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

CONSOLIDATED BRIEF OF PROSECUTING ATTORNEYS SAVIT, LEYTON, SIEMON, GETTING, WIESE, MCDONALD, AND WORTHY IN SUPPORT OF GOVERNOR WHITMER'S MOTION FOR PRELIMINARY INJUNCTION

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

Counsel for Defendants Jarzynka and Becker

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

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

Counsel for Respondent Eli Savit, Prosecuting Attorney, Washtenaw County

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

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

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

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

Christina Grossi (P67482)
Deputy Attorney General

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

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

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

Counsel for Plaintiff Gretchen Whitmer

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

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

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

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

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

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

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

INTRODUCTION

For nearly 50 years, abortion has been safe, legal, and protected in Michigan. Countless Michigan residents—as well as countless institutions—have ordered their affairs on the assumption that it would remain so. But over the past two months, the certainty and freedom on which so many rely has been eroded. In June, the U.S. Supreme Court overruled *Roe v. Wade*. And last week, the Michigan Court of Appeals issued a ruling which suggested that county prosecutors (but *not* the state Attorney General) could begin prosecuting cases under Michigan's archaic criminal abortion statute. That decision sowed fear, chaos, and confusion across the state. The chaos was alleviated only once this Court issued a temporary restraining order.

The undersigned prosecuting attorneys[1] now urge this Court to issue a preliminary injunction enjoining Defendants (the only county prosecutors with abortion facilities in their jurisdictions) from enforcing Michigan's anti-abortion law. Across Michigan, millions of people—everyone capable of childbirth—stand to lose equality under the law if the preliminary injunction is not issued. These are not abstract issues. Michigan's anti-abortion law is sweeping and draconian. It criminalizes virtually all abortions, regardless of medical need. The health, economic security, and personal safety of millions of Michiganders are at risk.

In addition, the blizzard of conflicting court orders has placed medical providers, law-enforcement, and both private and state institutions on uncertain terrain. Among other things,

[1] On August 3, this Court ordered that "any responsive briefs [to the preliminary injunction motion], filed by named parties," must be submitted by August 16. In addition, pursuant to this Court's August 8 order, all "named parties" may file an "optional supplemental brief in support of their respective position, limited to no more than twenty (20) pages" by today. In lieu of filing individual briefs of 20 pages each, on behalf of each named party, this consolidated brief of 36 pages represents the combined briefs of the seven undersigned named parties. All parties that are signatories to this brief represent that we do not intend to file any further briefs on the preliminary injunction prior to the hearing on August 17.

absent a preliminary injunction, patients, doctors, and others will be forced to make fundamental decisions based not on personal interests and autonomy—but rather, based on their best guess as to what the next court ruling will say and how prosecuting attorneys will interpret it. Further, without a preliminary injunction, Michigan law-enforcement officials will face a byzantine landscape in which Michigan's anti-abortion law can be prosecuted by county prosecutors, but *not* by the state Attorney General.

That situation is untenable and will have far-reaching effects. Already, businesses across the nation—concerned about their ability to attract talent—are shifting their operations away from States that criminalize abortion. Allowing Michigan's anti-abortion law to remain in flux thus risks undermining the Michigan economy. It will also erode the ability of state institutions (such as our university system) to compete for talent.

Moreover, and of obvious concern to the undersigned prosecuting attorneys, allowing Michigan's criminal abortion law to go into effect threatens public safety. People who are in abusive relationships already face the highest risk of violence when they are pregnant. Many opt to terminate their pregnancy to avoid abuse. That option, however, would be unavailable if Michigan's archaic anti-abortion law becomes enforceable. What is more, many who seek an abortion following a sexual assault will almost certainly be chilled from reporting their rape to law enforcement—fearful that they, or those who assisted them in securing the abortion, might be subject to criminal prosecution.

The ripple effects will not stop there. Many people who are forced to bear a child against their will suffer significant future physical and mental health maladies. Many more are denied an opportunity for economic or educational advancement. And because nearly 6 in 10 people who

obtain an abortion already have at least one child, these adverse effects will harm not just the person denied an abortion, but their children and families as well.

All of these cascading consequences are a result of the potential enforcement of a law, MCL 750.14, that dates back to *1846.* That law has not been enforceable for a half-century. And (as discussed in further detail below) the law expressly discriminates based on sex. Indeed, it was explicitly born of animus towards the idea that women could participate in Michigan's civic and political system and backed by a paternalistic 19th-century medical community based on the belief that abortion harmed pregnant people and caused hysteria.

These facts make it particularly likely that Governor Whitmer will ultimately prevail on the merits of her claim. But they also highlight the overwhelming equitable need for a preliminary injunction. In one sense, the requested preliminary injunction is quite modest. At bottom, it will do nothing more than preserve—pending final disposition of this case—the state of affairs that has existed in Michigan for a half-century. But as modest as the requested preliminary injunction is, it is also crucial. A preliminary injunction enjoining prosecution of MCL 750.14 is the *only* way to ensure that abortions that are provided while litigation is pending cannot be prosecuted in the future. In turn, a preliminary injunction is the only way to provide certainty to Michigan patients, providers, and institutions as litigation winds its way through the courts.

For these reasons and more, the undersigned prosecuting attorneys join Governor Whitmer in her request for a preliminary injunction. We urge this Court to enjoin enforcement of MCL 750.14 until a full resolution on the merits in this case.[2]

[2] In filing this response with the Circuit Court, the undersigned prosecuting attorneys preserve all rights with respect to proceedings, including any claims or defenses they might assert in an initial responsive pleading.

BACKGROUND

Until August 1, 2022, abortion access had been protected in Michigan for nearly 50 years. Michigan maintains an archaic pre-*Roe* criminal abortion statute—codified in 1931 at MCL 750.14—which makes it a felony for "[a]ny person" to provide an abortion, except where "necessary to preserve the life of [the pregnant] woman." MCL 750.14. The main contours of that law date back to 1846.

Though MCL 750.14 was rendered unenforceable by *Roe v. Wade*, 410 U.S. 113 (1973), it threatened to spring back into life after the Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). That did not happen, however, thanks to a statewide injunction issued by the Court of Claims on May 17. *See Planned Parenthood of Michigan v. Attorney General*, No. 22-000044-MM, 2022 WL 2103141 (Mich. Ct. Cl. May 17, 2022). In issuing that injunction, the Court of Claims concluded that there is "a substantial likelihood" that MCL 750.14 "violates the Due Process Clause of Michigan's Constitution." *Id.* at *13. It further concluded that if an injunction was not issued, abortion providers "and their patients face a serious danger of irreparable harm." *Id.* Accordingly, the Court of Claims blocked both "state and local officials" from prosecuting abortion cases. *Id.* at *14.

On the morning of August 1, however, the Court of Appeals issued an order indicating that the Court of Claims' "preliminary injunction does not apply to county prosecutors." *In re Jarzynka*, No. 361470, 2022 WL 3041132, at *5 (Mich. App. Aug. 1, 2022). The Court of Appeals did not question the merits of the Court of Claims' ruling, or its conclusion that Michigan's anti-abortion law is likely unconstitutional. Instead, it held that because the Court of Claims has limited jurisdiction to hear claims "against the State"—and because county prosecutors are "local officials"—the Court of Claims' injunction did not bind county prosecutors. *Id.* at *1, *5. The

Court of Claims' ruling declaring Michigan's anti-abortion law presumptively unconstitutional remained in effect. But, per the Court of Appeals, that ruling formally enjoined *only the Attorney General*, not county prosecutors. Accordingly, despite Michigan's anti-abortion law being ruled presumptively unconstitutional, the Court of Appeals' decision was interpreted by at least some county prosecutors as giving them the green light to criminally prosecute abortion immediately, including those planned and scheduled while a statewide injunction was in place.

The fallout was immediate. At least two county prosecutors with abortion facilities in their jurisdictions indicated that they intended to begin prosecuting abortion cases. Seven others (the undersigned) reiterated that they would not. Planned Parenthood of Michigan issued a statement opining that the Court of Appeals' decision would not take effect until at least 21 days (and possibly 42 days) after its issuance, and it would continue providing abortion through that timeframe.[3] The attorney for the Jackson and Kent County prosecutors, however, asserted that the Court of Appeals' decision was effective immediately.

Caught in the middle of all of this were providers, patients, and others involved in the delivery of reproductive health care. Providers were faced with the possibility that medical procedures that had been constitutionally protected for a half-century could be met with a felony prosecution. Patients—many of whom had scheduled appointments days or weeks in advance—faced the possibility that the legality of their reproductive decisions could be subject to the whims of county prosecutors. Others debated whether driving a loved one to a clinic or delivering medication could leave them exposed to criminal sanction. For a day, chaos reigned in Michigan.

[3] Statement from Planned Parenthood of Michigan regarding the Michigan Court of Appeals Ruling (Aug. 1, 2022), https://www.plannedparenthood.org/uploads/filer_public/74/4b/744b4a67-d7c6-4e34-bf60-1e3c9d0a71ef/2022-08-01_statement.pdf.

On August 1, this Court granted the Governor's request for a temporary restraining order enjoining all Defendants in this case—the 13 county prosecutors with abortion facilities in their jurisdiction (including the undersigned)—from enforcing Michigan's 1931 anti-abortion law. Order Granting Temporary Restraining Order at 3 ("Order"). In that ruling, this Court correctly concluded that "immediate and irreparable injury . . . will occur if Defendants are allowed to prosecute abortion providers . . . without a full resolution of the merits of the pending cases challenging that statute." *Id.* Two days later, following a hearing, this Court maintained the TRO but indicated it would quickly consider briefing and argument on a preliminary injunction.

This Court correctly issued a TRO to stem the spiraling chaos in Michigan. Because the Governor is likely to succeed on the merits, and because the equities weigh heavily in favor of maintaining the status quo of the past half-century, this Court should grant the Governor's request for a preliminary injunction.

ARGUMENT

This Court should issue a preliminary injunction. There have been no changes in circumstance since the issuance of the temporary restraining order, and a closer look at the factors considered for injunctive relief make clear that maintaining the status quo is imperative. If a preliminary injunction is not issued, a vague and archaic law that has been unenforceable in Michigan for a half-century will spring back into effect. Patients will be denied care. Doctors and medical systems will be chilled from providing potentially lifesaving services. And both our legal and medical systems will again be thrown into a state of chaos and mired in uncertainty. These harms far outweigh any impact of maintaining, for the duration of this case, the status quo.

In determining whether to order a preliminary injunction, the Court must weigh whether: (1) Plaintiff is likely to prevail on the merits; (2) Plaintiff will suffer irreparable harm if an

injunction is not issued; (3) the public interest will be harmed if an injunction is not granted; and (4) the injury that Defendants will suffer if a preliminary injunction is issued does not outweigh the harm that Plaintiff would suffer if such relief is not granted. *Detroit Fire Fighters Ass'n IAFF Local 344 v City of Detroit Fire Fighters*, 482 Mich. 18, 34 (2008) (citing *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich. 152, 157–158 (1984)). The undersigned prosecuting attorneys agree with and incorporate the Governor's argument regarding the urgent necessity for a preliminary injunction in this case. We also agree with the Governor's arguments on the merits and have concluded that the Michigan Constitution protects the right to an abortion. We write to further emphasize why the relevant factors weigh so heavily in favor of the preliminary injunction—in particular, why Michigan's Equal Protection Clause likely protects the right to an abortion, and how "there will be harm to the public interest"—significant harm, in fact—if the injunction is not maintained in this case. *Detroit Fire Fighters Ass'n,* 482 Mich. at 34.

I. GOVERNOR WHITMER'S ACTION IS LIKELY TO SUCCEED BECAUSE MCL 750.14 VIOLATES MICHIGAN'S EQUAL PROTECTION CLAUSE.

The undersigned Prosecuting Attorneys agree with and adopt the Governor's arguments that MCL 750.14 violates the Michigan Constitution's Due Process and Equal Protection Clauses. To avoid duplicative briefing, we write separately to further explain why the Governor is particularly likely to succeed on her claim that MCL 750.14 violates the Equal Protection Clause of the Michigan Constitution, Const. 1963, art. 1 § 2.

A. MCL 750.14 Imposes A Sex-Based Classification.

Michigan's Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws, nor shall any person be denied the enjoyment of his civil or political rights." Const. 1963, art. 1 § 2. "The essence of the Equal Protection Clause is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify

disparate treatment." *Crego v. Coleman*, 463 Mich. 248, 258 (2000) (*quoting Miller v. Johnson*, 515 U.S. 900, 919 (1995)).

Sex[4] is one such innate characteristic. *See id.* at 260, 273 (noting that there are "immutable distinctions" between men and women, including the "biological ability to bear children"). Michigan courts also have recognized that the decision whether to give birth or have an abortion rests exclusively with women. *See In re RFF*, 242 Mich. App. 188, 210–11 (2000). And against this backdrop, Michigan's anti-abortion law unambiguously imposes a sex-based classification. The relevant statute, MCL 750.14, explicitly bans the provision of medication "to any pregnant *woman*"—making a sex-based distinction on its face. *Id.* (emphasis added). Furthermore, the medical procedure that MCL 750.14 targets is abortion, a decision that Michigan courts have emphasized rests exclusively with women. *See In re RFF*, 242 Mich. App. at 210–11. MCL 750.14 thus criminalizes a decision *made by women* as to when, whether, and under what circumstances to bear a child.

There are no comparable Michigan laws criminalizing reproductive decisions made by men. Under Michigan law, men have access to the full panoply of reproductive decisions that are biologically available to them, including (for example) surgical procedures such as vasectomies. Because MCL 750.14 expressly makes a sex-based classification—and because there is no parallel law criminalizing men's reproductive decision—the law unambiguously imposes a sex-based classification.

[4] Because cases discussing discrimination on the basis of sex generally mean "sex-assigned-at-birth," this brief discusses "sex" and "sex-assigned-at-birth" synonymously. References in this brief to "women" are not meant to invalidate those who identify with a different gender identity than assigned at birth.

B. MCL 750.14 Cannot Survive Heightened Scrutiny.

Any law that makes classifications based on sex (or circumstances determined by sex) is subject to heightened scrutiny. *See Crego*, 463 Mich. at 260; *Rose v. Stokely*, 258 Mich. App. 283, 302 (2003) ("Gender-based classification schemes are subject to heightened scrutiny review."). A law can withstand heightened scrutiny only if (1) "the classification serves an *important* government interest," and (2) "the classification is *substantially* related to the achievement of the important governmental objective." *Rose*, 258 Mich. App. at 303 (emphasis in original).

In applying the heightened-scrutiny standard, Michigan courts have upheld sex-based classifications only in narrow circumstances. Those include laws that are substantially related to important government objectives like increasing economic equality between men and women, *North Ottawa Cmty. Hosp. v. Kieft*, 547 Mich. 394, 407 (1998), or increasing the pool of qualified female applicants for law-enforcement, *Alspaugh v. Comm'n on Law Enforcement Standards*, 246 Mich. App. 547, 558–59 (2001). By contrast, laws justified by "old notions" or "archaic and overbroad generalizations" about men and women are unconstitutional. Such laws fail the heightened-scrutiny standard because the "statute's 'objective itself [was] illegitimate.'" *Heckler v. Matthews*, 465 U.S. 728, 745 (1984) (quoting *Mississippi U. for Women v. Hogan*, 458 U.S. 718, 724–25 (1982)); *see also, e.g.*, *In re Est. of Miltenberger*, 482 Mich. 901, 910 (2008) (CORRIGAN, J., concurring) (laws which make gender-based classifications should be upheld only where they do not "rest on mere archaic and stereotypic notions") (internal quotation omitted); *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (sex-based classifications "may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.").

Here, MCL 750.14 cannot survive heightened scrutiny because its objective was invidiously discriminatory against women. Michigan's anti-abortion laws had their genesis in a mid-nineteenth century backlash to women's rights. As women advocated for voting rights and a voice in lawmaking, male commentators lamented that "'the tendency to force women into men's places' was creating insidious 'new ideas of women's duties.'" James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* at 104 (1978) ("Mohr"). These purportedly "insidious new ideas" included the notion that a woman was more than a vessel for childbirth and motherhood—and that women should have some control over their own reproductive choices. Indeed, in the mid-nineteenth century, abortion was surging as women sought to delay childbearing and control their number of children. *See id*. According to (male) anti-abortion activists in the nineteenth century, the rising chorus of female voices demanding an opportunity to participate in civic society was rooted in women's ability to control their reproductive decision-making through abortion. *Id.* With the prospect of women's full civic participation on the horizon, men bemoaned the "strong-minded" and "selfish" women who used abortion to reject "the maternity for which God had supposedly created them." *Id.* at 105, 107.

Invidious sex-stereotypes also animated certain 19th-century doctors to push for criminal abortion bans, because they did not believe women could make choices about sex and childbearing on their own. According to many physicians, interrupting a pregnancy produced hysteria.[5] Avoiding motherhood was believed to confer "a moral as well as a physical taint" that "stamps its

[5] *See, e.g.*, E.P. Christian, The Pathological Consequences Incident to Induced Abortion, 2 DETROIT REV. MED. & PHARMACY 145, 146 (1867) (noting that "violence against the physiological laws of gestation" would cause a "severe and grievous penalty").

effects indelibly on the constitution of the female."[6] Abortions were also understood to harm the health of women overall.[7]

State legislatures—including in Michigan—responded to these "domestic subsersives" by criminalizing abortion. Mohr at 108, 128-29. Michigan's 1846 anti-abortion statute closely tracked criminal statutes across the country that were proposed because "[w]omen had to be saved from themselves." *Id.* at 128–30. The movement to criminalize abortion in Michigan was inextricably tied to the preservation of women's domestic role: Michigan's Special Committee on Criminal Abortion opined that "to take away the responsibility of motherhood is to destroy the greatest bulwarks of female virtue."[8] The State's anti-abortion law, MCL 750.14, is a now-90-year-old "updated" version of the 1846 statute. It maintains the invidious criminalization of abortion based on these "archaic and overbroad generalizations" about a woman's societal role, and the need to force women into motherhood. *Heckler*, 465 U.S. at 745. Because those "archaic and stereotypical notions" are illegitimate, MCL 750.14 violates the Equal Protection Clause.

To be sure, many contemporary supporters of Michigan's anti-abortion laws offer a post-hoc justification: that those laws are based on a governmental interest in preserving life. But MCL 750.14 cannot be rescued by these post-hoc government interests. As an initial matter, when (as here) a law is "born of animosity toward the class of persons affected," it is unconstitutional—full-stop. *Romer v. Evans*, 517 U.S. 620, 634 (1996); *see also id.* ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to

[6] J.J. Mulheron, Feticide: A Paper Read Before the Wayne County Medical Society, 10 PENINSULAR J. MED. 385, 390 (1874).

[7] *See, e.g.*, O.S. Phelps, Criminal Abortion: Read Before the Calhoun County Medical Society, 1 DETROIT LANCET 725, 728 (1878).

[8] Cox, Hitchcock, French, Michigan State Board of Health, Ninth Annual Report of the Secretary, 166 (1881).

harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (alterations and citation omitted; emphasis in the original). That is true even where a law *does not* target a protected class and is subject to more deferential rational-basis equal-protection review. It is *a fortiori* true here, where MCL 750.14's sex-based classification renders it subject to heightened scrutiny.

Even by its terms, a preservation of life justification cannot rescue MCL 750.14. To start, the question of when "life" begins—and whether fetal life is entitled to protection—is a hotly contested moral issue. That question divides citizens of good conscience and is subject of widespread theological disagreement.[9] Though consensus is elusive as to when life begins in the womb, nobody disputes that a *pregnant person* is alive. And far from preserving the lives of pregnant people, anti-abortion laws gravely threaten them. Abortion is widely acknowledged by the medical community to be a safe procedure, with fewer risks of complication or death than childbirth.[10] Bans on abortion care result in worse health outcomes. In fact, states with more restrictions on abortion care see higher rates of maternal and infant mortality.[11] Researchers

[9] *See* Sarah McCamon, *Encore: Religions Don't Agree on When Life Begins*, NPR (May 11, 2022), https://www.npr.org/2022/05/11/1098150740/encore-religions-dont-agree-on-when-life-begins. For example, the Vatican has instructed that life begins at conception. *See Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation* (1987), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html. However, according to Jewish traditions, life begins at first breath. *See, e.g.*, Lindsay Schnell, *Jews, Outraged by Restrictive Abortion Laws, Are Invoking Hebrew Bible in Debate*, USA Today (July 24, 2019), https://www.usatoday.com/story/news/nation/2019/07/24/abortion-laws-jewish-faith-teaches-life-does-not-start-conception/1808776001/.

[10] *See generally* Nat'l Academy of Sciences, Engineering, and Medine, *The Safety and Quality of Abortion Care in the United States* (2018); *see also* Gennevra Pittman, *Abortion Safer Than Giving Birth: A Study*, Reuters (Jan. 23, 2012), https://www.reuters.com/article/us-abortion/abortion-safer-than-giving-birth-study-idUSTRE80M2BS20120123.

[11] Anusha Ravi, *Limiting Abortion Access Contributes to Poor Maternal Health Outcomes*, Center for American Progress (June 13, 2018), https://www.americanprogress.org/article/limiting-abortion-access-contributes-poor-maternal-health-outcomes/.

estimate that as states move to ban abortion entirely following the U.S. Supreme Court's ruling in *Dobbs*, maternal mortality will increase nationally by as much as 24%.[12] Already, doctors in Michigan are concerned that they will have to delay or deny abortion as life-saving treatment—such as when cancer patients need to end a pregnancy due to hormones speeding the development of the tumor—because of MCL 750.14's vague and draconian language.[13] Michigan's anti-abortion law is thus inversely, rather than substantially, related to preserving life or furthering health care outcomes. A preservation of life interest thus cannot be asserted successfully to sustain Michigan's anti-abortion law.

C. No Precedent Prevents this Court from Applying Michigan's Equal Protection Clause to Invalidate MCL 750.14.

This Court can analyze the Equal Protection Clause claim as presenting a question of first impression. The Michigan Supreme Court has never evaluated the constitutionality of MCL 750.14 under Michigan's Equal Protection Clause. *See Larkin v. Calahan*, 389 Mich. 533 (1973) (affirming the federal constitutional protection for abortion under *Roe* but not evaluating MCL 750.14 under the Michigan Constitution); *People v. Bricker*, 389 Mich. 524 (1973) (same); *In re Vickers*, 371 Mich. 411 (1963) (evaluating whether MCL 750.14 applied to those receiving an abortion rather than the constitutionality of the statute). In particular, *Mahaffey v. Attorney General*, 222 Mich. App. 325, 333–39 (1997), is not dispositive. Though *Mahaffey* suggested that Michigan's Due Process Clause does not independently protect the right to an abortion, it never considered an Equal Protection argument.

[12] Amanda Jean Stevenson, et al., *The Maternal Mortality Consequences of Losing Abortion Access*, Univ. of Colo. (June 29, 2022), https://osf.io/preprints/socarxiv/7g29k.

[13] Selena Simmons-Duffin, *For Doctors, Abortion Restrictions Create an "Impossible Choice" When Providing Care*, NPR (June 24, 2022), https://wfpl.org/for-doctors-abortion-restrictions-create-an-impossible-choice-when-providing-care/.

Nor is this Court bound by the U.S. Supreme Court's decision in *Dobbs,* which concluded that the U.S. Constitution does not protect a right to an abortion. To start, the Court in *Dobbs* was addressing a 2018 Mississippi law, not a law like Michigan's that has its roots in archaic and invidious sex-based stereotypes that date back to 1846. *See Dobbs*, 142 S.Ct. at 2243 (discussing the legislative history surrounding the 2018 Mississippi law at issue). In addition, the Michigan Supreme Court has recognized that the Michigan Constitution protects rights more expansively than the U.S. Constitution. *Sitz v. Dep't of State Police*, 443 Mich. 744, 765 (1993) (holding that the Michigan Supreme Court is "obligated to interpret [the state's] own organic instrument of government" separate from the U.S. Constitution). Importantly in this case, for example—and as emphasized in the Governor's motion—the Michigan Supreme Court has recognized a strong right to bodily integrity based in the Michigan Constitution. *See Mays v. Governor of Michigan*, 506 Mich. 157, 192–95 (2020).

The Michigan Constitution's provision of broader rights than the U.S. Constitution is particularly relevant in the equal protection context. The Equal Protection Clause in the Michigan Constitution is broader in text and understanding than the parallel provision in the U.S. Constitution. Both the U.S. Constitution and the Michigan Constitution provide that no person shall be denied "the equal protection of the laws." Mich. Const. 1963, art. 1 § 2; U.S. Const. Amend. 14 § 1. Notably, the Michigan Constitution goes further, providing that no "person be denied the enjoyment of his civil or political rights." Mich. Const. 1963, art. 1 § 2. That clause is particularly important here, given that (as surveyed above) Michigan's anti-abortion law was born of a desire to keep women locked in "the maternity for which God had supposedly created them," Mohr at 107, and deny women the ability to participate in civil and political life.

For all of these reasons, the Governor's Equal Protection claim presents an issue of first impression upon which the Governor is likely to succeed.

II. THE PUBLIC INTEREST WILL BE SERVED BY THE ISSUANCE OF A PRELIMINARY INJUNCTION.

The remaining factors for injunctive relief require courts to consider a balancing of harms and whether the requested injunctive relief is in the public interest. *Detroit Fire Fighters Ass'n,* 482 Mich. at 34. Those factors all weigh in favor of issuing the preliminary injunction. At bottom, the Governor is seeking to maintain the status quo that has existed in Michigan for a half-century and to ensure that access to abortion care remains protected through the pendency of this litigation. Such an injunction will provide certainty and order in Michigan. That is especially true given that the Court of Claims has already ruled that MCL 750.14 is likely unconstitutional and enjoined the Attorney General from enforcing it.

On one side of the ledger, the only "injury" that Defendants will suffer if a preliminary injunction is issued is an inability to prosecute abortion-related conduct that occurs while the preliminary injunction remains in effect. That is hardly an injury of import: Defendants have been constitutionally prohibited from prosecuting that same conduct for *fifty years.* On the other hand, if an injunction is not issued, the consequences for pregnant people, families, and providers will be dire. For countless pregnant people and their children, a criminal abortion ban will cause irreparable economic- and health-related harms. For some patients, the availability of an abortion is literally a matter of life and death. If MCL 750.14 springs back into effect, lives will be lost and the quality of life and well-being of countless Michiganders will be far worse off.

By contrast, an injunction against MCL 750.14 will provide clarity and certainty for patients, doctors, and other medical providers alike. It will allow elective care to move forward and guarantee that lifesaving services are offered without hesitation. A preliminary injunction will

further preserve State resources, benefit law enforcement by safeguarding trust in our communities, and enable State agencies to avoid the loss of personnel—either temporarily or permanently—because of inadequate access to health care. We have seen extensive confusion in Michigan and elsewhere in the aftermath of the U.S. Supreme Court's decision in *Dobbs*. There is no need to exacerbate that confusion any further. The preliminary injunction requested by the Governor should be issued.

A. An Injunction Protects the Autonomy, Economic Independence, Health, and Safety of Pregnant People.

Abortion access is fundamental to equality in our society. The decision whether to bear a child, with whom, and under what circumstances is one of the most important decisions a person will make in their lifetime. It is a choice that has profound consequences for *anyone* and implicates a wide array of considerations—ranging from health to personal safety to economic opportunity to family well-being. Without maintaining access to abortion in Michigan, it is impossible to ensure that women, and anyone who can become pregnant, has equal standing and opportunity in society. "In the balance is a woman's autonomous charge of her full life's course—her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985).

These basic principles have been recognized time and again. In *Planned Parenthood v. Casey*, the U.S. Supreme Court called reproductive choices "central to personal dignity and autonomy." 505 U.S. 833, 851 (1992), *overruled by Dobbs*, 142 S. Ct. 2228. Though *Casey* has been overruled, its observations regarding the importance of reproductive decisions are no less true today. Access to abortion is central to "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007)

(GINSBURG, J., dissenting). Indeed, that is the consensus of the international community. According to a U.N. working group on Discrimination Against Women in Law and in Practice, decisions about one's body and reproduction are "at the very core of [a] fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity."[14]

Access to abortion, in short, is a cornerstone for equal participation in society. That is true for innumerable reasons, but three bear particular emphasis. As described in detail below, access to abortion is necessary to ensure equal access to health, economic opportunity, and safety. Were MCL 750.14 to go into effect, all three of these fundamental interests would be irreparably harmed.

1. Health

As an initial matter, the decision whether to carry a pregnancy to term is one that can carry significant health consequences. In many circumstances, pregnancy can be dangerous, and even life-threatening. As the U.S. Supreme Court has recognized, childbirth is more dangerous than abortion. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016). By contrast, numerous studies have shown that abortion is one of the safest outpatient medical procedures performed in the U.S.[15]

[14] Frances Raday, *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends* at 1, United Nations Working Group on the Issue of Discrimination Against Women in Law and in Practice, United Nations Human Rights Special Procedures (Oct. 2017), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf (citing Articles 3 and 17 of the International Covenant on Civil and Political Rights, Adopted 16 December 1966 by General Assembly resolution 2200A (XXI)).

[15] *See, e.g.*, Ushma D. Upadhyay et al., *Abortion-Related Emergency Department Visits in the United States: An Analysis of a National Emergency Department Sample*, BMC Med. J., Art. No. 88, p.8 (2018), https://bmcmedicine.biomedcentral.com/track/pdf/10.1186/s12916-018-1072-0.pdf.

Abortion bans, therefore, impose significant—and dire—health-related harms. According to one estimate, if all abortions in the U.S. were to cease, 21% more people would die from pregnancy complications, and 33% more Black people would die.[16] And though abortion can literally be a matter of life and death, there are many other significant adverse health consequences that can stem from an inability to access an abortion. One major study—the "Turnaway Study" led by Dr. Diana Greene Foster—compared the long-term health outcomes for patients who (a) sought abortions and received them, and (b) sought abortions but were unable to receive them (*i.e.*, were "turned away") as a result of the abortion facility's gestational age limit.[17] The Turnaway Study unequivocally demonstrated that, years after seeking an abortion, those who were denied access to abortion had worse health outcomes than those who were able to access abortion care. Many of those adverse health outcomes were physical. Years later, those denied access to an abortion had higher rates of hypertension, chronic migraines, and joint pain than those who received an abortion.[18] Those who are denied access to an abortion experience higher rates of mental-health issues as well. People who are denied abortions experience more short-term anxiety and report lower life satisfaction and self-esteem.[19]

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[16] AJ Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: a Research Note on Increased Deaths due to Remaining Pregnant*, Demography, (2021), https://read.dukeupress.edu/demography/article/58/6/2019/265968/The-Pregnancy-Related-Mortality-Impact-of-a-Total.

[17] *See, e.g.*, Lauren J. Ralph, et al., *Self-reported physical health of women who did and did not terminate pregnancy after seeking abortion services: A cohort study*, Annals of Internal Medicine, (Aug. 20, 2019). The Turnaway Study was reported in a series of scholarly articles, some of which are cited in this brief. It also has been published as a book. Diana Greene Foster, THE TURNAWAY STUDY, Scribner (New York 2020).

[18] *Id.*

[19] M. Antonia Biggs, et al., *Women's mental health and well-being 5 years after receiving or being denied an abortion. A prospective, longitudinal cohort study*, JAMA Psychiatry, 169–178 (Feb. 2017). Importantly, there is also no evidence that abortion itself causes emotional distress. *See*

These adverse health outcomes are not borne equally. Rather, they are most pronounced in those of lower socioeconomic status. For many, poverty and adverse health outcomes occur in tandem. After all, people who cannot afford shelter or food necessarily struggle to pay for preventative health care that could alleviate the adverse physical and mental effects of being denied an abortion.[20] Denying access to abortion thus creates a cycle of health problems that are most pronounced among those of lower socioeconomic status. And because Black and Hispanic women experience poverty at more than double the rate of their white counterparts, these adverse health outcomes are disproportionately pronounced among women of color.[21]

Crucially, the adverse health outcomes associated with abortion bans are not limited to pregnant people. Rather, the physical and economic toll of abortion bans ripples through families. Children raised by a mother who was denied an abortion are more likely to grow up in a household without enough money to pay for basic living expenses.[22] That, in turn, causes significantly worse health outcomes for children. Women denied access to an abortion are also more likely to have difficulty bonding with their infants.[23] Relative to the children of women who obtain an abortion, the children of women who are denied abortions have lower child development scores and are

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Brenda Major, et al., *Report of the APA Task Force on Mental Health and Abortion*, American Psychological Association, (2008), http://www.apa.org/pi/wpo/mental-health-abortion-report.pdf.

[20] Diana Greene 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 Pediatrics (2018), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2698454.

[21] Alexa L. Solazzo, *Different and Not Equal: The Uneven Association of Race, Poverty, and Abortion Laws on Abortion Timing*, 66 Soc. Probs., p. 523 (Aug. 28, 2018).

[22] Greene, *supra*, note 20.

[23] *Id.*

more likely to live in poverty.[24] Like the harms abortion denial imposes on pregnant people, these harms disproportionately affect children of color.[25]

2. Economic Opportunity and Stability

In addition to the risk of adverse *health* consequences, those who are denied access to abortion care are substantially more likely to face direct *economic* hardships. Pregnancy itself can have a destabilizing effect on one's earning potential. For one, carrying a pregnancy to term can often result in the loss of one's employment. Pregnant workers are routinely denied workplace accommodations related to their pregnancy—denials that can cost them employment.[26] And even when a pregnancy does not directly result in the loss of one's job, it can significantly hinder a new mother's career. Several studies demonstrate that women who had children in early adulthood "risk[ed] becoming low wage earners when reentering the workforce," because they did not obtain

[24] Diana Greene Foster et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. Pediatrics (Feb. 1, 2019), https://www.jpeds.com/article/S0022-3476(18)31297-6/fulltext.

[25] Maria Trent et al., *The Impact of Racism on Child and Adolescent Health*, 144 Pediatrics, No. 2 (Aug. 2019), https://pediatrics.aappublications.org/content/pediatrics/144/2/e20191765.full.pdf (explaining that "[r]acism is a social determinant of health that has a profound impact on the health status of children, adolescents, emerging adults, and their families"); Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS Notes (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm ("[T]he typical White family has eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family.").

[26] Carly McCann, et al., *Pregnancy Discrimination at Work,* Ctr. for Emp. Eq., p. 8-9 (May 26, 2021), https://www.umass.edu/employmentequity/sites/default/files/Pregnancy%20Discrimination%20at%20Work.pdf ("Based on these survey results, an estimated 250,000 women are denied accommodations related to their pregnancies each year. This is likely a conservative estimate of unmet need . . . ."); *Young v. United Parcel Serv.*, 575 U.S. 206 (2015) (finding violation of Pregnancy Discrimination Act when UPS refused to give pregnant driver a doctor-recommended accommodation and then placed her on unpaid leave).

much experience early on in their careers before leaving work to give birth and/or care for a child.[27] The availability of abortion allows mothers to delay childbearing until later in life, allowing them to maximize both their educational and earning potential before starting a family. The suggestion that abortions amount to mathematical "lives lost" is simply false. Abortion allows people to decide *when* and *with whom* to have a child.

Again: the adverse economic costs associated with abortion bans are not distributed equally. Even before the decision in *Dobbs,* poorer people were significantly more likely to be denied access to an abortion than those who are better-off. The Turnaway Study found that the families of those who were denied were four times more likely to be living below the federal poverty line.[28] These individuals also had 78% more past due debt and 81% more negative public financial records, such as bankruptcies and evictions, than those who obtained abortions.[29]

That makes sense. After all, wealthier people have always maintained the financial ability to travel to secure reproductive health care. Poorer people, by contrast, are frequently limited to the health care options available in their local communities. A pregnant person living below the poverty line is far less likely to be able to afford to travel long distances, take time off of work, secure childcare, and pay for an abortion procedure. Thus, the economic ramifications of being forced to carry an unwanted pregnancy to term are particularly pronounced among those who are *already the least economically secure.*

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[27] Adam Sonfield, *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children*, Guttmacher Inst., p. 40, (Mar. 2013), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf.

[28] Diana Greene 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, No. 3, p. 410-13 (2018), https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.

[29] Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion*, Nat'l Bureau of Econ. Rsch., p. 3 (Jan. 2020), https://www.nber.org/system/files/working_papers/w26662/w26662.pdf.

And again, because Black and Hispanic women are more than twice as likely to live in poverty than white women, a larger proportion of Black and Hispanic women experience economic barriers obtaining an abortion.[30] That means women of color are significantly more likely than white women to suffer adverse economic consequences associated with being forced to carry a pregnancy to term. Indeed, studies have demonstrated that restrictive TRAP laws—laws that severely curtail the ability of abortion clinics to operate—have a pronounced negative effect on college completion and income levels of Black women especially.[31]

These considerations are particularly important in light of MCL 750.14's virtually categorical abortion ban. If the ban goes into effect, and county prosecutors can begin prosecuting abortion, wealthier people will have the resources to travel out-of-state to access abortion care. But others will not. And that, in turn, will impose profound economic burdens on the very Michiganders who, by and large, are least able to shoulder them.

3. Safety

Finally—and of particular import to the undersigned prosecuting attorneys—access to abortion protects the physical safety of those who become pregnant and makes it less likely that they will be victims of a violent crime. Abusive partners can tightly control a victim's reproductive choices by restricting the use of contraception or engaging in sexual assault. Once a victim in an abusive relationship becomes pregnant, they are at much higher risk of violence.[32]

[30] Solazzo, *supra* note 21.

[31] Kelly M. Jones et al., *Targeted Regulations on Abortion Providers: Impacts on Women's Education and Future Income*, http://ses.wsu.edu/wp-content/uploads/2021/02/101620_Jones Pineda_TRAPLaws.pdf.

[32] Karen T. Grace et al., *Reproductive Coercion: A Systematic Review*, Trauma, Violence, & Abuse, (Aug. 16, 2016), https://journals.sagepub.com/doi/abs/10.1177/1524838016663935.

Access to abortion can reduce that threat. Research has demonstrated that when a victim in an abusive relationship is able to secure an abortion, their risk of violence from the sexual partner involved in the pregnancy decreases. For those who are unable to obtain access to abortion care, by contrast, the risk of physical violence remains heightened.[33] And beyond abortion's direct effect on alleviating intimate-partner violence, the ability to choose an abortion can be crucial for allowing a pregnant person to leave an abusive relationship. Nearly a third of people in the Turnaway Study listed partner-related reasons as part of what motivated them to seek an abortion.[34] These people might feel unsafe in the relationship or uncertainty about whether their partner is equipped to help with raising a child. Either way, the ability to access abortion keeps people safer and in a better position to leave a potentially abusive relationship.

B. An Injunction Protects Medical Providers Against Legal Uncertainty and Enables Them to Care for the Health and Welfare of the Pregnant Person.

A preliminary injunction is also needed to protect the vitality of Michigan's health care system, and to ensure that medical professionals are able to deliver a wide array of care. While abortion bans aim to inhibit deliberately induced pregnancy loss, in practice they widely disrupt all kinds of medical care, due to providers' confusion over to how to reconcile the ambiguous language of laws like MCL 750.14 with the nuance and complexity of real-world medical situations. Providers also are confused as to how their actions may be interpreted down the line and fear that medical treatments—even those that are only distantly related to reproductive health—could be grist for criminal prosecution. This confusion and uncertainty already has led

[33] Sarah CM Roberts et al., *Risk of Violence from the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion*, BMC Medicine, (Sept. 2014), https://bmcmedicine.biomedcentral.com/track/pdf/10.1186/s12916-014-0144-z.pdf.

[34] M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, BMC Medicine, (2013), https://bmcwomenshealth.biomedcentral.com/track/pdf/10.1186/1472-6874-13-29.pdf.

providers to hesitate to provide care and delay intervention in all types of medical situations. Abortion bans like MCL 750.14 thus disrupt the provision of care and needlessly create harm, danger, and distress to patients everywhere.

1. An injunction is necessary to protect against legal uncertainty for medical providers about enforcement of MCL 750.14.

Fears about the disruption of care in Michigan are anything but hypothetical. Last week, the Court of Appeals' decision suggesting that county prosecutors could begin prosecuting abortion created pronounced confusion that led to immediate disruptions in care. That experience—which was fortunately short-lived—plainly demonstrates the need for an injunction.

In the immediate aftermath of the Court of Appeals' August 1 decision, providers began turning patients away, including patients who had scheduled appointments weeks in advance.[35] On August 1, the University of Michigan temporarily halted its abortion services as the day's legal wrangling played out. When this Court issued its temporary restraining order, the University resumed the provision of care.[36] Northland Family Planning Centers paused its operations in Macomb County and shifted its patients to its facilities in Oakland County, while Planned Parenthood continued providing care.[37] Henry Ford Health (which operates hospitals in Jackson

[35] Kate Wells, *Confusion roiled Michigan for days as abortion rights changed hour to hour,* National Public Radio (Aug. 5, 2022), https://www.npr.org/2022/08/05/1115666725/confusion-roiled-michigan-for-days-as-abortion-rights-changed-hour-to-hour ("One of [Dr. Audrey] Lance's recent patients was a 'young girl' who drove seven hours with her mother from Milwaukee for her appointment, then turned around and drove back home.").

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

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

and Macomb counties) and Beaumont-Spectrum health (which operates hospitals across Michigan) each issued statements indicating they are searching for clear direction regarding which care is permitted for their patients.[38] Faced with the possibility that MCL 750.14 could be enforced, providers thus shifted resources, patients, and staff to escape patchwork enforcement across the state, with some pausing services altogether rather than risk legal liability.

Moving beyond last week's specific disruption, experience from other states shows that abortion restrictions erode the quality of care and patient-provider trust. To take just one example: Research demonstrates that providers in states with severe abortion restrictions are significantly less likely to be able to help patients safely manage their miscarriage.[39] Patients who experience pregnancy loss may be investigated, and providers may report their patients to law enforcement to avoid being seen as abetting the loss. Predictably, the insertion of the criminal legal system into a doctor-patient relationship makes patients far less likely to seek medical care. Patients in states with severe abortion restrictions frequently avoid seeking medical care for a miscarriage for fear of being falsely accused of committing a crime.[40] Due to the similarity between treatment practices for abortions and treatment practices to manage miscarriages, restricting abortion often disrupts providers' ability to provide the accepted standard of care for those suffering fetal loss.[41]

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[38] Beth LeBlanc, *Oakland County judge blocks county prosecutors from enforcing abortion ban*, The Detroit New (Aug. 1, 2022), https://www.detroitnews.com/story/news/local/michigan/2022/08/01/county-prosecutors-can-enforce-abortion-ban-appeals-court-says/10200100002/.

[39] Gabriela Weigel et al., *Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws*, Women's Health Policy, KFF, (Dec. 4, 2019), https://www.kff.org/womens-health-policy/issue-brief/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws/.

[40] *Id.*

[41] Maya Manian, *The Consequences of Abortion Restrictions for Women's Healthcare*, Washington and Lee Law Review, (Mar. 1, 2014), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4405&context=wlulr.

2. Life of the mother exception is ambiguous and does not provide sufficient clarity for providers to offer life-affirming care.

Further, the vague and ambiguous language in MCL 750.14 in particular threatens to chill provision of potentially *lifesaving* care. Under MCL 750.14, abortions are prohibited unless "necessary to preserve the life of such woman." *Id.* But at this juncture, no one—not providers, not prosecutors, and not patients—has a clear understanding of what preserving the life of a pregnant person means with any real specificity.[42] As one leading Michigan medical provider explained in the *New England Journal of Medicine*:

> Might abortion be permissible in a patient with pulmonary hypertension, for whom we cite a 30-to-50% chance of dying with ongoing pregnancy? Or must it be 100%? When we diagnose a new cancer during pregnancy, some patients decide to end their pregnancy to permit immediate surgery, radiation, or chemotherapy, treatments that can cause significant fetal injury. Will abortion be permissible in these cases, or will patients have to delay treatment until after delivery? These patients' increased risk of death may not manifest for years, when they have a recurrence that would have been averted by immediate cancer treatment. We've identified countless similar questions.[43]

And because MCL 750.14 is punishable as a felony, doctors would be left to evaluate risk, based not on their best medical judgment, but rather based on their best guess as to what police and prosecutors might do.[44] In other words: if MCL 750.14 goes into effect, doctors—*during a moment of medical emergency*—would be left to try and guess whether a county prosecutor will think a particular procedure was "necessary" to "protect life."

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

[43] *Id.*

[44] Carrie Feibel, *Because of Texas abortion law, her wanted pregnancy became a medical nightmare*, NPR, (July 26, 2022), https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare.

All of this would present providers with a medically unethical dilemma. Rather than weighing the risks and benefits of a medical procedure for the patient, a provider must weigh the medical risks to the patient against the *legal* jeopardy the *provider* is willing to shoulder. This is a flagrant inversion of medical ethics, as enshrined by the Michigan State Medical Society: "A physician must recognize responsibility to patients first and foremost . . . A physician shall, while caring for a patient, regard responsibility to the patient as paramount."[45] But faced with potential criminal liability, providers, hospitals and medical systems—and even medical education and training programs—may refrain from performing, studying, or teaching certain aspects of medical care.[46] For many patients, medical system confusion and hesitancy regarding whether to provide care could result in no care at all. [47]

Reports from around the country post-*Dobbs* have demonstrated, time and time again, that doctors and patients in states with similarly vague laws are struggling through horrific choices and medical emergencies.[48] When doctors are chilled from providing potentially lifesaving care, people may die or have worse and more complicated medical outcomes, such as losing their ability

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

[46] Indeed, the experience in hospitals where abortions are banned indicates that patients experience significant delays in care when an abortion is medically indicated—which creates significantly greater health risks. Harris, *supra* note 42.

[47] Lori R. Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, Am J Public Health, p. 1774-78 (Oct. 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636458/.

[48] J. David Goodman et al., *Women Face Risks as Doctors Struggle With Medical Exceptions on Abortion*, N.Y. Times (July 20, 2022), https://www.nytimes.com/2022/07/20/us/abortion-save-mothers-life.html; *see also* Tessa Weinberg et al., *Missouri doctors fear vague emergency exception to abortion ban puts patients at risk*, Missouri Independent (July 2, 2022), https://missouriindependent.com/2022/07/02/missouri-doctors-fear-vague-emergency-exception-to-abortion-ban-puts-patients-at-risk/.

to have children in the future. That risk of grave injury or death is harrowing considering that 59% of people who seek abortions already have children.[49]

Beyond MCL 750.14's ambiguity as to what it means to be "necessary" to preserve life, there are a number of troubling medical emergencies in which an abortion may not be lifesaving—but is nevertheless necessary to protect an individual's long-term health. These include complications related to kidney inflammation, lupus, pulmonary hypertension, and diabetes.[50] But were MCL 750.14 to go into effect, medical providers would be barred from terminating a pregnancy to preserve a patient's long-term health.

Once again, that outcome will have adverse consequences for children and families in Michigan. Currently, a pregnant person who already has children, for example, may choose to prioritize the well-being of their *existing* family. Faced with the possibility that carrying a pregnancy to term could result in long-term disability, they may thus opt for an abortion so they can continue providing for their children. If MCL 750.14 were operative, however, that choice would be taken off the table. And, in turn, children and families in Michigan would suffer.

3. Care beyond pregnancy will be impacted if MCL 750.14 goes into effect.

Finally, anti-abortion laws like MCL 750.14 threaten to chill the provision of care that has *nothing to do with pregnancy.* Many people, both pregnant and not, take medications to treat diseases like lupus or arthritis that can result in a miscarriage as a side-effect. Because these medications could theoretically be used to attempt to terminate a pregnancy, some providers in states with criminal abortion bans have hesitated to offer them due to concerns that they could be

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

[50] *See, e.g.*, Michael Greene et al., *Abortion, Health and the Law*, 350 New Eng. J. Med., p. 184, (Jan. 2004).

held criminally liable for a pregnancy loss. This complicates patients' ability to get the care they need for issues completely unrelated to pregnancy, and disrupts their treatment regimen.[51] For example, methotrexate is commonly prescribed for rheumatoid arthritis, cancer, and even autoimmune diseases. Yet in states with criminal abortion bans, many patients are now experiencing extensive screening from pharmacists due to concern that dispensing those medications could put them in legal jeopardy under state abortion bans.[52]

In short, in the absence of a preliminary injunction in this case, the entire medical system in Michigan would be thrown into a state of chaos and uncertainty. Doctors would be chilled from providing potentially lifesaving and life-altering care. They will be barred from providing care that is necessary to ensure long-term health and well-being. Even patients who are *not* pregnant could see their access to needed medication restricted—placing their health in jeopardy. None of this is hypothetical, as the widespread confusion and uncertainty on August 1 demonstrated. A preliminary injunction is needed to avoid repeating (and exacerbating) that state of affairs.

C. State and Local Government Institutions and Programs Substantially Benefit from Sustained Access to Abortion Care.

In addition to the direct impact on patients and providers, state and local governments will be adversely impacted if the anti-abortion law goes into effect. That is true for at least three reasons.

First, state and local governments provide health and welfare services to pregnant people and children. Throughout Michigan, there are a variety of health care programs that provide care

[51] Lindsey Tanner, *Abortion laws spark profound changes in other medical care*, AP News, (Jul 16, 2022), https://apnews.com/article/abortion-science-health-medication-lupus-e4042947e4cc0c45e38837d394199033.

[52] Rose Horowitch, *State abortion bans prevent women from getting essential medication*, Reuters, (July 14, 2022), https://www.reuters.com/world/us/state-abortion-bans-prevent-women-getting-essential-medication-2022-07-14/.

and support to pregnant people, mothers, and children. For example, the Maternal Infant Health Program (MIHP) provides home visits and support for pregnant people and new mothers who are eligible for Medicaid.[53] Through this program, low-income Michiganders receive vital health care services and support in order to promote better outcomes for the pregnant person and their children.[54] Local governments also administer the Women, Infants, and Children ("WIC") nutritional program.[55] Funding for these programs is limited, and it is already difficult to meet the demand. If MCL 750.14 is made operative, it could result in a significant increase in demand for government support services for pregnant people, mothers, and children. That increase in demand would place significant strain on Michigan's already-strained support systems.

Second, like private companies and local governments elsewhere, city, county, and state governments would need to reckon with whether and how to expend resources to ensure that our personnel have access to needed medical care. In other parts of the country, local governments have amended health care plans and allocated budget items to cover abortion care as well as the travel expenses associated with obtaining out-of-state care.[56] These are necessary costs to ensure the health and well-being of governmental workforces. In addition to these direct expenses, state

[53] *See, e.g.*, Washtenaw County Maternal Infant Health Program, https://www.washtenaw.org/1828/Maternal-Infant-Health-Program-MIHP (last accessed Aug. 12, 2022).

[54] Oakland County, for example, offers a variety of services across the county, Oakland County Free & Low Cost Services for Moms & Babies, https://www.oakgov.com/health/partnerships/echo/Documents/Free%20and%20Low%20Cost%20Services%20for%20Moms%20and%20Babies%2011.15.19.pdf (last accessed Aug. 12, 2022).

[55] *See, e.g.*, Wayne County Special Supplemental Nutrition Program for Women, Infants, and Children, https://www.waynecounty.com/departments/hhvs/wellness/wic.aspx (last accessed Aug. 12, 2022).

[56] *See, e.g.*, Helen Battipaglia, *City Council passes emergency ordinance to allow elective abortions in City Health Plan*, The Cincinnati Herald, (July 9, 2022), https://thecincinnatiherald.com/2022/07/city-council-passes-emergency-ordinance-to-allow-elective-abortions-in-city-health-plan/.

and local governments can expect more disruption in employee availability should individuals be required to travel out of state to seek care. Currently, Michiganders need only travel an average of about 15 miles to obtain abortion care. But if MCL 750.14 goes into effect, Michiganders will need to travel out-of-state to obtain abortion care—requiring additional time off work and disrupting operations for state and local governments.

Third, if Michigan's draconian anti-abortion law goes into effect, it will almost certainly result in an inability for private businesses and state-affiliated institutions to attract and retain employees. As an initial matter, that inability to attract talent will inevitably result in businesses leaving Michigan. Indeed, in other parts of the country where abortion bans are in effect, companies are *already* relocating elsewhere, concerned about their ability to attract workers. For example, after a near-total abortion ban was signed into law in Indiana, Eli Lily, one of the state's largest employers, announced that it "will be forced to look outside the state for employment growth."[57] That was hardly an ideological decision; rather, it was a practical one. Many workers who are considering job opportunities will opt to relocate to a state in which their reproductive choices (and the choices of their adolescent children) are protected and accessible. In order to be competitive and attract top talent, many businesses want to be located in states where abortion is protected. If Michigan's abortion ban goes into effect, it is therefore likely that private businesses will relocate—or expand—elsewhere. That, in turn, will result in lost tax revenues for state and local governments, undermining their ability to provide needed government services.

The workforce-retention issues associated with abortion bans, moreover, will also undermine the competitiveness of state institutions. The University of Michigan, for example, is the state's largest employer, and the University draws students and faculty from across the world.

[57] Lora Kelley, *Major Indiana Employers Criticize States' New Abortion Law*, N.Y. Times, Aug. 6, 2022, https://www.nytimes.com/2022/08/06/business/indiana-companies-abortion.html.

The State also boasts numerous additional world-class research universities, including Michigan State University, Oakland University, Wayne State University, and others. These universities are anchor institutions. Already, however, there are concerns around whether these institutions can continue to draw a qualified and diverse workforce and student body if there is no access to abortion care in the state.[58] For example, women's athletic coaches have already expressed concern that they will be unable to recruit athletes to universities in states that criminalize reproductive health care.[59] The same is true for promising undergraduate and graduate students, faculty members, and scientists. Perhaps most directly, an abortion ban would adversely impact the ability of medical residents to receive the full training they need, particularly in OBGYN practices—making Michigan's residency programs less competitive and their hospitals less able to maintain high quality services.

D. Criminalization of Abortion Will Erode Public Trust in Law Enforcement.

In addition, and of particular import to the undersigned prosecuting attorneys, there is a considerable risk that MCL 750.14 could undermine trust in law-enforcement—and deter the reporting of serious crime. Laws that criminalize deeply personal and private decisions create fear and distrust in the community.[60] That trust is essential for our offices to function effectively. When there is trust in law enforcement, community members are more likely to report crimes, act as

[58] Meredith Bruckner, *University of Michigan establishes task force for abortion access*, All About Ann Arbor, (May 25, 2022), https://www.clickondetroit.com/all-about-ann-arbor/2022/05/25/university-of-michigan-establishes-task-force-for-abortion-access/.

[59] Molly Hensley-Clancy, *With NCAA Silent on Abortion Bans, College Sports Face Confusion*, The Washington Post, (July 27, 2022), https://www.washingtonpost.com/sports/2022/07/27/college-sports-ncaa-abortion-bans/. As Michigan State's assistant athletic director told the *Post,* recruiting student-athletes "has the potential to be a real issue" if MCL 750.14 goes into effect. *Id.*

[60] Fair and Just Prosecution, *Joint Statement From Elected Prosecutors*, (July 25, 2022), https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf; *see also*, Thomas C. O'Brien et al., *Rebuilding Trust between Police & Communities Through Procedural Justice & Reconciliation*, 5 Behav. Sci. & Pol'y, 35 (2019).

necessary witnesses, place faith in the justice system, and trust authority.[61] When that trust erodes, fewer crimes are reported and public safety suffers. For that reason, our offices engage in extensive outreach and community-based partnerships to foster stronger connections and maintain trust.[62]

That trust is absolutely crucial for victims of sexual assault. Sexual assault is already one of the least likely crimes to be reported, and if MCL 750.14 goes into effect, reporting rates will decline further still. Imagine, for example, that a 12-year-old is raped and impregnated, and the minor's parents help her secure an abortion. Would that rape be reported? If MCL 750.14 goes into effect, perhaps not. After all, MCL 750.14 contains no exceptions for rape or incest (even for minor victims). That rape victim's parents could therefore plausibly face criminal liability, perhaps under a conspiracy theory, for aiding in her abortion. If MCL 750.14 were enforceable, therefore, the parents would have to place themselves at risk of *felony prosecution* were they to tell law-enforcement the full story about the rape. Failing to extend the injunction thus makes it less likely that serious, horrific crimes will be reported, solved, and successfully prosecuted. Our criminal justice system will be appreciably worse off as a result.

E. Statewide Consistency in the Enforceability of MCL 750.14 Counsels in Favor of Issuance of the Injunction.

A final point bears emphasis. The Michigan Court of Claims already has held that MCL 750.14 is likely unconstitutional and enjoined the State Attorney General from enforcement. To our knowledge, never in Michigan's history has the Attorney General been enjoined on state

[61] *See, e.g.*, Tom R. Tyler et al., *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol'y & L. p.78, 78–79 (2014); Tom R. Tyler, et al., *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. p.231, 263 (2008).

[62] For example, the Oakland County Prosecuting Attorney's office has several advisor councils to advise the Prosecuting Attorney on issues of community concern. Oakland County Michigan, Community, https://www.oakgov.com/prosecutor/community/Pages/default.aspx (last accessed Aug. 12, 2022).

constitutional grounds from enforcing a state criminal law while county prosecutors maintain free reign to prosecute it. Indeed, such a state of affairs is inconsistent with Michigan's legal design. Such unusual—and perhaps unprecedented—circumstances warrant this Court's continued intervention by way of an injunction.

The Attorney General and prosecuting attorneys have concurrent jurisdiction to "appear for the state" on any criminal matter. MCL 14.28 (Attorney General may "appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal"); MCL 14.153 ("prosecuting attorneys shall, in their respective counties, appear for the state . . . and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested."). The Attorney General "consult[s] and advise[s] the prosecuting attorneys, in all manners pertaining to the duties of their offices." MCL 14.30. And if a prosecuting attorney is "disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office," the prosecuting attorney "*shall* file with the attorney general" a petition seeking appointment of a special prosecutor. MCL 49.160 (emphasis added).

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

The current situation, as a result of the Court Appeals decision, raises thorny questions. For example: how (if at all) can the Attorney General "consult and advise the prosecuting attorneys" about the enforcement of a law that the Attorney General has been prohibited from

enforcing on constitutional grounds? *See* MCL 14.30. How (if at all) can a prosecuting attorney with a conflict of interest seek the appointment of a special prosecutor on an abortion case? Again: the legal mechanism for such an appointment is to "file with the attorney general" a petition seeking the appointment of a special prosecutor. MCL 49.160. May the Attorney General accept such a petition, or would that cross the line into "enforcement" of an enjoined criminal law? And if she does accept that petition—seeking prosecution of a law that the Attorney General has been told is likely unconstitutional—can the Attorney General assign the case to a different county prosecutor? Or would that violate her legal duty to uphold the Constitution?[63]

None of these questions has an easy answer. The reason is straightforward: it is antithetical to Michigan's legal structure for a criminal law to be enjoined as to the Attorney General, but not county prosecutors. The bottom line is that none of these questions should have to be resolved now, and especially not at the cost of access to essential health care or bodily autonomy. Instead, this Court should issue a preliminary injunction against Defendants—the 13 county prosecutors with abortion facilities in their jurisdiction—until a final judicial determination has been made as to the constitutional validity of Michigan's abortion laws.

* * *

For the past half-century—since the U.S. Supreme Court's decision in *Roe*—abortion has been legal, safe, and protected in Michigan. Now, in the aftermath of a litany of confusing and chaotic court orders, that certainty has been undermined in this State. This Court should act quickly to restore order. At bottom, the Governor and the undersigned prosecutors ask only that the state

[63] The instant situation—in which the Attorney General has been enjoined from enforcing a law on *constitutional* grounds—is distinct from a situation in which the Attorney General has a conflict in a case. The latter situation can likely be resolved by (1) creating a conflict wall within the Attorney General's Office, or (2) the Attorney General performing only ministerial tasks relating to the prosecution of a case. Here, however, doing so would put the Attorney General at odds with what a court has said the Michigan Constitution requires.

of affairs that has existed in Michigan for the past half-century be maintained, pending a final court determination as to whether Michigan's anti-abortion laws are constitutional.

"Liberty finds no refuge in a jurisprudence of doubt." *Casey*, 505 U.S. at 844. It is unfair and unworkable for patients, providers, and institutions to be forced to abide by continuing confusion and uncertainty as to the scope of reproductive rights in Michigan. And the harm that would result from a denial of a preliminary injunction would indeed be irreparable—undermining the health, safety, economic security, and personal autonomy of countless Michigan residents. Our legal system, residents, and medical providers deserve order and certainty as these cases continue. The public interest clearly is furthered by the issuance of a preliminary injunction.

CONCLUSION

For all of the foregoing reasons, the Governor's request for a preliminary injunction should be granted.

Respectfully submitted,

DATED: August 12, 2022

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

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

Counsel for Respondent Eli Savit, Prosecuting Attorney, Washtenaw County

* pro hac vice forthcoming

DATED: August 12, 2022

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

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

DATED: August 12, 2022

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

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

DATED: August 12, 2022

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

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

DATED: August 12, 2022

/s/ Karen D. McDonald
Karen D. McDonald

Respondent Prosecuting Attorney, Oakland County

DATED: August 12, 2022

/s/ Sue Hammoud
Sue Hammoud
Wayne County Corporation Counsel

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

PROOF OF SERVICE

I, Eli Savit, hereby affirm that on the date stated below I delivered a copy of Consolidated Brief of Prosecuting Attorneys Savit, Leyton, Siemon, Getting, Wiese, McDonald and Worthy's in Support of Governor Whitmer's Motion for Preliminary Injunction, upon opposing counsel stated above, via the Court's MiFile system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: August 12, 2022

/s/ Eli Savit
Eli Savit
Prosecuting Attorney
Washtenaw County