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,

Docket No. 362876

Oakland Circuit Case No. 22-193498-CZ

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

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Defendants-Appellees,

and

RIGHT TO LIFE OF MICHIGAN
AND MICHIGAN CATHOLIC
CONFERENCE,

Proposed Intervenors-Appellants.

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INTRODUCTION

Because the Oakland County Circuit Court's intervention ruling is indefensible, Governor Whitmer does not even try. Her opposition brief fails to engage Right to Life of Michigan and the Michigan Catholic Conference's emergency application for leave, relying on her trial-court briefing that was admittedly wrong in important respects, 9/27/22 Gov Whitmer's Resp in Opp to Emergency App for Leave to Appeal (Gov's Opp) at 1 n1, and on which not even the Circuit Court relied. 8/16/22 Order re: Proposed Intervenors', Right to Life of Mich & Mich Catholic Conf, Mot to Intervene at 3 n4 (**Application Exhibit 1**).

As the emergency application explains, the Circuit Court's intervention ruling will leave key sponsors and defenders of Michigan legislation—conservatives, liberals, progressives, and libertarians alike—excluded from future litigation that will decide the fate of their hard work. Accordingly, this Court should not only grant the application for leave to appeal but should also grant immediate intervention without further briefing or oral argument.

ARGUMENT

I. Proposed Intervenors have much more than a "policy preference" regarding whether the Michigan Constitution creates a right to abortion, and caselaw supports granting their motion to intervene.

Governor Whitmer's recycled briefing argues that Right to Life of Michigan and the Michigan Catholic Conference lack "any cognizable interest" in this case and "do not identify any case holding otherwise." Ex A to Gov's Opp at 1. That is incorrect. "[P]ublic interest group[s] that [are] involved in the process leading to adoption of

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legislation [have] a cognizable interest in defending that legislation." *Mich State AFL-CIO v Miller*, 103 F3d 1240, 1245 (CA 6, 1997); *accord id.* at 1245–47. The Sixth Circuit's decision in *Michigan State AFL-CIO*—which the application highlights on page 23—cites numerous examples. But the Governor addresses none of them.

Right to Life of Michigan and the Michigan Catholic Conference's interest in enacting and preserving pro-life laws is second to none. They have been key players "in the political process" to pass and preserve—and in litigation to defend—Michigan's pro-life laws for decades. *Id.* at 1245. Specifically in regard to MCL 750.14, the Michigan Catholic Conference was primarily responsible for defeating Proposal B in 1972, a referendum that would have legalized many abortions and invalidated the statute—just as Governor Whitmer seeks to do here. Application at 15

But the threat of a judicially created state constitutional right to abortion of unknown scope does not stop at MCL 750.14. It puts at risk *all* the pro-life legislation that Right to Life of Michigan and the Michigan Catholic Conference have shepherded into law and defended in court, including (just to name a few) 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). Application at 25–26. And it also puts at risk all future pro-life laws that Proposed Intervenors will promote, sponsor, or defend in court. Application at 1.

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That is why the Michigan Supreme Court ruled—*unanimously*—that the pro-life ballot-question committee spearheaded by Right to Life of Michigan and the Michigan Catholic Conference had a sufficient interest to warrant intervention in litigation regarding the November ballot measure that, if approved, will create what the Circuit Court invented here—a constitutional right to abortion. *Reprod Freedom for All v Bd of State Canvassers*, 978 NW2d 854 (Mich 2022). This Court should grant leave to appeal and follow suit.

Right to Life of Michigan and the Michigan Catholic Conference are the *only* parties who have sought to intervene in *any* post-*Dobbs* litigation in Michigan for a reason. Fabricating a state constitutional right to abortion could be the death knell of their work—past, present, and future. Proposed Intervenors do not have "a policy preference" regarding this question; they have a critical stake in the answer. Ex A to Gov's Opp at 1. Just like the Legislature, 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); *accord* Application at 23–24. And the Governor's unexplained argument to the contrary is meritless.

II. The existing parties may not adequately represent Proposed Intervenors' interests.

Governor Whitmer misstates the intervention standard, just like the Circuit Court: she says that a proposed intervenor must show that their "interest *is* [in]adequately represented by an existing party." Ex A to Gov's Opp at 1 (emphasis added). She is wrong. As the application explains, "there need be no positive showing that the existing representation is in fact inadequate. All that is required is that the

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representation by existing parties *may be* inadequate." *Mullinix v City of Pontiac*, 16 Mich App 110, 115; 167 NW2d 856 (1969) (emphasis added); *accord* Application at 27–28. To intervene, Right to Life of Michigan and the Michigan Catholic Conference need show only that "the *concern* of inadequate representation" exists. *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001) (per curiam) (emphasis added). And they have certainly made that "minimal" showing. *D'Agostini v City of Roseville*, 396 Mich 185, 188-189; 240 NW2d 252 (1976) (quotation omitted).

The application gives seven reasons why the existing parties may not adequately represent Right to Life of Michigan and the Michigan Catholic Conference's interests. Application at 28–31. Governor Whitmer refutes none of them. For the sake of brevity, Proposed Intervenors reiterate only one here.

County Prosecutors Jarzynka and Becker are the only existing parties who have offered a substantive defense of MCL 750.14's constitutionality. Given the nature of their prosecutorial office, Defendants Jarzynka and Becker have *no power* to enforce civil laws and *no interest* in defending them. But many of the pro-life laws that Right to Life of Michigan and the Michigan Catholic Conference have played a crucial role in enacting—and have a vital interest in defending—are civil in nature. Proposed Intervenors alone have an interest in calling out and opposing a constitutional right to abortion's impact on civil laws like the Parental Rights Restoration Act (MCL 722.901–08) and informed consent law (MCL 333.17015), both of which may serve as a predicate for civil actions, such as a lack of informed consent or interference with family relations. MCL 722.907.

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Governor Whitmer's claim that Proposed Intervenors' interests are adequately represented turns on the notion that MCL 750.14 stands alone. But that is false. Under the Michigan Constitution, any number of pro-life laws will rise or fall together, especially if courts, applying the constitutional right the Governor demands they invent, review them under strict scrutiny. The Governor's position is akin to saying a raging house fire interests no one else living on the same block because it's not their house. Only Right to Life of Michigan and the Michigan Catholic Conference have a vested interest in explaining *all* pro-life laws' relevance to this case, those laws' importance to unborn children and their families, and the broadscale danger of the Governor's sweeping constitutional attack.

III. Proposed Intervenors' claims and defenses have a question of law or fact in common with the main action.

Governor Whitmer argues that Proposed Intervenors do not raise a claim or defense that shares a question of law or fact in common with her lawsuit. Ex A to Gov's Opp at 4. That argument is baseless and the Governor's own caselaw shows why. In her recycled brief, the Governor relies on *League of Women Voters of Michigan v Secretary of State*, 506 Mich 561; 957 NW2d 731 (2020). Ex A to Gov's Opp at 5. The Supreme Court, in that case, dealt with a different scenario in which a court granted intervention on appeal—not in the trial court—after the original parties decided not to pursue further litigation. *League of Women Voters*, 506 Mich at 573–79. Yet a portion of that ruling is relevant here. Applying the standard for permissive intervention, the Supreme Court held that the "[t]he Legislature undoubtedly me[t]" the common-question-of-law-or fact requirement because "the parties . . . seek a

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declaratory judgment as to the constitutionality of [certain statutory provisions], as does the Legislature." *Id.* at 575.

The same is true here. Governor Whitmer seeks a declaratory judgment that MCL 750.14 violates the Michigan Constitution. 4/7/22 Compl for Declaratory & Injunctive Relief at 26. And Proposed Intervenors seek a declaratory judgment that MCL 750.14 does not violate the Michigan Constitution. 5/4/22 Proposed Ans of Intervening Defs Right to Life of Mich & the Mich Catholic Conf to Compl for Declaratory & Injunctive Relief at 45 (**Application Exhibit 3**). So, Michigan Right to Life and the Michigan Catholic Conference "undoubtedly meet[ ] th[e] standard" for permissive intervention. *League of Women Voters*, 506 Mich at 575. The matter is cut and dried, and none of the Governor's arguments put that conclusion in doubt.

IV. This Court's order in *In re Jarzynka* is irrelevant to Proposed Intervenors' bid to intervene in the Circuit Court.

The Governor's primary opposition to intervention is this Court's order dismissing the superintending control complaint in *In re Jarzynka*. Ex B to Gov's Opp at 2–4. But as the application explains, that order is unpublished, non-final, and legally irrelevant. Application at 21 n2.

Right to Life of Michigan and the Michigan Catholic Conference need not show that they have independent standing to intervene in the Circuit Court. Adverse parties with standing to litigate MCL 750.14's constitutionality are already present. Application at 18–20. And, in that scenario, Proposed Intervenors have the "ability to ride 'piggyback' on [Defendants Jarzynka and Becker] undoubted standing." *Diamond v Charles*, 476 US 54, 64; 106 S Ct 1697 (1986). That "at least one

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[Defendant] has standing" in the Circuit Court is enough. *Dodak v State Admin Bd*, 441 Mich 547, 550; 495 NW2d 539 (1993); *accord id.* at 561. This Court "need not consider whether [all Defendants] have standing." *Horne v Flores*, 557 US 433, 446; 129 S Ct 2579 (2009). Because the Governor cites no authority for this added requirement, the *In re Jarzynka* order is beside the point.

Viewed through a different lens, the "special injury or right, or substantial interest" that *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349, 372; 792 NW2d 686 (2010), requires is an independent standing element. Ex B to Gov's Opp at 3. But, when it comes to intervention, independent standing only matters when no other aligned party has standing to piggyback on, such as when none "of the losing parties below filed a timely appeal," *League of Women Voters*, 506 Mich at 575 (quotation omitted), and intervenors are "essentially taking the place of defendants in th[e] case," *id* at 579. That is not the case here. So, the Governor's argument is off-base.

What's more, Right to Life of Michigan and the Michigan Catholic Conference have independent standing for the reasons explained in their application in this proceeding, Application at 23–27, and separate application for leave to appeal in *In re Jarzynka*, 8/31/22 Pls-Appellants' App for Leave to Appeal or for Preemptory Reversal at 13–17, *In re Jarzynka*, S Ct No 164753. The Governor's reclaimed briefing does not engage these arguments, let alone refute them.

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V. The Michigan Supreme Court's hold on Proposed Intervenors' motion to intervene in the high court is of no significance here.

The same day that Governor Whitmer filed the Circuit Court action, she also filed a certification request via executive message asking that the Michigan Supreme Court take over the case and hold that the Michigan Constitution creates a right to abortion. Proposed Intervenors moved promptly to intervene in the Supreme Court to oppose the Governor's bid to insert a right to abortion into the Michigan Constitution. Six months later, the Supreme Court has still not ruled on the Governor's request. Because the Supreme Court has not granted certification (*i.e.*, taken over the case) or entered any substantive rulings, there has been no need for the Court to rule on Proposed Intervenors' intervention motion, which remains pending. Application at 14.

True, the Supreme Court construed as an amicus brief one of Proposed Intervenors' submissions, a brief addressing five supplemental questions the Supreme Court posed related to whether the Court should grant certification. *In re Exec Message of the Governor Requesting the Authorization of a Certified Question*, 974 NW2d 829, 829 (Mich 2022). But those predetermined, certification-related questions had nothing to do with the Governor's constitutional arguments. And at that early stage, it made no difference whether the Supreme Court treated Proposed Intervenors' submission as a party brief or an amicus filing.

Now, the Governor suggests the Supreme Court's hold on Proposed Intervenors' intervention motion is akin to a denial. But if anything, the shoe is on the other foot: the Supreme Court has effectively denied Governor Whitmer's

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certification request by sitting on it for roughly half a year. The Governor's failure to convince the Supreme Court to take over the Circuit Court litigation tells this Court nothing about the merits of Right to Life of Michigan and the Michigan Catholic Conference's intervention request.

When it came to ruling on the Governor's constitutional arguments, the Circuit Court possessed no discretion: it *had* to decide whether the Michigan Constitution creates a right to abortion and *ruled* that it likely did. Excluding Proposed Intervenors from the Circuit Court litigation for invalid reasons caused them—and MCL 750.14's defense—material harm. Application at 2–3. This Court should grant leave to appeal, remand with instructions for the Circuit Court to grant Proposed Intervenors' intervention motion, and prevent that injury from reoccurring next month when the Circuit Court proceedings resume.

Governor Whitmer's repurposed brief suggests that Proposed Intervenors should not be allowed to intervene because they can file an amicus brief in the Circuit Court. Ex B to Gov's Opp at 5. But the Governor knows full well that the trial judge allowed only the *parties* to file briefs at the TRO and preliminary-injunction stages of the case. Its briefing orders ruled out amicus submissions. 8/2/22 Addendum to Order Granting Temporary Restraining Order Entered Aug 1, 2022 at 2 ("accept[ing] and consider[ing] . . . briefs . . . by any named party" on whether the TRO should be continued) (**Reply Exhibit 1**); 8/3/22 Order re TRO Hearing on Aug 3, 2022 at 3 (**Application Exhibit 9**) (allowing "responsive briefs, filed by named parties," to the Governor's preliminary-injunction motion). And, perhaps most telling, the Circuit

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Court inexplicably denied Proposed Intervenors' motion to file a brief opposing the Governor's motion for preliminary injunction outright. (**Application Exhibit 13**). It did not construe that timely and well-reasoned submission as an amicus brief. (**Application Exhibit 11**). And the Circuit Court steadfastly refused to allow Proposed Intervenors' undersigned counsel to speak at the TRO hearing—even to make a record as to the arguments that Proposed Intervenors planned to present.

In sum, amicus "participation" in the Circuit Court means no right to file briefs and no right to be heard at oral argument; in other words, no right to participate at all. Quite the opposite, the Circuit Court went to great pains *not* to hear from Right to Life of Michigan and the Michigan Catholic Conference, whose arguments differed substantially from those of any party and would have derailed the court prior to its intended destination. Unless this Court grants leave to appeal and reverses the Circuit Court's erroneous denial of Proposed Intervenors' intervention motion, the Circuit Court will continue to exclude Right to Life of Michigan and the Michigan Catholic Conference from participating in this litigation in *any* capacity. That may suit the Governor's purpose but it does not comport with the letter or spirit of MCR 2.209.

VI. Proposed Intervenors and Defendants Jarzynka and Becker are not joined at the hip, as the Governor now admits.

Previously, the Governor claimed that Right to Life of Michigan, the Michigan Catholic Conference, and Defendants Jarzynka and Becker were "represented by the same counsel" in *In re Jarzynka*. Ex B to Gov's Opp at 5. That was never true, as the Governor now admits in a footnote. Gov's Opp at 1 n1. Nor do recent developments

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support Governor Whitmer's argument that they're joined at the hip. Ex B to Gov's Opp at 5–6. As the application explains, Proposed Intervenors made substantially different legal arguments than Defendants Jarzynka and Becker. Application at 28–29. The only case in which they have worked jointly on briefing is *In re Jarzynka*. And this is a *different* case that concerns a *different* ruling by a *different* trial court.

The Governor's suggestion of redundancy is curious given that nearly all the defendants agree with her and second her (and Planned Parenthood's) arguments at every turn. (**Application Exhibits 15 and 16**). Given the sharp tilt towards the pro-abortion side in this case, as well as every case in which MCL 750.14's constitutionality has been questioned, granting Proposed Intervenors' intervention motion will simply add some much-needed balance to litigation the Governor admits "is of broad public interest and significance." Gov's Opp at 1.

VII. Granting leave to appeal and holding that Proposed Intervenors are entitled to intervene will not lead to a barrage of putative intervenors.

The Governor suggests that granting Proposed Intervenors' leave to appeal and reversing the Circuit Court's denial of their intervention motion will lead to a barrage of putative intervenors. Gov's Opp at 1 (arguing that "[m]any groups and individuals care deeply about [this case's] outcome). That concern is a phantom, not reality. Only Right to Life of Michigan and the Michigan Catholic Conference moved to intervene in the Circuit Court. *No one else.* Proposed Intervenors' position as the backer, sponsor, and defender of Michigan's pro-life laws is unique and their interest in this litigation's outcome unmatched. Application at 24–27.

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Nor will granting leave to appeal and intervention cause the sky to fall. There is no evidence that anyone else intends to file an intervention motion. But if another motion comes, MCR 2.209 states that intervention requests must be "timely." Clearly, after the Circuit Court has ruled on the Governor's *ex parte* TRO and preliminary injunction motions, any further intervention requests would come too late.

CONCLUSION

"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, 508-509; 746 NW2d 118 (2008) (per curiam) (citation omitted). A trial court abuses its discretion when it fails to allow intervention despite the requirements of MCR 2.209 being met. *Id* at 508-511.

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.

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Dated: October 12, 2022

Respectfully submitted,

ALLIANCE DEFENDING FREEDOM

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 3,999 countable words in 12-point Century Schoolbook, a proportionally spaced font with serifs, according to the word-count function of the system used to prepare it, Microsoft Word 2013. MCR 7.212(B)(3); MCR 7.211(A)(3). It also complies with the additional requirements of MCR 7.212(B)(5).

/s/ Jonathan B. Koch
Jonathan B. Koch (P80408)

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REPLY EXHIBIT 1

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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.
_____/

ADDENDUM TO ORDER GRANTING TEMPORARY RESTRAINING ORDER ENTERED AUGUST 1, 2022

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

The Court issued a temporary restraining order on August 1, 2022, on the request of Plaintiff. In the order issued on that day, the Court indicated it would hold a hearing on Wednesday August 3, 2022, at 2:30 p.m. via Zoom videoconferencing. Further, the Court indicated all parties need appear for the hearing.

The Court finds it necessary to enter this addendum order for clarification. In lieu of the hearing being held via Zoom videoconferencing, the Court will conduct the scheduled hearing in person in Courtroom 5C at the Oakland County Circuit Court. The Court leaves it to the discretion of the named parties and their respective counsel to determine if they wish to appear for oral argument on

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Plaintiff's request to continue the temporary restraining order entered August 1, 2022, beyond the hearing scheduled for Wednesday, August 3, 2022.

The Court will accept and consider appropriately e-filed briefs on the sole issue of Plaintiff's request for a temporary restraining order for consideration by any named party in this litigation no later than 11:00 a.m. on Wednesday, August 3, 2022. All briefs must conform with MCR 2.119 and be e-filed timely or they will not be considered.

Any counsel of record wishing to be heard by the Court shall appear in person for the scheduled hearing. No witness testimony is authorized at this time.

Any and all media requests are to be submitted no later than 12:00 p.m. on August 3, 2022, for approval.

IT IS SO ORDERED.

Dated: AUG 0 2 2022

Hon. JACOB JAMES CUNNINGHAM
Circuit Court Judge

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