STATE OF MICHIGAN
IN THE SUPREME COURT

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

Plaintiffs.

_____ /

Case No. _____

Court of Appeals
Case No. 361470

PLANNED PARENTHOOD OF MICHIGAN AND DR. SARAH WALLETT'S APPLICATION FOR LEAVE TO APPEAL, OR, IN THE ALTERNATIVE, COMPLAINT FOR SUPERINTENDING CONTROL

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Planned Parenthood Michigan ("PPMI") and Sarah Wallett, M.D., M.P.H., FACOG (together, "Planned Parenthood") seek leave to appeal from an unpublished order of the Court of Appeals dated August 1, 2022 (attached hereto as **Exhibit 1**), which concludes that the Court of Claims's May 17, 2022 preliminary injunction against Michigan's 1931 felony abortion ban, MCL 750.14, does not bind county prosecutors while dismissing for lack of standing the complaint for superintending control that sought to vacate that preliminary injunction.

Consistent with MCR 7.302(B), this case involves a substantial question as to the constitutionality of a 1931 law that affects the civil rights of tens of thousands of people in this state, involves legal principles of major significance to the State's jurisprudence, raises issues of significant public interest, and is a case against an agency of the State. Additionally, the Court of Appeals's decision is clearly erroneous and causes material injustice to Planned Parenthood, its patients and staff, and families and communities across Michigan.

Planned Parenthood requests that this Court (1) preserve the status quo by granting the application to confirm that the May 17, 2022 preliminary injunction, which itself is intended to preserve the status quo, prevents any and all enforcement of MCL 750.14; (2) reverse the Court of Appeals's decision to the extent it holds otherwise; and (3) affirm the Court of Appeals's dismissal of the action for superintending control.

Alternatively, Planned Parenthood requests that the Court either (A) remand with directions to vacate the Court of Appeals's decision as to its conclusion that the prosecutors lacked standing because the preliminary injunction did not bind them, and direct the Court of Appeals instead to dismiss the complaint for superintending control on the grounds that the prosecutors failed to meet the requirements of MCR 3.302(B), (D)(2); or (B) remand with directions to vacate

the Court of Appeals's conclusion that the prosecutors lacked standing because the preliminary injunction did not bind them, and direct the Court of Appeals instead to consider whether the prosecutors satisfy the requirements of MCR 3.302(B), (D)(2).

In the event that this Court does not grant Planned Parenthood's leave to appeal, Planned Parenthood requests that the Court construe this application for leave to appeal as a complaint for superintending control over the action in the Court of Appeals and grant the same relief identified above. Given the urgency of the case, the irreparable harm that would result from leaving the Court of Appeals's decision in place, and the chaos that has already resulted from that decision, Planned Parenthood also requests that the court grant its motion for immediate consideration and its motion staying the Court of Appeals's order, filed concurrently.

STATEMENT OF THE QUESTION INVOLVED

1. Did the Court of Appeals err in concluding that the Court of Claims's May 17, 2022 preliminary injunction—which maintained the status quo, found a "strong likelihood that plaintiffs will prevail on the merits" of their challenge to the 1931 Criminal Abortion Ban, and blocked the Attorney General and "anyone acting under [the Attorney General's] control and supervision," including local officials, from enforcing the Ban—could not enjoin county prosecutors from enforcing the Criminal Abortion Ban?

Planned Parenthood's Answer:	**Yes**
Complainants-Appellees' Answer:	**No**
Court of Appeals's Answer:	**No**

STATEMENT OF JURISDICTION

Planned Parenthood seeks leave to appeal from the Court of Appeals's August 1, 2022, order dismissing the complaint for superintending control in *In re Jarzynka*, No. 361470. This Court has jurisdiction to consider a timely application for leave to appeal from a decision of the Court of Appeals. MCR 7.305(B)(5). This application is timely because it is filed within 42 days of the decision of the Court of Appeals. MCR 7.305(C)(2).

The Court of Appeals's order undermines the May 17, 2022, preliminary injunction maintaining the status quo and protecting Planned Parenthood and its patients from MCL 750.14 (the "Criminal Abortion Ban") while Planned Parenthood litigates the constitutionality of that statute in *Planned Parenthood of Michigan v Attorney General*, Court of Claims (Docket No. 22-000044-MM). Because of the direct harm Planned Parenthood and its patients will suffer as a result of the Court of Appeals's order, and indeed have already experienced in the last two days, Planned Parenthood is an aggrieved party with standing to appeal from that order. *Manuel v Gill*, 481 Mich 637, 644; 753 NW2d 48 (2008) (explaining that a prevailing party may nonetheless possess appellate standing if it has "suffered a concrete and particularized injury as a result of the Court of Appeals decision"); *People v Burton*, 429 Mich 133; 413 NW2d 413 (1987) (granting defendant leave to appeal from order of superintending control reversing trial court order in defendant's favor).

In the alternative, if the Court does not grant leave to appeal under MCR 7.305, Planned Parenthood respectfully requests that the Court construe this application for leave as a complaint for superintending control of the Court of Appeals in *In re Jarzynka*, Court of Appeals (Docket No. 361470). This Court would have jurisdiction over such an action under MCR 7.306(A)(1) and

MCR 3.302(D)(1) because an application for leave to appeal could not have been filed under MCR 7.305.

INTRODUCTION

For nearly fifty years, the people of Michigan have relied on access to safe, legal abortion. Until last month, that right was protected under the United States Constitution. When it became clear that the U.S. Supreme Court's decision in *Dobbs v Jackson Women's Health Organization*, 597 US ___, 142 S Ct 2228; ___ L Ed 2d ___ (2022) might eliminate this federal constitutional right to abortion, however, potentially reviving a 1931 Michigan law criminalizing abortion even in cases of rape, incest, or grave threats to the pregnant person's health, on April 7, 2022 Planned Parenthood filed suit seeking a declaration that this Criminal Abortion Ban separately violates the Michigan Constitution and a permanent injunction against its enforcement. To maintain the status quo, Planned Parenthood also sought a preliminary injunction to protect abortion access in Michigan while the courts considered the Criminal Abortion Ban's constitutionality as a matter of state law.

On May 17, 2022, the Court of Claims entered a preliminary injunction blocking enforcement of the Criminal Abortion Ban. *Planned Parenthood of Michigan v Attorney General*, Court of Claims (Docket No. 22-000044-MM). The Court of Claims concluded there was a "strong likelihood that plaintiffs will prevail on the merits," *Planned Parenthood of Michigan v Attorney General*, Op and Order, Court of Claims, entered May 17, 2022 (Docket No. 22-000044-MM) (PI Op.) attached hereto as **Exhibit 2**, p. 25, and found that if the Criminal Abortion Ban took effect, Planned Parenthood and its patients would "face a serious danger of irreparable harm." *Id.* at 25–26. The Court of Claims further found that if the Criminal Abortion Ban were enforced, abortion services would end "abruptly and completely," and accordingly concluded that a preliminary injunction would further the public interest because it would "allow the Court to make a full ruling

of the merits of the case without subjecting plaintiffs and their patients to the impact of a total ban on abortion services in the State." *Id.* at 26.

This preliminary injunction therefore ensured that abortion access would remain the status quo in Michigan while the courts determined whether the Michigan Constitution protects the right to abortion. To effectuate this preservation of the status quo, the preliminary injunction protects abortion providers from criminal prosecution by the Attorney General and "all state and local officials acting under [the Attorney General's] supervision." Ex. 2, PI Op., at 27. In turn, the preliminary injunction provided stability, certainty, and protection to pregnant people in Michigan and their families and communities in the wake of *Dobbs v Jackson Women's Health Organization*, which overruled *Roe v. Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973) and nearly fifty years of precedent protecting the right to abortion under the United States Constitution.

On August 1, 2022, in a case that did not seek review of the Court of Claims's preliminary injunction, the Court of Appeals issued an order that cast doubt on the scope of that injunction, throwing abortion access in Michigan into chaos. The Court of Appeals's order addressed a complaint for superintending control brought by two county prosecutors and two anti-abortion advocacy groups unhappy with the preliminary injunction, who sought to wrest control of the case from the Court of Claims. The Court of Appeals dismissed that complaint, but in doing so it stated—incorrectly—that the preliminary injunction does not bind county prosecutors. Thus, although the Court of Appeals neither modified the preliminary injunction nor ordered the Court of Claims to do so, its decision immediately and dramatically upended the status quo previously guaranteed by the preliminary injunction.

This ruling was in error. As Planned Parenthood set forth in its briefing requesting a preliminary injunction and opposing the complaint for superintending control, an injunction in a

case against the Attorney General in her official capacity can bind the county prosecutors under her control and supervision, and the May 17, 2022, preliminary injunction does. Although county prosecutors may make independent charging decisions, nothing in the Michigan Constitution or in Michigan statutes permits a county prosecutor to enforce an unconstitutional law. A plaintiff at risk of potential prosecution does not need to obtain injunctive relief in every circuit court throughout the state to avoid prosecution under an unconstitutional statute. Injunctive relief from the Court of Claims should be—and is—enough.

The Court of Appeals's erroneous order will cause grave, widespread, and irreparable material injustice each day it remains uncorrected. Indeed, the order has already wreaked havoc on patients' ability to access abortion in the state. On Monday, August 1, 2022, the day the Court of Appeals issued its decision, some Michigan abortion providers ceased providing abortion immediately due to the sudden legal uncertainty and some county prosecutors' threats to begin enforcing the Criminal Abortion Ban.[1] The uncertainty the Court of Appeals decision has created makes it impossible for Planned Parenthood and other providers throughout Michigan to provide abortion without the risk of criminal investigation and possibly even prosecution, notwithstanding the Court of Claims's injunction.[2] This is precisely the uncertainty that the Court of Claims sought to avoid by issuing the preliminary injunction in the first place. Ex. 2, PI Op., at 25–26. In light of the Court of Appeals's decision, many physicians may stop providing abortions altogether, as

[1] Wells, *They Came to Michigan for an Abortion. Now That's Uncertain Too*, Michigan Radio (August 1, 2022) <https://www.michiganradio.org/criminal-justice-legal-system /2022-08-01/ they- came-to-michigan- for-an-abortion-now-thats-uncertain-too> (accessed August 2, 2022) (stating that Northland Family Planning had ceased providing abortion care in Macomb County).
[2] See LeBlanc, *Abortion Ban Enforcement On, then Off Again*, Detroit News (August 2, 2022) <https://infoweb-newsbank-com.proxy.lib.umich.edu/apps/news/document-view?p=WORLDNEWS&t=&sort=YMD_date%3AD&maxresults=20&f=advanced&val-base-0=michigan%20abortion&fld-base-0=alltext&docref=news/18BA3ECF98D5DD48> (accessed August 2, 2022) (stating that both Henry Ford Hospital and McLaren Health Care were reassessing whether they could continue providing abortions following the Court of Appeals's decision).

many did on August First.[3] Patients seeking abortion risk being turned away from appointments, forced to prolong their pregnancies and make arrangements to travel out of state despite the significant hardship such travel entails. Some will be forced to remain pregnant and give birth against their will.

Planned Parenthood's request is simple: it merely seeks to be free from prosecution under the Criminal Abortion Ban, which has already been preliminarily enjoined. Accordingly, Planned Parenthood seeks an order from this Court that grants leave to appeal under MCR 7.305(B); confirms that the May 17, 2022 preliminary injunction preserves the status quo by preventing any and all enforcement of the Criminal Abortion Ban, including by county prosecutors; reverses the Court of Appeals's decision to the extent it renders the Criminal Abortion Ban enforceable by county prosecutors; and affirms the Court of Appeals's dismissal of the action for superintending control. In the event that this Court does not grant Planned Parenthood leave to appeal, Planned Parenthood requests that the Court construe this application for leave to appeal as a complaint for superintending control over the action in the Court of Appeals and grant the same relief. Given the urgency of the case and irreparable harm that would result from leaving the Court of Appeals's decision in place, Planned Parenthood also requests that the court grant its motion for immediate consideration and its motion staying the Court of Appeals's order.

[3] On August 1, 2022 at 5pm, the Oakland Circuit Court, upon motion by the Governor in a pending case, *Whitmer v Linderman,* Sixth Judicial Circuit Court for County of Oakland (Docket No. 22-193498-CZ), issued a temporary restraining order ("TRO") enjoining county prosecutors from enforcing the Criminal Abortion Ban. A hearing on the matter is scheduled for August 3, 2022. As that Court's order is temporary, clarity from this Court remains urgently necessary.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Abortion is one of the safest and most common medical services performed in the United States today. Affidavit of Sarah Wallett, M.D., M.P.H., FACOG (Wallett Aff, attached hereto as **Exhibit 3**), ¶ 42. Indeed, legal abortion carries far fewer risks than pregnancy and childbirth. *Id.* at ¶ 42; compare *id.* at ¶¶ 19–41, with *id.* at ¶¶ 43–58, 80–81. Certainly, many people decide that adding a child to their family is well worth all of the associated medical risks and physical, personal, and economic consequences. *Id.* at ¶ 41. But if abortion becomes unavailable in Michigan, pregnant people in this state will be forced to assume those risks involuntarily. *Id.*; see also *id.* at ¶¶ 76–77.

The Criminal Abortion Ban criminalizes abortion, even in cases of rape, incest, or grave threats to the pregnant person's health, making providing an abortion at any point in pregnancy punishable as a felony, unless the abortion is necessary to save the pregnant person's life. MCL 750.14. Violating the Criminal Abortion Ban is punishable by up to four years' imprisonment, a fine of up to $5,000, or both. MCL 750.503. Physicians convicted of violating the Criminal Abortion Ban may also face administrative penalties, including permanent license revocation. MCL 333.16221(b)(v); MCL 333.16226(1). Michigan-licensed health care facilities that employ physicians who violate the Criminal Abortion Ban may face possible penalties as well, including criminal prosecution, see MCL 750.10; MCL 333.20199(1), license revocation through administrative enforcement by LARA, see MCL 333.20165; MCL 333.20168(1), or actions to enjoin operation of their licensed facility, MCL 333.20177. The Criminal Abortion Ban has a six-year statute of limitations. MCL 767.24(10).

Applicant PPMI provides abortion at its health centers in Michigan and therefore faces possible felony criminal prosecution and licensure penalties for violating the Criminal Abortion

Ban, as well as possible actions to enjoin operation of their licensed health centers. Ex. C, Wallett Aff, at ¶¶ 11–13. Applicant Dr. Wallett, a board-certified, Michigan-licensed obstetrician-gynecologist and the Chief Medical Officer of PPMI, provides abortion to people in Michigan and therefore faces possible felony criminal prosecution and potential licensure penalties for violating the Criminal Abortion Ban. Ex. 3, Wallett Aff, at ¶¶ 1–4, 9, 73, 75, 88, 91.

PPMI and Dr. Wallett wish to continue to provide abortions, but they will be unable to do so if enforcement of the Criminal Abortion Ban would place them at risk of arrest, criminal prosecution, *id.* at ¶¶ 75, 88, 91, and licensure revocation, *id.* at ¶¶ 3, 13, 73. In turn, Planned Parenthood's patients will be unable to obtain the abortions they seek in Michigan—or at all, *id*. at ¶¶ 75–85, putting them at increased risk of physical, mental, and financial harm, *id.* at ¶¶ 19–41, 79–86.

On April 7, 2022, Planned Parenthood sued in the Court of Claims for declaratory and injunctive relief against the Criminal Abortion Ban under the Michigan Constitution and the Elliott-Larsen Civil Rights Act. Planned Parenthood named as defendant the Attorney General of the State of Michigan, in her official capacity as the chief law enforcement officer for the state and as supervisor of all Michigan county prosecutors. *Planned Parenthood of Michigan v Attorney General*, Verified Complaint, Court of Claims, filed April 7, 2022 (Docket No. 22-000044-MM). Planned Parenthood also sought a preliminary injunction blocking the Ban's enforcement to preserve the status quo.

On May 17, 2022, the Court of Claims granted the motion for a preliminary injunction. The Court of Claims concluded that there was "a strong likelihood" that the Criminal Abortion Ban violates the right to bodily integrity recognized in *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018), under the Due Process Clause of the Michigan Constitution. Ex. 2, PI Op., at 16–25.

The Court of Claims found that if *Roe* were overruled, PPMI, Dr. Wallett, and their patients would "face a serious danger of irreparable harm." *Id.* at 25–26. It further found that if the Criminal Abortion Ban were enforced, abortion services would end "abruptly and completely" and that a preliminary injunction would further the public interest because it would "allow[] the Court to make a full ruling of the merits of the case without subjecting plaintiffs and their patients to the impact of a total ban on abortion services in the State." *Id.* at 26. The injunction itself provided, in relevant part, as follows:

> (1) Defendant and anyone acting under defendant's control and supervision, see MCL 14.30, are hereby enjoined during the pendency of this action from enforcing MCL 750.14
>
> (2) Defendant shall give immediate notice of this preliminary injunction to all state and local officials acting under defendant's supervision that they are enjoined and restrained from enforcing MCL 750.14; . . .
>
> (5) This preliminary injunction shall remain in effect until this Court resolves the case in full.

Id. at 27. The preliminary injunction clearly enjoined *all* enforcement of the Criminal Abortion Ban to preserve the status quo.

On May 20, 2022, Jerard M. Jarzynka and Christopher R. Becker (the county prosecutors for Jackson County and Kent County, respectively), with Right to Life Michigan and the Michigan Catholic Conference (collectively, "Complainants"), filed a complaint in the Court of Appeals for superintending control of Planned Parenthood's case (the "Jarzynka complaint"). In their answer to the Jarzynka complaint, Planned Parenthood explained that Jarzynka and Becker had failed to demonstrate that they had no adequate legal remedy through appeal, a basic requirement for superintending control, because Jarzynka and Becker could have intervened in the Court of Claims

and appealed the preliminary injunction from that procedural posture.[4] In response to the Court of Appeals's request for supplemental briefing on the jurisdictional issue, Jarzynka and Becker argued that they could not intervene in the Court of Claims.

On August 1, 2022, the Court of Appeals issued an unpublished order dismissing the Jarzynka complaint for lack of standing. Applying the four-part test set forth in *Manuel v Gill*, the Court of Appeals concluded that county prosecutors are local, not state, officials, and that they therefore are not subject to the jurisdiction of the Court of Claims. The Court of Appeals opined that the preliminary injunction issued in the Court of Claims by Judge Gleicher "does not apply to county prosecutors." Ex. 1, *In re Jarzynka*, Order, Court of Appeals, issued August 1, 2022 (Docket No. 361470) p. 5. While the Court of Appeals's decision ultimately dismissed the Jarzynka complaint for superintending control, it effectively undermined the very preliminary injunction that the Jarzynka complaint itself sought to vacate. Under MCR 7.215(F)(1)(a) and MCR 7.305(2)(a), the Court of Appeals ruling does not take effect until September 12, 2022.

Despite the fact that the ruling has not taken effect and that it did not in any way purport to modify the preliminary injunction, the Court of Appeals ruling has caused chaos for patients seeking abortion. In the hours after the decision was issued, abortion providers throughout the state were forced to weigh either ceasing provision of abortion even under the preliminary injunction's protection, or risk prosecution by local prosecutors who were asserting publicly though counsel

[4] Notably, the Michigan House of Representatives and Michigan Senate did intervene in the case, request reconsideration of the preliminary injunction, and upon denial of their motion, seek leave to appeal the denial of their reconsideration motion. Their application for leave to appeal is currently pending. *Planned Parenthood of Michigan v Attorney General,* Court of Appeals (Docket No. 362078).

that they could and intended to enforce the still-enjoined Criminal Abortion Ban.[5] Some providers canceled appointments, sent away patients, and stopped providing abortion.[6]

The same day, in a lawsuit the Governor filed against county prosecutors in Oakland County Circuit Court, the Governor requested a temporary restraining order blocking county prosecutors from enforcing the Criminal Abortion Ban. *Whitmer v Linderman*, Sixth Judicial Circuit Court for County of Oakland (Docket No. 22-193498-CZ). The court granted the order, finding that it was necessary to prevent "immediate and irreparable injury," and scheduling a hearing for August 3, 2022. *Whitmer v Linderman*, Order Granting Temporary Restraining Order, Sixth Judicial Circuit Court for County of Oakland, entered August 1, 2022 (Docket No. 22-193498-CZ), attached hereto as **Exhibit 4**.

[5] See LeBlanc, *Judge Blocks County Prosecutors from Enforcing Abortion Ban*, Detroit News (August 1, 2022) <https://www.detroitnews.com/story/news/local/michigan/2022/08/01/county-prosecutors-can-enforce-abortion-ban-appeals-court-says/10200100002/> (accessed August 2, 2022) (quoting David Kallman, attorney for prosecutors Jarzynka and Becker, saying they would prosecute under the Criminal Abortion Ban "if a case is brought to them and the elements are there"); McVicar, *'I Cannot and Will Not Ignore a Validly Passed Law,' Kent County Prosecutor Says of Abortion Ban Ruling*, MLive (August 1, 2022) <https://www.mlive.com/ news/grand-rapids/2022/08/i-cannot-and-will-not-ignore-a-validly-passed-law-kent-county- prosecutor-says-of-abortion-ban-ruling.html> (accessed August 2, 2022) (quoting Becker as saying the injunction "never applied to county prosecutors" and that he would "not ignore a validly passed law" and would consider charging under the Criminal Abortion Ban if a report were brought to his office).

[6] See Wells, *They Came to Michigan for an Abortion. Now That's Uncertain Too*, Michigan Radio (August 1, 2022) <https://www.michiganradio.org/criminal-justice-legal-system/ 2022-08-01/they-came-to- michigan-for-an-abortion-now-thats-uncertain-too> (accessed August 2, 2022) (stating that Northland Family Planning had ceased providing abortion care in Macomb County and Michigan Medicine doctors were unsure if appointments would continue the next day); LeBlanc, *Abortion Ban Enforcement On, then Off Again*, Detroit News (August 2, 2022) <https://infoweb-newsbank-com.proxy.lib.umich.edu/apps/news/document-view?p=WORLDNEWS&t=&sort=YMD_date%3AD&maxresults=20&f=advanced&val-base-0=michigan%20abortion&fld-base-0=alltext&docref=news/18BA3ECF98D5DD48> (accessed August 2, 2022) (stating that both Henry Ford Hospital and McLaren Health Care were reassessing whether they could continue providing abortions following the Court of Appeals's decision).

STANDARD OF REVIEW

An application for leave to appeal a decision of the Court of Appeals must show that

> (1) the issue involves a substantial question about the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves a legal principle of major significance to the state's jurisprudence; [or . . .]
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice.
> [MCR 7.305(B).]

Planned Parenthood satisfies all four of these prongs.

Planned Parenthood also requests, in the alternative, that if the Court does not grant leave to appeal under MCR 7.305, it construe this application for leave as Planned Parenthood's complaint against the Court of Appeals seeking superintending control of *In re Jarzynka* Court of Appeals (Docket No. 361470). "The filing of a complaint for superintending control is . . . an original civil action designed to order a lower court to perform a legal duty." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 346–47; 675 NW2d 271 (2003). "For superintending control to lie, the plaintiff must establish that the defendant has failed to perform a clear legal duty and that plaintiff is otherwise without an adequate legal remedy." *In re Credit Acceptance Corp*, 273 Mich App 594, 598; 733 NW2d 65 (2007), *aff'd sub nom Credit Acceptance Corp v 46th Dist Ct*, 481 Mich. 883; 748 NW2d 883 (2008).

The Constitution has vested this Court with general superintending control over all courts in this state. Const 1963, art 6, § 4; *In re James*, 492 Mich 553, 559; 821 NW2d 144 (2012). The purpose of this power is to "keep the courts themselves within bounds and to ensure the

harmonious working of the judicial system." *Matter of Probert*, 411 Mich 210; 308 NW2d 773 (1981), quoting *In re Huff*, 352 Mich 402, 418; 91 NW2d 613 (1958). This Court has the authority to assert superintending control to "maintain public confidence in the administration of justice." *In re James*, 492 Mich 553, 572; 821 NW2d 144 (2012) (Markman, concurring); *Ransford v Graham*, 374 Mich 104, 108; 131 NW2d 201 (1964). Should the Court decline to grant Planned Parenthood leave to appeal under MCR 7.305, superintending control is warranted instead.

ARGUMENT

I. THIS CASE PRESENTS LEGAL QUESTIONS OF THE UTMOST IMPORTANCE TO THIS STATE'S JURISPRUDENCE AND THE PEOPLE OF MICHIGAN

In the Court of Claims action, Planned Parenthood seeks to establish that the Criminal Abortion Ban violates the Michigan Constitution and to protect pregnant people and health care providers throughout Michigan from the public health crisis the Criminal Abortion Ban would cause. The Court of Claims properly entered the preliminary injunction blocking enforcement of the Ban to preserve the status quo—fifty years of access to safe, legal abortion—while the courts take the time they need to consider these significant constitutional questions. Planned Parenthood meets the first three factors under MCR 7.305(B), only one of which is required for this Court to grant leave to appeal.

First, the case involves a substantial question about the validity of a Michigan statute that has not been enforced in nearly fifty years but is subject to enforcement following *Dobbs*. The underlying question is whether the Criminal Abortion Ban violates the Michigan Constitution. As the Court of Claims concluded in issuing the May 17 preliminary injunction, Planned Parenthood is likely to succeed on the merits of its claim that the Criminal Abortion Ban violates the state constitutional right to bodily integrity: "after 50 years of legal abortion in Michigan, *there can be no doubt* but that the right of personal autonomy and bodily integrity enjoyed by our citizens

includes the right of a woman, in consultation with her physician to terminate a pregnancy." Ex. 2., PI Op., at 24–25 (emphasis added). Planned Parenthood asserted several additional grounds upon which the Criminal Abortion Ban violates Michigan's Constitution as well as asserted the Ban is unconstitutionally vague. Numerous "substantial question[s] about the validity of a legislative act" drive this case, and the constitutional questions are "legal principle[s] of major significance to the state's jurisprudence." MCR 7.305(B)(1), (3).

Next, the case is the subject of significant public interest, as the avalanche of news coverage of the Court of Appeals's August 1 decision demonstrates. There is overwhelming public interest in both issues presented here—specifically, whether the county prosecutors are bound by the Court of Claims's preliminary injunction,[7] and generally, whether the Criminal Abortion Ban violates the Michigan Constitution or remains enforceable and obliterates abortion access throughout the state.[8] Additionally, Planned Parenthood's lawsuit sues a state actor—the Attorney General of Michigan in her official capacity—and the Jarzynka superintending control action seeking vacatur of the preliminary injunction was brought by two county prosecutors, both agents of the state, against the Court of Claims, another state entity. MCR 7.305(B)(2). Thus, the second factor is met.

Any of these factors independently warrants granting leave to appeal; together, they compel consideration by this Court at the earliest possible juncture. See *League of Women Voters of Michigan v Secy of State*, 506 Mich 905; 948 NW2d 70, 75 (2020) (McCormack, CJ, dissenting)

[7] See, e.g., Wells, *Can Michigan Abortion Providers Be Prosecuted Now? State, County Prosecutors Disagree*, Michigan Radio (June 28, 2022) <https://www.interlochenpublicradio.org /2022-06-28/can-michigan-abortion-providers-be-prosecuted-now-state-county-prosecutors-disagree> (accessed August 1, 2022); Clark, *After an Abortion Shakeup Monday in Michigan, Voters Head to the Polls Tuesday*, Michigan Radio (August 2, 2022) <https://www.wpr.org/ after-abortion-shakeup-monday-michigan-voters-head- polls-tuesday> (accessed August 2, 2022).

[8] Wells, *They Came to Michigan for an Abortion. Now, That's Uncertain Too*, Michigan Radio (August 1 2022) <https://www.michiganradio.org/criminal-justice-legal- system/2022-08-01 /they-came-to-michigan-for-an-abortion-now-thats-uncertain-too> (accessed August 1, 2022)

("It's not often we see a case that checks all those boxes. We should acknowledge as much by exercising our responsibility as the state's highest court and further considering this case.").

II. THE COURT OF APPEALS'S DECISION WILL CAUSE MATERIAL INJUSTICE

Leave to appeal is independently warranted under MCR 7.305(5)(a), as the Court of Appeals's decision threatens to radically upend the status quo and unleash widespread irreparable harm to pregnant Michiganders and their physicians throughout the state by allowing enforcement of the Criminal Abortion Ban, despite the "substantial likelihood that [the Ban] violates the Due Process Clause of Michigan's Constitution." Ex. 2, PI Op., at 25. This is a "material injustice" of the highest order. MCR 7.305(5)(a).

In its decision, the Court of Appeals did not question the Court of Claims's finding that enforcement of the Criminal Abortion Ban would "abruptly and completely end the availability of abortion services in Michigan" and presented "a serious danger of irreparable harm." Ex. 2, PI Op., at 25-26. Nor did the Court of Appeals disturb the Court of Claims's holding that the Criminal Abortion Ban likely violated the Michigan Constitution, or its weighing of the hardships and public interest. *Id.* at 25. Altogether, the Court of Appeals left wholly untouched the Court of Claims's ultimate conclusion that a preliminary injunction blocking enforcement of the Criminal Abortion Ban by "all state and local officials acting under [the Attorney General's] supervision" was necessary to preserve the status quo, and in turn the "stability and predictability of the law." *Id.* at 26–27.

Nevertheless, the Court of Appeals potentially gutted the core of the preliminary injunction by suggesting that it "does not apply to county prosecutors." Ex. 1, *In re Jarzynka*, Order at 5. As explained below, this conclusion is wrong on the law. But more immediately, the Court of Appeals's decision has unleashed all of the uncertainty, fear, and chaos that the preliminary injunction served to prevent, and this Court's intervention is urgently needed to restore order.

As long as the Court of Appeals's decision remains in place, county prosecutors could conclude that they are not bound by the preliminary injunction and could attempt to commence prosecutions—despite the unlawfulness of doing so. As explained above, confusion over the legal status of the Criminal Abortion Ban is already roiling the state. On August 1, 2022, numerous media outlets reported that county prosecutors believed they could enforce the Criminal Abortion Ban.[9] In fact, Complainants Jarzynka and Becker said that they intended to move forward with prosecutions under the Criminal Abortion Ban.[10] Their lawyer has stated to the press that under the Court of Appeals's decision, the preliminary injunction never applied to county prosecutors, so they do not need to wait for the expiration of the appeal period before proceeding with prosecutions.[11] He has also stated that because the Criminal Abortion Ban has a six-year statute of limitations, abortion providers in jurisdictions where local prosecutors have pledged not to enforce the Ban may still be prosecuted by their successors.

In response to these news reports, intense confusion over the state of legal abortion in Michigan has contributed to conflicting understandings of what procedures were available to pregnant Michiganders and uncertainty among doctors as to what work and services they could provide. According to one article, "doctors at the University of Michigan had to tell patients they had no idea if they'd be able to get the abortions they were scheduled for."[12]

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[9] See, e.g., Borter, *Michigan Court Allows County Prosecutors to Enforce 1931 Abortion Ban*, Reuters (August 1, 2022) <https://www.reuters.com/world/us/michigan-court-allows-county-prosecutors-enforce-1931-abortion-ban-2022-08-01/> (accessed August 2, 2022); Le Blanc, *County Prosecutors Can Enforce Michigan Abortion Ban, Appeals Court Rules*, The Detroit News (August 1, 2022) <https://www.detroitnews.com/story/news/local/michigan/2022/08/01/ county-prosecutors-can-enforce-abortion-ban-appeals-court-says/10200100002/> (accessed August 2, 2022).

[10] Boucher, Michigan Court Ruling Lets Prosecutors File Charges Under 1931 Abortion Law, Detroit Free Press (August 1, 2022) <https://www.freep.com/story/news/politics/2022/08/01/ michigan-abortion-injunction-court-appeals/7744390001/> (accessed August 2, 2022).

[11] Le Blanc, *supra*.

[12] Wells, supra.

The legal uncertainty caused by the Court of Appeals decision has seriously compromised pregnant people's ability to make informed decisions about their healthcare. In a news statement following the Court of Appeals's decision, a Michigan obstetrician-gynecologist who provides abortion explained the unjust position that pregnant people now face:

> We have patients who get diagnoses of serious genetic or anatomical illnesses in their babies. We have people with serious underlying medical illnesses for whom it's not safe to continue a pregnancy. And in those situations, we really encourage people to take the time that they need to make a decision. Those should be decisions made for medical reasons, not because a patient is worried about how long a temporary restraining order will last. [Id. (cleaned up)]

It is profoundly unjust for pregnant Michiganders to be forced to compromise their right to make healthcare decisions because of an unpublished decision by the Court of Appeals that has not yet taken effect.

In Planned Parenthood's complaint in the Court of Claims, they addressed the catastrophic consequences of permitting the Criminal Abortion Ban to be enforced. Planned Parenthood and other abortion providers would be forced to stop offering virtually all abortions—or face felony prosecution, *Planned Parenthood of Michigan v Attorney General*, Complaint at ¶ 75, and more, *id.* at ¶¶ 3, 13, 73. Enforcement would have devastating consequences for Michigan abortion providers and their patients. See *id.* at ¶¶ 75–85. Many people would not be able to travel to another state to access abortion or would be significantly delayed by the cost and logistical arrangements required to do so. *Id.* at ¶ 76.

The United States Supreme Court's decision in *Dobbs* lengthened wait times for abortions in Michigan to weeks.[13] Even for those people who have the means to travel out of state to access

[13] *Michigan Abortion Waits Stretch For Weeks As Out–Of-State Patients Pour In*, Bridge MI (July 29, 2022), <https://www.bridgemi.com/michigan-health-watch/michigan-abortion-waits- stretch-weeks-out-state-patients-pour> (accessed August 2, 2022).

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

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

Because the Criminal Abortion Ban does not allow exceptions for pregnancies resulting from rape or incest, see MCL 750.14, allowing county prosecutors to enforce it would have a uniquely devastating impact on rape and incest survivors, who would be forced either to carry their pregnancies to term or to find a way to access abortion in another state, Ex. 3, Wallett Aff, at ¶ 83. Further, enforcement of the ban would likely lead some people to self-manage abortion. *Id.* at ¶ 84. Some who do may experience one of the rare complications from medication abortion and may be too afraid to seek necessary follow-up care. *Id.* This could cause serious harm—not because abortion is unsafe, but because the Criminal Abortion Ban has made it unsafe for them to be fully open with their medical providers. *Id.* And given the Criminal Abortion Ban's extraordinarily

narrow exception for abortions necessary to preserve the pregnant person's life, allowing the Court of Appeals's order to go into effect could force pregnant people with dangerous medical conditions to wait to receive an abortion—even an urgently medically necessary abortion—until they are literally dying. *Id.* at ¶ 85.

Allowing county prosecutors to enforce the Criminal Abortion Ban would also directly harm PPMI's mission and its standing in the eyes of its patients. *Id.* at ¶ 89. Some patients might misunderstand why Planned Parenthood is no longer providing abortion and think that it is because its providers no longer want to help them. *Id.* Planned Parenthood would no longer be seen as a safe place where people can be open and honest about their health care histories and needs, not only harming Planned Parenthood's reputation as a health care provider, but interfering with its ability to provide other care. *Id.* Additionally, some Planned Parenthood staff may be afraid to continue working there if the Criminal Abortion Ban were enforced. *Id.* at ¶ 90. Given the statute's vagueness, even if Planned Parenthood and its staff complied with the Ban, a prosecutor might accuse staff of violating it. *Id.* Some staff might prefer to leave Planned Parenthood given this risk. *Id.* Other staff might simply be unable to bear turning patients away. *Id.*

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

Uncertainty about when or whether county prosecutors may be allowed to enforce the Criminal Abortion Ban also interferes with Planned Parenthood's ability to plan for the months ahead, because they do not know whether they will still be able to provide abortion weeks or months from now. *Id*. at ¶ 92.

The preliminary injunction clearly enjoined the enforcement of the Criminal Abortion Ban and protected Planned Parenthood, its patients and staff, and the people of Michigan from suffering these material injustices. Recognizing that the Court of Appeals's decision has wreaked havoc on abortion services throughout the state, the Oakland County Circuit Court on August 1, 2022 granted the Governor's request for a temporary restraining order. Ex. 4, Order Granting Temporary Restraining Order. The Oakland Circuit Court found that a temporary restraining order was "necessary to preserve the last, actual, peaceable, uncontested status quo," and that "immediate and irreparable injury" would occur if the prosecuting attorney defendants in that case, who include Jarzynka and Becker, are allowed to prosecute under the Criminal Abortion Ban "without a full resolution of the merits of the pending cases challenging that statute." *Id.* The court set a hearing on the matter for August 3, 2022.

Although this temporary restraining order gives abortion providers and pregnant people seeking an abortion in Michigan a brief respite from the chaos caused by the Court of Appeals, more permanent relief from this Court is necessary to prevent material injustice and to ensure continued, stable access to safe and legal abortion for the people of Michigan.

III. THE COURT OF APPEALS'S DECISION IS CLEARLY ERRONEOUS

Finally, the Court of Appeals clearly erred in concluding that the preliminary injunction does not bind county prosecutors. MCR 7.305(5)(a). Appeal is urgently necessary to correct this significant error.

First, the Court of Claims's preliminary injunction against the Attorney General in turn binds county prosecutors because they act under the Attorney General's supervision and control, and thus qualify as her "officers, agents, servants, employees." MCR 3.310(C)(4). Michigan county prosecutors operate under the Attorney General's supervision for purposes of their authority to prosecute violations of state law, see *Shirvell v Dep't of Attorney Gen*, 308 Mich App 702, 751; 866 NW2d 478 (2015), citing MCL 14.30, and they are thus bound by a judgment against the Attorney General that the Criminal Abortion Ban is unconstitutional. When a prosecutor pursues a criminal charge under the Michigan Penal Code, they do so not for the benefit of the injured party but the *public good*. See *People v Morrow*, 214 Mich App 158, 163; 542 NW2d 324 (1995). As a matter of public policy, the Code defines what acts are offenses *against the state*. Thus, prosecutors appear for the state when the underlying charge arises from state law. *People v Williams*, 244 Mich App 249; 625 NW2d 132 (2001). The Attorney General's office is responsible for coordinating the work of prosecuting attorneys to ensure uniform enforcement of state law. See MCL 49.103.[14]

Indeed, the Attorney General has recognized that their office has the authority to bind local prosecutors. See also *Northland Family Planning Clinic, Inc v Cox*, 487 F3d 323, 338 (CA 6, 2007) ("[T]he Attorney General argues that he can bind local prosecutors . . . ."). So has the Legislature, after intervening in Planned Parenthood's lawsuit to defend the constitutionality of

[14] The Court of Appeals previously implicitly recognized the Court of Claims' power to enjoin state prosecutors in *Mich All. for Retired Ams v Sec'y of State*, 334 Mich App 238; 964 NW2d 816 (2020). In that case, the Court of Claims issued an order permanently enjoining two laws relating to absentee ballots, one of which included criminal penalties. *Id.* at 244–45, 247. The Court of Appeals did not conclude that the Court of Claims lacked jurisdiction to enjoin the enforcement of a criminal statute. To the contrary, it stated, "It is beyond reasonable dispute that a trial court has the authority, and, in appropriate cases, the duty, to enter permanent injunctive relief against a constitutional violation." *Id.* at 263, citing *Michigan Coalition of State Employee Unions v Michigan Civil Serv Comm*, 465 Mich 212, 219; 634 NW2d 692 (2001). The Court of Appeals reversed on the merits of the claim.

the Criminal Abortion Ban. *Planned Parenthood of Michigan v Attorney General*, Legis' Mtn & Brf to Int, Ex 1 ¶ 95 ("The Legislature admits that, at the time of Plaintiffs' Verified Complaint, no court order enjoined any Michigan official from enforcing MCL 750.14, but denies that the allegation is still true, as this Court entered a state-wide preliminary injunction on May 17, 2022, prohibiting the Attorney General and *all county prosecutors* from enforcing MCL 750.14.") (emphasis added).

Under Michigan law, a litigant need not sue the prosecuting attorneys of all 83 counties to ensure that an unconstitutional law will not be enforced. Instead, because Michigan law provides that the Attorney General "shall supervise the work of . . . the prosecuting attorneys, in all matters pertaining to the duties of their offices," MCL 14.30, a judgment against the Attorney General regarding the enforceability of a state criminal law is binding on county prosecutors. Prosecutors acting in the name of the people of this State are bound by judgments against the state official who supervises them.[15]

The United States Court of Appeals for the Sixth Circuit confirmed the binding effect of injunctions regarding state criminal laws in *Platinum Sports Ltd v Snyder*, 715 F3d 615 (CA 6, 2013). The plaintiff in *Platinum Sports* filed a lawsuit to enjoin enforcement of a Michigan law that had already been enjoined in a previous lawsuit brought by a different set of plaintiffs. *Id*. at 616. The Sixth Circuit explained that the new plaintiff could not obtain additional relief because

[15] In addition to MCL 14.30, other statutes also establish the Attorney General's supervision and control over county prosecutors. MCL 49.103 establishes an Office of Prosecuting Attorneys in the Attorney General's office. Under MCL 49.109, the office works with all local prosecutors to keep them informed of changes in the law and create a "unified system of conduct, duty, and procedure." And even the Court of Appeals acknowledged that "other statutory provisions give the Attorney General limited control over county prosecutors." Ex. 1, *In re Jarzynka,* Order at 5 n.3 (citing MCL 49.160(2), providing that the Attorney General may determine that a county prosecutor is "disqualified or otherwise unable to serve").

local prosecutors were bound by the permanent injunction against state officials that was already in place:

> The "executive power" of Michigan is "vested in the governor," Mich. Const. art. V, § 1, and the Attorney General, as the top legal official in the State, is bound by a permanent injunction against his top client: the Governor. As for local prosecutors, they answer to the Attorney General, who is obligated to "supervise the work of . . . prosecuting attorneys." Mich. Comp. Laws § 14.30. Any effort by a prosecutor at this point to enforce the statutes—keeping in mind that no one has threatened any such thing—would be *ultra vires*. [*Id*. at 619.]

Second, even assuming that county prosecutors are not bound through the Attorney General as her agents, the terms of the Court of Claims's May 17 order restrain the county prosecutors themselves specifically, since the prosecutors' enforcement of the Criminal Abortion Ban would "abruptly and completely end the availability of abortion services in Michigan" and enjoining that enforcement therefore was necessary to preserve the status quo. Ex. 2, PI Op., at 26. The order granting the preliminary injunction provided explicitly that:

> Defendant and anyone acting under defendant's control and supervision, see MCL 14.30, are hereby enjoined during the pendency of this action from enforcing MCL 750.14
>
> Defendant shall give immediate notice of this preliminary injunction to all state and local officials acting under defendant's supervision that they are enjoined and restrained from enforcing MCL 750.14; . . . [Ex. 2, PI Op., at 27.[16]]

Indeed, a preliminary injunction from the Court of Claims enjoining the enforcement of an unconstitutional criminal law *must* bind county prosecutors in order to preserve the status quo. If

[16] The Attorney General did in fact send "immediate notice" of the injunction to all county prosecutors. See Oosting, *Michigan Judge Suspends 1931 Abortion Ban, Citing 'Irreparable Harm' to Women* (May 17, 2022) <https://www.bridgemi.com/michigan-government/michigan-judge-suspends-1931-abortion-ban-citing-irreparable-harm-women> (accessed August 2, 2022). The county prosecutors are thus "persons in active concert or participation with" the Attorney General who "receive[d] actual notice of the order" enjoining them from enforcing the Criminal Abortion Ban. MCR 3.310(C)(4).

the Court of Claims lacked authority to prevent a county prosecutor's enforcement of a state criminal law while it considered the constitutionality of that law, no effective injunctive relief would ever be possible, and any preliminary injunction would be a functional nullity. In fact, if the Court of Appeals's logic were correct, the Court of Claims would also be powerless to issue *permanent* injunctive blocking county prosecutors from enforcing an unconstitutional state statute because they would fall outside its jurisdiction. This cannot be so. To the contrary, the Court of Claims is empowered to enter statewide preliminary injunctive relief as necessary to preserve the status quo as it properly did here. MCL 600.6419(1)(a) (giving the Court of Claims jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court").

To the extent the Court of Appeals's decision rests on a conclusion that the Court of Claims lacks jurisdiction to enter injunctive relief against the county prosecutors, that decision is clearly erroneous. Although non-state actors cannot intervene as defendants in the Court of Claims, see *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 321 Mich App 456; 909 NW2d 449 (2017), prosecuting attorneys are state officials for purposes of the Court of Claims's jurisdiction. See *Manuel*, 481 Mich at 653; *Meda v City of Howell*, 110 Mich App 179, 183; 312 NW2d 202 (1981). Significantly, a prosecuting attorney in Michigan, although elected at the county level, "act[s] as a state agent when prosecuting state criminal charges." *Cady v Arenac Co*, 574 F3d 334, 343 (CA 6, 2009). Indeed, the caption in all such cases states that the named-party plaintiff is the People of the State of Michigan. Prosecutors may therefore be bound by Court of

Claims injunctions against the enforcement of state criminal laws. Cf. *Platinum Sports Ltd v Snyder*, 715 F3d 615, 619 (CA 6, 2013).

Furthermore, an injunction "is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." MCR 3.310(C)(4). This language replicates verbatim Rule 65(d)(2) of the Federal Rules of Civil Procedure. The Supreme Court has explained that this rule "is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co v NLRB*, 324 U.S. 9, 14; 65 S.Ct. 478; 89 L.Ed. 661 (1945). In the context of collateral estoppel, the Michigan Supreme Court has addressed several times whether a state actor and a prosecutor are in privity. In *People v Gates*, 434 Mich 146, 156; 452 NW2d 627 (1990), the Court held that "even though the Department of Social Services was the nominal party in the earlier proceeding, both the department and the prosecutor's office are creatures of the state and thus should be considered to be the same party." And while in *Baraga County v. State Tax Commission*, 466 Mich 264, 270; 645 NW2d 13 (2002), this Court noted that no privity generally exists between state and local governments, that case dealt with whether the *state* could be bound by a judgment against a local subdivision, not vice versa. In *Sal-Mar Royal Vill, LLC v Macomb Cnty Treasurer*, 497 Mich 908, 908; 856 NW2d 68 (2014), the Court cited *Baraga County* for the proposition that "A subordinate governmental unit cannot bind a superior unit unless the subordinate unit is authorized to represent the superior."

Rather than dismissing the prosecutors' complaint for superintending control on standing grounds, the Court of Appeals should have dismissed the complaint because the prosecutors had

an alternative adequate remedy available to them, such that an action for superintending control is improper and indeed without jurisdiction. MCR 3.302(B), (D)(2); *In re Gosnell*, 234 Mich App 326, 341–342; 594 NW2d 90 (1999) (an order of superintending control is improper where it is used as a substitute for appeal); see also *People v Burton*, 429 Mich 133, 141–142; 413 NW2d 413 (1987). Given this grounds for dismissal, the Court of Appeals did not need to reach the question whether the prosecutors had standing to file the complaint for superintending control, or opine on whether the prosecutors were bound by the preliminary injunction—which, as explained above, they were—in order to dismiss the complaint for superintending control. This Court can affirm the Court of Appeals's dismissal of the complaint for superintending control on this alternative ground, while reversing the Court of Appeals's decision to the extent it held the prosecutors lacked standing because they were not bound by the Court of Claims's preliminary injunction.

Specifically, the prosecutors could have sought intervention in the Court of Claims to oppose Planned Parenthood's requested preliminary injunction and exercise their appellate rights. As explained above, although non-state actors cannot intervene as defendants in the Court of Claims, see *Council of Organizations*, 321 Mich App 456, prosecuting attorneys are state officials for purposes of the Court of Claims's jurisdiction, see *Meda*, 110 Mich App at 183. The reason that the prosecutors did not seek such relief lies in gamesmanship, not the absence of an adequate remedy. In their complaint for superintending control, the prosecutors even admitted as much by arguing that had they intervened, they would have deprived themselves of the argument that there was insufficient adversity to confer jurisdiction in the Court of Claims: that the Attorney General's decision not to appeal the preliminary injunction "lock[s] in the ACLU, Planned Parenthood, and the Attorney General's mutually-desired result unless another State entity seeks to intervene as defendant—an action that would create adversity and the jurisdiction that the Court of Claims

lacks. This is an untenable Catch-22 for any State entity considering intervention." *In re Jarzynka*, Complaint for Superintending Control, Court of Appeals, filed May 20, 2022 (Docket No. 361470), ¶ 62.

Accordingly, the prosecutors failed to show that they required the extraordinary relief of an order for superintending control or even had jurisdiction to seek it, and the Court of Appeals should have dismissed their complaint on that basis. See, e.g., *State ex rel Schroeder v Cleveland*, 150 Ohio St 3d 135, 139; 80 NE3d 417 (2016) (denying mandamus relief where petitioners had adequate remedy by way of intervention); *State ex rel Denton v Bedinghaus*, 98 Ohio St 3d 298, 304; 784 NE2d 99 (2003) (denying mandamus where nonparties "could have moved to intervene"); *Barker v United States Dist Court*, 185 F2d 582, 583 (CA 9, 1950) (denying writ of prohibition sought by a "stranger to the original action" because "[i]t seems petitioner could have intervened in the proceedings below, as an interested party"); *Tomlinson v Lampton*, 18 Cal App 2d 671, 672; 64 P2d 443 (1937) ("Petitioner has an adequate legal remedy, namely, intervention in the other action, and accordingly it is not proper to issue the writ.").

IV. PLANNED PARENTHOOD HAS STANDING TO SEEK LEAVE TO APPEAL THE COURT OF APPEALS'S DISMISSAL OF THE COMPLAINT

Planned Parenthood has standing to appeal. Although MCR 7.305(A) generally provides that an application for leave to appeal must be filed by "a party," in this case the Court of Appeals ordered Planned Parenthood to answer the complaint as a party to the proceeding over which superintending control was sought, *In re Jarzynka*, Order, Court of Appeals, issued May 25, 2022 (Docket No. 361470); see also MCR 3.302(E)(1), (2), and referred to Planned Parenthood as "Defendant," *id.* In a later order, the Court of Appeals also referred to PPMI and Dr. Wallett as "[t]he parties," *In re Jarzynka*, Order, Court of Appeals, issued June 27, 2022 (Docket No. 361470). Indeed, Complainants included Planned Parenthood's attorneys on the cover page of

several of their filings. *In re Jarzynka*, Renewed Motion for Immediate Consideration; Reply in Support of Complaint for Order of Superintending Control; Plaintiffs' First Supplemental Authority; Plaintiffs' Supplemental Brief Regarding Jurisdiction, Court of Appeals (Docket No. 361470). Accordingly, Planned Parenthood has been and should continue to be treated as a party for purposes of MCR 7.305(A).

Additionally, Planned Parenthood has standing to appeal the Court of Appeals decision even though that decision granted Planned Parenthood's motion to dismiss the complaint for superintending control because the Court of Appeals's statement that county prosecutors are not bound by the May 17 preliminary injunction causes Planned Parenthood concrete and particularized injury, as detailed above. Parties that technically prevail on the face of the court's order nonetheless have standing to appeal if they are somehow "aggrieved" by the court's decision. *Manuel*, 481 Mich. at 643; see also *Federated Ins Co v Oakland Cnty Road Comm'n*, 475 Mich 286, 290–92; 715 N.W.2d 846 (2006) (explaining that a litigant has standing to appeal where it can "demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case"); *League of Women Voters of Mich v Mich Sec of State*, 506 Mich 561, 578; 957 NW2d 731 (2020) (finding standing to appeal where appellant "suffered a concrete and particularized injury arising from the actions of the lower courts").

In *Manuel*, the Court of Appeals affirmed the dismissal of a claim with prejudice, meaning the defendant technically prevailed on every issue on appeal. *Id.* at 641. But in its ruling, the Court of Appeals held that the defendant was a state agency, thereby permitting a new lawsuit to be brought against it in the Court of Claims. *Id.* at 641–42. The defendant appealed. The Supreme Court held that, even though "[o]rdinarily, a party who prevails on every claim cannot be

considered to be aggrieved," the defendant had appellate standing because it "suffered a concrete and particularized injury as a result of the Court of Appeals decision." *Id.* at 644. Specifically, the Court of Appeals effectively "revived" a claim that had been dismissed with prejudice; this "disparit[y]" made the defendant an aggrieved party. *Id.* at 644, 645.

In the Court of Appeals case, Planned Parenthood technically prevailed because the Court of Appeals dismissed the complaint for superintending control. However, the Court of Appeals arguably nullified the preliminary injunction. Similar to the appellate court's revival of the dismissed claim in *Manuel*, the conclusion that the preliminary injunction did not bind county prosecutors changed the nature of the relief granted by the Court of Claims by casting public doubt on the scope and continuing legal effect of the preliminary injunction. Because of this disparity, PPMI and Dr. Wallett have suffered a concrete and particularized injury; if county prosecutors may be able to initiate prosecutions against them, they may no longer be able to provide abortions. In effect, the relief they obtained under the preliminary injunction is negated. Thus, although PPMI and Dr. Wallett technically prevailed at the Court of Appeals, they have standing to appeal that court's dismissal of the complaint for superintending control.

V. ALTERNATIVELY, IF THIS COURT CONCLUDES THAT LEAVE TO APPEAL IS NOT APPROPRIATE, PLANNED PARENTHOOD REQUESTS THAT THE COURT EXERCISE SUPERINTENDING CONTROL OF THIS CASE BECAUSE THE COURT OF APPEALS FAILED TO PERFORM A CLEAR LEGAL DUTY.

Under Rule 3.302(D)(2), if an appeal is available, "that method of review must be used," instead of an action for an order of superintending control. MCR 3.302(D)(2). In this filing, Planned Parenthood requests that the Court grant them leave to appeal. Only if the Court concludes that leave to appeal is not appropriate does Planned Parenthood request that the Court construe this application as a complaint seeking an order of superintending control over the Court of Appeals in *In re Jarzynka*. In that circumstance, because Planned Parenthood would not have recourse to an

appeal, it would be left without another "adequate legal remedy," *In re Credit Acceptance Corp*, 273 Mich App at 598, and must show, as it does below, that the Court of Appeals failed to perform a clear legal duty.

The Court of Appeals had a clear legal duty to dismiss the complaint for superintending control because, as explained above, see *supra* Part III, the prosecutors had an alternative available remedy in the form of intervention and appeal, and thus the Court of Appeals lacked jurisdiction under MCR 3.302(D)(2).

In addition, the Court of Claims *must* have the authority to bind county prosecutors; in order to preserve the status quo; if it did not have such authority, it would be powerless to enjoin effectively any unconstitutional criminal law. See MCL 600.6419(1)(a) (establishing the Court of Claims's jurisdiction "to hear and determine any claim or demand, statutory or constitutional . . . or any demand for monetary, equitable, or declaratory relief . . . against the state or any of its departments or officers"). By concluding that the Court of Claims's preliminary injunction did not bind prosecutors, the Court of Appeals functionally stripped the Court of Claims of an important part of its jurisdiction. In so doing, it violated a clear legal duty.

Accordingly, if this Court does not grant Planned Parenthood leave to appeal, it should exercise superintending control over *In re Jarzynka*, remand with directions to vacate the Court of Appeals's decision as to its conclusion that the prosecutors lacked standing because the preliminary injunction did not bind them, and direct the Court of Appeals instead to dismiss the complaint for superintending control on the grounds that the prosecutors failed to meet the requirements of MCR 3.302(B), (D)(2). Alternatively, the Court could vacate the Court of Appeals's standing determination as described above and remand with directions to consider whether the prosecutors satisfy the requirements of MCR 3.302(B), (D)(2).

CONCLUSION

For the foregoing reasons, this Court should enter an order (1) clarifying that the Court of Claims's May 17, 2022 preliminary injunction preserves the status quo by barring all enforcement of MCL 750.14 during the pendency of that litigation, including by county prosecutors; (2) reversing the Court of Appeals's August 1, 2022 decision to the extent it modifies that injunction by holding that county prosecutors are not bound by it; and (3) affirming the Court of Appeals's August 1, 2022 dismissal of the complaint for superintending control in *In re Jarzynka*, Case No. 361470.

Alternatively, the Court could remand with directions to vacate the Court of Appeals's decision as to its conclusion that the prosecutors lacked standing because the preliminary injunction did not bind them, and direct the Court of Appeals instead to dismiss the complaint for superintending control on the grounds that the prosecutors failed to meet the requirements of MCR 3.302(B), (D)(2). The Court could also remand with directions to vacate the Court of Appeals's conclusion that the prosecutors lacked standing because the preliminary injunction did not bind them, and direct the Court of Appeals instead to consider whether the prosecutors satisfy the requirements of MCR 3.302(B), (D)(2).

If this Court does not grant Planned Parenthood leave to appeal under MCR 7.305(B), Planned Parenthood requests that the Court construe this application for leave to appeal as a complaint for superintending control over *In re Jarzynka*, Court of Appeals Docket No. 361470 and grant the same relief.

Respectfully submitted,

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Dated: August 3, 2022

EXHIBIT 1

Court of Appeals, State of Michigan

ORDER

In re Jarzynka

Docket No. 361470

LC No. 22-000044-MM

Stephen L. Borrello
Presiding Judge

Michael J. Kelly

Michael F. Gadola
Judges

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Presiding Judge

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

August 1, 2022
Date

Chief Clerk

EXHIBIT 2

STATE OF MICHIGAN

COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients, and SARAH WALLET, M.D., M.P.H., FACOG, on her own behalf and on behalf of her patients,

Plaintiffs,

v

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, in her official capacity,

Defendant.
_____/

OPINION AND ORDER

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

Plaintiffs Planned Parenthood of Michigan and Sarah Wallett, M.D., M.P.H, FACOG, filed this suit seeking a declaration that MCL 750.14 is unconstitutional under the Michigan Constitution, and requesting preliminary and permanent injunctions barring its enforcement.

The Court hereby concludes that the balancing of the pertinent factors weighs in favor of granting preliminary injunctive relief. The motion for a preliminary injunction is GRANTED as described herein, and defendant is preliminarily enjoined from enforcing MCL 750.14.

I. MICHIGAN'S ABORTION STATUTES AND THEIR INTERPRETATION BEFORE *ROE V WADE*

The common law proscribed abortion only after a mother first felt fetal movement, referred to as "quickening." "[A]t common law, abortion performed before 'quickening'—the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense." *Roe v Wade*, 410 US 113, 132; 93 S Ct 705; 35 L Ed

2d 147 (1973) (citations omitted).[1] See also *Commonwealth v Parker*, 50 Mass 263, 263 (1845) ("It is not a punishable offence, by the common law, to perform an operation upon a pregnant woman, with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child."), and *State v Cooper*, 22 NJL 52, 58 (1849) ("We are of opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently that the mere attempt to commit the act is not indictable.)

Michigan's first abortion statutes, enacted in 1846, distinguished between the abortion of a "quick" fetus, deemed "manslaughter," 1846 RS, ch 153, §32 and an abortion conducted before quickening, punished "by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment." 1846 RS, ch 153, §33. "In other words, the unquickened fetus was not considered to be a separate human being so as to make the destruction of such fetus a killing." *People v Nixon*, 42 Mich App 332, 336-337; 201 NW2d 635 (1972). The *Nixon* majority concluded that the latter statute's "obvious purpose was to protect the pregnant woman" rather than the fetus. *Id.* at 337.

[1] Post-*Roe*, in *Larkin v Cahalan*, 389 Mich 533, 541-542; 208 NW2d 176 (1973), the Michigan Supreme Court interpreted the term "quick child" as "a viable child in the womb of its mother; that is, an unborn child whose heart is beating, who is experiencing electronically measurable brain waves, who is discernably moving, and who is so far developed and matured as to be capable of surviving the trauma of birth with the aid of the usual medical care and facilities available in the community."

The 1846 abortion statutes were reenacted with little change until 1931, when the statute at issue in this case became part of Michigan law. MCL 750.14 applies to all abortions and deems all abortions felonious, with the exception of those performed to "preserve" the life of the mother:

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

One year before the United States Supreme Court decided *Roe v Wade*, a physician convicted under MCL 750.14 challenged the statute as "vague in the constitutional sense, and because it places an undue restraint upon a physician in the discharge of his professional duties." *Nixon*, 42 Mich App at 334-335. The Court of Appeals held that "a licensed physician is not subject to prosecution for an induced abortion performed in a hospital or appropriate clinical setting upon a woman in her first trimester of pregnancy." *Id.* at 341. For the most part, the opinion rested on policy grounds, not constitutional principles.[2] The majority determined that the state had no legitimate interest in proscribing first-trimester abortions performed by licensed physicians "in an antiseptic environment." *Id.* at 339. The Court observed: "Not only has modern medical science made a therapeutic abortion reasonably safe, but it would now appear that it is safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child." *Id.*

[2] With virtually no analysis, the Court declared the last sentence of the statute unconstitutional because "it impermissibly shifts the burden of proof to the defendant." *Id.* at 344.

The Court of Appeals subsequently concluded that Nixon's "discussion of the constitutionality of the statute under circumstances other than those presented in that case was mere dicta." *Mahaffey v Attorney General*, 222 Mich App 325, 339; 564 NW2d 104 (1997).

II. POST-*ROE* MICHIGAN CASE LAW

In *Roe v Wade*, the United States Supreme Court held that a woman's fundamental due process right to privacy encompasses a right to abortion. *Roe*, 410 US at 153-155. Restrictions on abortion, the Court explained, were subject to strict scrutiny and could be justified only by a demonstration of a compelling state interest. *Id.* at 155. During the first trimester of pregnancy, the Supreme Court declared, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. Before viability, the Supreme Court continued, a state could regulate abortion "in ways that are reasonably related to maternal health." *Id.* After viability, "a state may regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.*

Six months after the United States Supreme Court issued *Roe v Wade*, the Michigan Supreme Court held that the United States Constitution's Supremacy Clause precluded the enforcement of MCL 750.14 with regard to abortions performed by physicians. Consistent with "the principles enunciated" in *Roe*, the Court reasoned, Michigan's criminal abortion statute "cannot stand as relating to abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment." *People v Bricker*, 389 Mich 524, 527; 208 NW2d 172 (1973). In *Bricker*, however, the defendant was a non-physician convicted of conspiracy to commit an abortion. Our Supreme Court affirmed the

defendant's conviction, holding that "except as to those cases defined and exempted under *Roe v Wade* and *Doe v Bolton*,[3] ... criminal responsibility attaches." *Id.* at 531. *Bricker* did not consider the constitutionality of MCL 750.14 under the Michigan Constitution.

Over the years following *Roe*, the Michigan Legislature enacted a variety of laws intended "to test its limits." *Planned Parenthood of SE Pennsylvania v Casey*, 505 US 833, 858; 112 S Ct 2791; 120 L Ed 2d 674 (1992). *Casey* discarded the strict scrutiny standard adopted in *Roe*, and in its place introduced an "undue burden" analysis. Pre-*Casey*, the Legislature barred Medicaid funding of abortion, MCL 400.109a; in 1990 the Legislature enacted "the parental rights restoration act," MCL 722.901 *et seq.*; in 1993 the Legislature passed a detailed statute governing the parameters of the informed consent required of adult women undergoing abortion, MCL 333.17015; and in 1996 the Legislature banned "partial birth abortions." MCL 333.17016.

Save for the partial birth abortion ban, these statutes all survived constitutional challenges.[4] In *Mahaffey v Attorney Gen*, 222 Mich App 325, 334; 564 NW2d 104 (1997), the plaintiffs challenged the constitutionality of the informed consent law, MCL 333.17014 *et seq.*, under the Michigan Constitution. The Court of Appeals held that although the Michigan Supreme Court has "long recognized privacy to be a highly valued right" and that "the Michigan Constitution provides a generalized right of privacy," "neither application of traditional rules of constitutional

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[3] 410 US 179; 93 S Ct 739; 35 L Ed 2d 201 (1973)

[4] A federal district court held the "partial birth" abortion ban to be unconstitutionally vague and overbroad, and an undue burden on and overbroad and an undue burden on a woman's right to seek a pre-viability second trimester abortion in *Evans v Kelley*, 977 F Supp 1283 (ED Mich, 1997).

interpretation nor examination of Supreme Court precedent supports the conclusion that there is a right to abortion under the Michigan Constitution." *Id.*

In December 2021, the United States Supreme Court heard oral argument in *Dobbs v Jackson Women's Health Org*, __US__; 141 S Ct 2619; 209 L Ed2d 748 (2021). *Dobbs* presents an opportunity for the United States Supreme Court to overrule *Roe*. See, for example, Greenhouse, *The Supreme Court Gaslights Its Way to the End of Roe* <https://www.nytimes.com/2021/12/03/opinion/abortion-supreme-court.html> (accessed May 16, 2022), and *Ziegler*, *The Supreme Court Just Took a Case that Could Kill Ro v. Wade—or Let it Die Slowly*, <https://www.washingtonpost.com/politics/2021/05/18/supreme-court-just-took-case-that-could-kill-roe-v-wade-or-let-it-die-slowly/> (accessed May 16, 2022). A draft opinion in *Dobbs* purporting to overrule *Roe* was leaked to the press on May 2, 2022.

Plaintiffs' complaint correctly posits that if the United States Supreme Court overrules *Roe v Wade*, abortion will again become illegal in Michigan except when "necessary to preserve the life of [the] woman." MCL 750.14. Implicitly recognizing that the Court of Appeals' decision in *Mahaffey* forecloses a constitutional argument premised on the right to privacy found in the Michigan Constitution, plaintiffs challenge the constitutionality of the statute on additional grounds distinct from privacy. Planned Parenthood's complaint preserves a privacy claim and also avers that the statute is unconstitutional because it violates the rights to liberty, … bodily integrity, and equal protection guaranteed by the Michigan Constitution and the Elliott-Larsen Civil Rights Act, and it is unconstitutionally vague." Before considering plaintiffs' arguments, however, the Court must address the threshold question of its jurisdiction.

III. THE JUSTICIABILITY OF THIS ACTION

Defendant Attorney General concurs with plaintiffs' argument that MCL 750.14 is unconstitutional but does not offer any legal analysis in support of her concurrence.[5] Rather, defendant argues that because she has publicly vowed not to defend or to enforce the law "there is at present a lack of adversity" resulting in the absence of this Court's subject-matter jurisdiction. Defendant has not moved to dismiss the action on jurisdictional grounds, however. And as authority for her jurisdictional argument, defendant relies primarily on a non-precedential source: Justice David Viviano's concurrence to an order denying leave to appeal, which in turn relied on two opinions penned by Justice Scalia: a dissent (the majority opinion is discussed below), and a lower court ruling in a legally immaterial context. The relevant language of Justice Viviano's statement is as follows:

> ... In our adversary system, the parties' competing interests lead to arguments that sharpen the issues so that courts will "not sit as self-directed boards of legal inquiry and research ...." *Carducci v Regan*, 230 US App DC 80, 86, 714 F 2d 171 (1983) (Scalia, J.); see also Fuller, The Adversary System, in Berman, ed., Talks on American Law (New York: Vintage Books, 1971), p. 35 ("[B]efore a judge can gauge the full force of an argument, it must be presented to him with partisan zeal by one not subject to the restraints of judicial office. The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation."). Our role, therefore, is to act as neutral arbiters of real disputes brought by adverse parties. *Carducci*, 230 US App DC at 86, 714 F.2d 171.[6]

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[5] The Court has had the benefit of two amicus curiae briefs filed in opposition to the relief requested, one by signed by Right to Life of Michigan and the Michigan Catholic Conference, and the other offered by Drs. Gianina Cazan-London and Melissa Halvorson. No third parties have moved to intervene in this case, which has been pending since April 7, 2022.

[6] Respectfully, Justice Viviano mischaracterized the meaning and contextual applicability of Justice Scalia's opinion in *Carducci*. The appellant in that case claimed that the application of a federal law had deprived him of a due process right, but he failed to adequately brief the constitutional issue. Justice (then Judge) Scalia declared that the issue was "of major importance to all employees in the federal competitive service," further expressing that "[w]e will not resolve that issue on the basis of briefing and argument by counsel which literally consisted of no more

> Courts cannot fulfill this role when the parties agree on the merits to such an extent that no honest dispute exists. Cf. *United States v Windsor*, 570 US 744, 782; 133 S Ct 2675; 186 L Ed2d 808 (2013) (Scalia, J., dissenting) ("We have never before agreed to speak—to 'say what the law is'—where there is no controversy before us."). [*League of Women Voters of Mich v Sec'y of State*, 506 Mich 905; 948 NW2d 70 (2020) (VIVIANO, J., concurring)].

In response to the Attorney General's subject-matter jurisdiction argument, plaintiffs assert that their allegations meet the "actual controversy" requirement for a declaratory judgment under MCR 2.605(A)(1), that the Attorney General's "personal views and even present-day intentions" are irrelevant to a case against an official who is merely a representative of a state office, and that the current Attorney General may not be the Attorney General of Michigan on January 1, 2023. Plaintiffs stress: "[T]he chilling effect of such a possibility would be paralyzing; Plaintiffs and other providers need to know whether they could be vulnerable to future prosecution for the conduct they undertake now." Further, plaintiffs contend, a court order is required to bind county prosecutors "who operate under the Attorney General's supervision for purposes of their authority to prosecute violations of state law[.]" Because the statute of limitations for a prosecution under MCL 750.14 is six years, plaintiffs urge, plaintiffs may "be forced to cease providing abortions altogether notwithstanding the current attorney general's legal position[.]"

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than the assertion of violation of due process rights, with no discussion of case law supporting that proposition or of the statutory text and legislative history relevant to the central question of the exclusiveness of entitlements set forth in the" statute at issue. *Carducci v Regan*, 714 F2d 171, 177; 230 US App DC 80, 86 (1983). In context, the cut-and-pasted snippet relied on by Justice Viviano has nothing to do with the justiciability issues under consideration in this case, which plaintiffs have exhaustively briefed.

The Court finds that this matter is a justiciable declaratory judgment action. In reaching this conclusion, the Court is guided by Michigan law, but finds persuasive ancillary support in federal jurisprudence.

MCR 2.605(A)(1) states: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Our Supreme Court has explained that "[a]n actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters of Mich v Sec'y of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). "What is essential to an 'actual controversy' under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000) (citation and quotation marks omitted). A merely hypothetical future injury does not give rise to an actual controversy. *Id.*

In determining whether an "actual controversy" exists in this case, it bears emphasis that unlike the federal Constitution, Michigan's Constitution does not contain an equivalent to Article III's case-or-controversy requirement and does not explicitly or implicitly limit the power of a court to decide declaratory judgment actions. In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 364; 792 NW2d 686 (2010), our Supreme Court emphatically rejected that Article III's check on federal judicial power applies to a state court's justiciability analysis under MCR 2.605(A)(1): "…[T]his Court long ago explained that Michigan courts' judicial power to decide controversies was broader than the United States Supreme Court's interpretation of the Article III

case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not."

Lansing Schools involved the standing doctrine, one component of Article III's case-or-controversy requirement. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012) ("MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness."). Nevertheless, *Lansing Schools* establishes the key threshold proposition that Michigan law rather than federal jurisprudence governs whether the Attorney General's legally non-specific concurrence with plaintiff's general contention that MCL 750.14 is unconstitutional eliminates a "case of actual controversy" under MCR 2.605(A)(1).

Logically, defendant's argument is problematic. The Attorney General essentially maintains that if she expresses agreement with a plaintiff's underlying legal position but disagrees with or resists a judicially crafted remedy, a court is automatically divested of subject-matter jurisdiction. Such a rule would destroy an aggrieved party's ability to obtain a meaningful legal ruling with actual effect. According to defendant's thesis, in any case challenging the constitutionality of a statute the Attorney General would be empowered to derail a constitutional challenge by simply communicating a non-specific consonance with the plaintiff's position. "[I]t would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." *INS v Chadha*, 462 US 919, 939; 103 S Ct 2764; 77 L Ed 2d 317 (1983). No authority supports the defendant's jurisdictional argument. To the contrary, Michigan law decidedly refutes defendant's position.

"The Declaratory Judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Id.* "It is clear enough that, if a case has progressed to the point where a traditional action for damages or for an injunction could be maintained, declaratory relief will not be denied for lack of an actual controversy." 3 Longhofer, Michigan Court Rules Practice (7th ed), § 2605.3, p. 465. As the Longhofer text urges, the intended purpose of the declaratory judgment rule is "to give relief, in appropriate cases, before injury has occurred or duties have been violated." *Id.* The text continues:

> Typically, these are cases in which a party would like to know its rights or liabilities under a statute … without having to act at the party's own peril. These are the precise situations that declaratory relief was meant to cover, and that intent should not be frustrated by an unduly restrictive construction of the actual controversy requirement. [*Id.*]

The Court of Appeals has repeatedly applied the same reasoning. "An actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct. In such situations, courts are "not precluded from reaching issues before actual injuries or losses have occurred." *City of Huntington Woods v City of Detroit*, 279 Mich App 603; 761 NW2d 127, 136 (2008) (citation and quotation marks omitted). "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW*, 295 Mich App at 495 (citation and quotation marks omitted). Thus, Michigan law supports that despite the Attorney General's view that MCL 750.41 is unconstitutional, because the parties do not agree on a remedy, they remain adverse for the purposes of MCR 2.605(A)(1).

The same result obtains even under the more rigorous standards imposed by Article III of the United States Constitution. A somewhat similar case procedurally, *United States v Windsor*, 570 US 744, 756; 133 S Ct 2675; 186 L Ed 2d 808 (2013), involved whether the federal Defense of Marriage Act barred the respondent from claiming an estate tax exemption as a surviving spouse. Windsor and her wife had been legally married in Canada and resided in New York. After her spouse died, Windsor paid the assessed estate taxes but filed suit challenging the constitutionality of §3 of the DOMA, which defined a "spouse" as "a person of the opposite sex who is a husband or a wife." 1 USC §7. While the case was pending in the district court, the Attorney General of the United States announced that the Department of Justice "would no longer defend the constitutionality of DOMA's §3." *Windsor*, 570 US at 753.

At the outset of its analysis, the Supreme Court considered a jurisdictional "complication" not unlike the one asserted by defendant here, and found that it did not destroy the action's justiciability:

> Even though the Executive's current position was announced before the District Court entered its judgment, the Government's agreement with Windsor's position would not have deprived the District Court of jurisdiction to entertain and resolve the refund suit; for her injury (failure to obtain a refund allegedly required by law) was concrete, persisting, and unredressed. The Government's position—agreeing with Windsor's legal contention but refusing to give it effect—meant that there was a justiciable controversy between the parties, despite what the claimant would find to be an inconsistency in that stance. [*Id.* at 756].

The Court also rejected an amicus argument that the parties were no longer "adverse" after the Department of Justice's concession: "This position … elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise." *Id.* The Court explained that despite agreeing in principle with Windsor's legal argument, the United States refused to repay the withheld taxes, "thus establish[ing] a controversy sufficient for

Article III jurisdiction." *Id.* at 758. The Court summarized: "It would be a different case if the Executive had taken the further step of paying Windsor the refund to which she was entitled under the District Court's ruling." *Id.*

The Attorney General's unwillingness to stipulate to a preliminary injunction or any other relief creates adversity in this case, just as a similar reluctance did in *Windsor*. Furthermore, plaintiff's complaint describes an on-going controversy regarding the constitutionality of MCL 750.41 and a need for a declaration to guide the future conduct of Planned Parenthood's physicians and patients. These allegations suffice to create an actual controversy under MCR 2.605(A)(1).

IV. THE MERITS

As of the date this opinion is issued, it is unknown whether the United States Supreme Court will overrule *Roe v Wade*. Should that occur, an initial question likely to be of interest to our state's citizenry is the power of a state Court to interpret Michigan's Constitution differently than the United States Supreme Court interprets the federal Constitution. To dispel any uncertainty on that subject, the Court offers the following brief review.

The United States Supreme Court has repeatedly endorsed the proposition that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Florida v Powell*, 559 US 50, 59; 130 S Ct 1195; 175 L Ed 2d 1009 (2010) (citation and quotation marks omitted). And the Michigan Supreme Court has accepted that invitation, most notably in *Sitz v Dept of State Police*, 443 Mich 744, 761-762; 506 NW2d 209 (1993). See also *People v Tanner*, 496 Mich 199, 222; 853 NW2d 653 (2014) ("[I]t is this Court's obligation to independently examine our state's

Constitution to ascertain the intentions of those in whose name our Constitution was 'ordain[ed] and establish[ed].' ")

Sitz involved the constitutionality of sobriety checklanes used by the Michigan State Police. The United States Supreme Court upheld the constitutionality of the checklanes under the Fourth Amendment of the United States Constitution. *Michigan Dep't of State Police v Sitz*, 496 US 444; 110 S Ct 2481; 110 L Ed 2d 412 (1990). On remand, however, a two-judge majority of the Michigan Court of Appeals determined that sobriety checklanes violated art 1, § 11 of the Michigan Constitution. *Sitz v Dep't of State Police (On Remand)*, 193 Mich App 690; 485 NW2d 135 (1992). The Michigan Supreme Court agreed, explaining: "Because there is no support in the constitutional history of Michigan for the proposition that the police may engage in warrantless and suspicionless seizures of automobiles for the purpose of enforcing the criminal law, we hold that sobriety checklanes violate art. 1, § 11 of the Michigan Constitution." *Sitz*, 443 Mich at 747.

In *Sitz*, the Michigan Supreme Court specifically and emphatically addressed its power to interpret Michigan's Constitution more expansively, and in a manner more protective of civil liberties, than the United States Supreme Court had interpreted an analogous provision of the federal constitution:

> [A]ppropriate analysis of our constitution does not begin from the conclusive premise of a federal floor. Indeed, the fragile foundation of the federal floor as a bulwark against arbitrary action is clearly revealed when, as here, the federal floor falls below minimum state protection. As a matter of simple logic, because the texts were written at different times by different people, the protections afforded may be greater, lesser, or the same. [*Sitz*, 443 Mich at 761-762 (footnotes omitted)].

Regarding due process rather than the Fourth Amendment, the Michigan Supreme Court has made it clear that the Michigan Constitution's due process clause need not be interpreted in lockstep with the Fourteenth Amendment's due process clause: "Although these provisions are

often interpreted coextensively, Const 1963, art 1, § 17 may, in particular circumstances, afford protections greater than or distinct from those offered by U.S. Const Am XIV, § 1." *AFT Mich v Michigan*, 497 Mich 197, 245; 866 NW2d 782 (2015) (footnotes omitted).

Thus, this Court is not constrained to adopt the United States' Supreme Court's analysis of the constitutionality of abortion under the United States Constitution but must instead focus its inquiry on the rights and guarantees conferred by *our* Constitution.

One additional preliminary point bears discussion. This Court acknowledges that the Court of Appeals held in *Mahaffey*, 222 Mich App at 334, that although the Michigan Constitution provides "a generalized right of privacy," the right does not embrace a right to abortion. A circuit court judge is required to follow controlling precedent established by a published decision of the Court of Appeals "until a contrary result is reached by this Court or the Supreme Court takes other action." *Holland Home v Grand Rapids*, 219 Mich App 384, 394; 557 NW2d 118 (1996). Accordingly, *Mahaffey* constitutes binding precedent to which this Court must adhere.

Mahaffey describes as follows the arguments made by the plaintiffs in that case regarding the informed consent statute: "Plaintiffs claimed that the act violates a woman's right to privacy and due process, violates a physician's right to free speech, and is unconstitutionally vague with regard to what constitutes a 'medical emergency.' " *Mahaffey*, 222 Mich App at 332. The plaintiffs also claimed that the act was unconstitutional because, in violation of the Headlee Amendment, the Legislature did not enact a specific appropriation for funding the act." *Id.* The "act" in question was not MCL 750.14, but a series of laws governing the informed consent required for abortion procedures. Plaintiffs' argument in the instant case that MCL 750.14 unconstitutionally infringes on the right to bodily integrity was not considered in *Mahaffey*.

Indeed, the right of bodily integrity was not specifically recognized as a right granted by the Michigan Constitution until 2018, when the Court of Appeals decided *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018).

A. The Right To Bodily Integrity Under the Michigan Constitution

Mays was class action that arose from the Flint water crisis. The plaintiffs were individual and commercial consumers of the contaminated water. Their class action complaint stated three causes of action, including "violation of plaintiffs' due-process right to bodily integrity (Count II)" under the Michigan Constitution. *Id.* at 23. Among other defenses, the defendants asserted that the plaintiffs "failed to allege facts to establish a constitutional violation for which a judicially inferred damage remedy is appropriate." *Id.* This Court (Judge Mark T. Boonstra) found that the plaintiffs "have alleged sufficient facts, when taken as true, to establish a violation of each plaintiff's respective individual right to bodily integrity under the substantive due process component of art I, §17." *Mays v Snyder*, opinion and order of the Court of Claims, issued October 26, 2016 (Docket No. 16-000017-MM), p. 29. Summary disposition was granted on other grounds, and the plaintiffs appealed.

In a thoughtful and detailed examination of the contours of the right of bodily integrity, the Court of Appeals' majority affirmed Judge Boonstra's ruling on that issue, holding that "[p]laintiffs have alleged facts sufficient to support a constitutional violation by defendants of plaintiffs' right to bodily integrity." *Id.* at 62. The defendants applied for leave to appeal to our Supreme Court, which affirmed the Court of Appeals by equal division. The lead opinion, authored by Justice Richard Bernstein, held that "plaintiffs pleaded a recognizable due-process

claim under Michigan's Constitution for a violation of their right to bodily integrity." *Mays v Governor of Michigan*, 506 Mich 157, 195; 954 NW2d 139 (2020) (opinion by BERNSTEIN, J.).

In a separate concurrence focusing on the Michigan Constitution, Justice Bernstein provided a more comprehensive explanation of the origins of the right to bodily integrity:

> The United States Supreme Court has recognized for over a century that "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac R Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891). Plaintiffs allege a substantive due-process claim based on defendants' conduct that caused their severe bodily injuries and impaired their liberty. Plaintiffs frame these allegations as a violation of their constitutional right to bodily integrity. Although this Court has not opined on the right before, I believe that it is one of the most fundamental rights ensured by Michigan's Constitution. The right is implicit in our Due Process Clause and would have been obvious to those who ratified our Constitution. I conclude that common notions of liberty in this state are so inextricably entwined with physical freedom and freedom from state incursions into the body that Michigan's Due Process Clause plainly encompasses a right to bodily integrity. [*Id.* at 212-213.]

Justice Bernstein's citation to *Union Pacific R Co v Botsford* is particularly apt. The issue in that case was whether Clara Botsford could be compelled to submit to a "surgical examination" to pursue a damage action against the railway company for an injury she sustained when a berth fell on her head. *Union Pacific R Co*, 141 US at 251. The United States Supreme Court began its discussion of Botsford's right to what we now call bodily integrity with a citation to Michigan's own Justice Thomas M. Cooley. The United States Supreme Court approvingly declared: "As well said by Judge Cooley: 'The right to one's person may be said to be a right of complete immunity; to be let alone.' Cooley, Torts, 29." *Id.* at 251.

Justice Cooley is not merely a former member of our Supreme Court. His wisdom is lauded in many opinions of that Court. See, e.g., *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 462; 952

NW2d 434 (2020) ("Former Michigan Supreme Court Justice Thomas M. Cooley, one of our nation's preeminent jurists and learned scholars …"); *People v Szalma*, 487 Mich 708, 716; 790 NW2d 662 (2010) ("Michigan's own Blackstone, Justice THOMAS M. COOLEY …); *Michigan Dept of Transp v Tomkins*, 481 Mich 184, 207; 749 NW2d 716 (2008) ("our venerable Michigan Supreme Court Justice Thomas M. Cooley,"); and *Michigan Coal of State Employee Unions v Michigan Civil Serv Comm,* 465 Mich 212, 222; 634 NW2d 692 (2001) ("the great constitutional law scholar and member of this Court in the nineteenth century, Justice Thomas M. Cooley …). Justice Cooley's 1879 pronouncement has several critical implications for this case.

First, Justice Cooley's succinct acknowledgment of the right "to be let alone" is now viewed as the foundation for the common law's recognition of the right to bodily integrity.[7] Personal autonomy and bodily integrity have been characterized as essential rights in a multitude of cases predating the adoption of Michigan's 1963 Constitution. See, for example, Justice Cardozo's pronouncement in *Schloendorff v Soc'y of New York Hosp*, 211 NY 125, 129; 105 NE 92 (NY, 1914), overruled in part on other grounds *Bing v Thunig*, 2 NY2d 656; 143 NE2d 3 (1957), that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body," the New Jersey Supreme Court's declaration that "The right of a person to control his own body is a basic societal concept, long recognized in the common law," *Matter of Conroy*, 98 NJ 321, 346; 486 A2d 1209 (NJ, 1985), and the Kansas Supreme Court's 1960 holding that: "Anglo-American law starts with the premise of thorough-going self-determination.

[7] The Michigan Supreme Court is also regarded as the source of the right to privacy. As noted in *Dalley v Dykema Gossett*, 287 Mich App 296, 306; 788 NW2d 679 (2010): "Dean William Prosser has identified a Michigan case, *De May v. Roberts,* 46 Mich 160, 9 NW 146 (1881), as among the first reported decisions allowing relief premised on an invasion of privacy theory. Prosser, *Privacy*, 48 Cal L R 383, 389 (1960)."

It follows that each man is considered to be master of his own body …". *Natanson v Kline*, 186 Kan 393, 406-407; 350 P2d 1093 (Kansas, 1960). And as Justice Brandeis observed in dissent in *Olmstead v United States*, 277 US 438, 478; 48 S Ct 564, 572; 72 L Ed 944 (1928) (BRANDEIS, J, dissenting), "The makers of our Constitution … sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men."[8]

Second, given its historical provenance and widespread judicial acceptance, there can be no doubt but that the right to be let alone—the right to bodily integrity—was understood by the ratifiers of the 1963 Michigan Constitution as a fundamental component of due process. A Michigan court's objective in discerning the meaning of a constitutional provision "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468; 684 NW2d 765 (2004). "In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have 'ratified the instrument in the belief that that was the sense designed to be conveyed.' " *People v Nutt*, 469 Mich 565, 573-574; 677 NW2d 1 (2004) (citation omitted). As held in *Mays* and discussed above, the right to bodily integrity is subsumed within our Constitution's due process guarantees.

Mays did not address whether the due process right to bodily integrity qualifies as fundamental—nor did it need to. The Michigan Supreme Court has not articulated a definitive pathway for evaluating whether a constitutional right qualifies as "fundamental" under our state's

[8] The Supreme Court overruled *Olmstead* in *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed2d 576 (1976).

Constitution. Similar to the law governing the interpretation of constitutional meaning, the case law suggests that history and tradition play major roles in the determination. See *People v Kevorkian*, 447 Mich 436, 477; 527 NW2d 714 (1994), in which the Court explored whether the right to commit suicide "arises from a rational evolution of tradition," and its recognition would not constitute "a radical departure from historical precepts" (opinion CAVANAGH, CJ, and BRICKLEY and GRIFFIN, JJ), and *Phillips v Mirac, Inc*, 470 Mich 415, 434; 685 NW2d 174 (2004), where the Court rejected that that a jury's "right" to assess full damages is "fundamental" under the Michigan Constitution examining whether it represented "an interest traditionally protected by our society" that is "implicit in the concept of ordered liberty." Examined through those lenses, the right to bodily integrity is indisputably fundamental.

Many fundamental due process rights are not mentioned in our constitutional text but are nevertheless central to our freedoms as Americans and Michiganders. Other rights now generally accepted by our society as fundamental include the right to marry the person of our choice, *Loving v Virginia*, 388 US 1; 87 S Ct 1817; 18 L Ed 2d 1010 (1967); the right to have children, *Skinner v Oklahoma ex rel Williamson*, 316 US 535; 62 S Ct 1110; 86 L Ed 1655 (1942); the right to direct the education of our children, *Meyer v Nebraska*, 262 US 390; 43 S Ct 625 67 L Ed 1042 (1923) and *Pierce v Society of Sisters*, 268 US 510; 45 S Ct 571; 69 L Ed 1070 (1925); and the right to be free from intrusive and invasive governmental searches, *Rochin v California*, 342 US 165; 72 S Ct 205; 96 L Ed 183 (1952). All of these rights were commonly understood by the ratifiers of the 1963 Constitution as essential components of our state Constitution's concept of due process. Recognition of the right to bodily integrity as fundamental flows naturally from our understanding of the essential nature of these other due process rights.

B. The Right to Bodily Integrity and Abortion

The due process protections we take for granted in 2022 "have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v Oliver*, 510 US 266, 272; 114 S Ct 807; 127 L Ed 2d 114 (1994). The decision to voluntarily terminate a pregnancy "is at the very heart" of the "cluster of constitutionally protected choices" described in the cases cited above. *Carey v Population Services, Intern*, 431 US 678, 685; 97 S Ct 2010; 52 L Ed 2d 675 (1977).

Thirty years ago, the United States Supreme Court explicitly tied a woman's right to abortion with her right to bodily integrity. In prohibiting abortion, a state not only "touche[s] upon the private sphere of the family but upon the very bodily integrity of the pregnant woman." *Casey*, 505 US at 896. Pregnancy implicates bodily integrity because even for the healthiest women it carries consequential medical risks. Pregnant women face the prospect of developing conditions that may result in death, or may forever transform their health, such as blood clots and hypertensive disorders. See the affidavit of Dr. Sarah Wallett, ¶¶24-34. For others,

> carrying a pregnancy to term may aggravate pre-existing conditions such as heart disease, epilepsy, diabetes, hypertension, anemia, cancer, and various psychiatric disorders. According to these sources, pregnancy also can hamper the diagnosis or treatment of a serious medical condition, as when a pregnant woman cannot receive chemotherapy to treat her cancer, or cannot take psychotropic medication to control symptoms of her mental illness, because such treatment will damage the fetus. [*New Mexico Right to Choose/NARAL v Johnson*, 975 P2d 841, 855 (NM, 1998)].

Pregnancy and childbirth, particularly if unwanted, transform a woman's psychological well-being in addition to her body. As recognized in *People v Nixon* half a century ago, legal abortion is actually safer than childbirth. *Nixon*, 42 Mich App at 339. Thus, the link between the right to bodily integrity and the decision whether to bear a child is an obvious one.

Among the substantive due process decisions implicating the right to bodily integrity, the cases most conceptually relevant to the connection between the right to bodily integrity and a woman's right to abortion are *Rochin v California*, 342 US 165, 169; 72 S Ct 205; 96 L Ed 183 (1952), and *Cruzan v Director, Mo Dep't of Health*, 497 US 261; 110 S Ct 2841; 111 L Ed 2d 224 (1990). In *Cruzan* the Supreme Court considered whether the parents of a young woman in a persistent vegetative state could demand that a hospital withdraw life-sustaining treatment. *Cruzan*, 497 US at 265-269. The Court extensively traced the roots of the informed consent doctrine, drawing on the common law and specifically on cases recognizing the right to bodily integrity: "This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment," *id.* at 269, and "generally encompass[es] the right of a competent individual to refuse medical treatment." *Id.* at 277. Because every medical procedure implicates a person's liberty interests in personal privacy and bodily integrity, the Supreme Court reasoned, there is "a general liberty interest in refusing medical treatment." *Id.* at 278.

A general liberty interest in *refusing* medical treatment inextricably correlates with a general liberty interest in *seeking* medical treatment. The right to bodily integrity inherent in a decision to reject a physician's advice logically embraces the right to make a medical decision to obtain treatment. "Just as the Due Process Clause protects the deeply personal decision of the individual to refuse medical treatment, it also must protect the deeply personal decision to obtain medical treatment, including a woman's decision to terminate a pregnancy." *Casey*, 505 US at 927 (BLACKMUN, J., concurring).

Forced pregnancy, and the concomitant compulsion to endure medical and psychological risks accompanying it, contravene the right to make autonomous medical decisions. If a woman's

right to bodily integrity is to have any real meaning, it must incorporate her right to make decisions about the health events most likely to change the course of her life: pregnancy and childbirth.

In *Rochin*, 342 US 165, the United States Supreme Court reversed a conviction based on evidence obtained by forcibly pumping the accused's stomach. The Supreme Court tethered its holding to the Due Process Clause rather than to the Fifth Amendment's prohibition of compelled self-incrimination, explaining that "[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which ... are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' ... or are 'implicit in the concept of ordered liberty.' " *Id.* at 169 (citations omitted).

Speaking through Justice Felix Frankfurter, the *Rochin* Court characterized the Due Process Clause as "the least specific and most comprehensive protection of liberties." *Id.* at 170. Those liberties cannot always be precisely labeled or defined, the Court observed, as their meanings are at times garnered from "the deposit of history." *Id.* at 169. In dealing with human rights," however, "the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions." *Id.*

Rochin instructs that as the world changes and history advances, new ideas and perceptions emerge, guiding judicial determinations of "rights." This process is not at odds with judicial humility, Justice Frankfurter advanced; "[t]o believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges." *Id.* at 171. The language of the Due Process Clause "may be indefinite and vague," Justice Frankfurter conceded, but "[i]n each case 'due process of law' requires an

evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, ... on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." *Id.* at 172.

The judicial process described in *Rochin* is not unlike that employed by the Michigan Supreme Court in *Sitz*, yielding a ruling that sobriety checklanes, unknown in 1963, were nevertheless unconstitutional under the 1963 Constitution. In reaching that conclusion, the Supreme Court drew heavily on Michigan jurisprudence surrounding the search and seizure of automobiles, tracing the case law back to 1922. *Sitz*, 443 Mich at 765. After reviewing the case law (including abundant federal authority) in considerable detail, the Court summarized: "[T]the protection afforded to the seizures of vehicles for criminal investigatory purposes has both an historical foundation and a contemporary justification that is not outweighed by the necessity advanced." *Id.* at 778.

The fundamental right to personal autonomy, to be let alone, has an even deeper "historical foundation" than the checklanes struck down in *Sitz*. As pointed out in *Nixon*, the state had no interest in fetal life before quickening until 1931. And after 50 years of legal abortion in Michigan, there can be no doubt but that the right of personal autonomy and bodily integrity enjoyed by our citizens includes the right of a woman, in consultation with her physician, to terminate a pregnancy. From a constitutional standpoint, the right to obtain a safe medical treatment is indistinguishable from the right of a patient to refuse treatment. Based on the due process principles discussed

above, the Court finds a substantial likelihood that that MCL 750.14 violates the Due Process Clause of Michigan's Constitution.[9]

V. INJUNCTIVE RELIEF

Plaintiffs seek preliminary and permanent injunctions barring the enforcement of MCL 750.14. The parties have waived the requirement of a hearing under MCR 3.310(A)(1).

A party seeking a preliminary injunction bears the burden of demonstrating entitlement to relief based on the following factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Davis v Detroit Fin Review Team*, 296 Mich App 568, 613; 821 NW2d 896 (2012) (citation and quotation marks omitted).]

This type of relief is "an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Id.* (citation and quotation marks omitted). "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Mich Alliance for Retired Americans v Sec'y of State*, 334 Mich App 238, 262; 964 NW2d 816 (2020) (citation and quotation marks omitted).

The Court finds a strong likelihood that plaintiffs will prevail on the merits of their constitutional challenge, as discussed above. Second, should the United States Supreme Court overrule *Roe v Wade*, plaintiffs and their patients face a serious danger of irreparable harm if

[9] The Court's opinion is not intended to resolve the other grounds raised by plaintiffs in support of their motions for declaratory judgment and injunctive relief. Those arguments remain outstanding.

prevented from accessing abortion services for the reasons set forth in Dr. Wallett's affidavit. The inability to exercise a fundamental constitutional right inherently constitutes irreparable harm. See *Planned Parenthood of Minnesota, Inc v Citizens for Cmty Action*, 558 F2d 861, 867 (CA 8, 1977) ("Planned Parenthood's showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury.")[10] Dr. Wallett also averred that the current uncertainty regarding *Roe* and *Dobbs* is frustrating the ability of plaintiffs to carry out their organizational goals, which itself can be a form of irreparable harm. See *Santa Cruz Lesbian & Gay Comm Ctr v Trump*, 508 F Supp 3d 521, 545-546 (ND Cal, 2020). Third, the balancing of hardships strongly weighs in plaintiff's favor. MCL 750.14 criminalizes virtually all abortions, and if enforced, will abruptly and completely end the availability of abortion services in Michigan. Maintenance of the status quo will not harm the Attorney General. Finally, a preliminary injunction furthers the public interest, allowing the Court to make a full ruling on the merits of the case without subjecting plaintiffs and their patients to the impact of a total ban on abortion services in this State. Maintenance of the status quo preserves public's interest in the stability and predictability of the law. Moreover, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc v Michigan Liquor Control Com'n*, 23 F3d 1071, 1079 (CA 6, 1994).

VI. CONCLUSION

[10] Because it is impossible to predict when the United States Supreme Court will issue a decision in *Dobbs*, the Court finds that the issuance of immediate preliminary injunctive relief warranted to avoid the necessity of another motion and further briefing. Should *Dobbs* not overrule *Roe*, or result in a ruling that calls into question any portion of the Court's analysis, the parties will be expected to advise the Court of the need for additional briefing and a hearing.

The Court **GRANTS** Plaintiffs' motion for a preliminary injunction and further **ORDERS:**

(1) Defendant and anyone acting under defendant's control and supervision, see MCL 14.30, are hereby enjoined during the pendency of this action from enforcing MCL 750.14;

(2) Defendant shall give immediate notice of this preliminary injunction to all state and local officials acting under defendant's supervision that they are enjoined and restrained from enforcing MCL 750.14;

(3) Other laws in effect *regulating* abortion in this State shall remain in full effect;

(4) The parties shall inform the Court within the next thirty (30) days whether there is a need to schedule a trial on the merits;

(5) This preliminary injunction shall remain in effect until this Court resolves the case in full.

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

Date: May 17, 2022

Elizabeth L. Gleicher
Judge, Court of Claims

EXHIBIT 3

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients; and **SARAH WALLETT, M.D., M.P.H., FACOG**, on her own behalf and on behalf of her patients,

Plaintiffs,

v

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, in her official capacity,

Defendant.
_____/

Case No.

Hon.

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

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

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

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

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

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

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

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

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

My Education and Professional Background

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

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

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

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

Planned Parenthood of Michigan

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

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

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

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

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

[1] See MCL 333.17015(3).

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

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

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

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

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

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

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

Pregnancy Has Significant Medical, Financial, and Personal Consequences

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

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

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

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

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

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

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

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[6] *Id.*

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

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

[9] *Id.* at 3–4.

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

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

[12] *Id.*

[13] *Id.* at 1676.

[14] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36. While insurance may cover most of these expenses, many pregnant patients with insurance must still pay for significant labor and delivery costs out of pocket. A recent study found that 98% of women on employer-sponsored insurance had to pay out-of-pocket costs from childbirth.[30] Out-of-pocket costs today average around $4,314 for vaginal deliveries and $5,161 for C-sections.[31]

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[28] Allsbrook & Ahmed, *Building on the ACA: Administrative Actions to Improve Maternal Health*, (March 25, 2021), Ctr for Am Progress <https://www.americanprogress.org/article/building-aca-administrative-actions-improve-maternal-health>/ (accessed April 4, 2022), citing Wier & Andrews, Healthcare Cost & Utilization Project, Statistical Brief #107, *The National Hospital Bill: The Most Expensive Conditions by Payer, 2008* (2011), available at <https://www.hcup-us.ahrq.gov/reports/statbriefs/sb107.jsp>.

[29] *Id.*, citing Sonfield, *No One Benefits If Women Lose Coverage for Maternity Care*, Guttmacher Institute (2017), available at <https://www.guttmacher.org/gpr/2017/06/no-one-benefits-if-women-lose-coverage-maternity-care>. Some sources show even higher rates for both vaginal delivery and C-section. See, e.g., Truven Health Analytics, *The Cost of Having a Baby in the United States* (2013), p 6, available at <https://www.nationalpartnership.org/our-work/resources/health-care/maternity/archive/the-cost-of-having-a-baby-in-the-us.pdf> (finding the "average total charges for care with vaginal and cesarean births" among "women and newborns with employer-provided Commercial health insurance" to be "$32,093 and $51,125, respectively").

[30] Moniz et al, *Out-of-Pocket Spending for Maternity Care Among Women with Employer-Based Insurance, 2008-15*, 39 Health Affairs 18, 20 (2020).

[31] *Id.*

37. Of course, the financial burdens of pregnancy and childbirth weigh even more heavily on people without insurance, who are disproportionately people of color,[32] and on people with unintended pregnancies, who may not have sufficient savings to cover pregnancy-related expenses.[33] Almost half of the pregnancies in the U.S. are unintended, and people of color and people with low incomes experience unintended pregnancy at a disproportionately higher rate,[34] in large part due to systemic barriers to contraceptive access.[35] According to the Federal Reserve, nearly 40% of Americans cannot cover an unexpected $400 expense.[36] Roughly 14% of people of reproductive age do not have health insurance,[37] and even more are under-insured, meaning they lack full coverage for needed services[38] and may need to pay out-of-pocket. A costly pregnancy, particularly for people already facing an array of economic hardships, could have long-term and severe impacts on a family's financial security.[39]

38. Pregnant people may also face an increased risk of intimate partner violence. According to the American College of Obstetricians and Gynecologists (ACOG), "the severity of

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[32] Allsbrook & Ahmed, *supra* note 28.

[33] *Id.*

[34] Guttmacher Institute, *Unintended Pregnancy in the United States* (2019), p 1, available at <https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf>.

[35] ACOG, Committee Opinion No 615, *Access to Contraception* (2015), p 5, available at <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2015/01/access-to-contraception.pdf>; Sudhinaraset et al, *Women's Reproductive Rights Policies and Adverse Birth Outcomes: A State-Level Analysis to Assess the Role of Race and Nativity Status*, 59 Am J Preventive Med 787, 788 (2020).

[36] Bd of Governors of the Fed Reserve Sys, *Report on the Economic Well-Being of U.S. Households in 2018 - May 2019* (May 28, 2019), available at <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm>.

[37] Adam Sonfield, *Uninsured Rate for People of Reproductive Age Ticked up Between 2016 and 2019*, Guttmacher Institute (April 1, 2021), available at <https://www.guttmacher.org/print/article/2021/04/uninsured-rate-people-reproductive-age-ticked-between-2016-and-2019>.

[38] Allsbrook & Ahmed, *supra* note 28.

[39] See *id.*

intimate partner violence may sometimes escalate during pregnancy or the postpartum period,"[40] and "[h]omicide has been reported as a leading cause of maternal mortality, with the majority perpetrated by a current or former intimate partner."[41] According to the U.S. Centers for Disease Control and Prevention (CDC), 36.1% of Michigan women experience contact sexual violence,[42] physical violence, and/or stalking victimization by an intimate partner in their lifetime.[43] An estimated 51.9% of Michigan women—approximately 2,028,000 women—experience psychological aggression from an intimate partner in their lifetime.[44] Women who have experienced intimate partner violence and who give birth after being unable to access a desired abortion will, in many cases, face increased difficulty escaping that relationship.[45]

39. A person carrying a pregnancy to term may also experience post-pregnancy mental health issues. According to a reported systematic review of the literature, the global prevalence of postpartum depression among healthy women without a history of depression and who give birth to healthy full-term infants is about 17%.[46] In 2018, 13.4% of Michigan women reported experiencing symptoms of depression since giving birth.[47] Similarly, a reported systematic review

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[40] ACOG, Committee Opinion No 518, *Intimate Partner Violence* (2012, reaff'd 2019), p 2, available at <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2012/02/intimate-partner-violence.pdf>.

[41] *Id.*

[42] The CDC defines this term as "a combined measure that includes rape, being made to penetrate someone else, sexual coercion, and/or unwanted sexual contact." Smith et al, CDC, Nat'l Ctr for Injury Prevention & Control, *The National Intimate Partner and Sexual Violence Survey, 2010–2012 State Report* (2017), p 19, available at <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf.>

[43] *Id.* at 128 tbl 5.7.

[44] *Id.* at 134 tbl 5.9.

[45] See Roberts et al, *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, 12 BMC Med 144, 149 (2014).

[46] Shorey et al, *Prevalence and Incidence of Postpartum Depression Among Healthy Mothers: A Systematic Review and Meta-Analysis*, 104 J Psychiatric Research 235, 238 (2013).

[47] Mich Dep't Health & Human Servs, *Pregnancy-Related Depression* (July 2018), p 1, available at <https://www.michigan.gov/documents/mdhhs/Pregnancy_Related_Depression_APPROVED_alt_text_7.18.2018_628203_7.pdf>.

of the literature examining the prevalence of anxiety disorders among postpartum women estimated that approximately 8.5% of postpartum women experience one or more anxiety disorders.[48]

40. Beyond childbirth, raising a child is expensive, both in terms of direct costs and due to lost wages. On average, women experience a large and persistent decline in earnings following the birth of a child, an economic loss that compounds the additional costs associated with raising a child, which typically exceed $9,000 in annual expenses.[49] In Michigan, the cost of child care for a parent with two children in a Michigan child care center is approximately $18,600 a year—exceeding the average annual cost of rent ($9,900) or a mortgage ($15,000).[50]

41. Given the impact of pregnancy and childbirth on a person's mental and physical health, finances, and personal relationships, whether to become or remain pregnant is one of the most personal and consequential decisions a person will make in their lifetime. Certainly, many people decide that adding a child to their family is well worth all of these risks and consequences. But no one should be forced to assume those risks involuntarily. As discussed below, I am gravely concerned that if abortion becomes unavailable in Michigan—as might happen any day now—thousands of pregnant people in this state will be forced to do so.

Background on Abortion

42. Abortion is one of the safest and most common medical services performed in the United States today. Indeed, abortion carries far fewer risks than childbirth. A woman's risk of

[48] Goodman, Watson, & Stubbs, *Anxiety Disorders in Postpartum Women: A Systematic Review and Meta-Analysis,* 203 J of Affective Disorders 292, 328 & tbl 8 (2016).

[49] Miller, Wherry, & Foster, *The Economic Consequences of Being Denied an Abortion*, NBER Working Paper No 26662 (revised January 2022), p 2, available at <https://www.nber.org/system/files/working_papers/w26662/w26662.pdf>.

[50] Mich League for Pub Policy, *2021 Budget Priority: Help Parents with Low Wages Find Affordable Child Care* (2019), p 1, available at <https://mlpp.org/wp-content/uploads/2019/07/2021-budget-priority-child-care-pat.pdf>.

death associated with childbirth, specifically, is more than 12 times higher than that associated with abortion,[51] and the total risk of maternal mortality is 34 times higher than the risk of death associated with abortion.[52] Every pregnancy-related complication is more common among women having live births than among those having abortions.[53] Of the 29,669 induced abortions in Michigan in 2020, the Michigan Department of Health reported just seven immediate complications.[54] The average three-year rate of immediate abortion complications between 2017 and 2019 was 3.5 per 10,000 induced abortions: just 0.035%.[55] Approximately one in four women in this country will have an abortion by age forty-five.[56]

43. There are two general categories of methods used to provide abortion: medication abortion and procedural abortion.[57]

44. For early medication abortion, patients take a regimen of two prescription drugs approved by the U.S. Food and Drug Administration (FDA): mifepristone, which blocks progesterone, a hormone necessary to continue a pregnancy; and misoprostol, which softens the cervix and causes the uterus to contract and empty. Patients first take the mifepristone, then 0 to

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[51] Nat'l Academies of Sciences, Engineering, & Med, *supra* note 20, at 75 tbl. 2-4 (finding a mortality rate of 0.7 per 100,000 procedures for abortion and a mortality rate of 8.8 per 100,000 live births for childbirth).

[52] Hoyert, *supra* note 5, at 1 (finding an overall maternal mortality rate of 23.8 per 100,000 live births).

[53] Raymond & Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 216–17 & fig 1 (2012).

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

[55] *Id.*

[56] Jones & Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am J Pub Health 1904, 1904, 1908 (2017).

[57] The only other medically-proven method of abortion is induction. Induction abortion uses medications to induce labor in a hospital, but accounts for only a small percentage of abortions in the United States.

48 hours later, they take the misoprostol at a location of their choosing, typically at home. Together, the medications cause the pregnancy to pass in a process similar to miscarriage.

45. The use of mifepristone in combination with misoprostol is evidence-based and widely used to terminate pregnancies through 11 weeks (or 77 days) LMP. Accordingly, through 11 weeks LMP, patients wishing to terminate their pregnancies may choose between medication and procedural abortion. After 11 weeks LMP, only procedural abortion is generally available.

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

47. Up to approximately 14 weeks LMP, procedural abortion relies on the aspiration technique, where the clinician inserts a thin, flexible tube through the patient's cervical opening and uses gentle suction to empty the uterus. After approximately 14 weeks LMP, procedural abortion involves the dilation and evacuation (D&E) technique, where the clinician uses instruments as well as aspiration to empty the uterus. Starting around 18 to 20 weeks LMP, an additional procedure may be performed to ensure that the patient's cervix is adequately dilated for the procedural abortion. This may occur on the same day as the abortion, or the day prior to the abortion.

48. As mentioned above, Michigan law creates additional, medically unnecessary steps that we must follow when providing either a medication abortion or a procedural abortion: patients must receive certain state-mandated information at least 24 hours before the abortion, and patients

who are minors must either obtain written parental consent or obtain permission from a judge through a legal proceeding that can take several days to complete.

49. There is no typical abortion patient, and pregnant people seek abortions for a variety of deeply personal reasons. In addition to cisgender women, gender-nonconforming people, transmasculine people, and trans men have abortions.[58] Some people have abortions because they conclude that it is not the right time in their lives to have a child or to add to their families.[59] Some decide to end a pregnancy because they want to pursue their education[60] or because of the negative impact pregnancy would have on their current employment or employment opportunities. Some people have an abortion because they feel they lack the necessary economic resources or an adequate level of family or partner support or stability to parent a child.[61] Some decide to have an abortion because they do not want children at all.[62] Some people decide to end their pregnancy because it is dangerous to their mental or physical health, including by worsening a pre-existing condition or triggering the onset of a new condition.

50. Nearly 60% of abortion patients nationally already have at least one child.[63] Most also report plans to have children (or additional children)[64] at another time in their lives.

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[58] To reflect this reality, in this affidavit I generally use the phrase "pregnant person" rather than "pregnant woman." I occasionally use "woman" or "women" as a short-hand for people who are or may become pregnant, while recognizing that people of all gender identities may become pregnant and seek abortion services. I also use "woman" or "women" when citing or quoting research that reports its results in terms of "women," to preserve the accuracy of those results.

[59] Biggs, Gould, & Foster, *Understanding Why Women Seek Abortions in the US*, 13 BMC Women's Health e1, e5–e8 (2013); Finer et al, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 Perspectives on Sexual & Reproductive Health 110, 112 (2005).

[60] Biggs, Gould, & Foster, *supra* note 59, at e7; Finer et al, *supra* note 59, at 112.

[61] Biggs, Gould, & Foster, *supra* note 59, at e5–e7; Finer et al, *supra* note 59, at 112.

[62] Biggs, Gould, & Foster, *supra* note 59, at e8.

[63] Jerman, Jones, & Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016), p 7, available at <https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf>.

[64] Henshaw & Kost, *Abortion Patients in 1994–1995: Characteristics and Contraceptive Use*, 28 Family Planning Perspectives 140, 144 (1996), available at <https://www.guttmacher.org/sites/

51. At PPMI, between July 2020 and June 2021, 27% of abortion patients had incomes below 101% of the federal poverty level, and an additional 22% had incomes between 100% and 200% of the federal poverty level.[65] In 2020, 200% of the federal poverty level was $25,520 annually for a household of one, and $34,480 annually for a household composed of one parent and one child.[66] The vast majority—93%—of PPMI abortion patients between July 2020 and June 2021 paid for their abortions out of pocket rather than with insurance.

52. Nearly three-fourths of abortion patients say they cannot afford to become a parent or to add to their families, and the same proportion also cites responsibility to other individuals (such as children or elderly parents), or that having a baby would interfere with work and/or school, as their reason for ending their pregnancy.[67]

53. Some people seek abortions because they are experiencing intimate partner violence. Many of these patients fear that carrying the pregnancy to term and giving birth would further tie them to their abusers. In some circumstances, people experiencing intimate partner violence may face additional risk of violence if their partner learns of their pregnancy or desire for an abortion.

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

55. Some people decide to have an abortion because of an indication or diagnosis of a fetal medical condition. Some families feel they do not have the resources—financial, medical,

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default/files/pdfs/pubs/journals/2814096.pdf>.

[65] Because 33% of PPMI abortion patients in that time frame did not report their income level, the actual percentages could be even higher.

[66] See US Dep't of Health & Human Servs, Ass't Secretary for Planning & Evaluation, *2020 Poverty Guidelines* <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2020-poverty-guidelines> (2020) (listing the federal poverty level for a household of one as $12,760 and for a household of two as $17,240) (accessed April 4, 2022).

[67] Finer et al, *supra* note 59, at 112.

educational, or emotional—to care for a child with special needs, or to do so while providing for the children they already have.

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

57. Some abortion patients with high-risk pregnancies—because of advanced maternal age or some other underlying medical condition—have complications that lead them to end their pregnancies to preserve their own life or health. Such underlying medical conditions include severe cardiovascular disease, sickle-cell disease, congenital heart disease, severe liver or kidney disease, and autoimmune disease. Complications requiring abortion to save the pregnant person's life or health include eclampsia, ectopic pregnancy, and infection resulting from a preterm premature rupture of membranes.

58. In summary, the decision to terminate a pregnancy is often motivated by a combination of complex and interrelated factors that are intimately tied to the pregnant person's identity, values, culture, religion, mental and physical health, family circumstances, and resources and economic stability. The decision is often made with the support of the person's partners, loved ones, family, friends, and other support networks, including support networks that are religious and spiritual.

My Medical Practice as an Abortion Provider

59. Since the first year of my medical residency in the OB/GYN department at the University of Michigan Medical School, I have provided both medication abortion and procedural

abortion. In fact, I first began my abortion training during my rotation at a Planned Parenthood health center here in Michigan, in 2009.

60. At PPMI, I currently provide medication abortion through 11 weeks LMP and procedural abortion through 19 weeks, 6 days LMP.

61. I came to this work rather deliberately. I attended college knowing that I wanted to become a doctor, and I went to medical school knowing that I wanted to help women. I became an OB/GYN knowing that providing abortions was an integral part of the care that women require and deserve.

62. Still, I had not considered becoming an abortion provider myself until I was actually in medical school. I was raised in a Christian home in Lexington, South Carolina. My family went to church regularly and said prayers before meals, and I grew up understanding that it was my duty to leave the world a better place than I found it. Abortion was something we never talked about at home; I had neither negative nor positive feelings about it. But to fulfill my moral responsibility to help people in need, I knew I wanted to take care of women and people who can become pregnant, so I decided to become an OB/GYN, and I came to Michigan for that training.

63. In medical school, I noticed that some of the people who I worked with and respected took care of abortion patients in a way that stigmatized those patients, and it negatively impacted the care that those patients received. The patients themselves often seemed to feel as though they needed to justify their desire to have an abortion in order to receive the care they deserved. I came to understand that providing abortion with respect and compassion was something I could do to make a significant difference in people's lives, particularly when others would not.

64. Once I had the opportunity to start working for Planned Parenthood, it just felt right. It matched my core values, shaped by my faith and upbringing. I could care for people without judgment, and with respect and compassion. Unlike when I was working in other settings, at Planned Parenthood I did not have to justify to anyone why providing abortion is important.

65. Today, abortion constitutes the majority of the clinical care I provide—not because I could not provide other care, but because the need for abortion providers is so great.

66. The patients I see every day are so clearly people in need, and the compassion and empathy I learned from my faith are fundamental to my work. I am proud to provide abortion to people in Michigan, and to train other medical students, residents, and fellows to provide compassionate, respectful, high-quality abortion services.

67. Providing abortion in Michigan is both similar to and different from providing abortion in other parts of the country. At PPMI, I see abortion patients who travel to Michigan from other states, most commonly Ohio and Indiana, but also from Wisconsin. We do not affirmatively ask out-of-state patients why they have come to Michigan to obtain an abortion, but sometimes people volunteer that one of our PPMI health centers was the closest access point for them. Others explain that in their home state, they would have been required to make two separate trips to the health center, and that traveling a farther distance one time was less difficult than making two separate trips in their home state. Recently, I even saw a patient from Texas, who came all the way to Michigan after Texas effectively outlawed abortion after approximately six weeks' gestation through its S.B. 8 law.

68. Michigan has significant barriers to abortion access, most notably travel obstacles: in many parts of the state, people have to drive hours to reach a health center that provides abortion. In the Upper Peninsula, there is only one PPMI health center, and it only provides medication

abortion—meaning patients who are past 11 weeks LMP cannot access abortion there at all. Additionally, in Michigan we do not have a robust public-transportation network. Even in metro Detroit, where there are a number of abortion providers, you could be just as out of luck as in rural parts of the state, because without a personal vehicle or a comprehensive bus system, there is no way for someone to get where they need to be.

69. People who are able to access abortion in Michigan frequently still contend with abortion stigma. For example, in parts of the state without a supportive medical community, I worry all the time that other medical providers will not be kind to our patients in the event that they need follow-up care. Worse, I worry that some of our patients will be scared away from seeking needed medical care at all. We already see this with some of our rural patients—in the rare event that someone needs follow-up care after an abortion, they would rather drive a long distance to see us at PPMI than obtain that care closer to home, simply because they do not want anyone closer to home to know that they have terminated a pregnancy.

70. Of course, what abortion ultimately means for patients is the same no matter where they live. Abortion allows people to have control over their bodies and their futures. It makes it possible for them to care for the families they already have, or to escape a dangerous situation in their own home. It alleviates serious medical risks caused or worsened by pregnancy. It brings peace to people who experience pregnancy as a violation of their truest selves. Put simply, abortion is a life-changing and often life-saving procedure that can be and often is positive, not just for patients but also for their loved ones and their communities.

The Consequences of Banning Abortion in Michigan

71. Though I and other PPMI physicians provide abortion that is outlawed by the text of the Criminal Abortion Ban presently on the books, I understand that a Michigan Supreme Court

decision currently protects me and other abortion providers from being criminally prosecuted under that statute. Still, that protection could disappear any day now, since the United States Supreme Court's decision in the *Dobbs v Jackson Women's Health Organization* case could modify *Roe v Wade*—the case on which the Michigan Supreme Court decision relies.

72. I am not a lawyer, but I know that people seeking abortion in Michigan will be confused and panicked if the law changes and if the Criminal Abortion Ban becomes enforceable, outlawing abortion in the state. My patients will not know whether they can still come to PPMI for care, or whether they need to try to make arrangements to travel out of state. This uncertainty will disrupt our ability to care for our patients even before any government official takes a step to enforce the Ban.

73. In addition to the risk of criminal prosecution, I understand that the Michigan Department of Licensing and Regulatory Affairs could revoke my medical license for providing an abortion in violation of the Criminal Abortion Ban as written.[68] And the insurance company that provides my medical malpractice insurance might cancel my coverage even before the licensing action was finalized.[69] Without my medical license or malpractice insurance, I would no longer be able to provide *any* medical care in Michigan.

74. Furthermore, certain parts of the Criminal Abortion Ban as written are unclear to me, as the statute uses certain terms in a way that is inconsistent with medical terminology. For example, I understand that the law makes it a felony to "procure [a] miscarriage." In medical practice, "miscarriage" is used interchangeably with the terms "spontaneous abortion" and "early

[68] Kaffer, *Opinion: Prosecution Wouldn't Be Only Option for Abortion Foes in a Post*-Roe *Michigan*, Detroit Free Press (March 26, 2022) <https://www.freep.com/story/opinion/columnists/nancy-kaffer/2022/03/26/roe-abortion-supreme-court-michigan/7146616001/> (accessed April 4, 2022).

[69] *Id.*

pregnancy loss," and generally refers to "a nonviable, intrauterine pregnancy with either an empty gestational sac or a gestational sac containing an embryo or fetus without fetal heart activity."[70] Because "miscarriage" is something that happens spontaneously, medical professionals would not describe abortion as "procuring a miscarriage."[71] Moreover, I am aware that in Michigan and elsewhere, people who lack a complete or accurate understanding of reproductive medicine may interpret the Criminal Abortion Ban to criminalize conduct that is not abortion at all, such as prescribing emergency contraception.[72]

75. If the Criminal Abortion Ban were enforced as written in Michigan, my colleagues at PPMI and I would be forced to stop providing abortion under virtually any circumstance—that, or face felony prosecution and licensure penalties. In turn, PPMI would no longer be able to offer abortion at its health centers. The Ban would thus have devastating consequences for my patients, for PPMI, and for me personally.

76. If abortion were unavailable in Michigan, many people would not be able to travel to another state to access abortion, or would be significantly delayed by the cost and logistical arrangements required to do so. Already, people living in poverty forgo or delay other basic needs, like rent or groceries, to pay for their abortions and all the associated logistical expenses, such as travel costs, childcare, and time away from work. Many people need to borrow money from family

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[70] ACOG, Practice Bulletin No 200, *supra* note 19, at e197.

[71] See generally *id.*

[72] E.g., Reilly, *Missouri Lawmakers Pretended IUDs Cause Abortion. They Lost*, ReWire News Grp (June 28, 2021) <https://rewirenewsgroup.com/article/2021/06/28/missouri-lawmakers-pretended-iuds-cause-abortion-they-lost/> (accessed April 4, 2022) (Missouri legislators incorrectly characterizing emergency contraception and IUDs as abortion); Filipovic, *How Ohio Became One of the Worst States for Reproductive Rights in the Country*, Cosmopolitan (June 6, 2014) <https://www.cosmopolitan.com/politics/news/a7129/ohio-abortion-laws/> (accessed April 4, 2022) (same in Ohio); Verlee, *Colorado Debates Whether IUDs Are Contraception or Abortion*, Nat'l Pub Radio (March 5, 2015) <https://www.npr.org/sections/health-shots/2015/03/05/391030821/colorado-debates-whether-iuds-are-contraception-or-abortion> (accessed April 4, 2022) (same in Colorado).

and friends to pay for care, which takes time. Navigating inflexible or unpredictable work schedules and child care needs further delays or prevents our patients accessing care.

77. On top of these existing obstacles, many people traveling long distances to an abortion appointment out of state would need to raise additional money to afford the travel. Many would also need to arrange for childcare and time off work while they are away. The need to travel could thus significantly delay people in accessing care. And because abortion becomes more expensive as pregnancy progresses, people trying to save money for an abortion, plus money to pay for the necessary travel out of state, could find themselves in a vicious cycle: as the process of raising the necessary funds delays them in obtaining care, the amount of money required grows, resulting in more delay. This delay could, in turn, push some people past the point in pregnancy where abortion is legally or practically available in nearby states, forcing them to carry the pregnancy to term against their will.

78. I am mindful that, currently, people travel to Michigan for an abortion because for some it is easier to access abortion here than in surrounding states. If abortion were illegal in Michigan, I worry that both people from Michigan and people from those other states would be unable to access abortion at all.

79. Delays in accessing abortion, or being unable to access abortion at all, pose risks to patients' health. While abortion is very safe at any point in pregnancy, the risks of abortion increase with gestational age.[73] And because pregnancy and childbirth are far more medically risky than abortion, forcing people to carry a pregnancy to term exposes them to an increased risk of physical harm. If abortion is no longer available, people will instead be forced to remain pregnant and give

[73] Nat'l Academies of Sciences, Engineering, & Med, *supra* note 20, at 77–78, 163 & tbl 5-1.

birth in a health care system that does not adequately keep pregnant people safe, especially pregnant people of color.

80. Further, a person's ability to access abortion has consequences not only for that person, but also for their family and community. Longitudinal research assessing the short- and long-term consequences of being denied an abortion demonstrates the negative impacts not only on the person's mental health,[74] on their professional prospects,[75] and on their finances,[76] but also on the well-being of their existing children[77] and of the child the person is forced to have.[78]

81. The COVID-19 pandemic has exacerbated these consequences, as access to affordable child care has been strained and women have been forced out of the workforce to care for children at rates vastly disproportionate to men. Since the start of the pandemic, women have lost a net five million jobs, and 2.3 million women have left the workforce entirely, likely as a result of child care obligations.[79]

82. Enforcing the Criminal Abortion Ban would most harm pregnant people who are poor or have low incomes, pregnant people living in rural counties or urban areas without access

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[74] Biggs et al, *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion*, J Am Med Ass'n Psychiatry E1, E3–E6 (2017).

[75] Upadhyay, Biggs, & Foster, *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC Women's Health e1, e4, e6 (2015).

[76] Miller, Wherry, & Foster, *supra* note 49, at 36.

[77] Foster et al, *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J of Pediatrics 183, 185, 187 (2019); see also Foster et al, *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am J Pub Health 407, 411–12 (2018) (finding that denial of a wanted abortion exacerbates socioeconomic hardships).

[78] Foster et al, *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to An Abortion*, 172 J Am Med Ass'n 1053, 1056–59 (2018); see also Foster et al, *Socioeconomic Outcomes of Women*, *supra* note 77, at 411–12.

[79] Nat'l Women's Law Ctr, *A Lifetime's Worth of Benefits: The Effects of Affordable, High-Quality Child Care on Family Income, the Gender Earnings Gap, and Women's Retirement Security* (2021), p 1, available at <https://nwlc.org/wp-content/uploads/2021/04/Lifetime-Fact-Sheet.pdf>.

to adequate prenatal care or obstetrical providers, and Black pregnant people in Michigan. Nationwide, three out of four abortion patients are poor or live on low incomes (up to 200% of the federal poverty level).[80] A majority of people in Michigan who had an abortion in 2020 identified as Black;[81] in Michigan and nationally, Black patients seek abortions at a higher rate than white patients due to disparities caused by a long history of structural racism—specifically, unequal access to quality family-planning services, economic disadvantage,[82] and other social determinants of health such as limited access to "safe and affordable housing, quality education, healthy food, [and] stable employment."[83] As discussed above, pregnancy is more dangerous for Black women than it is for white women: as of 2020, the national maternal mortality rate for Black women is approximately three times the rate for white women,[84] a consequence of structural and systemic racism. Banning abortion in Michigan would force Black women to bear this disproportionate risk to their health and their lives.

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

84. If abortion were outlawed in Michigan, given the barriers to accessing abortion out of state, I expect that some people would find ways to self-manage abortion. Some who do may

[80] Jerman, Jones, & Onda, *supra* note 63, at 11.

[81] Mich Dep't of Community Health, *Table 11, Number and Percent of Reported Induced Abortions by Race or Hispanic Ancestry of Woman, Michigan Residents, 2020* <https://www.mdch.state.mi.us/osr/abortion/Abortrace.asp> (accessed April 4, 2022).

[82] CDC, *Abortion Surveillance — United States*, *supra* note 7, at 7.

[83] Mich Dep't of Health & Human Servs, *2020 Health Equity Report, Moving Health Equity Forward*, p 4 (2021), available at <https://www.michigan.gov/documents/mdhhs/2020_PA653-Health_Equity_Report_Full_731810_7.pdf>.

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

experience one of the rare complications from medication abortion. As I described earlier, people in Michigan are already afraid to tell their doctors that they have had a *legal* abortion, and I am deeply concerned that, if the Criminal Abortion Ban is enforced, people who experience complications after self-managing their abortions will be too afraid to seek necessary follow-up care. Those people could be seriously harmed—not because abortion is unsafe, but because the Criminal Abortion Ban has made it unsafe for them to be fully open with their medical providers and prevented them from accessing accurate medical information.

85. Given the Criminal Abortion Ban's extraordinarily narrow exception for abortions necessary to preserve the pregnant person's life, I fear that pregnant people with dangerous medical conditions will be forced to wait to receive an abortion—even an urgently medically necessary abortion—until they are literally dying. I understand that this is already happening in Texas, where emergency-room physicians are afraid to terminate patients' pregnancies even where doing so would avert serious medical risk to the patient because they are afraid of being sued for violating Texas's law banning abortion at roughly six weeks.[85]

86. I recently had a glimpse of what this world might look like when I saw a patient whose pregnancy was past the legal gestational age limit for abortion in Michigan. When I told this patient that I was not able to provide her an abortion, she sobbed in a way I had not heard in a very long time. She did not want to be pregnant, she was not prepared to decide between parenting and adoption, and traveling out of state was not an option. She left my office with resources, but I felt helpless.

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

87. If I could not provide abortion in Michigan, that is how I would feel with every single patient. Over and over again, I would have to deliver news that would change someone's entire life against their wishes. Despite knowing that I have the resources and the medical training to help them safely, I would have to tell each person *I'm sorry, I can't help you, because it is a crime for me to provide you with the medical care that you need.*

88. Absent enforcement of the Criminal Abortion Ban, PPMI will continue to provide both medication and procedural abortion in Michigan. But if the Criminal Abortion Ban were enforced against physicians who provide abortion in Michigan, PPMI would be forced to stop offering abortion to our patients.

89. The Criminal Abortion Ban would directly harm PPMI's mission to provide comprehensive sexual and reproductive health care to the communities we serve, and PPMI's standing in the eyes of our patients and supporters. Our patients know PPMI as a trusted, nonjudgmental provider. People trust us with their most personal information and questions, and that allows us to provide the highest-quality sexual and reproductive health care. But if we could no longer provide abortion when people come to us and ask for that care, some patients might misunderstand why we are no longer providing abortion and think that it is because we no longer want to. That would badly undermine our patients' trust in us. People might be afraid to tell us that they have self-managed abortion or that they are planning to travel out of state to obtain abortion elsewhere. We would no longer be seen as a safe place where people can be open and honest about their health care histories and needs. This would not only harm our reputation as a health care provider; it would interfere with our ability to provide other care.

90. Additionally, I worry that some PPMI staff would be afraid to continue working at PPMI if the Criminal Abortion Ban were being enforced against abortion providers. Even if we all

complied with the law, a prosecutor somewhere might accuse us of violating it, or open an invasive investigation into PPMI's practices. Some staff might prefer to leave PPMI rather than continue working with those threats hanging over them. Other staff might simply be unable to bear turning patients away in their time of need, over and over again.

91. Finally, enforcing the Criminal Abortion Ban would harm me personally. My work as an abortion provider is a core part of my identity. It is also my area of professional expertise. If I were no longer able to provide abortion in Michigan, I would face the hard choice between staying here and continuing to provide other medical care to Michigan patients, or uprooting my life and my family and moving to a state where abortion remains legal so that I could use my extensive training to continue to provide this vitally important health care. If I stayed in Michigan, I would be forced to stop providing the specific category of medical care that I am trained in and highly skilled at, and I would not be allowed to provide the care that my patients need. It would feel unethical and immoral to deny my patients medical care that they need and that I am highly trained to provide safely. I would find it challenging to provide any other OB/GYN care in such an environment. Other abortion providers in Michigan would face this same choice, and I know that some are already weighing their options. I am also concerned that medical students and residents in Michigan would no longer be able to learn this critical component of medical care for pregnant people. It makes me so sad to contemplate all that collective medical expertise leaving the state, all because our specialized area of practice—care that today we provide safely and routinely, when and where patients need it—would have become illegal.

92. Not knowing when or how the law will change makes it hard for PPMI to plan even a month in advance. For example, while we try to see people for their abortion appointments as soon as the patient is firm in their decision and available, at some of our health centers we must

schedule appointments two to three weeks in advance. If the Criminal Abortion Ban became enforceable next week, I would need guidance on whether that would prevent me from providing abortions entirely, whether it would only prohibit some of the procedures I provide, or something else entirely. In the absence of that clarity, I would have no idea whether I could care for the patients whose appointments are already scheduled for that week or the week after. And when other PPMI physicians and staff ask about the clinical schedule for the months ahead, I do not know what to tell them. I do not know whether we will still be able to provide abortion a month from now, because I do not know when or even whether the existing legal protections for abortion will disappear. Because it is my personal and professional mission to provide safe, compassionate, high-quality care to my patients, of which abortion is an essential part, this uncertainty keeps me up at night.

FURTHER AFFIANT SAYETH NAUGHT.

STATE OF MICHIGAN)
)ss
COUNTY OF WASHTENAW)

I declare that the above statements set forth in this affidavit are true to the best of my knowledge, information, and belief. If sworn as a witness, I can testify competently to the facts stated herein.

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

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

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

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

EXHIBIT 4

STATE OF MICHIGAN
IN THE 6TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, DAVID S. LEYTON, Prosecuting Attorney of Genesee County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants.

Oakland Circuit Court No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

This case involves a claim that state governmental action is invalid

ORDER GRANTING TEMPORARY RESTRAINING ORDER

ORDER GRANTING TEMPORARY RESTRAINING ORDE

At a session of Court on August _1_, 2022
In Pontiac, Michigan at _____
Honorable James J. Cunningham
Circuit Court Judge

This matter came before the Court on Plaintiff's Ex Parte Motion for Temporary Restraining Order.

The Court has considered the Emergency Ex Parte Motion for Temporary Restraining Order, the supporting Affidavit, and the Certification by Plaintiff's Counsel under MCR 3.310(B)(1).

The Court finds:

1. The Plaintiff's Motion seeks a Temporary Restraining Order prohibiting Defendants from enforcing MCL 750.14, which bans nearly all abortions in the State of Michigan.

2. A Temporary Restraining Order is necessary to preserve the last actual, peaceable, uncontested status quo pending further order from the Court.

3. The last actual, peaceable, uncontested status quo was that abortion was legal in Michigan under the framework provided in the United States Supreme Court decision *Roe v Wade*, as provided by *People v Bricker*.

4. The Plaintiff has established that Defendants' public statements that they will consider a case against an abortion provider should a law enforcement officer bring one to them, coupled with the Michigan Court of Appeals' August 1, 2022 decision that County prosecutors are not bound by Judge Gleicher's May 17,

2022 preliminary injunction, poses a threat of immediate and irreparable injury to the people of the State of Michigan.

5. A Temporary Restraining Order is necessary to prevent the immediate and irreparable injury that will occur if Defendants are allowed to prosecute abortion providers under MCL 750.14 without a full resolution of the merits of the pending cases challenging that statute.

NOW THEREFORE, pursuant to MCR 3.310(B), it is hereby ordered that Defendants must:

A. Refrain from enforcing MCL 750.14 until further Order of the Court.

IT IS FURTHER ORDERED, parties are ordered to appear via Zoom videoconferencing for a hearing on this matter on Wednesday, August 3, 2022, at 2:30 p.m. Zoom meeting ID: 248 858 0365.

Circuit Judge James J. Cunningham

MY