IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Borello, PJ; Kelly & Gadola, JJ

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

Plaintiffs.
_____/

Supreme Court Case No. 164656

Court of Appeals Case No. 361470

PLAINTIFFS' ANSWER IN OPPOSITION TO PLANNED PARENTHOOD OF MICHIGAN AND DR. SARAH WALLETT'S EMERGENCY MOTION TO ISSUE AN ORDER STAYING THE COURT OF APPEALS ORDER LIMITING THE SCOPE OF THE COURT OF CLAIMS'S PRELIMINARY INJUNCTION UNTIL RESOLUTION OF THE MERITS OF THE APPEAL

Lower Court Case: *Planned Parenthood of Mich v Atty Gen*, Court of Claims Case 22-000044-MM

John J. Bursch (P57679)
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Michael F. Smith (P49472)
THE SMITH APPELLATE LAW FIRM
1717 Pennsylvania Avenue, NW
Suite 1025
Washington, DC 20006
(202) 454-2860
smith@smithpllc.com

David A. Kallman (P34200)
Stephen P. Kallman (P75622)
Jack C. Jordan (P46551)
William R. Wagner (P79021)
GREAT LAKES JUSTICE CENTER
5600 W. Mount Hope Hwy.
Lansing, MI 48917
(517) 993-9123
dave@greatlakesjc.org

Counsel for Plaintiffs Jarzynka and Becker

Deborah LaBelle (P31595)
221 N. Main St., Ste. 300
Ann Arbor, MI 48104
(734) 996-5620
deblabelle@aol.com

Mark Brewer (P35661)
1700 W. 10 Mile Rd.
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Rachael M. Roseman (P78917)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 458-3620
rroseman@shrr.com
jkoch@shrr.com

Counsel for Plaintiffs Right to Life of Michigan and Michigan Catholic Conference

Fadwa A. Hammoud (P74185)
Heather S. Meingast (P55439)
Elizabeth Morrisseau (P81899)
Adam R. de Bear (P80242)
Michigan Department of Attorney General
P.O. Box 30736
Lansing, MI 48909
(517) 335-765
meingasth@michigan.gov
morrisseaue@michigan.gov
debeara@michigan.gov

Attorneys for Attorney General of the State of Michigan

Hannah Swanson
Peter Im*
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Ave. NW, Ste. 300
Washington, DC 20005
(202) 803-4030
hannah.swanson@ppfa.org
peter.im@ppfa.org

Susan Lambiase*
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William St. – 9th Floor
New York, NY 10038
(212) 261-4405
Susan.lambiase@ppfa.org

Bonsitu Kitaba-Gaviglio (P78822)
Daniel S. Korobkin (P72842)
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Ave.
Detroit, I 48201
(313) 578-6800
bkitaba@aclumich.org
dkorobkin@aclumich.org

Michael J. Steinberg (P43085)
Hannah Shilling**Hannah Juge**
Emma Mertens**
Civil Rights Litigation Initiative
UNIVERSITY OF MICHIGAN LAW SCHOOL
701 S. State St. – Ste. 2020
Ann Arbor, MI 48109
(734) 763-1983
mjsteinb@umich.edu

Counsel for Planned Parenthood of Michigan and Dr. Sarah Wallett

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

PLAINTIFFS' ANSWER IN OPPOSITION TO PLANNED PARENTHOOD OF MICHIGAN AND DR. SARAH WALLETT'S EMERGENCY MOTION TO ISSUE AN ORDER STAYING THE COURT OF APPEALS ORDER LIMITING THE SCOPE OF THE COURT OF CLAIMS' PRELIMINARY INJUNCTION UNTIL RESOLUTION OF THE MERITS OF THE APPEAL

Non-parties Planned Parenthood and Dr. Wallett (collectively, "Planned Parenthood"), request an extraordinary stay of the Court of Appeals' unanimous order dismissing Plaintiffs' complaint for order of superintending control pending this Court's resolution of its application for leave to appeal. Though Planned Parenthood's motion is heavy on rhetoric and policy arguments, it is light on law. And for good reason. Michigan law does not support Planned Parenthood's theory that county prosecutors are mere agents of the Attorney General.

This Court should summarily deny Planned Parenthood's motion for four reasons. First, Planned Parenthood never sought a stay from the Court of Appeals, thus rendering its stay motion in this Court improper. Second, Planned Parenthood cannot show a likelihood of prevailing on the merits because the Court of Appeals' ruling that the Court of Claims lacks jurisdiction over county prosecutors—prototypical local officials—is correct. Third, Planned Parenthood's alleged harm is nonexistent. The only irreparable harm is the loss of innocent human life to abortion in violation of MCL 750.14 and *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104, 108 (1997), that two trial court orders now permit. Fourth, the public interest does not support enjoining county prosecutors from doing their jobs, which is to enforce validly enacted criminal laws like MCL 750.14.

Planned Parenthood's complaint is with the Court of Appeals' unanimous holding that the Court of Claims' injunction does not apply to county prosecutors. But that is simply a result of the way Planned Parenthood structured its case, suing only the Attorney General in the Court of Claims, a court of limited jurisdiction. If Planned Parenthood had wished to enjoin county prosecutors, it could have sued them in circuit court or, as the Attorney General invited, joined Governor Whitmer's action in search of the same result. That Planned Parenthood chose neither path is an impediment of its own creation. It does not justify a stay from this Court.

Background

On April 7, 2022, the ACLU filed suit on behalf of Planned Parenthood and its chief medical officer against Attorney General Dana Nessel, as the sole defendant, in the Court of Claims. The ACLU and Planned Parenthood argued that, notwithstanding *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104, 108 (1997), the Court of Claims should declare that the Michigan Constitution includes a right to abortion and enjoin the Attorney General and all county prosecutors from enforcing MCL 750.14 (along with other abortion regulations).

Right after filing the complaint, Planned Parenthood also filed a motion for preliminary injunction in the Court of Claims. It sought an order enjoining the enforcement of MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortions authorized by a licensed physician before viability, or even *after viability* in various circumstances.

Just hours after the plaintiffs filed their lawsuit and motion for preliminary injunction in the Court of Claims, Attorney General Dana Nessel—the sole defendant—issued a press release declaring that she would not defend MCL 750.14 and would support Planned Parenthood's legal position.

Right to Life of Michigan and the Michigan Catholic Conference filed an amici brief with the Court of Claims explaining that the Court lacked jurisdiction because, among other things, there was no adversity between the parties, no actual controversy existed, and the case was not ripe because the Attorney General did not intend to defend or enforce Michigan law. The Attorney General's submissions recognized that the Court of Claims lacked jurisdiction—just as Right to Life of Michigan and the Michigan Catholic Conference's amici brief had explained.

Without adversarial briefing or argument by the parties, without a public hearing, and without jurisdiction or even a ripe controversy, the Court of Claims issued an opinion and order on May 17, 2022, that preliminarily enjoins the Attorney General from enforcing MCL 750.14. The injunction issued over a month before the U.S. Supreme Court rendered its decision in *Dobbs v Jackson Women's Health Organization*, 142 S Ct 2228 (2022), and purports to enjoin all state and local officials acting under the Attorney General's supervision—including all county prosecutors in the State—even though they are not parties to the action.

Though the Attorney General consistently argued that the Court of Claims lacked jurisdiction, she praised the court's rejection of her jurisdictional arguments and issuance of an overly broad preliminary injunction. She declined to file a motion

to dismiss or to appeal the injunction. Within hours of the issuance of the preliminary injunction, the Attorney General e-mailed all 83 county prosecutors a copy of the opinion and order, stating that all Michigan county prosecutors are now enjoined from enforcing MCL 750.14. This includes Appellees Jarzynka and Becker.

Appellees Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference jointly filed a complaint for order of superintending control in the Michigan Court of Appeals on May 20, 2022. 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 the ground that (among other things) she had previously represented Planned Parenthood on behalf of the ACLU in abortion cases, as well as the plaintiffs in *Mahaffey*, arguing—and losing—the very issue presented in the Court of Claims action: whether a right to abortion can be read into the silence of Michigan's Constitution. Judge Gleicher, defendant in the superintending-control action, did not appear in the Court of Appeals. Instead, Planned Parenthood, a non-party, appeared and filed papers defending the Court of Claims' injunction.

On August 1, 2022, the Court of Appeals ruled that the Court of Claims lacked jurisdiction over county prosecutors because they are local—not state—officials. So, the Court of Claims' preliminary injunction had never applied to county prosecutors (contrary to the Attorney General's May 17th email) and Appellees Jarzynka and Becker were free to enforce MCL 750.14. The Court of Appeals dismissed the complaint for superintending control based on standing.

Two days later, without first seeking relief from the Court of Appeals, non-party Planned Parenthood filed the instant stay motion, along with an application for leave to appeal and a motion for immediate consideration of the stay motion.

Argument

I. Planned Parenthood's stay motion is procedurally improper because it did not first seek relief from the Court of Appeals.

Planned Parenthood filed its stay motion under MCR 2.614(F) and MCR 7.316(A)(7). Mot at 2. Yet MCR 2.614(D) says that a "[s]tay on appeal is governed by MCR 7.108, 7.209, and 7.305(I)"—not the rules on which Planned Parenthood's motion relies. More specifically, MCR 7.305(I) states that "MCR 7.209 applies to appeals in the Supreme Court." Planned Parenthood must therefore first seek a stay of the Court of Appeals' order under MCR 7.209.

MCR 7.209(A)(2) provides that "[a] motion for bond or for a stay pending appeal may not be filed in the Court of Appeals unless such a motion was decided by the trial court." Under MCR 7.305(I), the same principle applies to stay motions in this Court: Planned Parenthood may not file a motion for a stay pending appeal in the Supreme Court unless such a motion was decided by the Court of Appeals. It is undisputed that Planned Parenthood never requested a stay from the Court of Appeals, even though it had participated in those proceedings by filing an answer to the complaint for superintending control. Accordingly, Planned Parenthood is barred from filing a stay motion in this Court. For that reason alone, the Court should deny the motion as procedurally improper.

II. Planned Parenthood is not likely to prevail on the merits because the Court of Appeals correctly held that county prosecutors are local, not state, officials.

Planned Parenthood's motion also fails on the merits. This Court evaluates motions for a stay pending appeal under the traditional four-factor test for a preliminary injunction. *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008); *accord Scott v Mich Dir of Elections*, 490 Mich 888; 804 NW2d 119, 119–20 (2011). One key consideration is the movant's likelihood of success on the merits. *Detroit Fire Fighters Ass'n*, 482 Mich at 34. Planned Parenthood cannot show a likelihood of success here; remarkably, its motion does not even address the four factors in *Manuel v Gill*, 481 Mich 637, 653; 753 NW2d 48 (2008), at the heart of the Court of Appeals' analysis.

To begin, "the jurisdiction of the Court of Claims does not extend to local officials." *Mays v Snyder*, 323 Mich App 1, 47; 916 NW2d 227 (2018) (citing *Doan v Kellogg Cmty Coll*, 80 Mich App 316, 320; 263 NW2d 357 (1977). County prosecutors are quintessential examples of local government officials. Their election and jurisdiction are not statewide but limited to each county. As this Court explained, "the county prosecutor and the sheriff are clearly local officials elected locally and paid by the local government." *Hanselman v Killeen*, 419 Mich 168, 188; 351 NW2d 544 (1984). They are "the chief law enforcement officer of the county." *Matthews v Blue Cross & Blue Shield of Mich*, 456 Mich 365, 384; 572 NW2d 603 (1998). Any list of "local officials" necessarily includes "the sheriff, *prosecutor*, judges, the county commissioners, and the county executive." *Muskegon Cnty Bd of Comm'rs v Muskegon Cir Judge*, 188 Mich App 270, 274; 469 NW2d 441 (1991) (emphasis

added). Because county prosecutors are local (not state) officials, the Court of Claims lacks jurisdiction over them, as the Court of Appeals held. So there is no likelihood that Planned Parenthood's argument will succeed on the merits.

The four *Manuel* factors confirm this conclusion. First, courts consider whether an entity is created by the state constitution, a state statute, or a state agency. *Manuel*, 481 Mich at 653. The county prosecutors' office is established by Const 1963, art 7 § 4. In accordance with that constitutional provision, MCL 49.153 establishes prosecutors' authority and duties, which are limited to appearing for the state in "*in their respective counties*." (emphasis added). The Court of Appeals was right to conclude that this substantial limitation "cuts against a finding that county prosecutors are state officials." Order at 3.

Second, courts examine who funds the entity. *Manuel*, 481 Mich at 653. This Court acknowledged in *Hanselman* that county prosecutors are locally funded by their respective counties. 419 Mich at 188; Order at 3.

Third, courts look to whether a state agency or official controls the entity's actions. *Manuel*, 481 Mich at 653. The relevant action here is the prosecutors' decision whether to prosecute an abortionist under MCL 750.14. This Court has acknowledged that county prosecutors have "the right to exercise broad discretion" in deciding *whether* to prosecute and *what* criminal changes should be brought. *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972); *accord Fieger v Cox*, 274 Mich App 449, 466; 734 NW2d 602 (2007); *People v Gillis*, 474 Mich 105, 141 n19; 712 NW2d 419 (2006); *People v Williams*, 244 Mich

App 249, 254; 625 NW2d 132 (2001). The Attorney General has no ability to control their actions.[1] Order at 3.

Lastly, courts scrutinize whether and to what extent the entity serves local purposes or state purposes. *Manuel*, 481 Mich at 653. The Court of Appeals rightly concluded that county prosecutors serve primarily local purposes by enforcing state and local law within their respective counties. Order at 3.

Planned Parenthood's argument that the Court of Claims has jurisdiction over county prosecutors because they are state officials is unprecedented. It cites no case in which the Court of Claims has exercised jurisdiction over county prosecutors in the past. Planned Parenthood's conception of the relationship between the Attorney General and county prosecutors is uniformly contradicted by the state and local officials who actually *work* in the system and *know* how it operates.

The Attorney General herself has been crystal clear on this issue:

> "I don't believe that I as attorney general of this state have the authority to tell duly elected prosecutors what they can and what they cannot charge . . . . If that were the case, I don't even know why we would elect our county prosecutors in the first place, if they're not allowed to make their own decisions." [Beth LeBlanc, Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence, The Detroit News (May 3, 2022), https://bit.ly/3LrKaZJ, **Exhibit 1**.]

[1] There is no merit to Planned Parenthood's suggestion that Appellees Jarzynka and Becker are acting in concert or participation with the Attorney General. Mot at 14 n9. The Attorney General had steadfastly refused to defend or enforce MCL 750.14, so anyone acting in concert or participation with her poses no threat to Planned Parenthood's interests. Planned Parenthood seeks to force Appellees Jarzynka and Becker under the Court of Claims' injunction because they have *defended* MCL 750.14's constitutionality and *opposed* the Attorney General's legal position.

Even the county prosecutors who refuse to defend or enforce MCL 750.14, and thus agree with Planned Parenthood on the merits, disagree with Planned Parenthood's argument here. Seven county prosecutors recently filed a brief supporting Governor Whitmer's motion for a temporary restraining order in the Oakland County Circuit Court, even though they are named Defendants. These pro-abortion prosecutors recognize that (1) "prosecuting attorneys are independently elected," (2) "maintain independent authority to carry out our duties consistent with the needs of [their] communities, and (3) that "[t]he Attorney General cannot simply tell county prosecutors what to do." 8/4/22 Prosecuting Attorneys Savit, Legyton, Siemon, Getting, Wiese, McDonald, and Worthy's Resp in Supp of Gov Whitmer's Emergency Mot for *Ex Parte* Temporary Restraining Order at 9, *Whitmer v Linderman*, Oakland Circuit Ct No 22-193498-CZ, **Exhibit 2**.

Where the Legislature intends to make local officials "answer to" state constitutional officers, Motion, p 13, it certainly knows how to say so. *See, e.g.*, MCL 168.21 ("[t]he Secretary of State shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of [the Michigan Election Law]"); *see also* MCL 168.31(1)(b) ("The Secretary of State shall…*advise and direct* local election officials as to the proper methods of conducting elections") (emphasis added); *accord League of Women Voters of Mich v Secretary of State*, 333 Mich App 1, 5; 959 NW2d 1 (2020). Nothing provides the Attorney General with a similar grant of such direct authority and control over elected county prosecutors.

Unanimity is elusive in cases that involve abortion. But both sides (minus Planned Parenthood) agree that county prosecutors are not mere agents of the Attorney General. Given this consensus and the Court of Appeals' well-reasoned conclusion that county prosecutors are autonomous local officials, Planned Parenthood cannot show any likelihood of success on the merits. Accordingly, Planned Parenthood's stay motion must be denied.

III. Planned Parenthood's harm is nonexistent: the only irreparable harm is the loss of human life to abortion made possible by two lower court orders enjoining MCL 750.14's enforcement.

Planned Parenthood's motion raises a panoply of harms that MCL 750.14 is allegedly causing to its abortion business. But none of those harms are real. Two Michigan trial courts have refused to allow MCL 750.14 to have any real-world effect. Even though the Attorney General admitted that the Court of Claims lacked jurisdiction due to a lack of adversity between the parties, that court purported to enjoin the Attorney General and all county prosecutors from enforcing MCL 750.14 over a month *before* the U.S. Supreme Court even issued *Dobbs*.

After *Dobbs* was decided, the Court of Appeals confirmed that the Court of Claims lacked jurisdiction over county prosecutors and that its injunction does not apply to them. That same day, the Oakland County Circuit Court granted Governor Whitmer's request for an ex parte temporary restraining order, even though (1) the case had been effectively stayed, (2) there was no basis for proceeding ex parte, (3) the court did not comply with the most basic requirements in the Michigan Court Rules for issuing a TRO, and (3) Governor Whitmer had already admitted to

this Court that *Mahaffey* required lower courts—including the Oakland County Circuit Court—to reject her arguments for a state constitutional right to abortion.

On August 3, 2022, the circuit court held a hearing in which Right to Life of Michigan and the Michigan Catholic Conference were excluded by the court, even though they had filed a motion to intervene that the court has been sitting on for three months. While seven attorneys spoke in favor of extending the TRO, only one attorney for Appellees Jarzynka and Becker was allowed to oppose the TRO's extension, after which an attorney for Prosecuting Attorney Peter Lucido briefly seconded his arguments. The circuit court then issued a pre-prepared order that did not directly address a single procedural or substantive point raised by Appellees Jarzynka and Becker's counsel, extending the TRO "until the scheduled evidentiary hearing on whether a preliminary injunction should issue." 8/3/22 Order Regarding Temporary Restraining Order Hearing on August 3, 2022, *Whitmer v Linderman*, Oakland County No. 2022-193498-CZ, **Exhibit 3**. That hearing is scheduled to begin August 17, 2022, at 2:00 pm. And given the irregularity of proceedings to date, there is little doubt that the circuit court will issue a preliminary injunction despite the Governor's concession that *Mahaffey* prohibits such an order.

Meanwhile, 13 county prosecutors, including Appellees Jarzynka and Becker, are completely enjoined from enforcing MCL 750.14. Planned Parenthood's harm is nonexistent under these facts. Indeed, the Court of Claim's and Oakland County Circuit Court's orders give Planned Parenthood something new—the total elimination of MCL 750.14's abortion restrictions. Far from maintaining the status

quo (*i.e.*, that MCL 750.14 is enforceable to the extent it does not conflict with *Roe v. Wade*, 410 US 113; 93 S Ct 705 (1973)), these orders prevent Appellees Jarzynka and Becker from enforcing MCL 750.14 *in any circumstance*, even after viability and even against non-physicians. That was certainly not the case under *People v Bricker*, 389 Mich 524; 208 NW2d 172 (1973). During the nearly 50 years *Roe* was in effect, *Bricker* allowed prosecuting attorneys to enforce MCL 750.14 against (1) any abortionist who was not a physician 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. *Id.* at 529–30. The Court of Claim's and Oakland County Circuit Court's orders go far beyond protecting the *status quo* under which MCL 750.14 was partially enforceable and instead nullifies the law altogether.

In Michigan, the *only* irreparable harm is the loss of human life to abortion made possible by the Court of Claim's and Oakland County Circuit Court's orders. Right now, a non-physician could abort a baby at six months' gestation and get away scot-free. 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 Appellees Jarzynka and Becker or the Attorney General can do. Certainly, there is irreparable harm to the innocent human lives that will be lost while MCL 750.14 is wrongfully enjoined and abortionists enjoy free rein. But none of that harm applies to Planned Parenthood or justifies a stay. Indeed, the real-world harm that does exist compels allowing the Court of Appeals' order to take effect.

IV. The public interest favors allowing county prosecutors to enforce validly-enacted laws, not giving abortionists free reign.

To obtain a stay, Planned Parenthood must show that allowing the Court of Appeals' order to take effect would harm the public interest. *Detroit Fire Fighters Ass'n*, 482 Mich at 34. Yet the Court of Appeal's order did not have any real-world effect due to the Oakland County Circuit Court's TRO. Given this reality, Planned Parenthood's concerns are baseless and its stay motion unnecessary.

That does not mean there is no injury to the public interest. The Court of Claims' and Oakland County Circuit Court's orders have greatly harmed the public's "vital interest in the proper enforcement of [Michigan's] criminal laws." *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 205; 398 NW2d 245 (1986) (quotation omitted). MCL 750.14 is a criminal statute that plays an important role in regulating abortions in Michigan, a practice that intentionally destroys unborn human life. *Dobbs*, 142 S Ct at 2243.

Whereas allowing county prosecutors to enforce MCL 750.14 furthers the "public interest" in "a well-ordered society," stopping county prosecutors from enforcing the law *entirely* promotes chaos and allows abortionists like Planned Parenthood to destroy human life as they see fit. *Sheridan Rd Baptist Church v Dep't of Educ*, 426 Mich 462, 514 n34; 396 NW2d 373 (1986) (quoting *Young v United States*, 315 US 257, 259; 62 S Ct 510 (1942)). The public interest "in enforcing the criminal law" supports denying a stay. *People v Miller*, 440 Mich 631, 640 (1992).

Conclusion

Planned Parenthood's stay motion is procedurally improper and legally unjustified. For the reasons explained above, this Court should summarily deny Planned Parenthood's motion for a stay pending appeal.

Dated: August 5, 2022

Respectfully submitted,

By */s/ John J. Bursch*
John J. Bursch (P57679)
Alliance Defending Freedom
440 First Street NW, Street 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

By */s/ Michael F. Smith*
Michael F. Smith (P49472)
The Smith Appellate Law Firm
1717 Pennsylvania Ave. NW – Suite 1025
Washington, DC 20006
(202) 454-2860
smith@smithpllc.com

By */s/ Jonathan B. Koch*
Rachael M. Roseman (P78917)
Jonathan B. Koch (P80408)
Smith Haughey Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
rroseman@shrr.com
jkoch@shrr.com

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

EXHIBIT 1

The Detroit News

MICHIGAN

Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence

Beth LeBlanc
The Detroit News

Published 4:48 p.m. ET May 3, 2022 | **Updated 7:47 p.m. ET May 3, 2022**

Attorney General Dana Nessel on Tuesday reiterated her refusal to prosecute physicians or women under Michigan's abortion ban, but criticized a lawsuit filed against her department seeking to overturn the 1931 ban.

Nessel said she believes the lawsuit brought by Planned Parenthood of Michigan should be dismissed for a lack of jurisdiction because there is no case or controversy — or active prosecution — that could serve as a basis for the suit, nor will there ever be while she's in office.

It's unlikely the Democratic attorney general would file a motion to dismiss the case on those grounds since she's vowed not to expend the resources of her office to defend the 1931 law.

At the same time, Nessel noted it would be inappropriate for her to stipulate to any orders or preliminary injunctions with Planned Parenthood given her decision not to defend the case.

"Frankly, I believe that the case should be dismissed for lack of jurisdiction because there's no case or controversy," Nessel told media in a Tuesday Zoom press conference, noting her office is not investigating or prosecuting any cases under the law nor could it without a final decision from the U.S. Supreme Court.

"I've pledged multiple times that I will not enforce this law and unless Planned Parenthood just doesn't believe me and thinks that I'm misrepresenting what my position is, I don't understand why I would need to stipulate to anything," she said.

"Planned Parenthood would be better off if they were focusing on the governor's case and filing an amicus on behalf of the governor and her actions," Nessel said, adding that

prosecutors named in Whitmer's suit could create a case or controversy down the road should Roe be overturned.

Planned Parenthood of Michigan responded by noting Nessel's response to their complaint was due in court Thursday and that she had a "duty to defend."

"We don't litigate our case in the press and will respond in court to their arguments," said Ashlea Phenicie, a spokeswoman for Planned Parenthood Advocates of Michigan.

"PPMI has properly brought suit against the attorney general who by law has a duty to defend and is looking forward to having the merits of their claims evaluated and ruled upon by this court, which as stated in the pleadings has proper jurisdiction in this matter."

John Bursch, the state's solicitor general under Republican former Attorney General Bill Schuette, had made similar arguments to Nessel's in the Planned Parenthood case. He is representing Right to Life of Michigan and the Michigan Catholic Conference as amici in the case on behalf of Alliance Defending Freedom.

"Attorney General Nessel agrees with Right to Life of Michigan and the Michigan Catholic Conference that the Court of Claims lacks jurisdiction and should dismiss the case immediately," Bursch said. " We hope that happens as quickly as possible so this senseless proceeding can come to a quick close."

The clash between Nessel and Planned Parenthood came a day after a leaked U.S. Supreme Court opinion indicated the 1973 federal abortion right was likely to be overturned. It also followed by nearly a month Planned Parenthood and Gov. Gretchen Whitmer filing separate suits seeking to overturn Michigan's 1931 ban on performing abortions — a law that would take full effect if 1973's landmark Roe v. Wade decision is overturned.

Whitmer, who is being represented by Nessel's office, filed her suit in Oakland County Circuit Court April 7 against 13 county prosecutors who would be able to enforce the law at abortion clinics in their counties.

Planned Parenthood filed its case the same day against the attorney general as the state's top law enforcement official tasked with "defending and enforcing" the state's laws and "supervising all county prosecutors."

Nessel on Tuesday took issue with Planned Parenthood's posit that she had any authority to prohibit county prosecutors from charging individuals under the existing 1931 law.

"I don't believe that I as attorney general of this state have the authority to tell duly elected prosecutors what they can and what they cannot charge," Nessel said. "If that were the case, I don't even know why we would elect our county prosecutors in the first place, if they're not allowed to make their own decisions."

She called on the GOP-led Legislature to step in and defend the law if Republican lawmakers are concerned about the future of Michigan abortion statutes, noting an early House budget passed through committee last month included about $750,000 for lawmakers to use to defend the law.

"Come on in and you defend this law," Nessel said of the Legislature. "Because I've made it very clear I think it's unconstitutional, I think it is unethical for me to defend it."

The Planned Parenthood case has drawn criticism from anti-abortion groups who have alleged the litigation is a "friendly suit" in which both the plaintiff and defendant agree on the issue in question but seek a court opinion to change state law.

The suit drew further scorn when it was randomly assigned to a state Court of Claims judge, Elizabeth Gleicher, who disclosed she is a donor to Planned Parenthood of Michigan and represented the group in a 1998 abortion law challenge that will be an integral case in deliberations over the current case.

Gleicher declined to recuse herself and said through a court clerk that she could remain impartial.

Planned Parenthood of Michigan, Nessel's office, and Gleicher had a closed-door scheduling conference via Zoom Monday. The Court of Claims, through the State Court Administrative Office, said the conferences are usually conducted in chambers and would not allow members of public or media into the online proceeding.

So far, Right to Life of Michigan and the Michigan Catholic Conference are the only groups to have sought intervention in the case as amici parties.

In Whitmer's case, Right to Life of Michigan, the Michigan Catholic Conference and state House and Senate Democrats have sought to file as amici.

eleblanc@detroitnews.com

EXHIBIT 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.

Oakland Circuit Court No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

PROSECUTING ATTORNEYS SAVIT, LEYTON, SIEMON, GETTING, WIESE, MCDONALD, AND WORTHY'S RESPONSE IN SUPPORT OF GOVERNOR WHITMER'S EMERGENCY MOTION FOR *EX PARTE* TEMPORARY RESTRAINING ORDER

David A. Kallman (P34200)
Stephen P. Kallman (P75622)
Jack C. Jordan (P46551)
William R. Wagner (P79021)
Great Lakes Justice Center
5600 W. Mount Hope Hwy.
Lansing, MI 48917
(517) 993-9123
dave@greatlakesjc.org

Counsel for Defendants Jarzynka and Becker

Eli Savit (P76528)
Victoria Burton-Harris (P78263)
P.O. Box 8645
Ann Arbor, Michigan, 48107
(734) 222-6620
savite@washtenaw.org
burtonharrisv@washtenaw.org

Jonathan B. Miller (*pro hac vice* to be submitted)
Michael Adame (*pro hac vice* to be submitted)
Elsa Haag (*pro hac vice* to be submitted)
Public Rights Project
4096 Piedmont Avenue, #149
Oakland, CA 94611
(646) 831-6113
jon@publicrightsproject.org

Counsel for Respondent Eli Savit, Prosecuting Attorney, Washtenaw County

Brian MacMillan (P73702)
Office of the Prosecuting Attorney-
Civil Division
900 South Saginaw St., Suite 102
Flint, MI 48502
(810) 257-3050
bmacmillan@geneseecountymi.gov

Counsel for Respondent David S. Leyton, Prosecuting Attorney, Genesee County

Bonnie G. Toskey (P30601)
Sarah K. Osburn (P55539)
Cohl, Stoker & Toskey, P.C.
601 N. Capitol Ave.
Lansing, MI 48933
(517) 372-9000
btoskey@cstmlaw.com
sosburn@cstmlaw.com

Counsel for Respondents Carol Siemon, Prosecuting Attorney, Ingham County and Jeff S. Getting, Prosecuting Attorney, Kalamazoo County

Christina Grossi (P67482)
Deputy Attorney General

Linus Banghart-Linn (P73230)
Christopher Allen (P75329)
Kyla Barranco (P81082)
Assistant Attorneys General
Michigan Dep't of Attorney General
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628
Banghart-LinnL@michigan.gov

Lori A. Martin (*pro hac vice* pending)
Alan E. Schoenfeld (*pro hac vice* pending)
Emily Barnet (*pro hac vice* pending))
Cassandra Mitchell (*pro hac vice* pending)
Benjamin H.C. Lazarus (*pro hac vice* pending)
Special Assistant Attorneys General
Wilmer Cutler Pickering Hale and Dorr LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800
lori.martin@wilmerhale.com

Kimberly Parker (*pro hac vice* pending)
Lily R. Sawyer (*pro hac vice* pending)
Special Assistant Attorneys General
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000
kimberly.parker@wilmerhale.com

Counsel for Plaintiff Gretchen Whitmer

Wendy E. Marcotte (P74769)
Marcotte Law, PLLC
Marquette County Civil Counsel
102 W. Washington Street, Suite 217
Marquette, MI 49855

Counsel for Respondent Matthew J. Wiese, Prosecuting Attorney, Marquette County

Karen D. McDonald (P59083)
David W. Williams (P55611)
1200 North Telegraph Road
Pontiac, MI 48341

Melvin Butch Hollowell (P37834)
Angela L. Baldwin (P81565)
The Miller Law Firm
1001 Woodward, Ste. 850
Detroit, MI 48226

Counsel for Respondent Karen D. McDonald, Prosecuting Attorney, Oakland County

Sue Hammoud (P64542)
Wayne County Corporation Counsel
500 Griswold, 30th Floor
Detroit, MI 48226
(313) 224-6689
shammoud@waynecounty.com

Counsel for Respondent Kym L. Worthy, Prosecuting Attorney, Wayne County

INTRODUCTION

On August 1, 2022—before this Court issued its Temporary Restraining Order (TRO)—chaos reigned in Michigan. In the aftermath of the United States Supreme Court's decision overruling *Roe v. Wade*, 410 U.S. 113 (1973), the right to an abortion had remained protected in Michigan. The State of Michigan does maintain archaic laws, dating back to 1846, which criminalize abortion. *See* MCL 750.14. But enforcement of those laws had been blocked thanks to a May 17 preliminary injunction issued by the Court of Claims in *Planned Parenthood of Mich. v Mich. Attorney General*, No. 22-000044-MM.

All of that changed on August 1. That morning, the Court of Appeals issued an order which indicated that the Court of Claims' "preliminary injunction does not apply to county prosecutors." But the Court of Appeals did not question the merits of the Court of Claims' ruling, or its conclusion that Michigan's anti-abortion laws are likely unconstitutional. Instead, it held that because the Court of Claims has jurisdiction only to hear claims "against the State"—and because county prosecutors are "local officials"—the Court of Claims' injunction did not bind county prosecutors.

The net result: the Court of Claims' ruling declaring Michigan's anti-abortion laws presumptively unconstitutional remained in effect. But, per the Court of Appeals, that ruling formally enjoined *only the Attorney General*, not county prosecutors. Accordingly, despite Michigan's anti-abortion laws being ruled presumptively invalid, the Court of Appeals' decision was interpreted by at least some county prosecutors as giving them the green light to criminally prosecute abortion.

The fallout was immediate. At least two county prosecutors with abortion facilities in their jurisdictions indicated that they intended to immediately begin prosecuting abortion cases. Seven

others (the undersigned) reiterated that they would not. Planned Parenthood issued a statement opining that the Court of Appeals' decision would not take effect until at least 42 days after its issuance, and it would continue providing abortion through that timeframe. The attorney for the Jackson and Kent County prosecutors, however, disputed Planned Parenthood's assertion. That attorney publicly stated that the Court of Appeals' decision was effective immediately.

Caught in the middle of all of this were providers, patients, and many others taking action in support of access to foundational reproductive health care. Virtually instantaneously, providers were faced with the possibility that medical procedures that had been constitutionally protected for a half-century could be met with a felony prosecution. Patients—many of whom had scheduled appointments days or weeks in advance—faced the possibility that the legality of their reproductive decisions could be subject to the whims of Michigan county prosecutors. For a full day, chaos and confusion reigned.

That confusion was alleviated by this Court's late afternoon ruling on August 1. In that ruling, this Court correctly concluded that "immediate and irreparable injury . . . will occur if Defendants are allowed to prosecute abortion providers . . . without a full resolution of the merits of the pending cases challenging that statute." Order Granting Temporary Restraining Order at 3 ("Order"). Accordingly, this Court granted the Governor's request for a temporary restraining order enjoining Respondents—the 13 county prosecutors with abortion facilities in their jurisdiction—from prosecuting Michigan's archaic abortion-criminalization laws. *See id.*

This Court's decision was correct, and the TRO should remain in effect. "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Se. Pennsylvania v Casey*, 505 U.S. 833, 844 (1992). And to put it mildly, "doubt" will result if the TRO is not extended. Among other things, patients, providers, and others will be forced to make fundamental decisions based not on

personal interests and autonomy—but rather, based on their best guess as to what the next court ruling will say and how prosecuting attorneys will interpret it. Further, without the TRO, Michigan law-enforcement officials will face a byzantine landscape in which Michigan's anti-abortion laws have been ruled presumptively unconstitutional, but in a ruling that formalistically applies only to the Attorney General. That situation is untenable, cannot be in the public interest, and will cause something that goes far beyond irreparable harm.

Respondent Prosecuting Attorneys—who are named as defendants in their official capacities—are charged with enforcing the law in their communities. All of us understand that the law requires certainty and predictability. Absent an extension of the TRO, that certainty will be elusive in Michigan. Respondent Prosecuting Attorneys thus join Governor Whitmer in her request for an extended TRO. At minimum, the TRO should be extended until "a full resolution of the merits of the pending cases challenging that statute." Order at 3.[1]

STATEMENT OF FACTS AND PROCEEDINGS

Michigan's Law on Abortion

As a result of the United States Supreme Court's decision in *Roe v. Wade,* abortion has been constitutionally protected in Michigan since 1973. Michigan, however, maintains a pre-*Roe* criminal abortion statute, which 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. That law, of course, was rendered unenforceable by *Roe.* But it threatened to spring back into existence after the Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Organization* (No. 19-1392). Whether Michigan's law criminalizing abortion is consistent with the Michigan Constitution

[1] In filing this response with the Circuit Court, Respondent Prosecuting Attorneys preserve all rights with respect to proceedings, including any claims or defenses they might assert in an initial responsive pleading.

remains unsettled. The Michigan Supreme Court has never opined on whether the state constitution independently protects the right to an abortion.

Relevant Proceedings

In light of the current state of Michigan law, the *Dobbs* decision, and the substantial reliance interests of individuals and providers on legal access to abortion in Michigan, the Governor filed the instant case in this Court. The Governor contends that MCL 750.14 violates both the due process and equal protection clauses of the Michigan Constitution. Compl. ¶¶ 79–95. The case was filed pursuant to the Governor's authority under Article 5, § 8 of the Michigan Constitution. The Governor sought to have the Michigan Supreme Court review the questions presented under MCR 7.308. Respondent Prosecuting Attorneys have joined the Governor in that request on several occasions.

At the same time, Planned Parenthood of Michigan and Dr. Sarah Wallet filed a parallel suit in the Michigan Court of Claims on April 7 that also challenged the constitutionality of MCL 750.14. On May 17, the Court of Claims enjoined the Michigan Attorney General and all county prosecutors from enforcing MCL 750.14, concluding that there was "a strong likelihood that plaintiffs will prevail on the merits of their constitutional challenge." *Planned Parenthood of Michigan v. Attorney General*, No. 22-000044-MM, 2022 WL 2103141 (Mich. Ct. Cl. May 17, 2022). On August 1, the Michigan Court of Appeals issued an order holding that the injunction did not extend to local county prosecutors, because county prosecutors are not subject to the Court of Claims' jurisdiction. *See In re Jarzynka*, No. 361470, 2022 WL 3041132 (Mich. Ct. App. Aug. 1, 2022). Importantly, however, the Court of Appeals did not disturb the Court of Claims' conclusion that there was a "strong likelihood" Michigan's anti-abortion law was unconstitutional. Mere hours after the Court of Appeals issued its decision, this Court issued a temporary restraining

order to prevent the 13 named county prosecutors (all of the prosecutors who have abortion providers in their jurisdictions) from enforcing MCL 750.14. We strongly agree with this Court's conclusion and urge it to extend the temporary restraining order.

ARGUMENT

The TRO issued by this Court on August 1 should be extended. The factors to be considered when considering injunctive relief are whether: (1) Plaintiff is likely to prevail on the merits; (2) Plaintiff will suffer irreparable harm if a TRO is not issued; (3) the public interest will be harmed if a TRO is not granted; and (4) the injury that Defendant will suffer if a TRO is issued does not outweigh the harm that Plaintiff would suffer if preliminary injunctive relief is not granted. *Detroit Fire Fighters Ass'n IAFF Local 344 v City of Detroit Fire Fighters*, 482 Mich. 18, 34 (2008) (citing *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich. 152, 157–158 (1984)). Respondent Prosecuting Attorneys agree with and incorporate the Governor's argument regarding the urgent necessity for a TRO in this case. We also agree on the merits of the Governor's arguments and have concluded that the Michigan Constitution protects the right to an abortion. We write to further emphasize why the equities weigh so heavily in favor of the TRO extension—in particular, how "there will be harm to the public interest" if the TRO is not extended. *Detroit Fire Fighters Ass'n*, 482 Mich at 34.

I. Recent Legal Developments Create Uncertainty About Michiganders' Constitutional Rights

Today's legal landscape in Michigan is unprecedented. The State, including the Attorney General, is prohibited from enforcing MCL 750.14. That is because the Court of Claims found a "strong likelihood" that the *Planned Parenthood* plaintiffs will prevail on their constitutional challenges to the law. Simultaneously, however, county prosecutors—in the absence of this Court's August 1 temporary restraining order—*may* enforce the law.

The undersigned prosecutors have repeatedly stated their intent to respect the Court of Claims' ruling, and not to prosecute abortion. On the other side, the Jackson, Kent, Macomb, and Saginaw prosecutors have indicated that—in the absence of this Court's temporary restraining order—they would now enforce Michigan's criminal abortion law. The Cass, Charlevoix, Clinton, and Hillsdale County prosecutors also have publicly stated they would enforce the anti-abortion law as they are not covered by the temporary restraining order.[2]

To summarize this dizzying state of affairs, the state Attorney General (and the State itself) cannot enforce MCL 750.14 due to the Court of Claims' injunction. At least some county prosecutors with abortion facilities in their jurisdictions intend to respect the Court of Claims' ruling that Michigan's anti-abortion laws are likely unconstitutional. Other prosecutors in counties with abortion facilities are seeking to eliminate any restrictions on their ability to enforce anti-abortion laws. And confusing matters even further, some county prosecutors who do not have abortion facilities in their jurisdiction—and thus are not subject to this litigation—have indicated that they intend to enforce MCL 750.14 where they can.

This is madness. The uncertainty created by the barrage of legal decisions threatens the orderly application of the rule of law in Michigan. Michigan medical providers are reacting accordingly. On August 1, the University of Michigan temporarily halted its abortion services as the day's legal wrangling played out, and when this Court issued the TRO, the University resumed the provision of care.[3] Northland Family Planning Centers paused its operations in Macomb

[2] Beth LeBlanc, *Oakland County judge blocks county prosecutors from enforcing abortion ban*, The Detroit New (Aug. 1, 2022), https://www.detroitnews.com/story/news/local/michigan/2022/08/01/county-prosecutors-can-enforce-abortion-ban-appeals-court-says/10200100002/; Treas Baldas and Paul Egan, *These Mich. prosecutors will not charge women who have abortions, or doctors who perform them*, Detroit Free Press (June 24, 2022), https://www.freep.com/story/news/local/michigan/oakland/2022/06/24/michigan-prosecutors-wont-charge-abortions/7725417001/.

[3] Kate Wells, *They came to Michigan for an abortion. Now, that's uncertain too*, Michigan Radio (Aug. 1, 2022), https://www.michiganradio.org/criminal-justice-legal-system/2022-08-01/they-came-to-michigan-

County and shifted its patients to its facilities in Oakland County, while Planned Parenthood continues providing care.[4] Henry Ford Health (which operates hospitals in Jackson and Macomb counties) and Beaumont-Spectrum health (which operates hospitals across Michigan) each issued statements indicating they are searching for clear direction regarding which care is permitted for their patients.[5] Providers are thus shifting resources, patients, and staff to escape patchwork enforcement across the state, with some pausing services altogether rather than risk legal liability.

All Respondent Prosecuting Attorneys have made clear their agreement that the Michigan Constitution protects the right to an abortion at least concurrently with the former *Roe* standard (if not extending further).[6] Despite these assurances, the residents in the communities we serve, as well as those who come into our communities for care, face imminent and significant harm from MCL 750.14. Even in counties where prosecutors are not inclined to prosecute abortion, criminal abortion cases could still be investigated by *other* county prosecutors or law-enforcement agencies if the temporary restraining order is dissolved. For example, a person traveling through another county to obtain an abortion in one of our counties could plausibly face charges for conspiracy or aiding and abetting abortion in violation of MCL 750.14. *See, e.g.*, *People v. Meredith*, 209 Mich. App. 403, 408 (Mich. App. 1995) ("In a conspiracy case, venue is proper in any county in which an overt act was committed in furtherance of the conspiracy.").

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for-an-abortion-now-thats-uncertain-too; Meredith Bruckner, *Michigan Medicine will continue to provide abortion care following day of court rulings*, All About Ann Arbor (Aug. 2, 2022), https://www.clickondetroit.com/all-about-ann-arbor/2022/08/02/michigan-medicine-will-continue-to-provide-abortion-care-following-day-of-court-rulings/

[4] *Id.*

[5] LeBlanc, supra note 2.

[6] Press Release, Karen McDonald et al., *Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose Joint Statement* (Apr. 7, 2022) https://tinyurl.com/nhen4c9s.

Moreover, in the absence of a temporary restraining order, people could be *arrested* for abortion—even in counties where prosecutors would generally decline such cases. *See* MCL 750.14 (making abortion "a felony"); MCL 764.15 (allowing "[a] peace officer, without a warrant, [to] arrest a person" if (1) "[t]he person has committed a felony although not in the peace officer's presence"; or (2) "[a] felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it"). To say it plainly, if the temporary restraining order is dissolved, the rights of doctors, patients, and providers would depend not just on the county in which the reside, but the counties through which they travel. That state of affairs is intolerable. And the resulting uncertainty is flatly incompatible with the "public interest." *Detroit Fire Fighters Ass'n*, 482 Mich at 34.

II. The Attorney General Being Enjoined from Enforcing a State Law—But Not County Prosecutors—Creates Further Chaos and Uncertainty

What is more, the real-world chaos and uncertainty that would result if the temporary restraining order is dissolved would only be exacerbated by the *legal* chaos that would result. To Respondents' knowledge, never in Michigan's history has the Attorney General been enjoined, on constitutional grounds, from enforcing a state criminal law while county prosecutors maintain free reign to prosecute it.

Indeed, such a state of affairs is inconsistent with Michigan's legal design. The Attorney General and prosecuting attorneys have concurrent jurisdiction to "appear for the state" on any criminal matter. MCL 14.28 (Attorney General may "appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal"); MCL 14.153 ("prosecuting attorneys shall, in their respective counties, appear for the state . . . 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."). The Attorney General "consult[s] and

advise[s] the prosecuting attorneys, in all manners pertaining to the duties of their offices." MCL 14.30. And if a prosecuting attorney is "disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office," the prosecuting attorney "*shall* file with the attorney general" a petition seeking appointment of a special prosecutor. MCL 49.160 (emphasis added).

To be sure, prosecuting attorneys are independently elected. We maintain independent authority to carry out our duties consistent with the needs of our communities. The Attorney General cannot simply tell county prosecutors what to do. But it creates an uncharted (and potentially untenable) situation where a state criminal law is constitutionally enjoined from being enforced by the Attorney General—but not by Michigan's 83 prosecuting attorneys.

For example: how (if at all) can the Attorney General "consult and advise the prosecuting attorneys" about the enforcement of a law that the Attorney General has been prohibited from enforcing on constitutional grounds? *See* MCL 14.30. How (if at all) can a prosecuting attorney with a conflict of interest seek the appointment of a special prosecutor on an abortion case? Again: the legal mechanism for such an appointment is to "file with the attorney general" a petition seeking the appointment of a special prosecutor. MCL 49.160. May the Attorney General accept such a petition, or would that cross the line into "enforcement" of an enjoined criminal law? And if she does accept that petition—seeking prosecution of a law that the Attorney General has been told is likely unconstitutional—can the Attorney General assign the case to a different county prosecutor? Or would that violate her legal duty to uphold the Constitution?[7]

[7] The instant situation—in which the Attorney General has been enjoined from enforcing a law on *constitutional* grounds—is distinct from a situation in which the Attorney General has a conflict in a case. The latter situation can likely be resolved by (1) creating a conflict wall within the Attorney General's Office, or (2) the Attorney General performing only ministerial tasks relating to the prosecution of a case. Here, however, doing so would put the Attorney General at odds with what a court has said the Michigan Constitution requires. That constitutional taint cannot so easily be resolved.

None of these questions have easy answers. The reason is straightforward. It is antithetical to Michigan's legal structure for a law to be enjoined as to the Attorney General, but not county prosecutors. Dissolving the temporary restraining order while the Court of Claims' injunction remains would thus invite further chaos and uncertainty. None of that is in the public interest. *See, e.g., Detroit Fire Fighters*, 482 Mich at 34. And that provides further reason for this Court to keep the temporary restraining order in place.

III. The Risks to Michiganders' Constitutional Rights, Health, and Well-Being Extend Past this Immediate Moment and Require Intervention

The continuing whiplash regarding abortion's status in Michigan means that access to abortion care will remain in grave peril absent continued action by this Court. The temporary restraining order assists in both providing some immediate certainty while also reducing long-term risks to Michiganders' constitutional rights, health, and well-being.

A. Special constitutional considerations attach to questions of abortion.

Questions of abortion have long been granted special timeliness considerations given both their public importance and the unique circumstances of pregnancy. A pregnancy does not wait for the courts. Those who would seek an abortion cannot wait for litigation to wind its way through the judicial system. They urgently need to know whether, and under what circumstances, they can exercise their reproductive rights. This is not some abstract matter. Decisions about current pregnancies, and current decisions about whether to get pregnant, are at issue *today*.

Indeed, *Roe* explained—in a passage that was *not* overruled by *Dobbs*—that "[p]regnancy provides a classic justification for a conclusion of nonmootness. It truly could be capable of repetition, yet evading review." *Roe*, 410 U.S. at 125 (citation omitted); *Honig v. Doe*, 484 U.S. 305, 335–36, (1988) (Scalia, J., dissenting) ("*Roe* [and other abortion cases] differ from the body of our mootness jurisprudence . . . [by focusing] upon the great likelihood that the issue will recur

between the defendant and the other members of the public at large without ever reaching us") (emphasis in original). The same rationale merits the Court's continued action now.

B. The ethical and legal boundaries of life-saving abortion care under MCL 750.14 are uncertain, making this Court's intervention a critical public health matter.

Both the physical and economic health and well-being of Michigan residents are squarely at issue here. The physical-health analysis is straightforward, and straightforwardly disturbing. Prior to *Roe*, the criminalization of abortion pushed people and providers into the shadows, where they engaged in risky and unsafe abortion procedures. Thousands upon thousands of people died from abortion in the pre-*Roe* era.[8] Medical advances since *Roe* have dramatically changed the landscape but forcing people to carry a pregnancy to term carries great health risks for the pregnant person and the child. As the U.S. Supreme Court has recognized, childbirth is more dangerous than abortion. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016). According to one study, carrying a pregnancy to term is fourteen times risker than having an abortion.[9] The risks of pregnancy and childbirth are greater for people of color and of lower socioeconomic status (*i.e.*, those most likely to be denied abortions).[10] In addition to the significant physical health risks of pregnancy, childbirth, and the post-partum period, forced pregnancies pose immediate and long-term mental health risks.[11]

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[8] Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, 6 Guttmacher Report on Public Policy at 8 (Mar. 2003).

[9] *Black Women Over Three Times More Likely to Die in Pregnancy, Postpartum Than White Women, New Research Finds*, Population Reference Bureau, (Dec. 6, 2021), https://www.prb.org/resources/black-women-over-three-times-more-likely-to-die-in-pregnancy-postpartum-than-white-women-new-research-finds/.

[10] *Id.* (noting that "the maternal mortality rate among non-Hispanic Black women was 3.5 times that of non-Hispanic white women").

[11] Pamela Herd et al., *The Implications of Unintended Pregnancies for Mental Health in Later Life*, Am. J. Pub. Health, (Feb. 17, 2016), https://ajph.aphapublications.org/doi/10.2105/AJPH.2015.302973#_i6 ("Experiencing unwanted pregnancies . . . appears to be strongly associated with poor mental health effects

Returning specifically to Michigan, uncertainty as to the validity (and scope) of MCL 750.14 threatens to chill potentially life-saving medical care.[12] MCL 750.14 allows for abortion only if "necessary" to "preserve the life" of a pregnant person. If the temporary restraining order is dissolved so that MCL 750.14 is not enjoined statewide, or even in certain counties, abortions would be subject to criminal prosecution except when "necessary" to "preserve life." But at this juncture, no one—not providers, not prosecutors, and not patients—has a clear understanding of what preserving the life of a pregnant person means with any real specificity.[13] Reports from around the country post-*Dobbs* have demonstrated, time and time again, that doctors and patients in states with similarly vague laws are struggling through horrific choices and medical emergencies.[14] That dystopian reality will arise in Michigan if the TRO is not extended. When doctors are chilled from providing potentially lifesaving care, people may die or have worse and more complicated medical outcomes, such as losing their ability to have children in the future. That risk of grave injury or death is harrowing considering that 59% of people who seek abortions

for women later in life."); Sarah Fielding, *Adoption is No Substitute for Abortion: Forced Pregnancy Impacts Mental Health*, Verywell Mind, (updated Jan. 14, 2022), https://www.verywellmind.com/mental-health-implications-of-forced-pregnancy-5212669.

[12] The federal government has recognized the vital importance of ensuring access to emergency care when the life of a pregnant person is in jeopardy. For example, just yesterday, the Department of Justice announced a lawsuit challenging an Idaho law that failed to include an exception for the life of the mother. *See, e.g.*, Charlie Savage, *Justice Dept. Sues Idaho Over Its Abortion Restrictions*, N.Y. Times (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/us/politics/biden-abortion-idaho-lawsuit.html.

[13] *See, e.g.*, Lisa Harris, *Navigating Loss of Abortion Services — A Large Academic Medical Center Prepares for the Overturn of Roe v. Wade*, New Eng. J. Med. (May 11, 2022), https://www.nejm.org/doi/full/10.1056/NEJMp2206246.

[14] J. David Goodman and Azeen Ghorayshi, *Women Face Risks as Doctors Struggle With Medical Exceptions on Abortion*, N.Y. Times (July 20, 2022), https://www.nytimes.com/2022/07/20/us/abortion-save-mothers-life.html.

already have children, meaning that any new harm experienced by the pregnant person could have significant ripple effects on their families and communities.[15]

If the TRO is not extended, then, the possibility of prosecution will place doctors and patients in an untenable position *at precisely the point in time where a patient's life or health is in danger*. For one, the specter of prosecution presents providers with a medically unethical dilemma: rather than weighing the risks and benefits of a medical procedure for the patient, a provider must weigh the medical risks to the patient against the *legal* risks the *provider* is willing to shoulder. That is a flagrant inversion of medical ethics, as enshrined by the Michigan State Medical Society: "A physician must recognize responsibility to patients first and foremost . . . A physician shall, while caring for a patient, regard responsibility to the patient as paramount."[16] But faced with potential criminal liability, providers, hospitals and medical systems—and even medical education and training programs—may refrain from performing, studying, or teaching certain aspects of medical care. Such care could include, among others: (1) care for miscarriages, especially emergency miscarriages; (2) reproductive care such as in-vitro fertilization; and (3) referrals and so-called "warm hand-offs" of patients to other jurisdictions where abortion care is offered legally.[17] For many patients, confusion and hesitancy regarding whether to provide medical care could result in no care at all.

Moving one step further, without the temporary restraining order in place, abortion providers may simply shutter their operations, and never return. Without a clearly established right

[15] Katherine Kortsmit, et.al, *Abortion Surveillance — United States, 2019*, Center for Disease Control (Nov. 26, 2021), https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm.

[16] Michigan State Medical Society, *Policy Manual 2021 Ed.*, 2021, https://www.msms.org/Portals/0/Documents/MSMS/About_MSMS/2021%20MSMS%20Policy%20Manual%20(FINAL).pdf?ver=2021-11-18-175054-277.

[17] Harris, *supra* note 13.

under state law, medical providers will likely pause or altogether eliminate certain services. A temporary pause in the provision of abortion services may thus lead to the absolute erosion of the overall abortion infrastructure in Michigan. Abortion services, once stopped, do not readily restart. Providers and other personnel may move into other positions, resources may expire, and training may cease so that future providers are unable and unqualified to provide care altogether. These fears are not hypothetical. States that have imposed stark restrictions in abortions have *already* seen such permanent erosion in care.[18]

As elected prosecutors, our charge is to promote the public health and safety of our communities. Ensuring continued access to abortion care—especially care that protects the life of the pregnant person—is thus of critical importance.[19] Without further clarification as to whether MCL 750.14 can be enforced, many medical decisions about abortion (some of which can be required in a matter of moments during a medical emergency) will be both legally and ethically fraught. Our providers and our residents deserve greater clarity so they can make informed decisions together.

At the very least, then, the TRO should be extended until the validity and scope of MCL 750.14 has been fully and finally clarified. It would plainly be inimical to the "public interest" for health services to be so severely eroded—particularly before our Supreme Court has weighed in regarding abortion's legal status in Michigan.

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[18] *See* Abigail Abrams, *Abortion Clinics Are Rapidly Closing. Many Won't Come Back*, Time (Dec. 2, 2020), https://time.com/5916746/abortion-clinics-covid-19/.

[19] "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." *Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose Joint Statement*, (Apr. 7, 2022), https://bloximages.newyork1.vip.townnews.com/abc12.com/content/tncms/assets/v3/editorial/a/22/a22e73de-b68d-11ec-a8a3-5f2cfac31351/624f0dc153844.pdf.pdf.

C. Michiganders' long-term well-being is at risk absent additional intervention.

When determining whether to maintain the temporary restraining order, this Court also should consider the hugely impactful effect of reproductive choice for the economic and social opportunity of people who can become pregnant in Michigan and across the country. *See, e.g.*, *Casey*, 505 U.S. at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."). Irrespective of changes in Michigan courts, people will continue to seek out and have abortions. But that exercise of reproductive freedom will not be without consequences. A dramatic shift in the law makes abortion care more costly (by, among other things, requiring out-of-state travel),[20] riskier (by, among other things, delaying care), and less equitable (by becoming less available to people of less financial means and people of color in general).[21]

For those unable to secure an abortion due to quickly changing legal circumstances in Michigan, the "economic" consequences will be dire indeed. Many Michiganders, forced by the State to give birth, will "bear[ ] nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985). The economic costs of an unplanned pregnancy, which are disproportionately imposed on those who are already of lower socioeconomic status, are significant. Extending the

[20] For example, if abortion were prohibited in Michigan, the average resident would need to travel 260 miles for an abortion as opposed to only 13 as of November 2021. Jenn Schanz, *What a challenge to Roe v. Wade could mean for Michigan*, WXYZ, (Nov. 12, 2021), https://www.wxyz.com/news/what-a-challenge-to-roe-v-wade-could-mean-for-michigan.

[21] In addition to the risk of negative health consequences, pregnant women who are denied access to abortion care are substantially more likely to face economic hardships. *See, e.g.*, Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion*, Nat'l Bureau of Econ. Rsch., p. 3 (Jan. 2020), https://www.nber.org/system/files/working_papers/w26662/w26662.pdf.

TRO would thus help to ensure that legions of people maintain their right to be "an independent, self-sustaining, and equal citizen." *Id.*

There is, perhaps, no clearer articulation of the "public interest" involved in this case. *Detroit Fire Fighters Ass'n,* 482 Mich at 34. The lives, health, freedom, and well-being of countless Michiganders hang in the balance. Those are the stakes. And that is why the TRO must be extended.

CONCLUSION

For the foregoing reasons, the TRO requested by the Governor should remain in effect, and this Court should issue an order that prohibits Defendants from enforcing Michigan laws criminalizing abortion.

Respectfully submitted,

DATED: August 3, 2022

/s/ Eli Savit
Eli Savit
Victoria M. Burton-Harris

/s/ Jonathan B. Miller
Jonathan B. Miller*
Michael Adame*
Elsa Haag*
Public Rights Project

Counsel for Respondent Eli Savit, Prosecuting Attorney, Washtenaw County

* pro hac vice forthcoming

DATED: August 3, 2022

/s/ Brian MacMillan
Brian MacMillan
Office of the Prosecuting Attorney-Civil Division

Counsel for Respondent David S. Leyton, Prosecuting Attorney, Genesee County

DATED: August 3, 2022

/s/ Bonnie G. Toskey
Bonnie G. Toskey
Sarah K. Osburn
Cohl, Stoker, & Toskey, P.C

Counsel for Respondents Carol Siemon, Prosecuting Attorney, Ingham County and Jeff S. Getting, Prosecuting Attorney, Kalamazoo County

DATED: August 3, 2022

/s/ Wendy E. Marcotte
Wendy E. Marcotte
Marcotte Law, PLLC

Counsel for Respondent Matthew J. Wiese, Prosecuting Attorney, Marquette County

DATED: August 3, 2022

/s/ Karen D. McDonald
Karen D. McDonald

Respondent Prosecuting Attorney, Oakland County

DATED: August 3, 2022

/s/ Sue Hammoud
Sue Hammoud
Wayne County Corporation Counsel

Counsel for Respondent Kym L. Worthy, Prosecuting Attorney, Wayne County

PROOF OF SERVICE

I, Eli Savit, hereby affirm that on the date stated below I delivered a copy of Respondents Savit, Leyton, Siemon, Getting, Wiese, McDonald and Worthy's Response in Support of Governor Whitmer's Emergency Motion for *Ex Parte* Temporary Restraining Order, upon opposing counsel stated above, via the Court's MiFile system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: August 3, 2022

/s/ Eli Savit
Eli Savit
Prosecuting Attorney
Washtenaw County

EXHIBIT 3

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