixth Circuit has taken a particularly aggressive stance against the federal abortion right. It has upheld a state law that prohibits a doctor from performing an abortion if the doctor knows that the woman elected to have an abortion after learning that the child would have Down syndrome. *Preterm-Cleveland v McCloud*, 994 F3d 512, 517 (CA 6, 2021). And it has upheld a state law requiring doctors to provide women with certain information at least 48 hours before performing an abortion (except in cases of medical emergency). *Bristol Reg'l Women's Ctr, PC v Slatery*, 7 F4th 478, 481 (CA 6, 2021).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. There is no valid federal abortion right and the Sixth Circuit has not taken an aggressive stance against *Roe* or *Casey*. In fact, Governor Whitmer does not allege that the Sixth Circuit has ever contravened U.S. Supreme Court precedent, including *Roe* and *Casey*. Nor does she cite any Michigan laws restricting abortion which the Sixth Circuit has considered. Instead, Governor Whitmer complains about Ohio and Tennessee laws that the Sixth Circuit has upheld. But the Governor lacks standing to attack *other states' laws* that have no force or effect in Michigan.

58. In recent years, the steady drip of specific abortion restrictions upheld by the U.S. Supreme Court has substantially impaired the federal right to abortion. The U.S. Supreme Court also has cast doubt on whether the federal right to abortion is settled law by indicating a willingness to overturn precedent. In 2019, the Court granted certiorari in *June Medical Services v Russo*, No. 18-1323 (U.S.), which involved a challenge to a law requiring doctors to have admitting privileges at a hospital within thirty miles of the site of the abortion—even though the Court had invalidated a nearly identical Texas law four terms prior. *Whole Woman's Health v Hellerstedt*, 579 US 582 (2016). Concurring in *June Medical*, Chief Justice Roberts indicated that he would further weaken the existing *Casey* standard by considering only the burdens presented by a law restricting abortions, rather than weighing those burdens against any medical benefits conferred by the law, departing from the decision four terms earlier that required weighting of asserted benefits against burdens. See *June Medical Services v Russo*, __ US __, 140 S Ct 2103, 2135–2139 (2020) (Roberts, C.J., concurring); but see *Hellerstedt*, 136 S Ct at 2309–2310 (holding that the district court, in "weigh[ing] the asserted benefits against the burdens," had applied the correct legal standard). Some courts, including the Sixth Circuit, have treated Chief Justice Roberts' more recent standard as governing. See *EMW Women's Surgical Ctr, PSC v Friedlander*, 978 F3d 418, 432–433, 439 (CA 6, 2020).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. The U.S. Supreme Court has not approved a steady drip of abortion restrictions. Most recently, in *June Medical* and *Hellerstedt*, the Court struck down commonsense Louisiana and Texas laws that required abortion doctors to have hospital-admitting privileges to promote continuity of care and protect women's health. Chief Justice Roberts' concurrence in *June Medical* advocates a particular method of assessing whether there is an "undue burden" under *Casey* but

does not call for overruling either *Casey* or *Roe*. And while the Sixth Circuit treats Chief Justice Roberts' concurrence as controlling, other federal courts do not, and the U.S. Supreme Court has yet to resolve this conflict between the federal courts of appeals.

59. And in December of 2021, the U.S. Supreme Court heard oral argument in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, regarding the constitutionality of Mississippi's fifteen-week abortion ban. This marks the first time that the Court will determine the constitutionality of a pre-viability ban since *Roe*. The question presented in the case is "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." Br for Pet'rs at i, *Dobbs*. Mississippi's main argument is that the Court should overrule *Roe* and *Casey*.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that the U.S. Supreme Court heard oral argument in *Dobbs* on December 1, 2021, and that Mississippi argues—in part—that *Roe* and *Casey* were wrongly decided and should be overruled. But they deny that the U.S. Supreme Court has issued an opinion in *Dobbs* or that anyone (aside from perhaps the Justices and their clerks) at this point knows what the Court's *Dobbs* ruling will hold.

60. The Michigan Supreme Court has never considered whether *Bricker*'s construction of MCL 750.14 incorporates the substantial erosion of the federal right to abortion, creating uncertainty on the continued availability of a medically necessary procedure in Michigan. For example, could a court construe MCL 750.14 as making it a crime for a doctor to provide an abortion without providing the woman with certain information at least 48 hours before performing an abortion? Or for a doctor to provide an abortion if she knows that the woman requested the procedure after learning that the child would have Down syndrome? Similarly, could a court construe MCL 750.14 as criminalizing failure to comply with other Michigan abortion regulations, such as the requirement that providers show the patient a depiction, illustration, or photograph and

description of a fetus at the gestational age nearest to that of the patient, MCL 333.17015(3)(c), or the requirement that minors receive written consent of a parent, MCL 722.903, or petition for a waiver of parental consent, MCL 722.904, ahead of their procedure?

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. There has not been a substantial erosion of the right to abortion recognized by the U.S. Supreme Court in *Roe* and *Casey*. There is no substantial uncertainty regarding Michigan women's ability to procure an abortion. Further, there is no probability that a court would construe MCL 750.14's ban on abortion to include prerequisites for abortions that have no basis in, or relevance to, MCL 750.14's text. Governor Whitmer's allegations in this regard are wholly fanciful, show a lack of any real-world controversy with particular facts, and demonstrate her claims are not justiciable or ripe. Accordingly, the Court should dismiss her suit.

61. The question of how to construe MCL 750.14 in light of changing federal law, and whether Michigan residents may seek a medically safe and necessary procedure is pressing now, and may soon become even more so because of the U.S. Supreme Court's imminent decision in *Dobbs*.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. There has been no relevant change in law, abortion is not medically safe or necessary, and there is no reason—let alone a pressing one—for a court to decide MCL 750.14's constitutionality under the Michigan Constitution. *Bricker*'s construction of MCL 750.14 remains unchanged and no purported state constitutional right to an abortion is even potentially chilled or restricted. Importantly, paragraph 61 emphasizes the theoretical and unripe nature of Governor Whitmer's claims by using such language as "may soon become even more so" in regard to the

harm she identifies, which shows the injury she alleges is anticipatory, justiciability is lacking, and this case is not ripe for judicial decision. As a result, the Court should dismiss this case.

C. Abortion in Michigan Today

62. Abortion is a medically safe and necessary procedure. 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).

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Abortion is neither safe nor necessary, and the number of women procuring an abortion is irrelevant to either factor.

63. Complications from abortions are rare. There are no long-term health risks from abortion. Having an abortion does not increase a woman's risk of infertility, pre-term delivery, breast cancer, or mental health disorders. National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States*, pp 9–10 (2018).

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. Abortion complications are not rare, there are long-term health risks from abortion, and abortion has an impact on women's health, including—but not limited to—fertility, early delivery, the likelihood of developing cancer, and mental health.

64. Complications from abortion are much less frequent than complications arising during childbirth. National Academies at p 11. The risk of death subsequent to a legal abortion is just a fraction of the risk of death for childbirth (0.7 per 100,000 compared to 8.8 per 100,000). *Id.* at pp 74–75. One study found that the risk of death associated with childbirth is approximately fourteen times higher than that with abortion. Raymond & Grimes, *The Comparative Safety of Legal*

Induced Abortion and Childbirth in the United States, 119 Obstetrics & Gynecology 215 (Feb 2012). Abortion-related mortality is also lower than that for colonoscopies, plastic surgery, and adult tonsillectomies. National Academies at pp 74–75.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. By design, *every* abortion is fatal for at least one member of our human family. And childbirth is now safe and mortality low. And Governor Whitmer does not identify the types of abortion her numbers reflect, not all of which may be comparable to childbirth.

65. In 2020, a total of 29,669 induced abortions were reported in Michigan. Michigan Dep't of Health & Human Servs, Induced Abortions in Michigan: January 1 through December 31, 2020 (June 2021).[1] Eighty-nine percent of those abortions were performed in the first twelve weeks of gestation. *Id.*

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the truth of these allegations.

66. The Michigan Department of Health and Human Services has acknowledged that the vast majority of abortions in the state contain no immediate complications. Of the 29,669 induced abortions in Michigan in 2020, just seven immediate complications were reported. The Department reports that the average three-year rate of complications between 2017 and 2019 was 3.5 per 10,000 induced abortions: just 0.035%. Michigan Dep't of Health & Human Servs, Induced Abortions, at p 2.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. The Michigan Department of Health and Human Services indicates that "[m]ost

[1] https://www.mdch.state.mi.us/osr/abortion/Tab_A.asp

abortion *reports* indicate no immediate complications." Mich Dep't of Health & Human Servs, *Induced Abortions in Michigan: January 1 through December 31, 2020* at 2 (June 2021) (emphasis added). But reported information about abortions is often inaccurate and skewed.

67. Michigan women decide to end pregnancies for a variety of reasons. Some decide that it is not the right time to have a child or to add to their families; some end a pregnancy because of a severe fetal anomaly; some choose not to carry a pregnancy to term because they have become pregnant as a result of rape or incest; some choose not to have biological children; some end a pregnancy because they cannot financially support a child; and for some, continuing with a pregnancy could pose a significant risk to their health.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the truth of these allegations. But they further answer that Governor Whitmer's claims are wholly speculative and bear no relation to actual facts. Identifying the real reasons(s) a woman choses abortion in any particular instance is a complex and difficult task that is easily subject to error. In any event, the reasons why a woman may choose an abortion are irrelevant to MCL 750.14's constitutionality.

68. The denial of abortion harms Michigan women. Women who are denied an abortion must endure comparatively greater risks to their health from continued pregnancy and childbirth, may lose educational opportunities, may face decreased opportunities to advance their careers, and are more likely to experience economic insecurity and raise their children in poverty. And if Michiganders are required to seek abortions outside the state, they would face substantially greater expenses and lost income from time away from work or home.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. No Michigan woman has been denied an abortion authorized by *Bricker*, and choosing

life does not harm women. Governor Whitmer's speculative allegations ignore that women who choose life can also chose adoption and that women have many private and public resources available to help them and their (born and unborn) children. Governor Whitmer cites no reason to think that Michiganders are seeking abortions in other states. Her allegations in this regard are theoretical and dependent on record facts that do not exist because no woman seeking an abortion (let alone a woman denied one) is named as a plaintiff.

69. Women who are denied an abortion face a "large and persistent . . . . increase in financial distress" following the denial of care. They experience more past-due debt and are more likely to experience bankruptcy and eviction. See Miller, Wherry, Greene Foster, *The Economic Consequences of Being Denied an Abortion*, National Bureau of Economic Research (Working Paper 26662 Jan 2022) p 36. They may also face increased pressure to stay in contact with violent or abusive partners, which puts both women and children at risk.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Governor Whitmer wrongly assumes that a woman who chooses life for her child must also personally raise her child and stay in personal contact with putative violent or abusive partners contrary to numerous provisions of Michigan law. It is also hypocritical for Governor Whitmer to claim that women who choose life for their child experience financial distress when she vetoed millions of dollars that the Legislature appropriated for precisely that purpose.

70. Women who are denied access to safe and legal abortions will still terminate unintended pregnancies, possibly through unsafe methods. Those who are forced to carry their pregnancies to term face risks in childbirth, and these risks are greater for women of color, especially Black women. Reducing or eliminating access to legal abortion, then, will increase pregnancy-related

deaths. See Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, Demography (2021).

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations untrue, wholly speculative, and without any basis in fact. The article Governor Whitmer cites is not readily available and merely "*estimate[s]* one component of the mortality impact of denying *all wanted induced abortions* in the United States." Amanda Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, DEMOGRAPHY (2021), https://bit.ly/3s1mB3h (emphasis added). Governor Whitmer gives no reason to think a total abortion ban in all 50 states is looming. The article's purported estimate is irrelevant, and its methods and reliability are likely flawed. Moreover, legalized abortion has had a disproportionately negative impact on the black community. *See Box v Planned Parenthood of Indiana & Ky, Inc*, 139 S Ct 1780, 1783-84 (2019) (Thomas, J, concurring in the denial of certiorari) "("The use of abortion to achieve eugenic goals is not merely hypothetical. The foundations for legalizing abortion in America were laid during the 20th-century birth-control movement. That movement developed alongside the American eugenics movement"); *Id* at 1788 ("In a report titled 'Birth Control and the Negro,' Sanger and her coauthors identified blacks as 'the great problem of the South' – 'the group with "the greatest economic, health, and social problems"' – and developed a birth-control program geared toward this population"). As the CDC recently noted, a highly disproportionate percentage of aborted babies are black. *See* Center for Disease Control, Abortion Surveillance—United States, 2019, 70 Surveillance Summaries, at 20, tbl 6 (Nov. 26, 2021).

71. To participate fully and equally in society, Michigan women need access to abortion. Michigan women deserve the freedom and autonomy to plan their lives knowing that they have access to a common, safe, and key component of reproductive healthcare. They deserve 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. They deserve freedom and autonomy over their bodies and futures.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. Michigan women do not need abortion to participate fully and equally in society. Abortion is not healthcare, and certainly not a common, safe or key component of it. Michigan women already have the ability to make their own decisions about relationships, education, healthcare, and family planning. And Governor Whitmer cites no laws that, as construed and applied, even potentially puts women's health or well-being at risk. Women can exercise freedom and autonomy while choosing life for their child.

72. There are 27 medical providers in Michigan that provide abortions. Fifteen provide surgical abortions and all 27 provide medication abortions.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference state that they are without sufficient information or knowledge to form an opinion about the truth of these allegations.

73. These 27 providers provide abortions in the face of a number of burdensome and medically unjustified regulations that Michigan state law imposes in spite of the safety of abortion procedures. For example, an outpatient facility that performs 120 or more abortions per year and publicly advertises outpatient abortion services must be licensed as a freestanding surgical outpatient facility. MCL 333.20115(2). And each freestanding surgical outpatient facility must

have an agreement with a nearby licensed hospital to provide for emergency admission of patients. MCL 333.20821I. See generally State Facts About Abortion: Michigan, Guttmacher Institute (Jan 2022).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. Michigan laws designed to protect women's safety and welfare are not burdensome or medically unjustified, and abortion is not safe. In addition, Right to Life of Michigan and the Michigan Catholic Conference note that Governor Whitmer's complaint does not challenge the constitutionality of any state licensing or hospital admission laws designed to promote the health and safety of women who choose abortion. So these allegations are of no consequence.

74. The Michigan Supreme Court last opined on the constitutionality of MCL 750.14 in 1973. Much has changed since that time.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that the last time the Michigan Supreme Court construed MCL 750.14 was in *Bricker*, which the Court decided in 1973. They deny the remainder of these allegations because it is not clear what Governor Whitmer means by "[m]uch has changed since that time." Right to Life of Michigan and the Michigan Catholic Conference note that the Michigan Supreme Court's failure to consider MCL 750.14 for nearly 50 years does not advance Governor Whitmer's claims. It shows the lack of any real controversy or dispute regarding MCL 750.14 in five decades, not a problem for this Court to solve.

75. The U.S. Supreme Court and other federal courts have upheld abortion regulations that are inconsistent with the right to abortion articulated by *Roe*. In addition, the Supreme Court, in recent years, has created uncertainty about whether the federal right to abortion is settled law by granting certiorari in cases that appear to be governed by existing precedent, including *Dobbs*.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. The U.S. Supreme Court and lower federal courts have not upheld regulations that are inconsistent with *Roe*. Only the U.S. Supreme Court is capable of establishing what *Roe* demands—Governor Whitmer has no role. Furthermore, Right to Life of Michigan and the Michigan Catholic Conference deny that the U.S. Supreme Court has created uncertainty about *Roe*. The *Dobbs* cert. petition focused on the question of whether all pre-viability prohibitions on elective abortions are unconstitutional. That is the sole question on which the U.S. Supreme Court granted review and it does not necessarily put *Roe*'s validity into doubt, especially as *Casey*'s undue-burden standard displaced *Roe*'s trimester framework 30 years ago. Whether the *Dobbs* Court will head Mississippi's plea to overturn *Roe* is unknown at this time and remains to be seen.

76. The Michigan Court of Appeals has held that the Michigan Constitution does not protect the right to abortion. *Mahaffey*, 222 Mich App at 336. But the Michigan Supreme Court has never addressed the question.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that the Michigan Supreme Court denied leave to appeal in *Mahaffey* and did not resolve the questions raised in that case. But they deny that the Michigan Court of Appeals' decision in *Mahaffey* was erroneous. *Mahaffey* is correct that the Michigan Constitution does not protect a right to abortion.

77. Because the federal right to abortion has been undermined and because the Michigan Supreme Court has never opined on whether, contrary to the Court of Appeals, the Michigan Constitution protects the right to abortion, there is substantial ambiguity about what MCL 750.14, as construed by *Bricker*, prohibits. And there is substantial ambiguity about what, if anything, MCL 750.14 *can* prohibit consistent with the Michigan Constitution's Due Process and Equal Protection Clauses.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit that the Michigan Court of Appeals held (rightly) in *Mahaffey* that the Michigan Constitution does not include a right to abortion and that the Michigan Supreme Court denied review (rightly) in that case and has never ruled on that particular question because there was no need. Right to Life of Michigan denies that "the federal right to abortion has been undermined" or that "there is substantial ambiguity about what MCL 750.14, as construed by *Bricker*, prohibits." On the contrary, the Michigan Court of Appeals in *Higuera* refused to find MCL 750.14 unconstitutionally vague under the facts of that case. 244 Mich App at 440–42, 625 NW2d at 450–52. Here, there are no particular facts, as Governor Whitmer asserts no present, real-world harm, which renders her lawsuit unripe and nonjusticiable. There is no substantial ambiguity about what MCL 750.14 prohibits under the Michigan Constitution, even under Governor Whitmer's mistaken view of the Michigan Constitution's Due Process and Equal Protection Clauses.

78. This ambiguity would be clarified by a holding that MCL 750.14 is unconstitutional under the Michigan Constitution. There is a present need for such clarification, and likewise a pronounced imminent need in light of the possibility of changes to the federal right to abortion in *Dobbs*.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. There is no "ambiguity" that needs clarification, let alone an "imminent need" for clarification. Governor Whitmer's allegations are purely theoretical and there is no harm to women seeking abortion or their supporters (like Governor Whitmer). As reflected in paragraph 78's own language, Governor Whitmer relies on "the *possibility* of [future] changes to the federal right to abortion in *Dobbs*." (emphasis added). No actual controversy exists, Governor Whitmer's claims are unripe and nonjusticiable, and the Court should dismiss her suit.

Count I: Violation of Article 1, § 17 of the Michigan Constitution

79. The Governor hereby repeats, realleges, and reiterates each and every allegation in the preceding paragraphs as if fully restated herein.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference affirm and incorporate their answers to the previous paragraphs as if fully set forth herein.

80. The Due Process Clause of the Michigan Constitution protects the right to privacy, which includes a right to abortion.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. The Michigan Constitution's Due Process Clause protects no abortion right.

81. The right to privacy has a long pedigree in Michigan. The Michigan Supreme Court has "recognized privacy to be a highly valued right" since 1881. *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465, 504 (1976), citing *De May v Roberts*, 46 Mich 160 (1881). The Due Process Clause in the 1963 Constitution provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. This clause includes a right to privacy. See, e.g., *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich at 504 ("No one has seriously challenged the existence of a right to privacy in the Michigan Constitution . . . .").

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Any privacy right protected by the Michigan Constitution's Due Process Clause has nothing to do with abortion.

82. The right to privacy is also guaranteed by the Unenumerated Rights Clause, which protects rights retained by the people that are not otherwise enumerated in the Michigan Constitution. Const 1963, art 1, § 23. *See* 2 Official Record, 1961 Constitutional Convention, p

3365 (stating that § 23 is “taken from the 9th amendment to the U.S. Constitution” and “recognizes that no Declaration of Rights can enumerate or guarantee all the rights of the people”); see also *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich at 505 (recognizing a right to privacy in art. 1 of the Michigan Constitution, analogous to the federal right derived, in part, from the Ninth Amendment).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Any privacy right protected by the Michigan Constitution’s Unenumerated Rights Clause has nothing to do with abortion.

83. The right to bodily integrity, a component of the right to privacy, protects against “compelled intrusion into the human body.” *Missouri v McNeely*, 569 US 141, 159 (2013). “ ‘[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.’ ” *Mays v Snyder*, 323 Mich App 1 (2018) (quoting *Union Pacific R Co v Botsford*, 141 US 250, 251 (1891)), *aff’d Mays v Governor of Michigan*, 506 Mich 157 (2020); cf. *Schmerber v California*, 384 US 757, 772 (1966) (“The integrity of an individual’s person is a cherished value of our society.”).

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Any right to bodily integrity protected by the Michigan Constitution does not include a right to abortion.

84. The rights to privacy and to bodily integrity protect the right to abortion.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. Any constitutional right to privacy or bodily integrity does not include a right to abortion.

85. MCL 750.14 violates Michiganders' constitutional right to abortion.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny that Michiganders have any constitutional right to abortion or that MCL 750.14 violates any such right.

86. There is substantial uncertainty as to what MCL 750.14 now prohibits and will prohibit, creating uncertainty for Michigan women about the scope of their right to reproductive freedom and whether that right will continue to be protected.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. There is no substantial uncertainty as to what MCL 750.14 prohibits. Governor Whitmer's lawsuit raises only the hypothetical possibility of future harm contingent on a chain of speculative events that may not happen. MCL 750.14's text and the Michigan Supreme Court's construction of the statute have not changed. And Michigan women bear no uncertainty in procuring an abortion that *Bricker* authorizes, as Michigan law has not changed in nearly 50 years.

87. The possibility of enforcement of MCL 750.14 by Defendants is chilling the exercise of the constitutional right to abortion.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. County prosecutors will not enforce MCL 750.14 contrary to *Bricker* and no Michigan woman is chilled in seeking an abortion that *Bricker* authorizes.

88. The Court must clarify the due process right to abortion under the Michigan Constitution to preserve Michigan women's exercise of that right.

<u>ANSWER</u>: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations as untrue. There is no due process right to abortion under the Michigan Constitution, this case is not ripe or justiciable, and Michigan women's ability to procure an abortion authorized by *Bricker* has not changed.

Count II: Violation of Article 1, § 2 of the Michigan Constitution

89. The Governor hereby repeats, realleges, and reiterates each and every allegation in the preceding paragraphs as if fully restated herein.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference affirm and incorporate their answers to the previous paragraphs as if fully set forth herein.

90. The Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws." Const 1963, art 1, § 2.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference admit this allegation.

91. Under the Equal Protection Clause of the Michigan Constitution, legislation that creates sex-based classifications, including pregnancy-based classifications, is subject to heightened scrutiny.

ANSWER: Paragraph 91 states legal conclusions to which no response is required.

92. The 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 (2010). "When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity." Id.

ANSWER: Paragraph 92 states legal conclusions to which no response is required.

93. Where legislation creates a classification based on gender, it is subject to an intermediate level of scrutiny ("heightened scrutiny"). *People v Idziak*, 484 Mich 549, 570 (2009). "Under th[e heightened scrutiny] standard, a challenged statutory classification will be upheld only

if it is substantially related to an important governmental objective." *Phillips v Mirac, Inc*, 470 Mich 415, 433 (2004).

ANSWER: Paragraph 92 states legal conclusions to which no response is required.

94. Pregnancy-based classifications are sex-based classifications under Michigan's Equal Protection Clause because they are justified by physical differences between men and women.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. Not all laws involving pregnancy, in some broad sense, are sex-based or justified by physical differences between men and women. The statute bans performing an abortion, in certain circumstances identified by *Bricker*, regardless of whether the person performing the abortion is a man or a woman. But Right to Life Michigan and the Michigan Catholic Conference admit that there are physical differences between men and women.

95. MCL 750.14 is a sex-based classification.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. MCL 750.14 is not a sex-based classification. The statute bans performing an abortion, in certain circumstances identified by *Bricker*, regardless of whether the person performing the abortion is a man or a woman.

96. MCL 750.14 cannot survive heightened scrutiny because its passage was rooted in a desire to control women and reinforce patriarchy and therefore is not substantially related to an important governmental objective.

ANSWER: Right to Life of Michigan and the Michigan Catholic Conference deny these allegations. MCL 750.14 is not subject to heightened scrutiny. In addition, MCL 750.14 is substantially related to important governmental objectives and is not rooted in a desire to control women or reinforce patriarchy. The statute is designed to recognize the value of and protect

innocent human life, as well as uphold the do-no-harm principle that has governed the medical profession for millennia.

AFFIRMATIVE AND OTHER DEFENSES

Intervening Defendants assert the following affirmative and other defenses without assuming any burdens of production or proof that, pursuant to law, belong to Plaintiff:

1. Governor Whitmer's anticipatory claims are nonjusticiable and unripe.

2. The Michigan Constitution does not create a right to abortion, as confirmed by (1) *Mahaffey*, 222 Mich App at 336, 564 NW2d at 110 ("[T]here is no right to abortion under the Michigan Constitution."), (2) the Michigan Constitution's terms as they would have been commonly understood at the time of ratification, (3) Michigan's outlawing of abortion for more than 100 years at the time the Michigan Constitution was adopted, (4) essentially the same electorate rejecting a proposal to amend the abortion statute less than 10 years after the Michigan Constitution was adopted, and (5) Michigan law's protection of unborn children in a variety of contexts.

3. If a state court accepts Governor Whitmer's contention that the Michigan Constitution creates a right to abortion, the U.S. Constitution supersedes that right. The Fourteenth Amendment guarantees due process and equal protection to all members of the human species, including unborn members from the moment of conception. In addition to the Constitution's text, this understanding is confirmed by (1) the public, dictionary, and legal meaning of "person," (2) nearly every state's law banning abortion, and (3) the state's discarding of the "quickening" evidentiary

rule as obsolete at the time the Fourteenth Amendment was adopted, as well as by (4) the Fourteenth Amendment's purpose to protect all human beings.

4. A state court's decision to accept Governor Whitmer's contention that MCL 750.14 has been invalid for the past 59 years, since the moment the Michigan Constitution became effective in 1963, would violate article IV, section 2 of the U.S. Constitution, which states: "The United States shall guarantee to every State in this Union a Republican Form of Government." This provision safeguards effective majority rule through elective representatives and prevents arbitrary exercises of power by the state judiciary. Judges are not free to rule that the Michigan Constitution means whatever they prefer or deem the Michigan Legislature incapable of dealing with controversial issues like abortion. Accepting the Governor's claims would place a minority faction (of state judges) in control of Michigan's abortion laws without regard to the will of the people or the democratic process, violating a basic norm of republican government.

5. Right to Life of Michigan and the Michigan Catholic Conference reserve the right to amend and/or supplement these affirmative defenses to confirm with evidence that may be uncovered in discovery.

REQUEST FOR RELIEF

WHEREFORE, Right to Life of Michigan and the Michigan Catholic Conference request that this Court: (1) dismiss Governor Whitmer's Complaint, in its entirety; or, in the alternative, (2) enter judgment in their favor on all claims asserted in the Complaint; (3) award them any costs, including attorney fees, incurred in defending against this wrongly filed action; and (4) and grant them any other relief this Court deems just and proper.

Respectfully submitted,

Dated: May 4, 2022

ALLIANCE DEFENDING FREEDOM

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Attorneys for proposed intervenors Right to Life of Michigan and the Michigan Catholic Conference

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 4

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GRETCHEN WHITMER,
Governor,

Plaintiff,

Case No. 2022-193498-CZ
Hon. JACOB JAMES CUNNINGHAM

-vs-

JAMES R. LINDERMAN,
Prosecuting Attorney of Emmet County, *et al.*,

Defendants.
_____/

ORDER RE: PRAECIPE TITLED PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S MOTION TO INTERVENE

At said session of the Sixth Circuit Court held in the County
of Oakland, City of Pontiac, State of Michigan,
on this 24TH day of May, 2022.

Non-Parties proposed intervenors Right to Life of Michigan and Michigan Catholic Conference filed a motion and corresponding praecipe for Wednesday, May 25, 2022, at 8:30 a.m. However, in consideration of the May 20, 2022, order of the Michigan Supreme Court in docket number 164256, and in order to allow Plaintiff time to comply with the Michigan Supreme Court's request for additional briefing, this Court ADJOURNS Proposed Intervenors' motion pending resolution of the Michigan Supreme Court's recent directives. MCR 2.503(D)(1).

As such, the Court dispenses with oral argument, MCR 2.119(E)(3), and DISMISSES the praecipe for the purposes of docket management and removes this case from the Court's motion call docket. *Banta v Serban*, 370 Mich 367, 368 (1963) (Michigan's courts recognize that a trial court has the inherent power to control the

movement of cases on its docket); see also MCL 600.611. Parties need not appear on May 25, 2022. The motion may be repraeciped upon further direction by the Michigan Supreme Court directing this Court to take action on this file.[1]

IT IS SO ORDERED.

/s/ Jacob James Cunningham
May 24, 2022

Dated: 5/24/2022

Hon. JACOB JAMES CUNNINGHAM
Circuit Court Judge

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[1] The Court notes, the Michigan Supreme Court has already granted leave for and accepted participation from, non-parties in the Michigan Supreme Court proceedings at this juncture. Therefore, to an extent, the relief sought before this Court has already been granted by leave of the Michigan Supreme Court.

EXHIBIT 5

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.

---

[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

August 1, 2022
Date

Chief Clerk

EXHIBIT 6

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

PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S RENEWED MOTION TO INTERVENE PURSUANT TO MCR 2.209

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 RENEWED 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, 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) (per curiam). That published Court of Appeals decision is still binding today. 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. Right to Life of Michigan

and the Michigan Catholic Conference filed a timely motion to intervene on May 4, 2022. But on May 24, 2022, this Court canceled the hearing on that motion and removed this case from the motions docket, indicating that it would wait for guidance from the Supreme Court.

4. On the same day Governor Whitmer filed suit in this Court she submitted an Executive Message to the Michigan Supreme Court, asking it, under MCR 7.308, to authorize this Court to certify three questions for the Supreme 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. Right to Life of Michigan and the Michigan Catholic Conference subsequently filed a motion to intervene in the Supreme Court on April 22, 2022. The Supreme Court has ordered briefing on five questions that inform whether it should grant the Governor's certification request. But the Supreme Court has not ruled on the Governor's request or Right to Life of Michigan and the Michigan Catholic Conference's motion to intervene.

5. The same day that Governor Whitmer filed suit in this Court 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. On May 17, 2022, without a hearing or any opposition on the merits from the non-adverse parties, the Court of Claims granted Planned Parenthood's request for a preliminary

injunction enjoining MCL 750.14's enforcement. The Court of Claims's injunction purported to apply not just to the Attorney General's Office but to every county prosecutor in the state.

6. Along with Prosecuting Attorneys Jarzynka and Becker, Right to Life of Michigan and the Michigan Catholic Conference filed a complaint for order of superintending control in the Michigan Court of Appeals on May 20, 2022. They requested that the Court of Appeals order the Court of Claims to dismiss the case and/or vacate the preliminary injunction and order Judge Gleicher to recuse. On August 1, 2022, the Court of Appeals concluded that the Court of Claims lacked jurisdiction over county prosecutors because they are local—not state—officials. Consequently, the Court of Claims's preliminary injunction did not apply to county prosecutors and Prosecuting Attorneys Jarzynka and Becker were free to enforce MCL 750.14. The Court of Appeals subsequently dismissed the complaint based on the standing doctrine.

7. The same day the Court of Appeals issued its order on Proposed Intervenors' complaint for order of superintending control, Governor Whitmer filed a motion for an ex parte TRO in this Court. The Governor's ex parte motion, accompanied by a 20-page brief and several exhibits, obviously had been prepared beforehand in anticipation of an adverse Court of Appeals ruling. Even though this case had been pending for months without any substantive action, the parties and their counsel were known and available to respond on short notice, and the Court of Appeals's published decision in *Mahaffey* establishes that "there is no right to abortion under the Michigan Constitution," the Governor's ex parte motion asserted that the Michigan Constitution creates a right to abortion. 222 Mich App at 336. Governor Whitmer cited the Michigan Constitution's protection of privacy and equal protection in support, although she did not distinguish *Mahaffey* or adequately explain either legal theory. The Governor's ex parte motion requested an immediate order prohibiting county prosecutors from enforcing MCL 750.14.

8. Shortly after the Governor filed her ex parte motion, this Court issued a TRO prohibiting the county prosecutor defendants from enforcing MCL 750.14. The Court also set a Zoom hearing for August 3, 2022, at 2:30 pm. As the Supreme Court has still not taken any substantive action on the Governor's certification request, it appears the Court is done waiting for guidance from the Supreme Court and plans to allow this case to proceed.

9. Right to Life of Michigan and the Michigan Catholic Conference now renew their Motion to Intervene in this case, No. 22-193498-CZ, under MCR 2.209.

10. 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 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."

11. 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).

12. 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 Sec'y of State*, 506 Mich 561, 575; 957 NW2d 731 (2020).

13. "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, 508; 746 NW2d 118 (2008) (per curiam) (emphasis added and citations omitted).

14. 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 W Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001) (per curiam) (emphasis added).

15. "[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) (per curiam) (citations omitted) ("The proposed intervenors satisfied the second requirement by establishing that their representation is or *may be* inadequate.")

16. 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).

17. 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).

18. First, their motion to intervene is timely. Governor Whitmer sued on April 7, 2022, and Right to Life of Michigan and the Michigan Catholic Conference filed their initial motion to intervene a few weeks later, before any issues have been decided or any procedural Rubicons have

been crossed. This Court put that motion on hold and looked to the Supreme Court for guidance. Right to Life of Michigan and the Michigan Catholic Conference's renewed motion to intervene comes directly after this Court reactivated the case by granting the Governor's motion for an ex parte TRO.

19. 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 the county prosecutors who are defending Michigan's pro-life law 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. Right to Life of Michigan and the Michigan Catholic Conference are almost certain to advance different legal arguments than Defendants, including the federal constitutional defenses raised in their proposed answer. Proposed Answer at 45–46.

20. 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.

21. The Michigan Catholic Conference serves as the official voice of the Catholic Church in Michigan on matters of public policy. Its mission is to promote a social order that

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

22. 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.

23. Proposed intervenors regularly (1) work with the Michigan Legislature to enact pro-life legislation, (2) strive to enact pro-life laws through ballot initiatives, and (3) defend pro-

life laws in court. And they often succeed. Depending on the breadth of this Court's ruling, the Governor's lawsuit threatens to invalidate laws that were enacted as a direct result of proposed intervenors' efforts. When it comes to defending pro-life laws, Right to Life of Michigan and the Michigan Catholic Conference's interests are second to none.

24. Just some of the pro-life legislation that Right to Life of Michigan and the Michigan Catholic Conference have helped shepherd into law includes: the Parental Rights Restoration Act (MCL 722.901–08), the informed consent law (MCL 333.17015), laws regulating the teaching of or referring for abortion in public schools (MCL 380.1507 & 388.1766), laws forbidding public funding of abortion (MCL 400.109a), laws protecting infants intended to be aborted but born alive (MCL 333.1071–73), and the Abortion Insurance Opt-Out Act (MCL 550.541–51).

25. What's more, 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 (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.

26. 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. Governor Whitmer's lawsuit threatens to undo all their work. Their interest is unique and shared by no one else.

27. Even though this matter is of key public interest and highly publicized, no one else has sought intervention. That demonstrates, in and of itself, Right to Life of Michigan and the Michigan Catholic Conference's uniquely strong interest in how this case is resolved.

28. 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.

29. 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] A few of the remaining prosecutors have chosen to defend MCL 750.14 and oppose Governor Whitmer's attempt to undermine a Michigan law she is tasked with enforcing, but they may not adequately represent Right to Life of Michigan and the Michigan Catholic Conference's interests.

30. 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.

31. 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

[1] **Exhibit 1**, April 7, 2022 Statement by Seven Michigan Prosecutors; **Exhibit 2**, August 1, 2022 Prosecutors' Statement.

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.

32. What's more, a prosecutor acts on existing law and concrete facts to make a charging decision. 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. Their commitment to protecting innocent life is universal and unflinching.

33. 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 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.

34. 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.[2]

35. Alternatively, this Court should allow Right to Life of Michigan and the Michigan Catholic Conference to intervene by permission under MCR 2.209(B).

36. Intervention is proper under MCR 2.209(B) because Right to Life of Michigan's and the Michigan Catholic Conference's proposed answer raises defenses that "have a question of law or fact in common" with Governor Whitmer's suit. Proposed intervenors have pleaded, directly contrary to the Governor's claims, that "[t]he Michigan Constitution does not create a right to abortion." Proposed Answer at 45. And they raise federal defenses that are directly related to

[2] Governor Whitmer may argue that Right to Life of Michigan and the Michigan Catholic Conference are not entitled to intervene based on the Court of Appeals' recent order dismissing their complaint for superintending control. But the Court of Appeals' analysis pertained to whether Right to Life of Michigan and the Michigan Catholic Conference had standing to file a complaint for superintending control. Unlike standing, the possibly-inadequate-representation standard for intervention does not require a showing of concrete harm (even though that certainly exists here). *Mullinix v City of Pontiac*, 16 Mich App 110, 115; 167 NW2d 856 (1969) (emphasis added) ("[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*."). Here, the "minimal burden" for intervening is satisfied by the fact that legislation and referenda that Right to Life of Michigan and the Michigan Catholic Conference helped enact is at risk. *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). Additionally, Prosecuting Attorneys Jarzynka and Becker have standing to oppose a court order enjoining them from enforcing MCL 750.14. Right to Life of Michigan and the Michigan Catholic Conference, as intervenors, may "'piggyback' on [their] undoubted standing" and need not show independent standing of their own. *Diamond v Charles*, 476 U.S. 54, 64; 106 S Ct 1697 (1986); *accord Little Sisters of the Poor Saints Peter & Paul Home v Pennsylvania*, 140 S Ct 2367, 2379 n6 (2020).

the legal questions presented here but which the existing parties are unlikely to raise, including: (1) the Fourteenth Amendment to the U.S. Constitution protects human life from the moment of conception, superseding any state constitutional right to abortion, and (2) any state court declaration that the Michigan Constitution protects a right to abortion would violate article IV, section 2 of the U.S. Constitution, which guarantees a Republican form of government. Proposed Answer at 45–46.

37. Allowing Right to Life of Michigan and the Michigan Catholic Conference to participate in this matter as amicus curiae would not adequately protect their interests. Generally speaking, "amicus curiae cannot raise an issue that has not been raised by the parties." Kinder Morgan Mich, LLC v City of Jackson, 277 Mich App 159, 173, 744 NW2d 184, 193 (2007) (quotation omitted). Unless Right to Life of Michigan and the Michigan Catholic Conference are permitted to intervene, the Court is unlikely to consider their defenses and resolve the key federal constitutional questions described above.

38. 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 is in its infancy. Other than granting the Governor's motion for an ex parte TRO, this Court has not 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.

39. 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.

Dated: August 3, 2022

Respectfully submitted,

ALLIANCE DEFENDING FREEDOM

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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
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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 2

MOMENT
STRATEGIES

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

Jeffrey S. Getting
Kalamazoo County Prosecutor

Carol A. Siemon
Ingham County Prosecutor

Matthew J. Wiese
Marquette County Prosecutor

Eli Savit
Washtenaw County Prosecutor

David Leyton
Genesee County Prosecutor

Kym L. Worthy
Wayne County Prosecutor

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	2022_08_03 Renewed Mtn. to Intervene - Right to Life & MI Catholic Conf.) (5583643.1)

Person served	E-mail address of service	Date and time of service
Linus Banghart-Linn	Banghart-linnL@michigan.gov	08/03/2022 10:49:17 AM
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2. I, Francine Robinson, 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.

08/03/2022
Date

/s/Francine Robinson
Signature

Smith, Haughey, Rice and Roegge
Firm (if applicable)

EXHIBIT 7

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

GOVERNOR'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO RENEWED MOTION TO INTERVENE OF RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE

ORAL ARGUMENT REQUESTED

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Dated: August 9, 2022

Attorneys for Governor Gretchen Whitmer

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ARGUMENT

Governor Whitmer stands by the arguments made in her initial response in opposition to proposed intervenors' motion to intervene, and offers this supplemental filing in opposition to the renewed motion in order to bring to this Court's attention a few developments that occurred after the initial motion and response.

I. The Court of Appeals held that the proposed intervenors lacked standing in *In re Jarzynka*.

As this Court is aware, Michigan's abortion statutes are simultaneously being challenged on constitutional grounds in *Planned Parenthood of Michigan v Nessel*, No. 22-000044-MM, filed in the Court of Claims on April 7, 2022, and now also pending in the Court of Appeals, No. 362078. Though the parties to that case are different, the legal theories largely overlap, and the relief sought is practically identical.

After the Court of Claims issued a preliminary injunction barring the enforcement of MCL 750.14 on May 17, 2022, two individuals and two organizations filed a complaint for superintending control in the Court of Appeals: Jackson County Prosecuting Attorney Jerard Jarzynka and Kent County Prosecuting Attorney Christopher Becker (defendants in this case), and Right to Life of Michigan (RTL) and the Michigan Catholic Conference (MCC) (proposed intervenors in that case and this one).

On August 1, the Court of Appeals dismissed the complaint for superintending control for lack of standing. (*In re Jarzynka*, No. 361470, 8/1/22

Mich Ct App Order, attached as Ex A.) With respect to Jarzynka and Becker, the court undertook an extended discussion of the law regarding such issues as whether county prosecutors are state or local officials, the relationship between the Attorney General and county prosecutors, and the jurisdiction of the Court of Claims, among others. (Ex A, pp 2–5.)[1]

Turning to RTL and MCC, however, the court had a much easier task. The court held that they had no cognizable interest in that case and therefore no standing to seek superintending control. The court disposed of their standing in three short sentences:

> 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* [*v City of Fraser Civil Serv Comm*, 127 Mich App 239, 243 (1983)], 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," *Lansing Sch Ed Ass'n* [*v Lansing Bd of Ed*, 487 Mich 349, 372 (2010)]. Their complaint for superintending control, therefore, must also be dismissed for lack of standing. [Ex A, pp 5–6.]

The Court of Appeals' order is strong persuasive authority and the Governor submits that this Court should reach the same conclusion. While there are a few differences between that case and this one, there are no differences that are relevant to the motion to intervene. RTL and MCC have suffered no greater injury from the entry of a temporary restraining order in this case than they did from the entry of the preliminary injunction in *Planned Parenthood*. And they have no

[1] None of these questions are before this Court in this case.

greater "special injury or right, or substantial interest" in this case than they did in *Planned Parenthood*.

The Governor therefore submits that this Court should follow the reasoning of the Court of Appeals in *In re Jarzynka* and deny RTL and MCC's renewed motion to intervene. The proposed intervenors may have a strong preference about how this case is resolved, but they have no cognizable interest at stake. The motion to intervene should be denied.

II. The Michigan Supreme Court has accepted RTL's and MCC's pleadings as amici, not as intervenors.

As this Court is also aware, on the same day Governor Whitmer filed her complaint in this Court, she also filed in the Michigan Supreme Court an executive message requesting that this Court be permitted to certify the controlling legal question in this case to the Supreme Court for resolution. *In re Executive Message*, No. 164256. At the August 3rd oral argument on the hearing on the temporary restraining order, this Court had an exchange with counsel for both parties regarding pleadings filed by RTL and MCC in the Michigan Supreme Court.[2] To the best of undersigned counsel's recollection, counsel for defendants Jarzynka and Becker represented to this Court that RTL and MCC were permitted to file a brief in *In re Executive Message*, and that they were permitted to do so as intervening

[2] Although the Governor has ordered the transcripts of the August 3rd hearing, she has not yet received them and does not expect to receive them before this Court hears the motion to intervene. In this pleading, the Governor therefore proceeds from undersigned counsel's recollection of that hearing.

parties in that action. At the hearing, undersigned counsel represented to this Court that, while RTL and MCC were permitted to file a brief in the Supreme Court, they were permitted to do so only as *amici curiae*.

Although RTL and MCC did not move to submit an amicus brief to the Supreme Court, the Court construed the motion they did file as a motion for leave to file an amicus brief, and granted it on those terms. (Ex B, *In re Executive Message*, No. 164256, 6/15/22 Order.) Thus, any suggestion that the Michigan Supreme Court has indicated that RTL and MCC have standing or should be permitted to intervene in any action regarding the constitutionality of Michigan's abortion laws is mistaken.

III. Recent developments undermine RTL and MCC's assertion that their interests will not be represented by existing parties to this case.

This Court should further consider two other developments that indicate that the proposed intervenors' position will be represented by parties to this litigation.

First, when RTL, MCC, Jarzynka, and Becker sought superintending control over the Court of Claims in *In re Jarzynka*, all four were represented by the same counsel, and filed a single complaint jointly.

Second, the proposed intervenors' renewed motion indicates that they would, if permitted to intervene, raise novel "alternative arguments" under the Fourteenth Amendment and the Guarantee Clause. (Renewed Mot, ¶¶ 33, 36.) But only hours after the renewed motion was filed, counsel for defendants Jarzynka and Becker

raised exactly those arguments before this Court in their opposition to the temporary restraining order.

It is evident that counsel for RTL and MCC is aligned with counsel for Jarzynka and Becker, and so, even assuming the arguments the proposed intervenors would advance would aid this Court at all, there is no need to add parties to the case to present those arguments.

CONCLUSION AND RELIEF REQUESTED

For these reasons and for the reasons stated in her initial response in opposition to the motion to intervene, Governor Whitmer respectfully requests that this Court deny the motion.

Respectfully submitted,

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Dated: August 9, 2022

Attorneys for Governor Gretchen Whitmer

EXHIBIT 8

STATE OF MICHIGAN

IN THE CIRCUIT COUR 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. WOTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants.

Case No. 22-193498-CZ
Hon. Jacob J. Cunningham

DEFENDANTS' RESPONSE IN OPPOSITION TO RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S RENEWED MOTION TO INTERVENE PURSUANT TO MCR 2.209

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PROSECUTING ATTORNEYS MCDONALD, SAVIT, LEYTON, SIEMON, GETTING, WEISE, AND WORTHY'S RESPONSE IN OPPOSITION TO RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S RENEWED MOTION TO INTERVENE PURSUANT TO MCR 2.209

INTRODUCTION

Through their motion to intervene, Right to Life of Michigan ("RTL") and the Michigan Catholic Conference ("MCC") (collectively, "Proposed Intervenors") ask the Court to give them a heightened status and treat them differently from all others who have a generalized and similar interest. Proposed Intervenors assert that they have an interest to intervene because they have expended resources in combating reproductive rights in Michigan and defending pro-life legislation. However, if this Court were to grant intervention on such grounds there would be no end to the parties in a particular litigation. The Proposed Intervenors do not have a right to intervene under MCR 2.209 because: (1) they have no cognizable interest as already determined by the Michigan Court of Appeals in a similar lawsuit; and (2) any interests they maintain are being adequately represented by the existing parties.

The Court should reject this latest attempt to add additional parties who would only mire these proceedings in excess lawyers, motions, and briefing – none of which equates to more justice, but unequivocally equates to more burden on the existing parties and this Court. Given the exigent nature of these proceedings, this extra burden will cause unnecessary delay and, thus, prejudice to the parties as time is of the essence. In this case, perhaps more than any other justice delayed will be justice denied. *Michigan Consol Gas Co v Michigan Pub Serv Comm*, 389 Mich 624, 637; 209 NW2d 210, 214 (1973).

ARGUMENT

A. Proposed Intervenors are not intitled to intervene as of right because they have no cognizable interest in the case and cannot demonstrate that they are inadequately represented by a party to the suit.

MCR 2.209 permits intervention as of "right" and "permissive" intervention. On timely application a person has a right to intervene in an action:

> (1) when a Michigan statute or court rule confers an unconditional right to intervene;
>
> (2) by stipulation of all the parties; or
>
> (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated 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.

MCR 2.209(A)(1)-(3). As for "intervention of right," there is no "Michigan statute or court rule [that] confers an unconditional right to intervene" for the Proposed Intervenor. MCR 2.209(A)(1). And the parties have not stipulated to the intervention. MCR 2.209 (A)(2). As a result, Proposed Intervenor must show: an interest relating to the property or transaction which is the subject of the action and is so situated 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. MCR 2.209(A)(3). Here, Proposed Intervenors cannot meet such burden.

First, Proposed Intervenors do not have a cognizable interest in the case. They are advocates of organizations who are not being sued and whose rights are not being challenged. Although they care deeply about the case, they have only a generalized interest related to the outcome of the case – as do the millions of Michigan residents. There is nothing special about Proposed Intervenors warranting intervention. In fact, on August 9, 2022, the Michigan Court of

Appeals came to a similar conclusion. On May 17, 2022, Proposed Intervenors and Defendant Jarzynka and Becker, represented by the same counsel, filed a complaint *jointly* in the Michigan Court of Appeals seeking superintending control related to Court of Claims Case No. 22-000044-MM, *Planned Parenthood of Mich v Mich Attorney General*.[1] The legal theories and relief sought are almost identical to those in the case at bar. On August 1, 2022, the Court of Appeals dismissed the complaint and held that they had no cognizable interest in that case and thus had no standing to seek superintending control. *(In re Jarzynka, No*. 361470, 8/1/22 Mich App Order, Ex A); see also *In re Jarzynka*, unpublished opinion of the Court of Appeals, issued August 1, 2022 (Docket No. 361470), 2022 WL 3041132, p *5.[2]

In relevant part, the Michigan Court of Appeals held that the "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,' *Lansing Sch Ed Ass'n*, 487 Mich at 372. Their complaint for superintending control, therefore, must also be dismissed for lack of standing." Due to the similar nature, legal theories, and relief sought, Proposed Intervenors have no greater "special injury or right, or substantial interest" here than they did in *Planned Parenthood of Mich v Mich Attorney General*. The court rule itself does not contain a standing requirement, however, case law provides that a petitioner must also demonstrate standing to intervene in litigation. "Although [petitioners] have a basis to intervene as of right, they must also

[1] Jackson County Prosecuting Attorney Jerard Jarzynka and Kent County Prosecuting Attorney Christopher Becker are defendants in this case.

[2] An unpublished decision may be considered for its instructive and persuasive reasoning. *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562; 892 NW2d 388 (2016).

demonstrate that they have standing to assert their claims." *Karrip v Cannon Twp*, 115 Mich App 726, 732; 321 NW2d 690 (1982). Proposed Intervenors not only lack standing, they lack any cognizable interest as required under MCR 2.209, and thus have no business intervening in this case.

Instead, Proposed Intervenors ask the Court for special treatment to intervene because they have expended resources in combating reproductive rights in Michigan and have defended pro-life legislation, and are thus interested in the outcome of the case. Such arguments and analysis do not meet the legal standard for intervention, nor do Proposed Intervenors provide any Michigan authority to the contrary. They have failed to show the existence of any cognizable interest that will be detrimentally affected in a manner different from the citizenry at large. "Where one seeks to intervene who is not a necessary party under our statute, the trial court may exercise its discretion, and, unless there is a clear abuse of such discretion, no error is committed in denying the right to intervene." *Sch Dist of City of Ferndale v Royal Oak Tp Sch Dist No 8*, 293 Mich 1, 10; 291 NW 199, 203 (1940).

Even if this Court were to determine that the Proposed Intervenors had an interest (which it should not), that would still not warrant intervention. "The existence of an interest is not by itself dispositive because the Court Rules require the Court to determine whether the interest of the proposed intervenor is adequately represented by existing parties." (*Mothering Justice v Nessel*, No. 21-000095-MM, 4/27/22 Opinion and Order, Ex B). So, even a proposed intervenor who can show an interest will still be denied intervention if that interest is already represented by an existing party. Here, Proposed Intervenors not only share the same interest as some of the existing Defendants, they also share(d) the same counsel in *In re Jarzynka.*

Applicants for intervention bear the burden of proving that they are inadequately represented by a party to the suit. *United States v Michigan*, 424 F3d 438, 443 (CA 6, 2005). Accordingly, even assuming an "interest related to the . . . transaction which is the subject of the action," Proposed Intervenors are not "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest" precisely because its "interest is adequately represented by existing parties." MCR 2.209(A)(3). Here, Proposed Intervenors have not demonstrated that the existing Defendants in opposition to Plaintiff's interests (and thus the interests of Proposed Intervenors) are not adequately represented in this case. In fact, there is no separation between their interests and objectives at all.

For example, Proposed Intervenors and Defendant Jarzynka and Becker were represented by the same counsel, as recently as a few months ago, when they jointly filed a complaint in the Michigan Court of Appeals *(In re Jarzynka, No*. 361470, 8/1/22 Mich App Order, Ex A). They both want precisely the same result.

Moreover, Proposed Intervenors assert that they would raise "alternative arguments" under the Fourteenth Amendment and under the Guarantee Clause. (Renewed Mot, ¶¶33, 36). However, counsel for Defendants Jarzynka and Becker raised those same arguments in their opposition to the temporary restraining order last week. Clearly, Proposed Intervenors and Defendants Jarzynka and Becker's interests and arguments are aligned. RTL and MCC even concede that they may "piggyback" on Defendants Jarzynka and Becker's standing and "need not show independent standing of their own." (Renewed Mot, ¶ 14). Here, because Proposed Intervenors and Defendants Jarzynka and Becker share the same ultimate objective, and assert substantially the same arguments, it is the Proposed Intervenors' burden to overcome the presumption of adequate representation, which they cannot do here.

Next, the Proposed Intervenors argue that Defendants Jarzynka and Becker could be replaced in an election by prosecutors who share Governor Whitmer's views. However, courts do not typically allow intervention based upon "what will transpire *in the future*." *United States v Michigan*, 424 F3d 438, 444 (CA 6, 2005).[3] Proposed Intervenors' hypothetical situation does not currently exist, and it may never exist.[4]

Likewise, it is premature to speculate that the defendants who wish to defend MCL 750.14 would be reluctant to defend this matter because they "are place[d]…in a difficult political and legal position" as Proposed Intervenors assert. (Renewed Mot, ¶ 31) First, that argument applies equally to all parties, and it is not relevant to this Court's analysis. Second, difficult legal and political positions are no stranger to elected officials. Indeed, defendants in this case have engaged in zealous advocacy, including filing and arguing multiple briefs and opposing certification in the Michigan Supreme Court which demonstrates that the Proposed Intervenor's premonition on what "may transpire in the future" is particularly attenuated.

Third, speculation serves no basis for intervention. For example, the House and Senate filed a motion to intervene in *League of Women Voters* and argued that the Department of Attorney General "may change course later in the action and may elect not to defend the entirety of the statute" at issue. (*League of Women Voters v Sec'y of State,* No.21-000020-MM, 3/31/21 Opinion and Order, Ex C). When denying the motion to intervene, the Court held, "[w]hile inadequacy of representation need not be definitely established…the speculation of the House and Senate does not, on the record currently before the Court, convince the Court that the risk of inadequate

[3] The Supreme Court has found that there is striking similarity between the state and federal intervention provisions and, thus, looked to the federal courts for guidance. *Karrip v Cannon Tp*, 115 Mich App 726, 731; 321 NW2d 690, 692 (1982).

[4] We note that every defendant in this case has more than 30 months remaining in their term.

representation may exist. That is, the assertions and efforts made by the Attorney General [were] far more convincing than the speculation offered by the House and Senate." *Id*. at 3. Here, Proposed Intervenors offer nothing more than conjecture.

B. Proposed Intervenors are not intitled to permissive intervention because they do not have a claim or defense required by MCR 2.209(B).

Likewise, the Court should exercise its discretion and reject "permissive intervention." MCR 2.209(B)(2) provides for permissive intervention (1) when a Michigan statute or court rule confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. MCR 2.209(B)(1)-(2).

Here, the case for permissive intervention also fails for the same reasons asserted in section A, and that is, RTL and MCC's interests in this matter are already adequately represented. There is no "Michigan Statute or court rule [that] confers a conditional right to intervene" and Proposed Intervenors have not asserted any such rule or right in this case. MCR 2.209(B)(1). Even if Proposed Intervenor's "claim or defense and the main action have a question of law or fact in common," those questions of law and fact are precisely the same as those currently at issue with the existing parties. Proposed Intervenors have not alleged or demonstrated that their legal rights and obligations are at issue.

Furthermore, the case law relied upon by RTL and MCC (*Burg v B&B Enters, Inc*, 2 Mich App 496, 499; 140 NW2d 788 (1966) and *Hill v LF Transp, Inc*, 227 Mich App 500, 508; 746 NW2d 118 (2008)) are not analogous to the case at bar because those cases involved intervenors who personally had claims against the plaintiff, and their claims had questions of law and fact in common with those in the initial lawsuit. Proposed Intervenors assert they have been granted

intervention in the past as a basis for intervention in this matter. However, such intervention in the past is distinguishable because intervention was not opposed in those cases. It is unequivocally opposed in this matter.

Proposed Intervenors may still advocate their positions in this case as amicus curiae. That allows them to file briefing in support of the opposing Defendants without causing delay and an additional burden For example, the Michigan Legislature, who makes similar arguments as Proposed Intervenors, filed an amicus brief in *Whitmer v Linderman* Supreme Court Case No: 164256 on June 8, 2022. And, there were more than 140 amicus briefs filed in *Dobbs v Jackson Women's Health Organization*.[5] Likewise, here Proposed Intervenors are free to request to file briefs as amicus curiae.

Lastly, allowing duplicative representation of the same interests would be unnecessary and would complicate the proceedings. Under MCR 2.209, permitting Proposed Intervenors to intervene "will unduly delay or prejudice the adjudication of the rights of the original parties" by simply adding more parties, more lawyers, and redundant briefing, thereby delaying the proceedings and placing extra burdens on parties and this Court. As years of precedent has established, intervention may not be proper where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action. *Ferndale School Dist v Royal Oak Twp School Dist No. 8,* 293 Mich 1, 291 NW 199 (1940); *Hill v LF Transp, Inc*, 227 Mich App 500, 508; 746 NW2d 118 (2008). Our Supreme Court has recognized with wisdom of the "old saying, justice delayed is justice denied." *Michigan Consol Gas Co v Michigan Pub Serv Comm*, 389 Mich 624, 637; 209 NW2d 210, 214 (1973). This applies with particular force here, where

[5] https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to/ *Dobbs v Jackson Women's Health Org*, 142 S Ct 2228 (2022)

women and providers will remain in limbo regarding life and death decisions until this case is definitively decided. Allowing Proposed Intervenors to complicate, delay, and burden this case, is not simply justice denied, it is injustice with an escalating price tag.

CONCLUSION

WHEREFORE, Prosecuting Attorneys McDonald, Savit, Leyton, Siemon, Getting, Wiese, and Worthy respectfully request that this Honorable Court DENY Proposed Intervenor's Motion to Intervene and grant all other relief as is just and appropriate.

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Exhibit A

Court of Appeals, State of Michigan

ORDER

In re Jarzynka		Stephen L. Borrello Presiding Judge
Docket No.	361470	Michael J. Kelly
LC No.	22-000044-MM	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.

[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*

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[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

August 1, 2022
Date

Chief Clerk

Exhibit B

STATE OF MICHIGAN

COURT OF CLAIMS

MOTHERING JUSTICE, et al.,

Plaintiffs,

v

DANA NESSEL, et al.,

Defendants,

MICHIGAN HOUSE OF REPRESENTATIVES AND MICHIGAN SENATE,

Proposed Intervening Defendants.
_____/

OPINION AND ORDER

Case No. 21-000095-MM

Hon. Douglas B. Shapiro

Pending before the Court is the April 4, 2022 motion to intervene filed by the Michigan House of Representatives and the Michigan Senate. The motion is DENIED. However, the Court will GRANT proposed intervenors the opportunity to participate as amicus curiae by submitting briefing as directed herein.

I. RELEVANT PROCEDURAL HISTORY

At issue in this case is the so-called "adopt-and-amend" approach employed by the Legislature when it enacted 2018 PA 368 and 2018 PA 369. Plaintiffs challenge the constitutionality of this procedure, and the Michigan House and Senate (proposed intervenors) seek to intervene as defendants. Proposed intervenors filed their motion to intervene on April 4, 2022, and they expressed concerns that defendants might not file a brief in support of the

constitutionality of the statutes at issue. Those concerns turned out to be unfounded because, on April 7, 2022, the Court entered a stipulated order whereby the parties agreed that there would be "two teams of attorneys from the Department of Attorney General" who would represent defendants and that "attorneys representing Defendant State of Michigan will argue that PAs 368 and 369 are constitutional and in effect." Thus, the position that proposed intervenors seek to advance is now being advanced by a designated team of attorneys from the Department of Attorney General.

II. INTERVENTION IS NOT WARRANTED

Presently at issue at this time is whether intervention is warranted in this case, either as of right or by permission. With respect to intervention as of right, MCR 2.209(A) provides:

> (A) Intervention of Right. On timely application a person has a right to intervene in an action:
>
> > (1) when a Michigan statute or court rule confers an unconditional right to intervene;
> >
> > (2) by stipulation of all the parties; or
> >
> > (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated 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.

The first two options for intervention as of right are unavailable to proposed intervenors in this case, as they point to no statute or court rule conferring the right to intervene, and the motion for intervention has been contested by all named parties. Thus, proposed intervenors must show an interest in the action that is not "adequately represented by existing parties."

The Court will assume for purposes of argument that the motion to intervene was timely filed, although the Court notes that the concerns cited in support of the motion for intervention

existed months ago. The question then, is whether there is an interest that is not adequately represented by existing parties. As acknowledged recently and as to which there can be little dispute, "the Legislature has a sufficient interest in defending its own work . . . ." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 579; 957 NW2d 731 (2020) (citation and quotation marks omitted).

However, the existence of an interest is not by itself dispositive because the Court Rules require the Court to determine whether the interest of the proposed intervenor is adequately represented by existing parties. And it is on this point where the Court disagrees with the assertions of proposed intervenors. Whatever concerns of inadequate representation that might have previously existed have now been, to the Court's satisfaction, resolved by the decision of the Department of Attorney General to appoint a team of attorneys to argue in favor of the constitutionality of the public acts at issue. And the attorneys are, by and large, the same attorneys who already advanced this position when an advisory opinion was sought from the Supreme Court. The Court neither shares nor gives credence to the speculative assertions by proposed intervenors about whether the representation by the Department of Attorney General will protect the Legislature's interest. While the Court acknowledges that the rule for intervention "should be liberally construed," *Hill v LF Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008), it must still find that the proposed intervenor's interests may not receive adequate representation. Inadequate representation is not a concern in this case under the circumstances, however.

The Court will also deny the request for permissive intervention under MCR 2.209(B). Under the Court Rule, permissive intervention may be granted:

> (1) when a Michigan statute or court rule confers a conditional right to intervene; or

> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [MCR 2.209(B)(1)-(2).]

Exercising the discretion afforded by MCR 2.209(B), the Court concludes that permissive intervention is not warranted in this case. The matter is on track for decision on the merits in light of the recent scheduling order, and adding new parties as intervenors at this stage would only threaten to upset the schedule that has already been put in place. And where proposed intervenors' interests are adequately represented, the Court sees no benefit to adding them as parties at this time.

III. CONCLUSION

IT IS HEREBY ORDERED that proposed intervenors' motion to intervene is DENIED.

IT IS HEREBY FURTHER ORDERED that proposed intervenors may submit briefing as amicus curiae. Any such briefing shall be due by May 13, 2022, which is the due date for responsive briefing under the Court's current scheduling order. The named parties may respond to the amicus briefing by no later than May 20, 2022.

This is not a final order and it does not resolve the last pending claim or close the case.

April 27, 2022

Douglas B. Shapiro
Judge, Court of Claims

Exhibit C

STATE OF MICHIGAN

COURT OF CLAIMS

LEAGUE OF WOMEN VOTERS OF MICHIGAN, et al.,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Defendant,

and

DEPARTMENT OF ATTORNEY GENERAL,

Intervenor-Defendant,

and

THE MICHIGAN SENATE AND THE MICHIGAN HOUSE OF REPRESENTATIVES,

Proposed-Intervenors.
_____/

OPINION AND ORDER DENYING MARCH 3, 2021 MOTION TO INTERVENE AND GRANTING AMICI STATUS

Case No. 21-000020-MM

Hon. Cynthia Diane Stephens

Pending before the Court is the March 16, 2021 motion to intervene filed by the Michigan House and the Michigan Senate. The motion is DENIED. However, the Court grants amici status to the Michigan House and the Michigan Senate and accepts as amici briefing the papers already filed by the House and Senate.

Plaintiffs' complaint in this action asserts a number of constitutional challenges to 2018 PA 608. Defendant Jocelyn Benson has indicated that she will not be defending all of the challenged provisions of PA 608. As a result, the Department of Attorney General, pursuant to a stipulated order, intervened in this action. As set forth in the stipulated order entered on or about March 15, 2021, the Department of Attorney General erected a conflict wall to permit a different team of attorneys to defend all of the challenged statutes. Hence, while defendant Benson declined to defend all of the challenged provisions of PA 608, the Department of Attorney General has nevertheless taken steps to ensure that all of the challenged provisions will be defended.

Despite the efforts undertaken by the Department of Attorney General, the Michigan Senate and the Michigan House now move to intervene, contending that their interests in upholding PA 608 will not be adequately represented by the existing parties. They seek to intervene as of right under MCR 2.209(A)(3). Alternatively, they seek permissive intervention under MCR 2.209(B)(2).

Turning first to intervention as of right, MCR 2.209(A) provides that, on timely application, a person has a right to intervene in an action when, as is relevant to the arguments raised here:

> the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated 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. [MCR 2.209(A)(3).]

Caselaw advises that "[t]he rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented." *State Treasurer v Bences*, 318 Mich App 146, 150; 896 NW2d 93 (2016) (citation and quotation marks omitted).

The timeliness of the House and Senate's motion is not in question in the matter at hand, nor is the nature of their interest. See *League of Women Voters of Mich v Sec'y of State*, __ Mich __, __; __ NW2d __ (2020) (Docket Nos. 160907-160908), slip op at 10 (agreeing that "the Legislature has a sufficient interest in defending its own work") (citation and quotation marks omitted). The issue, which the Court considers to be dispositive, is whether the Legislature's interest in "defending its own work" is adequately represented by existing parties. And on this point, the House and Senate have not shown that they have a right to intervene. The Department of Attorney General has repeatedly asserted an intention to defend the entirety of PA 608 and has undertaken steps that will, ostensibly, ensure that the entirety of the Public Act will be defended regardless of any position(s) taken by the Secretary of State in this matter. Stated differently, this is not a scenario involving an executive's nondefense of a statute. Cf. *League of Women Voters*, __ Mich at __, slip op at 10-11.

In fact, in arguing to the contrary, the House and Senate acknowledge the pledge by the Department of Attorney General to seek to uphold PA 608 in its entirety. However, they speculate—and admittedly rely on speculation—to argue that the Department of Attorney General may change course later in the action and may elect not to defend the entirety of the statute. While the inadequacy of representation need not be definitively established, see *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001), the speculation of the House and Senate does not, on the record currently before the Court, convince the Court that the risk of inadequate representation *may* exist. That is, the assertions and efforts made by the Department of Attorney General are more convincing than the speculation offered by the House and Senate.

Accordingly, the House and Senate's interest in defending its legislation are adequately represented by existing parties at this time.[1]

The Court will also deny the request for permissive intervention under MCR 2.209(B). Under the Court Rule, permissive intervention may be granted:

> (1) when a Michigan statute or court rule confers a conditional right to intervene; or
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [MCR 2.209(B)(1)-(2).]

The case for permissive intervention fails for same the reasons stated above. That is, the House and Senate's interests in this matter are already receiving adequate representation. Allowing duplicative representation of the same interests would be unnecessary and would complicate the proceedings. The Court sees no benefit to the orderly adjudication of this case in having two sets of intervening defendants on the same side of the issues presented. See *Hill v LF Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008) (explaining that "intervention may not be proper where it will have the effect of delaying the action or producing a multifariousness of parties and causes of action") (citation and quotation marks omitted).

However, that is not to say that the Court does not welcome some form of participation of the House and Senate. Rather than affording the House and Senate party status, the Court will allow the House and Senate to participate as amici curiae, as they have done in prior cases. In

[1] Moreover, if the House and Senate's fears about inadequate representation came to pass, they could move to intervene again at that time.

addition, the Court will accept the papers already submitted by the House and Senate as amici briefing.

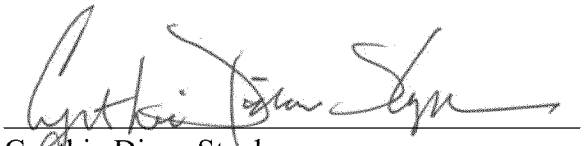
IT IS HEREBY ORDERED that the March 16, 2021 motion to intervene is DENIED.

IT IS HEREBY FURTHER ORDERED that the Michigan House and the Michigan Senate are granted amici status and that the papers filed by those parties are accepted as amici briefing.

This is not a final order and it does not resolve the last pending claim or close the case.

v

April 22, 2021



Cynthia Diane Stephens
Judge, Court of Claims

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
MISCELLANEOUS	Brief in Opposition to Motion to Intervene Fianl with Exhibits

Person served	E-mail address of service	Date and time of service
Linus Banghart-Linn	Banghart-linnL@michigan.gov	08/11/2022 4:58:30 PM
Christina Grossi	grossic@michigan.gov	08/11/2022 4:58:30 PM
Christopher Allen	AllenC28@michigan.gov	08/11/2022 4:58:30 PM
Kyla Barranco	BarrancoK@michigan.gov	08/11/2022 4:58:30 PM
Brooke Tucker	btucker@co.genesee.mi.us	08/11/2022 4:58:30 PM
Russell C Babcock	rbabcock@saginawcounty.com	08/11/2022 4:58:30 PM
Timothy Ferrand	tferrand@cmda-law.com	08/11/2022 4:58:30 PM
David Williams	williamsda@oakgov.com	08/11/2022 4:58:30 PM
John Bursch	jbursch@burschlaw.com	08/11/2022 4:58:30 PM
Jonathan Koch	jkoch@shrr.com	08/11/2022 4:58:30 PM
David Kallman	dave@kallmanlegal.com	08/11/2022 4:58:30 PM
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Wendy Marcotte	wendy@marcottelaw.us	08/11/2022 4:58:30 PM
Sue Hammoud	shammoud@waynecounty.com	08/11/2022 4:58:30 PM
Sarah Osburn	sosburn@cstmlaw.com	08/11/2022 4:58:30 PM
Eli Savit	savite@washtenaw.org	08/11/2022 4:58:30 PM
Bonnie Toskey	btoskey@cstmlaw.com	08/11/2022 4:58:30 PM

2. I, Angela Baldwin, 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.

08/11/2022
Date

/s/Angela Baldwin
Signature

The Miller Law Firm, P.C.
Firm (if applicable)

EXHIBIT 9

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 10

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 PROPOSED REPLY IN SUPPORT OF RENEWED MOTION TO INTERVENE PURSUANT TO MCR 2.209

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 PROPOSED REPLY IN SUPPORT OF RENEWED MOTION TO INTERVENE PURSUANT TO MCR 2.209

Right to Life of Michigan and the Michigan Catholic Conference submit this reply in support of their renewed motion to intervene under MCR 2.209.

1. Governor Whitmer argues that Right to Life of Michigan and the Michigan Catholic Conference must prove independent standing to intervene as defendants in this action. 8/9/22 Gov's Supp Resp in Opp to Renewed Motion to Intervene of Right to Life of Mich & Mich Catholic Conf ("Opp Br") at 2–4. The Governor is wrong. "[A] party seeking to intervene need not possess the standing necessary to initiate a lawsuit." *Purnell v City of Akron*, 925 F2d 941, 948 (CA6, 1997); *accord Priorities USA v Nessel*, 978 F3d 976, 979 (CA6, 2020) ("[A] party may generally intervene in a district court proceeding without showing that it would have standing . . . ."). Because there is an actual controversy between an existing "'plaintiff and defendant,'" there is "'no need to impose a standing requirement on . . . would-be intervenor[s].'" *Purnell*, 925 F2d at 948 (quoting *U.S. Postal Serv v Brennan*, 579 F2d 188, 190 (CA2, 1978)); *accord Providence Baptist Church v Hillandale Comm, Ltd*, 425 F.3d 309, 315 (CA6, 2005).

2. Right to Life of Michigan and the Michigan Catholic Conference, as intervening defendants, have the "ability to ride 'piggyback' on the [defending county prosecutors'] undoubted standing." *Diamond v Charles*, 476 U.S. 54, 64; 106 S Ct 1697 (1986). The *only* situations in which Right to Life of Michigan and the Michigan Catholic Conference must show independent standing is if: (1) they seek broader relief than the defendant invoking the court's jurisdiction, *Little Sisters of the Poor Saints Peter & Paul Home v Pennsylvania*, 140 S Ct 2367, 2379 n6 (2020); or (2) they appeal without the defendant they originally intervened to support, *Cherry Hill Vineyards, LLC v Lilly*, 553 F3d 423, 428–29 (CA6, 2008). Proposed Intervenors and the defending county prosecutors seek the same relief, and this case is not yet on appeal. So, the

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Governor has no plausible argument that Right to Life of Michigan and the Michigan Catholic Conference must prove independent standing to intervene.

3. To counsel's knowledge, the published cases in which Michigan courts have required an intervenor to show independent standing involve a lone intervenor appealing without the original defendant. *E.g.*, *League of Women Voters of Mich v Sec of State*, 506 Mich 561, 575; 957 NW2d 731 (2020) ("[N]either of the losing parties below filed a timely appeal . . . ."; *Mich Alliance for Retired Ams v Sec of State*, 334 Mich App 238, 251; 964 NW2d 816 (2020) ("The Legislature . . . is essentially taking the place of defendants in this case."); *Federated Ins Co v Oakland Cnty Road Comm'n*, 475 Mich 286, 290; 715 NW2d 846 (2006) ("[T]he Attorney General . . . sought to appeal in this Court, even though neither of the losing parties in the Court of Appeals sought timely leave to appeal."). Because some county prosecutors are defending MCL 750.14's constitutionality and this case is not on appeal, the Governor's standing argument is irrelevant.

4. Governor Whitmer's brief also conflates the criteria for standing and intervention, comparing apples to oranges. Opp'n Br at 1–4. A showing of unique and *concrete* harm may be necessary for standing, but the same is not true of intervention, which requires only a *possibility* of inadequate representation. *Compare Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686, 372 (2010) (demanding a "special injury or right . . . that will be detrimentally affected in a manner different from the citizenry at large" for standing), *with Vestevich v W Bloomfield Twp*, 245 Mich App 759, 762; 630 NW2d 646 (2001) (requiring a "concern of inadequate representation," not that the inadequately "be definitely established," for intervention). The bar is higher for standing than intervention. *Chapman v Tristar Prods, Inc*, 940 F3d 299, 307 (CA6, 2019); *Providence Baptist Church*, 425 F3d at 318. Consequently, Governor Whitmer's

standing arguments do not answer—let alone defeat—Right to Life of Michigan and the Michigan Catholic Conference's timely and well-supported motion to intervene.

5. Nor is Governor Whitmer's reliance on the Court of Appeals's unpublished order in *Planned Parenthood of Michigan v Attorney General* convincing. Opp'n Br at 3. She ignores the salient facts. The Court of Appeals scrutinized Right to Life of Michigan and the Michigan Catholic Conference's independent standing because it previously concluded that the Court of Claims's injunction *did not apply* to Prosecuting Attorneys Jarzynka and Becker—co-plaintiffs who joined the complaint for order of superintending control. Accordingly, the county prosecutors lacked standing to challenge the injunction and Proposed Intervenors' independent standing became relevant. The exact opposite is true here. All agree that this Court's TRO *applies* to Defendants Jarzynka and Becker—two named defendants. So, Right to Life of Michigan and the Michigan Catholic Conference, as intervenors, may piggyback on Defendants Jarzynka and Becker's undoubted standing. There is no need to examine whether they have standing too.

6. Second, the Court of Appeals's unpublished order on Right to Life of Michigan and the Michigan Catholic Conference's standing is nonprecedential and non-final. The Court of Appeals issued the order on August 1, 2022. Under MCR 7.215(E)(1) and (F)(1), that order does not take effect until September 13, 2022, when the time to seek Supreme Court review expires. Proposed Intervenors may still seek reconsideration from the Court of Appeals. MCR 7.114(D) & MCR 2.119(F). Or they may file a cross-application for leave to appeal the Court of Appeals's standing decision to the Supreme Court. MCR 7.205(E)(3) & MCR 7.307. This Court should not base its intervention ruling on a nonprecedential order that is non-final and may be reversed.

7. Independent standing is not necessary here. But Right to Life of Michigan and the Michigan Catholic Conference have shown it. Governor Whitmer's contrary arguments are

unadorned assertions that ignore the facts. Opp'n Br at 3–4. The Governor does not dispute that the Michigan Catholic Conference was primarily responsible for keeping MCL 750.14 intact. 8/3/2022 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Renewed Mot to Intervene ("Renewed Intervention Mot") at 10. Nor does Governor Whitmer question Proposed Intervenors' central role in enacting many (if not most) of Michigan's pro-life laws and defending those laws in court. *Id.* at 10–11, 13–14. Proposed Intervenors' "special injury" or "substantial interest" in this case is unassailable, Opp'n Br at 4, as the Governor's asserted constitutional right to abortion could impede these pro-life laws, undoing decades of Right to Life of Michigan and the Michigan Catholic Conference's work.

8. Courts 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 v Miller*, 103 F3d 1240, 1245 (CA6, 1997); *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). All of those factors describe Right to Life of Michigan and the Michigan Catholic Conference to a "t."

9. Much like the Legislature itself, Proposed Intervenors "certainly [have] an interest in defending [their] own work. *Mich Alliance for Retired Ams v Sec'y of State*, 334 Mich App 238, 250; 964 NW2d 816 (2020). And that is especially true in Governor Whitmer's action 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.*

10. The Governor makes much of the fact that the Supreme Court has not ruled on Right to Life of Michigan and the Michigan Catholic Conference's motion to intervene. Opp'n Br at 4–5. But that is unsurprising given that the Supreme Court has *not granted* the Governor's certification request and has taken *no substantive action* whatsoever. If the Supreme Court denies Governor Whitmer's certification request, as Proposed Intervenors have urged, there will be no need for the Court to rule on their intervention motion.

11. Governor Whitmer also contends that Proposed Intervenors' interests, counsel, and arguments are the same as Defendants Jarzynka and Becker. Opp'n Br at 5. Wrong again. Defendants Jarzynka and Becker are county prosecutors. They have no ability to enforce—and no interest in defending—civil laws. Many of the provisions that Right to Life of Michigan and the Michigan Catholic Conference have shepherded into law are civil in nature. For instance, they were instrumental in enacting the Parental Rights Restoration Act (MCL 722.901–08), and informed consent law (MCL 333.17015), violations of which could serve as a predicate for civil actions regarding a lack of informed consent or interference with family relations. MCL 722.907. The Governor's asserted constitutional right to abortion will impact *all pro-life laws*—not just MCL 750.14. And Defendants Jarzynka and Becker have no concern in the civil variety.

12. Whereas Defendants Jarzynka and Becker are represented by counsel at the Great Lakes Justice Center, Proposed Intervenors are represented by Alliance Defending Freedom, the Smith Appellate Law Firm, and Smith Haughey Rice & Roegge. It is false for the Governor to claim that "all four were [or are] represented by the same counsel." Opp'n Br. at 5. That has never been true. As the Renewed Motion to Intervene and separate briefs filed in the Supreme Court

demonstrate, Proposed Intervenors have different perspective and goals than Defendants Jarzynka and Becker. Renewed Intervention Mot at 12–13. Consequently, their arguments are different.

For these reasons and those stated in the renewed and original motion, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to grant their motion to intervene as defendants in Case No. 22-193498-CZ.

Dated: August 10, 2022

Respectfully submitted,

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EXHIBIT 11

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

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

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Defendants.

Case No. 22-193498-CZ

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This case involves a claim that state governmental action is invalid

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PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND THE MICHIGAN CATHOLIC CONFERENCE'S PROPOSED 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.

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,

[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

[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

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

[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 */s/ John J. Bursch*

(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

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

BRIEF IN SUPPORT OF GOVERNOR'S EXECUTIVE MESSAGE

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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.

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.

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

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

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

EXHIBIT 2

MOMENT
STRATEGIES

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

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 3

MOMENT
STRATEGIES

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

Jeffrey S. Getting
Kalamazoo County Prosecutor

Carol A. Siemon
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Kym L. Worthy
Wayne County Prosecutor

EXHIBIT 4

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

EXHIBIT 12

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 RE: PROPOSED INTERVENORS', RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE, MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF RENEWED MOTION TO INTERVENE

Non-Parties proposed intervenors, Right to Life of Michigan and Michigan Catholic Conference, filed a Motion for Leave to File a Reply in Support of Renewed Motion to Intervene citing MCR 2.119.

The Court notes there is no legal basis for a reply brief without leave of the Court.[1] The Court considers the motion. The motion is denied.

IT IS SO ORDERED.

Dated: 08/16/2022

Hon. JACOB JAMES CUNNINGHAM
Circuit Court Judge

MY

[1] See MCR 2.119(A)(2)(b), "[e]xcept as permitted by the court or as otherwise provided in these rules, no reply briefs, additional briefs, or supplemental briefs may be filed." Though MCR 2.116(G)(1)(a) provides for a reply brief, the instant motion to intervene by proposed intervenors is not brought under MCR 2.116. The Court is unaware of any authority, nor did proposed intervenors cite any authority, providing for a reply brief on a motion to intervene.

EXHIBIT 13

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

Non-Parties proposed intervenors, Right to Life of Michigan and Michigan Catholic Conference, filed a Motion for Leave to File a Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, and Brief in Support of the same. The Court has considered the motion.

As an initial matter, in an order dated August 16, 2022, the Court denied proposed intervenors' motion to intervene in this action. In light of the fact the proposed intervenors are not parties to this litigation, their request for leave to file a brief in opposition to the Plaintiff's preliminary injunction request, currently scheduled for a limited evidentiary hearing on August 17, 2022, is DENIED.

IT IS SO ORDERED.

Dated: 08/16/2022

Hon. JACOB JAMES CUNNINGHAM
Circuit Court Judge MY

EXHIBIT 14

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

EXHIBIT 15

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

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 16

MOMENT
STRATEGIES

NEWS RELEASE
For Immediate Release:
August 1, 2022

Contact: Alexis Wiley
AlexisWiley@momentstrategies.com
(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

Jeffrey S. Getting
Kalamazoo County Prosecutor

Carol A. Siemon
Ingham County Prosecutor

Matthew J. Wiese
Marquette County Prosecutor

Eli Savit
Washtenaw County Prosecutor

David Leyton
Genesee County Prosecutor

Kym L. Worthy
Wayne County Prosecutor

EXHIBIT 17

Court Explorer

Register of Actions

Go Back

Case Number
2022-193498-CZ
Entitlement
WHITMER GRETCHEN vs. LINDERMAN JAMES R
Judge Name
JACOB J. CUNNINGHAM
Case E-Filed
YES
Case Filed
04/07/2022
Case Disposed
00/00/0000

Date	Code	Desc
08/25/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/23/2022	APR	DATE SET FOR SETTL CONF ON 11212022 09 30 AM Y 03
08/23/2022		PROCEEDING TO BE HELD IN-PERSON
08/19/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/19/2022	INJ	INJUNCTION FILED /PRELIM
08/19/2022	H	HEARING HELD 0.25
08/18/2022	ORD	ORDER FILED RE EVIDENTIARY HEARING
08/18/2022	OTH	PRELIMINARY INJUCTION HRG HELD IN PERSON
08/18/2022	DM	DEFENSE MOTION PRO HAC VICE - GRANTED
08/18/2022	H	HEARING HELD 1.00 - CONTINUED TO 8/19/2022
08/18/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/18/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/18/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/18/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/18/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED

Date	Code	Desc
08/17/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/17/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/17/2022	ORD	ORDER FILED RE EVIDENTIARY HEARING
08/17/2022	OTH	PRELIMINARY INJUNCTION HRG HELD IN PERSON
08/17/2022	DM	DEFENSE MOTION TO DISMISS CASE-TUA
08/17/2022	H	HEARING HELD 0.50 CONTINUED TO 8/18/2022
08/16/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/16/2022	RES	RESPONSE FILED TO PLF MTN PRELIM INJ/BRF/LUCIDO
08/16/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/16/2022	RES	RESPONSE FILED IN OPP TO PLF MTN PRELIM INJ/JARZYNKA
08/16/2022	ORD	ORDER FILED DENY INTERVENOR MTN OPP PLF MTN PRELIM INJ
08/16/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/16/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/16/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/16/2022	ORD	ORDER FILED DENY INTRVNR MTN FILE REP SUPPT MTN INTRVN
08/16/2022	ORD	ORDER FILED DENY MTN INTERVENE
08/16/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/16/2022	ORD	ORDER FILED COA
08/15/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/15/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/15/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/15/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/15/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/15/2022	MTN	MOTION FILED TEMP ADMIMSS TO PRACTICE/PLF
08/15/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/15/2022	MTN	MOTION FILED FOR TEMP ADMISS/DFT
08/15/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/15/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/15/2022	MTN	MOTION FILED LVE FILE BRF OPP MTN PRLM INJ/RGHT OF LIF

Date	Code	Desc
08/15/2022	MTN	MOTION FILED CONSIDERATION OF MTN LV FILE BRF/RGHT LIF
08/12/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/12/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/12/2022	BRF	BRIEF FILED IN SUPT WHITMER MTN INJ/PROSECUTING ATTYS
08/12/2022	OTH	DFT POSITION STATEMNT ON GOVERNOR MTN INJ FILED
08/12/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/12/2022	WLT	WITNESS LIST FILED DFTS/POS
08/12/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/12/2022	WLT	WITNESS LIST FILED FOR PRELIM INJ HRG
08/12/2022	POS	AFFIDAVIT/PROOF OF SERVICE FILED
08/12/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/11/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/11/2022	RES	RESPONSE FILED OPP RIGHT TO LIFE MTN INTERVENE/DFT
08/10/2022	MPR	MOTION PRAECIPE FILED FOR 08172022 JUDGE 03
08/10/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/10/2022	REP	REPLY FILED PRPSD SPRT RENEWED MTN INTERVENE
08/10/2022	MTN	MOTION FILED PRELIM INJ/BRF/PLF
08/10/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/10/2022	POS	AFFIDAVIT/PROOF OF SERVICE FILED
08/10/2022	MTN	MOTION FILED LEAVE FILE REP SPRT MTN INTERVENE
08/10/2022	ORD	ORDER FILED RE PLF EMER MTN QUASH SUBPOENA
08/10/2022	M	MOTION EMERGENCY MTN TO QUASH-GRANTED
08/09/2022	OTH	EXH B TO SPLMT RES OPP RENEW MTN FILED
08/09/2022	POS	AFFIDAVIT/PROOF OF SERVICE FILED
08/09/2022	OTH	EXH A TO SPLMT RES OPP RENEW MTN FILED
08/09/2022	RES	RESPONSE FILED /SPLMT/OPP RENEW MTN INTERVENE/PLF
08/09/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/09/2022	POS	AFFIDAVIT/PROOF OF SERVICE FILED
08/09/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/09/2022	MTN	MOTION FILED TO QUASH SUBPOENA/BRF/PLF

Date	Code	Desc
08/08/2022	OTH	SUBPOENA FILED/KALLMAN
08/08/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/08/2022	ORD	ORDER FILED RE RELIM INJ EVIDENTIARY HRG
08/04/2022	MPR	MOTION PRAECIPE FILED FOR 08172022 JUDGE 03
08/04/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/03/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/03/2022	REQ	REQUEST FILED APP/DFT
08/03/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/03/2022	APP	APPEARANCE FILED /DFT SAVIT
08/03/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/03/2022	REQ	REQUEST FILED APP/DFT
08/03/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/03/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/03/2022	RES	RESPONSE FILED IN SUPT OF WHITMER EMER MTN/PROS ATTY
08/03/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/03/2022	RES	RESPONSE FILED IN OPP TO WHITMER MTN RESTRAIN ORD/DFT
08/03/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/03/2022	MTN	MOTION FILED TO INTERVENE/INT PLFS RTL/CC
08/03/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/03/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/03/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/03/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/03/2022	OTH	MOTION HELD IN PERSON
08/03/2022	M	MOTION TO CONTINUE TRO-GRANTED
08/03/2022	OTH	SET FOR EVIDENTIARY HEARING
08/03/2022	APR	DATE SET FOR EVIDNT HRG ON 08172022 02 00 PM Y 03
08/03/2022		PROCEEDING TO BE HELD IN-PERSON
08/03/2022	ORD	ORDER FILED RE TEMP REST ORD HRG 08/03/22
08/03/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/03/2022	MPS	MIFILE PROOF OF SERVICE FILED

Date	Code	Desc
08/03/2022	NOH	NOTICE OF HEARING FILED
08/02/2022	APP	APPEARANCE FILED DFT MCDONALD
08/02/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/02/2022	APP	APPEARANCE FILED DFT MCDONALD
08/02/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/02/2022	APP	APPEARANCE FILED /DFT
08/02/2022	APP	APPEARANCE FILED DFT WORTHY/POS
08/02/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/02/2022	POS	AFFIDAVIT/PROOF OF SERVICE FILED
08/02/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/02/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/02/2022	NTC	NOTICE FILED OF ERRATA
08/02/2022	POS	AFFIDAVIT/PROOF OF SERVICE FILED
08/02/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/02/2022	MRR	REQ/NTC-FILM/MEDIA COVERAGE FILED
08/02/2022	ORD	ORDER FILED ADDENDUM TO GRANT TEMP R/O
08/01/2022	MPS	MIFILE PROOF OF SERVICE FILED
08/01/2022	ORD	ORDER FILED GRNT TEMP REST ORD
08/01/2022	MTN	MOTION FILED EMERGENCY/FOR TEMP RESTRAIN ORD/PLF
06/21/2022	SO	SCHEDULING ORDER FILED INITIAL
06/18/2022	SOP	SCHEDULING ORDER WRITTEN
06/18/2022		10/07/2022 EXPERT DATE.
06/18/2022		12/07/2022 CASE EVALUATION DATE.
06/18/2022		10/07/2022 WITNESS DATE.
06/18/2022		01/06/2023 MOTION DATE.
06/18/2022		11/07/2022 DISCOVERY DATE.
06/18/2022		01/06/2023 SETTLEMENT CONFERENCE.
06/18/2022		02/23/2023 TRIAL DATE.
06/18/2022	APR	DATE SET FOR PRETRIAL ON 01062023 08 30 AM
06/18/2022	APR	DATE SET FOR TRIAL ON 02232023 08 30 AM

Date	Code	Desc
06/02/2022	MTN	MOTION FILED FOR LEAVE TO FILE AC BRIEF/NON-PTY SFL
06/02/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/27/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/27/2022	OTH	PLF OPPOSITION TO LUCIDO MTN SUM DISP FILED
05/25/2022	DM	DEFENSE MOTION TO INTERVENE-DISMISSED
05/24/2022	ORD	ORDER FILED RE PRAECIPE/MTN TO INTERVENE
05/24/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/24/2022	APP	APPEARANCE FILED /JARZYNKA/BECKER
05/21/2022	OJR	CASE REASSIGNED FROM JDG SOSNICK TO JDG CUNNINGHAM
05/20/2022	RES	RESPONSE FILED IN OPPO TO MTN INTERVENE/PLF
05/20/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/20/2022	OTH	INDEX/EXHS TO PLF RESP TO MTN INTERVENE FILED
05/16/2022	NOH	NOTICE OF HEARING FILED
05/16/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/16/2022	MPR	MOTION PRAECIPE FILED FOR 05252022 JUDGE 03
05/13/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/10/2022	REQ	REQUEST FILED /APP/DFT
05/10/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/06/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/06/2022	APP	APPEARANCE FILED SIEMON/GETTING
05/06/2022	APP	APPEARANCE FILED SIEMON/GETTING
05/06/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/06/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/06/2022	REQ	REQUEST FILED APP/P LUCIDO
05/06/2022	APP	APPEARANCE FILED /POS/LUCIDO
05/06/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/06/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/06/2022	MTN	MOTION FILED FOR SUM DISP/SEP/TRANS/BRF/NOH/POS/DFT PL
05/05/2022	ATC	ANSWER TO COMPLAINT FILED DFT MCCOLGAN
05/05/2022	MPS	MIFILE PROOF OF SERVICE FILED

Date	Code	Desc
05/05/2022	APP	APPEARANCE FILED DFT MCCOLGAN
05/05/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/04/2022	ATC	ANSWER TO COMPLAINT FILED /AFM/INTRVN PLFS
05/04/2022	MTN	MOTION FILED INTERVENE/RIGHT TO LIFE
05/04/2022	MPS	MIFILE PROOF OF SERVICE FILED
05/04/2022	MPR	MOTION PRAECIPE FILED FOR 05182022 JUDGE 03
05/03/2022	SUM	P/S ON SUMMONS FILED 04/11/22 GETTING
05/03/2022	SUM	P/S ON SUMMONS FILED 04/11/22 LINDERMAN
05/03/2022	SUM	P/S ON SUMMONS FILED 04/11/22 WORTHY
05/03/2022	SUM	P/S ON SUMMONS FILED 04/12/22 MCCOLGAN
05/03/2022	SUM	P/S ON SUMMONS FILED 04/09/22 BECKER
05/03/2022	SUM	P/S ON SUMMONS FILED 04/11/22 MOEGGENBERG
05/03/2022	SUM	P/S ON SUMMONS FILED 04/11/22 JARZYNKA
05/03/2022	SUM	P/S ON SUMMONS FILED 04/11/22 LEYTON
05/03/2022	SUM	P/S ON SUMMONS FILED 04/12/22 MCDONALD
05/03/2022	MPS	MIFILE PROOF OF SERVICE FILED
04/25/2022	APP	APPEARANCE FILED /LEYTON
04/25/2022	MPS	MIFILE PROOF OF SERVICE FILED
04/21/2022	APP	APPEARANCE FILED JARZYNKA/BECKER
04/21/2022	APP	APPEARANCE FILED /JARZYNKA/BECKER
04/21/2022	APP	APPEARANCE FILED JARZYNKA/BECKER
04/21/2022	MPS	MIFILE PROOF OF SERVICE FILED
04/21/2022	APP	APPEARANCE FILED JARZYNKA/BECKER
04/16/2022	TMP	INTERIM JDG REASSIGN LANGFORD MORRIS TO JUDGE SOSNICK
04/14/2022	MPS	MIFILE PROOF OF SERVICE FILED
04/14/2022	MTN	MOTION FILED TEMP ADMIT TO PRACTICE/PLF
04/14/2022	MTN	MOTION FILED TEMP ADMIT TO PRACTICE/PLF
04/14/2022	MTN	MOTION FILED TEMP ADMIT TO PRACTICE/PLF
04/14/2022	MTN	MOTION FILED TEMP ADMIT TO PRACTICE/PLF
04/14/2022	MTN	MOTION FILED TEMP ADMIT TO PRACTICE/PLF

Date	Code	Desc
04/14/2022	MTN	MOTION FILED TEMP ADMIT TO PRACTICE/PLF
04/14/2022	MTN	MOTION FILED TEMP ADMIT TO PRACTICE/PLF
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	C	COMPLAINT FILED
04/07/2022	OTH	EXHIBIT A GOVERNORS EXECUTIVE MESSAGE FILED
04/07/2022	NTC	NOTICE FILED OF FILING
04/07/2022	MPS	MIFILE PROOF OF SERVICE FILED
04/07/2022	APP	APPEARANCE FILED /DFT K MCDONALD
04/07/2022	MPS	MIFILE PROOF OF SERVICE FILED
04/07/2022	MPS	MIFILE PROOF OF SERVICE FILED
04/07/2022	SI	SUMMONS ISSUED
04/07/2022	SI	SUMMONS ISSUED

EXHIBIT 18

STATE OF MICHIGAN

IN THE COURT OF APPEALS

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, and JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, in their official capacities,

Defendants,

and

DAVID S. LEYTON, Prosecuting Attorney of Genesee County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants-Appellees,

and

Court of Appeals Docket No. _____

Oakland Circuit Case No. 22-193498-CZ

AFFIDAVIT OF JONATHAN B. KOCH

SHRR\107973\211544\5610676.v1-9/6/22

RIGHT TO LIFE OF MICHIGAN AND
MICHIGAN CATHOLIC
CONFERENCE,

Proposed Intervenors-Appellants.

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Linus Banghart-Linn (P73230)
Christopher Allen (P75329)
Kyla Barranco (P81082)
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SHRR\107973\211544\5610676.v1-9/6/22

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Counsel for Peter Lucido, Prosecuting Attorney for Macomb County

SHRR\107973\211544\5610676.v1-9/6/22

AFFIDAVIT OF JONATHAN B. KOCH

I, Jonathan B. Koch, being first duly sworn, deposes and states as follows:

1. I make this affidavit on personal knowledge.

2. I am an attorney of record on this case.

3. In this case, the trial court decided Proposed Intervenors' motion for intervention without hearing oral arguments. **Exhibit 1**, Order Denying Motion to Intervene. So there is no record to be transcribed.

Date: September 6, 2022

By: _____

Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
Counsel for Proposed Intervenors Right to Life of Michigan and Michigan Catholic Conference
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
jkoch@shrr.com

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

The foregoing instrument was acknowledged before me on September 6, 2022 by Jonathan B. Koch.

_____

Briana K. Wallin, Notary Public
State of Michigan, County of Montcalm

Acting in Kent County, Michigan

My commission expires: 09/13/2026

STATE OF MICHIGAN
MI Court of Appeals

Proof of Service

Case Title:	**Case Number:**
Gretchen Whitmer v James R. Linderman, et al.	TEMP-POK2SOOJ

1. Title(s) of the document(s) served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
Application	Right to Life of MI & MI Catholic Conference's Emergency App for Lv to Appeal or Peremptory Reversal
Appendix	COA Appendix of Exhibits to Proposed Intervenors' AFLTA re denial of intervention
Motion for Immediate Consideration	COA Motion for Immediate Consideration of Intervenors' AFLTA re denial of intervention

2. On 09-06-2022, I served the document(s) described above on:

Recipient	Address	Type
Jonathan Koch Smith Haughey Rice & Roegge 80408	jkoch@shrr.com	e-Serve
Francine Robinson	frobinson@shrr.com	e-Serve
Briana Wallin Smith Haughey Rice & Roegge	bwallin@shrr.com	e-Serve
Rachael Roseman Smith Haughey Rice & Roegge P78917	rroseman@shrr.com	e-Serve
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Eli Savit Washtenaw County Prosecuting Attorney P76528	savite@washtenaw.org	e-Serve
Timothy Ferrand CMDA P39583	tferrand@cmda-law.com	e-Serve

This proof of service was automatically created, submitted and signed on my behalf through my agreements with MiFILE and its contents are true to the best of my information, knowledge, and belief.

09-06-2022

Date

/s/ Francine Robinson

Signature

Smith Haughey Rice & Roegge