STATE OF MICHIGAN
IN THE SUPREME COURT

In re EXECUTIVE MESSAGE OF THE GOVERNOR REQUESTING THE AUTHORIZATION OF A CERTIFIED QUESTION

Supreme Court Case No. 164256

Oakland Circuit Court No. 22-193498-CZ
Hon. Jacob James Cunningham

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.

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DEFENDANT LUCIDO'S BRIEF IN RESPONSE TO THE GOVERNOR'S SUPPLEMENTAL BRIEF IN SUPPORT OF HER EXECUTIVE MESSAGE

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STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posted for immediate determination.

The Governor answers: No

Defendant Lucido answers: Yes

II. Whether there is an actual case and controversy requirement, and, if so, whether it is met here.

The Governor answers: No, and Yes

Defendant Lucido answers: Yes, and No

III. Given the infrequent application of the Executive Message process by current and former governors, what is required under MCR 7.308(A), and, specifically, whether the question is of "such public moment as to require an early determination."

The Governor answers: Yes

Defendant Lucido answers: No

IV. Whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question.

The Governor answers: No

Defendant Lucido answers: It depends on the circumstances of the case

V. Whether the questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization,* No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here.

The Governor answers: Yes, and No

Defendant Lucido answers: No, and Yes

STATEMENT OF FACTS

Governor Gretchen Whitmer filed this two-count Complaint for Declaratory and Injunctive Relief in the Oakland County Circuit Court against the prosecutors of 13 separate Michigan Counties. (**Ex. A**, Complaint) Defendant Peter J. Lucido is the Macomb County Prosecutor. (**Id.** at 6 ¶ 20) The Complaint is premised on the Governor's contention that MCL 750.14 violates the due process and equal protection provisions of the Michigan Constitution. (**Id.** at 4 ¶ 8) Specifically, the Complaint asks the Circuit Court to declare that the Due Process and Equal Protection Clauses protect the right to abortion, declare that MCL 750.14 violates the Due Process and Equal Protection Clauses of the Michigan Constitution, and enjoin the Defendant Prosecutors from enforcing MCL 750.14. (**Id.** at 26-27)

The Complaint is based on speculative, hypothetical, and contingent events which might accrue in the future. The Governor alleges that the United States Supreme Court *may* overturn *Roe v Wade*, the Michigan Legislature *may* choose not to amend, repeal, or otherwise revisit MCL 750.14, and the Defendant Prosecutors *may* bring charges against a theoretical future abortion provider. Thereafter, a Michigan Trial Court, the Michigan Court of Appeals, and this Court *may* choose to declare the statute constitutional as written, overrule prior caselaw interpreting it to comport with *Roe*, and uphold the convictions. *If each contingency comes to pass at some future date*, the Governor alleges, the Michigan Constitution will be violated.

On April 7, 2022, the Governor sent an Executive Message to this Court pursuant to MCR 7.308(A)(1) requesting permission for the Oakland County Circuit Court to certify certain questions for immediate determination as regards this case.

On May 20, 2022, this Court issued an Order directing the Governor to file a brief providing a further and better statement of the questions and facts presented in this case. Specifically, the Court asked the Governor to address the following questions: "(1) whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland County Circuit Court to certify the questions posed for immediate determination; (2) whether there is an actual case and controversy requirement and, if so, whether it is met here; (3) given the infrequent application of the Executive Message process by current and former governors, what is required under MCR 7.308(A) and, specifically, whether the question is of 'such public moment as to require an early determination"; (4) whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question; and (5) whether the questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here." (**Ex. B**, 5/20/22 Order)

The Order permitted the Defendant Prosecutors to file responsive briefs. (**Id.**) This brief is filed on behalf of Defendant Prosecutor Lucido.

ARGUMENT

I. *The Court of Claims' Injunction in Planned Parenthood Resolves Any Need for this Court to Certify the Questions Posed in this Case for Immediate Determination*

The first question this Court presented was "whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland County Circuit Court to certify the questions posed for immediate determination." The answer is yes, it does.

In *Planned Parenthood*, the plaintiffs filed suit seeking a declaratory judgment that MCL 750.14 is unconstitutional under the Michigan Constitution and requested preliminary and permanent injunctions barring its enforcement. (**Ex. C**, Court of Claims Opinion at 1) Planned Parenthood seeks the same relief requested by the Governor under the exact same theories the Governor is requesting in this action.

On May 17, 2022, the Court of Claims entered a preliminary injunction enjoining the Attorney General and everyone acting under the Attorney General's control and supervision from enforcing MCL 750.14 during the pendency of the action. (**Id.** at 27) The Court of Claims expressly cited MCL 14.30 in its order when defining "anyone acting under the [Attorney General's] control and supervision." (**Id.**) MCL 14.30 provides, *inter alia*, 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." MCL 14.30. *See also People v Hurst*, 155 Mich App 573, 580 (1986) ("The Attorney General is responsible for the supervision of all prosecutors in this state.") Thus, the Court of Claims' Order expressly purports to enjoin the prosecutors in this state, including the 13 Defendants in this case, from enforcing MCL 750.14 while *Planned Parenthood* is

pending.[1]

Though Defendant Lucido disagrees that the Attorney General can control the county prosecutors, the Court of Claims has ruled she can and does, and that its injunction can properly reach the prosecutors through her. Unless and until the Court of Claims, Court of Appeals, and/or this Court decides otherwise, it remains binding. The injunction prevents the potential, hypothetical harm the Governor initiated this action to address. The Governor does not disagree, arguing only that this Court will inevitably be asked to address these claims. Indeed, *Planned Parenthood* (which includes a real party at interest and an actual case and controversy) will proceed through the proper judicial process, and will likely ultimately be appealed to this Court. In the interim, the Court of Claims' injunction prohibits the Defendants in this case from enforcing the statute, eliminating the need for an early or immediate determination of the issue outside the normal judicial process.

There was absolutely no need for the present, parallel litigation, particularly considering the absence of a justiciable issue in this case, which does not exist in the prior pending lawsuit.

[1] The Governor notes there is dispute over whether MCL 14.30 can be read to confer authority on the Attorney General to instruct county prosecutors on whether and when to charge crimes or forbear from doing so. (**Pl. Brief** at 3) In support of this contention, she cites *Fieger v Cox*, 274 Mich App 449, 466 (2007). That case had absolutely nothing to do with MCL 14.30, to what extent the Attorney General supervises county prosecutors, and what that supervision entails. Regardless, the *Attorney General* is not enjoining the prosecutors; the *Court of Claims* is, through its incorporation of MCL 14.30 to define the parties covered by its injunction.

II. There is an Actual Case in Controversy Requirement to a Request for Review Received via Executive Message from the Governor Pursuant to MCR 7.308(A)(1), and that Requirement Has Not Been Met.

This Court's second question is whether MCL 7.308(A)(1) contains a case-in-controversy requirement, and if so, whether it is met here. The answers are yes, there is a case-in-controversy requirement, and no, it has not been met here.

"The [Michigan courts'] 'judicial power… [pertains to] the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.'" *Paquin v City of St Ignace*, 504 Mich 124, 139 (2019) (quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 616 (1920)). "In seeking to make certain that the judiciary does not usurp the power of coordinate branches of government, and exercises only 'judicial power,' both [the Michigan Supreme Court] and the federal courts have developed justiciability doctrines to ensure that cases before the courts are appropriate for judicial action." *Id.* (quoting *Mich Chiropractic Council v Office of Fin & Ins Servs Comm'r*, 475 Mich 363, 370 (2006), overruled on other grounds, *Lansing Sch Educ Assn v Lansing Bd of Educ*, 487 Mich 349, 372 (2010)). These include the doctrines of standing, ripeness, and mootness, all of which are considered jurisdictional in nature. *Id.* at 139-140 (citing *Mich. Chiropractic* at 370-71). "[T]he doctrines of justiciability…affect 'judicial power,' the absence of which renders the judiciary constitutionally powerless to adjudicate the claim." *Id.* at 140 (citing *Mich Chiropractic*, 475 Mich at 372).

In the underlying Oakland County Circuit Court case, the Governor seeks a declaratory judgment and injunctive relief. "When there is no actual controversy, the court lacks jurisdiction to issue a declaratory judgment." *Van Buren*, 319 Mich App at 545 (citing *Citizens for Common Sense in Govt*, 243 Mich App at 55). See also *McGill v Automobile*

Assn of Mich, 207 Mich App 402, 407 (1994); *Recall Blanchard Comm v Sec'y of State*, 146 Mich App 117, 122-23 (1985). Furthermore, "[c]ourts of equity may not lend aid by injunction in the abstract, and unconnected with any injury or damage to the person or persons asking relief." *Johnson v City of Muskegon Heights*, 330 Mich 631, 633 (1951) (quoting *City of Owosso v Union Telephone Co*, 185 Mich 349 (1915)). "Injunctive relief may not be granted on the basis of mere speculation or conjecture" that certain events may come to pass. *Johnson*, 330 Mich at 634 (citing *Roberts Tobacco Co v Dept of Revenue*, 322 Mich 519, 525 (1948)). "A court's equitable power is not an unrestricted license for the court to engage in wholesale policymaking…" *Gleason v Kincaid*, 323 Mich App 308, 318 (2018) (quoting *Devillers v Auto Club Ins Assn*, 473 Mich 562, 590 (2005)).

Indeed, almost every prior case involving an Executive Message arose out of pending litigation involving independent parties who asserted an actual, present legal controversy in the lower court. The lone exception, *Milliken v Green*, was vacated. The prior cases typically involved the intervention of the Attorney General to defend the constitutionality of the statute at issue. Furthermore, in the prior cases the Court concluded that an actual controversy existed before the Governor sought intervention:

- In ***City of Gaylord v Beckett***, the City Council of Gaylord approved a bond issue to finance the purchase and construction of an industrial plant pursuant to P.A. 1963, No. 62, the "industrial development revenue bond act of 1963." 378 Mich 273, 286-87 (1966). The City Clerk refused to complete the transaction. The City brought a mandamus action in the Otsego County Circuit Court to compel the Clerk's performance. *Id.* at 287. The Attorney General intervened, and the case

was certified directly to this Court upon the request of the Governor. *Id.* The Court expressed disapproval of the fact that neither party briefed the presented questions, leaving the justices to determine the constitutionality of a statute with no context. *Id.* at 287 n.1, 328.

- In ***Beech Grove Inv Co v Civil Rights Comm'n***, the Civil Rights Commission determined that Beech Grove Investment Company (a builder and developer) illegally discriminated against an African American man by refusing to sell him a house. 380 Mich 405, 416 (1968). The Commission issued an order to cease and desist. *Id.* Beech Grove filed an action in Oakland County Circuit Court challenging enforcement of the order. After the Commission answered the Complaint, the Governor requested this Court authorize the Circuit Court to certify controlling questions regarding the constitutionality and enforceability of the Act. *Id.*
- In ***Alan v Wayne County***, Wayne County issued bonds to fund the construction of a stadium. 388 Mich 210, 242 (1972). The plaintiff filed suit against the County alleging violations of the Public Securities Validation Act and contesting and seeking to enjoin the bonding process and construction of the stadium. *Id.* The Governor requested certification to this Court to decide the constitutionality of the process after the trial court confirmed that "the parties indicated the pleadings currently on file are satisfactory; consequently, the matter is at issue." *Id.* at 242-43.
- ***Milliken v Green*** presents the only instance in which the Attorney General and the Governor initiated the underlying case. 389 Mich 1, 10 (1972). They sought to test the constitutionality of the Michigan public school financing system under

the Equal Protection Clauses of the Michigan and United States Constitutions. *Id.* This Court originally accepted the request for certification, but later dismissed the request and vacated an opinion it issued "for the reason that the Court concludes that the request was improvidently granted." *Milliken v Green,* 390 Mich 389, 389 (1973). The Court did not explain why it changed its mind. However, in a concurring opinion, Justice Kavanagh twice noted that this case did not present "a concrete claim by either individual students or by school districts that they are suffering from particular specified educational inadequacies because of deficiencies in the school financing system." *Id.* at 392-93, 399 (Kavanagh, J., concurring).

- In ***W.A. Foote Memorial Hosp v Kelley***, the City of Jackson and a City-owned hospital sought to utilize the provisions of the Hospital Finance Authority Act to create a local authority. 390 Mich 193, 204-05 (1973). An agreement to transfer hospital facilities to the Authority was negotiated, but not consummated due to questions concerning the constitutionality of the Act and the proposed transfer. *Id.* at 205-06. The City filed a complaint seeking a declaratory judgment regarding the constitutionality of the Act. The Attorney General intervened, and the Governor requested that this Court certify the constitutional question. *Id.* at 206-07. This Court denied the request "without prejudice to recertification" after the trial court "decided the central issue of the constitutionality of the Act." *Id.* at 207.
- In ***Kratchman v City of Detroit*****,** the plaintiff filed suit against the City to enjoin the sale of bonds for development of a stadium in the Wayne County Circuit Court. 400 Mich 158, 162-63 (1977). The Court denied the Governor's request for early

determination of the question of whether the notice of intent to issue bonds was statutorily deficient but allowed the case to bypass the Court of Appeals on appellate review. *Id.* at 162-64.

- In ***Blue Cross Blue Shield of Michigan v Milliken***, Blue Cross brought a complaint for declaratory judgment against the Governor and Attorney General in the Ingham County Circuit Court challenging the constitutionality of the Nonprofit Health Care Corporation Reform Act and sought an injunction against its enforcement. 422 Mich 1, 9-10 (1985). Blue Cross argued that the Act impaired its public and private contractual rights and violated various constitutional provisions. *Id.* at 13. The Court accepted certification of multiple questions upon the Governor's request.

In each of the prior actions (where the question was certified) an actual case and controversy existed. Further, the Governor and the Attorney General intervened to support the Constitutionality of the existing statute. Neither prerequisite is present here. There is no pending case, no underlying dispute, no real party at interest, and no active challenge to the Constitutionality of the statute. Further, the Governor is not seeking to uphold the existing law but to have it declared unconstitutional. The difference is significant. The Governor and the Attorney General's duties are to uphold and enforce existing law. They do not make law and they cannot decide which laws they will follow. Laws are made by the Legislature. The Constitutionality of the laws is left to this Court given an actual case and controversy. Otherwise, the demarcation between the branches of government become blurred and a single elected official is allowed to determine which laws will be enforced. The Governor's current request is properly before the Legislature,

not the courts, which are currently without jurisdiction to adjudicate these claims.

A. The Governor's Claims are Justiciably Unripe

"The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *King*, 303 Mich App at 162 (quoting *Huntington Woods v Detroit*, 279 Mich App 603, 615 (2008)). "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Huntington Woods*, 279 Mich App at 615-16. "To determine whether an issue is justiciably ripe, 'a court must assess whether the harm asserted has matured sufficiently to warrant judicial intervention.'" *People v Robar*, 231 Mich App 106, 128 (2017) (quoting *People v Bosca*, 310 Mich App 1, 56 (2015)). Thus, the doctrine "requires that a party has sustained an actual injury to bring a claim." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553-54 (2017). "A party may not premise an action on a hypothetical controversy." *Id.*

Here, the underlying claims are hypothetical, contingent, and premised on future events. The Governor alleges that the United States Supreme Court *may* overturn *Roe v Wade*, the Michigan Legislature *may* choose not to amend, repeal, or otherwise revisit MCL 750.14, the Court of Claims' injunction in *Planned Parenthood may* by overturned, and the Defendant Prosecutors *may* prosecute abortion providers. None of these potential future events have accrued. Therefore, there is nothing any Michigan court is Constitutionally empowered to adjudicate.

Further, there is no actual plaintiff, no actual defendant, and no actual injury has been sustained. *Roe v Wade* has not been overturned, the Michigan Legislature has not been provided an opportunity to consider, amend, or adjust the existing statute, and none

of the Defendants have been asked to apply the statute, as written, in any theoretical criminal factual context. Indeed, none of the Defendants *can* currently enforce the statute due to the *Planned Parenthood* injunction. No one has been charged, no one is threatened with being charged, and no one has been injured. If every factual and legal contingency were removed and one or more Defendants participated in a prosecution, then an injured plaintiff stakeholder and defendant stakeholder would exist. The plaintiff (criminal defendant) could then challenge the application of the MCL 750.14 to his or her situation, the Attorney General could intervene (if she felt it necessary), and/or the Governor could request this Court allow the certification of these questions at that time. Presently, there is no controversy, no injury, and no stakeholder involved. This action is therefore not ripe for judicial review and must be dismissed.

B. The Governor's Claims are Moot

> It is universally understood by the bench and bar…that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. The only way a disputed right can ever be made the subject of judicial investigation is, first, to exercise it, and then, having acted, to present a justiciable controversy in such shape that the disputed right can be passed upon in a judicial tribunal, which can pronounce the right and has the power to enforce it.

League of Women Voters of Mich v Sec'y of State, 506 Mich 561, 580 (2020) (quoting *Anway*, 211 Mich at 610. "A moot case presents 'nothing but abstract questions of law which do not rest upon existing facts or rights.'" *T.M. v. M.Z.*, 501 Mich 312, 317 (2018). "And because 'Michigan courts exist to decide actual cases and controversies,' '[t]he question of mootness is a threshold issue that a court must address before it reaches the substantive issues of a case.'" *Can IV Packard Square, LLC v Packard Square, LLC*, 328

Mich App 656, 661 (2019) (quoting *In re Tchakarova*, 328 Mich App 172, 178 (2019)). See also *In re Smith*, 335 Mich App 514, 519 (2021) ("The courts of this state may only exercise the authority granted to them by Article VI of the 1963 Constitution. An essential element of that authority is that courts will not reach moot issues.") "The judiciary cannot simply scan the horizon for important legal issues to opine on – we address such issues only as they arise in the genuine controversies between adverse parties that come before us." *League of Women Voters*, 506 Mich at 599 n.60 (quoting *League of Women Voters of Mich v Sec'y of State*, 948 NW2d 70, 72 (2020) (Viviano, J., concurring)).

Here, the Governor's complaint below and request for certification to this Court are based on an "abstract legal question" which she implores the Court to certify because of its "importance." However, the Constitutional "violations" she envisions have not (and may never) come to pass. *Roe v Wade* remains the law under which all abortion rights are adjudicated. The Michigan statute has been interpreted consistent with and subject to the limitations of *Roe*. This Court cannot decide how the Michigan statute should be interpreted if *Roe* is overturned until *Roe* is overturned and a new pronouncement from the U.S. Supreme Court exists.

The question presented is an abstract legal question based on a hypothetical for which the Governor seeks an advisory opinion.[2] The obscurity in which it is presented --

[2] The Michigan Constitution does provide a process for the Governor and Legislature to seek this Court's opinion on the constitutionality of a statute, but it is confined to "solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." CONST. 1963, art. 3, § 8. See also MCR 7.308(B). The Convention opted not to allow advisory opinions whenever requested by the Governor or Legislature even though inclusion of such a grant "was, by at least one member of our Court, urged with considerable earnestness before the Convention's Committee on the Judicial Branch." *Beckett*, 378 Mich at 345 n.7 (Black, J., dissent to Order granting Governor's request for certification)

factually, legally and procedurally -- would require clairvoyance and prevents this Court from rendering a meaningful opinion regarding a pending controversy that would affect the rights of any potential litigant. Ultimately, the Governor asks this Court to overstep the authority granted to it in Article VI of the Michigan Constitution in order to address an alleged *potential* violation of the rights of others which may or may not happen in the future. The Complaint as alleged is legally moot and the Governor lacks the authority to adjudicate these claims on behalf of future hypothetical plaintiffs who are currently unaffected by existing law. This Court lacks jurisdiction to entertain or decide the issues as currently presented.

Finally, while the Governor has asserted this case presents an issue "of such public moment as to require early determination," it is not a legal question that is likely to evade judicial review such that it falls into the exception to the mootness doctrine. *See Smith*, 335 Mich App at 520 ("When a case presents an issue of public significance, and disputes involving the issue are likely to recur, yet evade judicial review, courts have held that it is appropriate to reach the merits of the issue even when the case is otherwise moot.") As discussed previously, if every potential factual and legal contingency the Governor anticipates came to pass and one or more Defendants participated in a prosecution, the person(s) prosecuted could then challenge the application of the MCL 750.14 to their situations. Such a case would present an actual "adversarial contest among competing interests" which the Courts would have the power to adjudicate. Where such an adversarial contest is not present, the case presents "a particularly poor vehicle for giving guidance to future litigants." *Smith*, 335 Mich App at 521-22.

C. The Governor Lacks Standing to Assert The Claims Below

"[A] litigant has standing whenever there is a legal cause of action" or the requirements of MCR 2.605 to seek a declaratory judgment are satisfied. *Lansing Bd of Educ*, 487 Mich at 372. If there is no legal cause of action, 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 or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id.*

Here, the Governor has not suffered any injury. Nor has she identified any "special injury or right, or substantial interest" that any prosecutor has "detrimentally affected in a manner different from the citizenry at large." Instead, the Governor asserts she has standing to bring these claims because she is authorized under Michigan's Constitution to "initiate court proceedings in the name of the state to enforce compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty, or right by any officer, department or agency of the state or any of its political subdivisions." CONST. 1963, art. 5, § 8. However, the actions she seeks to restrain have never been adjudicated to be Constitutional violations. Indeed, the Michigan Court of Appeals has held that "the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." *Mahaffey v Attorney General*, 222 Mich App 325, 339 (1997). This Court denied leave to hear that case, 456 Mich 948 (1998), and has never overruled it.

Furthermore, the Governor's Constitutional empowerment to initiate court proceedings to enforce compliance and/or restrain violations of the Constitution and laws of the State does not vest either her or the courts of this State with the power to throw

justiciability and jurisdiction laws out the window.

The basis for the underlying case is the Governor's request for a declaratory judgment pursuant to MCR 2.605 and injunctive relief. MCR 2.605(a) provides: "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." "An 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. Though 'a court is not precluded from reaching issues before actual injuries or losses have occurred,' there still must be 'a present legal controversy, not one that is merely hypothetical or anticipated in the future.'" *League of Women Voters*, 506 Mich at 586. "Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Govt v Atty Gen*, 243 Mich App 43, 55-56 (2000) (quoting *Recall Blanchard*, 146 Mich App at 121).

Likewise, there is no legal cause of action for injunctive relief where there has been no injury or damage to the person or persons asking for relief and/or based on mere conjecture and speculation that events *may* come to pass. *Johnson*, 330 Mich at 633-34 (1951) (quoting *Owosso,* 185 Mich 349 and *Roberts Tobacco Co*, 322 Mich at 525). Indeed, in a suit against a governmental agency, "a plaintiff generally may seek only injunctive or declaratory relief upon showing that the particular plaintiff has a clear, legally enforceable right that the particular defendant had a duty to protect." *MV v. State*, 307 Mich App 685, 701 (2014).

At this point, there is no actual controversy. Nor is this case based on the

enforcement of a "clearly established legally enforceable right." The Governor opposes MCL 750.14 and believes that it infringes on constitutional rights. The Court of Appeals has declared that there is no such constitutional right. Fearing that the Defendant Prosecutors will be bound to follow the statute and the Court of Appeals opinion, the Governor filed suit in the Oakland County Circuit Court seeking a declaratory ruling that the Court of Appeals did not accurately state the law, and that the prosecutors are not bound by it. She then asked this Court to certify the question based on that manufactured, hypothetical controversy.

The Governor's claims are not based on actual harm, but speculation as to how the Defendant Prosecutors will act if myriad contingent events come to pass. Unless or until those contingencies come to pass and a prosecutor acts to enforce the statute, there is no actual controversy. The Governor therefore does not have standing to seek the declaratory or injunctive relief requested in this case. She should not be permitted to manufacture a hypothetical controversy to obtain judicial review.

III. The Requirements of MCR 7.308(A) Have Not Been Met in This Case

The third question this Court posed is what is required under MCR 7.308(A), and, specifically, whether these questions are of "such public moment as to require an early determination." The answer to the first question is that the Governor may ask this Court to authorize the lower tribunal to certify a question only where "an action is proceeding involving a controlling question of public law, and the question is of such public moment as to require an early determination." MCR 7.308(A)(1). The answer to the second question is that those requirements have not been met in this case.

First, as argued in Section II above, actions may only "proceed" in the Michigan

courts when there is an actual controversy arising between adverse litigants. *Paquin*, 504 Mich at 139. In this case, there is none.

Second, though the Michigan courts have not defined "of such public moment," it is a common term utilized in many opinions of this Court and in a multitude of other jurisdictions. The through-line of these cases indicate that a case presents an issue of public moment "where what is at the heart of the problem is an alleged injury common to a substantial segment of the public." *Alameda Conservation Ass'n v State of Cal*, 437 F.2d 1087, 1097 (CA 9, 1971). *See also Landis v N Am Co*, 299 US 248, 256, 57 S Ct 163, 81 LEd 153 (1936) (A case of extraordinary public moment is one in which "great issues are involved, great in their complexity, great in their significance.")

Here, not only must the issues presented in the case be of public moment, but they must be "of *such* public moment" that this Court should not wait for the normal trial and appellate court procedures to be exercised before reviewing and opining. *See* MCR 7.308(A). As this Court noted in its Order, such cases have rarely arisen. Since 1963, such a situation has been found to exist only a handful of times: to consider the constitutionality of a recently enacted statute (*Beckett*), discrimination in the purchase and sale of private housing (*Beech Grove*), the use of tax bonds to build a stadium for the Detroit Tigers (*Alan*), and the constitutionality and construction of the Nonprofit Health Care Corporation Act, which affected the cost of healthcare (*BCBSM*).

In each case, a justiciable case was proceeding, and the answer would have affected a substantial segment of the public. Should all the issues the Governor apprehends come to pass, the issues presented in this case *may* become one of "such public moment" that immediate determination is necessary. However, currently, the

alleged injury is entirely hypothetical: *If* the United States Supreme Court overturns *Roe v Wade*, and *if* the *Planned Parenthood* injunction is lifted, and *if* the Michigan Legislature chooses not to amend, repeal, or otherwise revisit MCL 750.14, and *if* the Defendant Prosecutors prosecute abortion providers, then the Michigan Constitution will be violated (assuming, *arguendo*, that the Governor is correct that MCL 750.14 violates the Constitution). If any one of these contingencies *does not* come to pass, then the Constitution will not have been violated.

IV. While the Governor is not Entirely Prohibited from Questioning the Constitutionality of a Statute, if the Courts have Declared the Statute Constitutional, she is Required to Ensure it is Executed

The fourth question posited by this Court is "whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question." The answer to the question appears to be that the Governor is not restricted from calling a statute into question if there is reason to believe its enforcement would violate the Constitution. However, once the courts have opined that the law is constitutional, it is the Governor's duty to faithfully execute that law.

"Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed." *People ex rel. Sutherland v Governor,* 29 Mich 320, 324 (1874). "The governor shall take care that the laws be faithfully executed." CONST. 1963, art. 5, § 8. Furthermore, "[t]he governor may initiate court proceedings in the name of the state to enforce compliance with any

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

Defendant Lucido has been unable to find any law directly answering this Court's question concerning whether the Governor may only defend statutes, and not call them into question. However, there is some indication that the Governor's Article 5 § 8 constitutional power to initiate court proceedings to restrain violations of a constitutional right by any officer, department, or agency of the state and its political subdivisions would allow her to use the Executive Message process to test the constitutionality of a legislative act through a pending justiciable case.

In *Milliken v Green*, the Attorney General and the Governor brought a complaint against the State Treasurer and the Bloomfield Hills, Dearborn, and Grosse Pointe school districts seeking a declaratory judgment to test the constitutionality of the Michigan public school financing system on the grounds of violation of the equal protection clause of the Michigan Constitution. 389 Mich at 10. The Governor then requested this Court to allow the trial court to certify questions for early determination. *Id.*

Provision for and control of the State's public schools has been delegated to the State Legislature by the Constitution. CONST. 1963, art. 8, § 2; *Green*, 389 Mich at 13-15 (collecting cases). This Court originally granted the Governor's request and issued an opinion answering the certified questions. *Id.* This Court did not articulate any challenge to the Governor's ability to bring suit testing the constitutionality of the system in the original opinion. However, upon rehearing, the Governor's request for certification was dismissed and the prior opinions vacated "for the reason that the Court concludes that

the request was improvidently granted." *Green*, 390 Mich at 389. No reason was given. It stands to reason that if the Court had vacated the opinion because the Governor had no authority to test the constitutionality of a legislative act, it would have said so either in the majority or concurring opinion.

The Constitution charges the Governor with faithfully executing the laws of this State. It also gives the Governor the power to initiate court proceedings to restrain violations of a constitutional right. Thus, if the Governor believes a Constitutional right is being violated by a statute, he or she could appeal to the courts to decide the matter. *However*, once the courts of this state have opined that the statute is constitutional, the Governor is required by the Constitution to faithfully execute that law.

Here, the Michigan Court of Appeals has already held "the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." *Mahaffey*, 222 Mich App at 330. While the *Mahaffey* case was brought under the theory that abortion was protected by the Constitutional right to privacy, and not necessarily the right to due process or equal protection, the Court of Appeals' analysis applied to the Michigan Constitution in general. Specifically, the Court of Appeals explained:

> When the 1963 constitution was adopted, abortion was a criminal offense. See M.C.L. § 750.14; M.S.A. § 28.204. The drafters of a constitutional provision are presumed to have known the existing laws and to have drafted the provision accordingly. *Bingo Coalition for Charity–Not Politics v. Bd. of State Canvassers,* 215 Mich.App. 405, 412, 546 N.W.2d 637 (1996). Thus, we must presume that the drafters of the 1963 constitution were aware of the statutory prohibition against abortion. The fact that the 1963 constitution itself and the debates of the Constitutional Convention preceding the adoption of the constitution are silent regarding the question of abortion indicates that there was no intention of altering the existing law. We believe that the addition of a fundamental right to abortion to the constitution "would have been such a marked change in the law as to elicit major debate among the delegates to the Constitutional Convention as well as the public at large." *People v. Thompson,* 424 Mich. 118, 129, 379 N.W.2d 49 (1985).

> Furthermore, less than ten years after the adoption of the constitution, essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute. See *People v. Bricker,* 389 Mich. 524, 529, 208 N.W.2d 172 (1973). Under these facts, we cannot conclude that the intent of the people that adopted the 1963 constitution was to establish a constitutional right to abortion. See *Sitz, supra; Pfeiffer, supra.*

Mahaffey, 222 Mich. App. at 335–36. This Court denied leave to hear an appeal of the *Mahaffey* case, 456 Mich 948 (1998), and has never overruled it.

At this point, the legislative branch has enacted a law, and the judicial branch has declared it constitutional. The executive branch must now see that it is executed unless or until this Court overrules *Mahaffey*. *See Sutherland*, 29 Mich at 324.

V. The United States Supreme Court's Decision in Dobbs v Jackson Women's Health Organization May Serve as Persuasive Authority to this Court and Should be Decided Before the Questions Posed in this Case

Finally, this Court asks whether the questions posed in this case should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here. The answer to the first question is if this Court is inclined to certify these questions, it should wait to answer them until after *Dobbs* is decided. The answer to the second question is that while *Dobbs* may not be binding as far as this Court's interpretation of what rights the Michigan Constitution does and does not protect, it may serve as persuasive authority. Furthermore, depending on the outcome of *Dobbs*, it may restrain how the Michigan Constitution and statutory provisions may be enforced.

In *Dobbs*, the U.S. Supreme Court granted certiorari to answer the question of whether all pre-viability prohibitions on elective abortions are unconstitutional. A draft

opinion leaked to the press indicates that the U.S. Supreme Court *may* decide that the United States Constitution neither protects nor prohibits abortion, overturning *Roe v Wade*. If that happens, the question of whether and to what extent abortion should be regulated or prohibited will be a question for each state's legislature, thus potentially bringing MCL 750.14 into play as enacted.

However, the leaked opinion is a draft. Until the U.S. Supreme Court issues its opinion, it is impossible to confirm whether this draft opinion will stand in whole or in part, and if it does, whether it will be a majority opinion, a plurality opinion, a concurring opinion, or even a dissenting opinion.

"In interpreting [the Michigan] Constitution, [this Court is] not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." *People v Tanner*, 496 Mich 199, 221, (2014) (citing *People v Goldston,* 470 Mich 523, 534 (2004)) "[T]he courts of this state should reject unprincipled creation of state constitutional rights that exceed their federal counterparts. On the other hand, our courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so." *Sitz v Dep't of State Police*, 443 Mich 744, 763 (1993). Thus, while the *Dobbs* opinion would not be binding on this Court's interpretation of the Michigan Constitution, it should be considered and analyzed to ensure that this Court is not participating in an "unprincipled creation of state constitutional rights that exceed their federal counterparts." As such, it may serve as persuasive authority for this Court to rely upon in interpreting the Michigan Constitution.

Furthermore, while state courts may interpret state constitutional provisions to

provide greater protections to individual rights than the federal constitution, the opposite is not always true.

> When there is a clash of competing rights under the state and federal constitutions, the Supremacy Clause, art. IV, cl. 2, dictates that the federal right prevails. Where a right is given to a citizen under federal law, it does not follow that the organic instrument of state government must be interpreted as conferring the identical right. Nor does it follow that where a right given by the federal constitution is not given by a state constitution, the state constitution offends the federal constitution. It is only where the organic instrument of government purports to deprive a citizen of a right granted by the federal constitution that the instrument can be said to violate the constitution.

Sitz, 443 Mich at 760. This Court is "duty bound under the Michigan Constitution to preserve the laws of this State and to that end to construe them if we can so that they conform to federal and state constitutional requirements." *People v Bricker,* 389 Mich 524, 528 (1973). The Governor assumes (1) that the U.S. Supreme Court will overturn *Roe*, and (2) that this Court will agree that the Michigan Constitution protects the right to abortion. Neither is assured at this point.

If *Dobbs* overturns *Roe*, this Court is not bound to follow and interpret the Michigan Constitution similarly. It may, however, find the Supreme Court's reasoning and analysis persuasive in deciding the question. If *Dobbs* upholds *Roe*, on the other hand, the Michigan Constitution and statutes cannot be enforced to deny that federal Constitutional right. *See Bricker,* 389 Mich at 527 (declaring that the Supremacy Clause requires MCL 750.14 to be read so as not to offend the federal constitutional right recognized in *Roe v Wade*) This Court cannot know whether such a federal right will continue to exist until the U.S. Supreme Court decides *Dobbs.* Therefore, if this Court is inclined to grant review, it should wait to answer the questions posed until after the United States Supreme Court issues its decision in *Dobbs.*

CONCLUSION AND RELIEF REQUESTED

Defendant PETER J. LUCIDO respectfully requests this Honorable Court deny the Governor's request that this Court direct the Oakland County Circuit Court to certify the questions of law presented here.

Respectfully Submitted,

Cummings, McClorey, Davis & Acho, P.L.C.

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Dated: June 8, 2022

PROOF OF SERVICE

I hereby certify that on June 8, 2022, I electronically filed the foregoing paper with the Clerk of the Court and all attorneys of record via MiFILE TrueFiling, which will send notification of such filing to all attorneys of record.

I declare that the statement above is true to the best of my information, knowledge and belief.

/s/ Tara Lange

Exhibit A

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.

2022-193498-CZ

Case No. 22- -CZ

Hon. JUDGE D. LANGFORD MORRIS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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

INTRODUCTION

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

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

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

4. In 1973, the Michigan Supreme Court construed the statute to avoid its unconstitutionality under federal law by exempting abortions protected under the then recently decided *Roe v Wade*, 410 US 113 (1973). See *People v Bricker*, 389 Mich 524, 529–530 (1973). In the Court's words, the statute must be construed "to mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment to preserve the life or health of the mother." *Id.*

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

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

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

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

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

PARTIES

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

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

12. Defendants are the Prosecuting Attorneys in counties where providers offer abortion care. As Prosecuting Attorneys, Defendants are required to "appear for the state or county, and prosecute or defend in all courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested." MCL 49.153. As such, Defendants are charged with prosecuting violations of MCL 750.14. Defendants are sued in their official capacities.

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

26. Jurisdiction is conferred on this Court by Article 5, § 8 of the Michigan Constitution, which provides, "The governor may initiate court proceedings in the name of the state to enforce compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its political subdivisions."

27. The Governor's claims for declaratory and injunctive relief are authorized by MCR 2.605(A), as well as by the general equitable powers of this Court. A declaratory judgment is necessary to "sharpen[ ] the issues raised" by this action and guide Michiganders' future conduct in order to preserve their constitutional rights. *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012). "[B]y granting declaratory relief in order to guide or direct future conduct,

courts are not precluded from reaching issues before actual injuries or losses have occurred." *Id.*

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

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

FACTUAL ALLEGATIONS

30. On its face, MCL 750.14 is a sweeping prohibition on abortion. The statute, by its terms, deprives Michigan residents of a safe and necessary medical procedure by making it a felony for "[a]ny person" to "wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or . . . employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman." MCL 750.14.

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

A. The History of MCL 750.14

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

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

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

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

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

37. The 1846 law provided that "[e]very person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ an instrument or other means whatever, with intent

thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment." 1846 RS, ch 153, § 34.

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

39. After Michigan enacted this statute, the movement against abortion only grew. Physicians launched a concerted effort to restrict abortions and increase criminal penalties, largely motivated by a desire to keep women in their "natural" place as mothers in the home. Physicians asserted that abortion undermined the

fundamental relationship between men and women, "as a willingness to abort signified a wife's rejection of her traditional role as a housekeeper and child raiser." *Abortion in America*, p 108.

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

41. Michigan physicians also championed restrictions on women's ability to decide to postpone childbirth or to limit the size of their families. In an 1881 report by Michigan's State Board of Health, the Special Committee on Criminal Abortion wrote that "to take away the responsibility of motherhood is to destroy the greatest bulwarks of female virtue." Cox, Hitchcok, French, Michigan State Board of Health, Ninth Annual Report of the Secretary, 166 (1881). And in the Peninsular Journal of Medicine, Detroit doctor J.J. Mulheron lamented the willingness of women to seek abortions. "[T]he maternal affections have apparently lost much of their old-time intensity. Time was when it was a wife's proudest ambition to present her husband with a large family of healthy, rollicking children. . . . Time

was when sterility was the greatest misfortune which could befall a woman, but now-a-days the barren woman is an object of envy." Mulheron, *Foeticide*, The Peninsular Journal of Medicine, 387 (Sept 1874).

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

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

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

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

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

46. The Michigan Supreme Court has addressed the scope of MCL 750.14 in only three cases—most recently in 1973, the same year that *Roe v Wade*, 410 US 113 (1973), was decided.

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

48. The other two cases followed the United States Supreme Court's 1973 decision in *Roe*, which held that the Due Process Clause does not permit a state criminal abortion statute that, like MCL 750.14, "excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved." 410 US at 164. *Roe* further held that: (1) during the first trimester, "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," *id.*; (2) during the second trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health," *id.*; and (3) "[f]or the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," *id.* at 164–165.

49. In one post-*Roe* challenge to MCL 750.14, *Bricker*, the Michigan Supreme Court construed the statute to avoid its patent unconstitutionality under

the U.S. Constitution. Specifically, the court held that, in light of *Roe*, MCL 750.14 did not apply to "abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in [the] exercise of his medical judgment." *Bricker*, 389 Mich at 527. And it held that MCL 750.14 did not apply to abortions after viability "where necessary" in the physician's "medical judgment to preserve the life or health of the mother." *Id.* at 530. But, the Court said, the statute could criminalize abortions performed by anyone other than licensed physicians even under *Roe*. *Id.* at 531.

50. In the other post-*Roe* challenge, the Michigan Supreme Court explained, "[b]y reason of *Roe v Wade*, we are compelled to rule that as a matter of federal constitutional law, a fetus is conclusively presumed not to be viable within the first trimester of pregnancy." *Larkin v Calahan*, 389 Mich 533, 542 (1973).

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

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

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

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

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

55. A few years later, in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992), the Court limited the due process right recognized in *Roe*. The Court held that states can regulate pre-viability abortions (i.e. abortions in the first and second trimesters) so long as the regulation does not impose an "undue burden" on the right to choose, while reaffirming *Roe*'s holding

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

56. Over time, the Supreme Court has substantially eroded *Casey*'s "undue burden" standard and upheld numerous, onerous restrictions on abortion. For example, the Supreme Court has upheld a federal ban on intact dilation and evacuation abortions. *Gonzales v Carhart*, 550 US 124, 133 (2007). The Court also has held that states can restrict the performance of abortions to licensed physicians. *Mazurek v Armstrong*, 520 US 968, 975–976 (1997) (per curiam). And amid the coronavirus pandemic, before vaccines were widely available, the Court allowed the federal government to enforce an in-person requirement to receive mifepristone, one of the drugs used for medication abortions. *FDA v American College of Obstetricians & Gynecologists*, __ US __; 141 S Ct 578 (2021).

57. The Sixth Circuit has taken a particularly aggressive stance against the federal abortion right. It has upheld a state law that prohibits a doctor from performing an abortion if the doctor knows that the woman elected to have an abortion after learning that the child would have Down syndrome. *Preterm-Cleveland v McCloud*, 994 F3d 512, 517 (CA 6, 2021). And it has upheld a state law

requiring doctors to provide women with certain information at least 48 hours before performing an abortion (except in cases of medical emergency). *Bristol Reg'l Women's Ctr, PC v Slatery*, 7 F4th 478, 481 (CA 6, 2021).

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

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

60. The Michigan Supreme Court has never considered whether *Bricker*'s construction of MCL 750.14 incorporates the substantial erosion of the federal right to abortion, creating uncertainty on the continued availability of a medically necessary procedure in Michigan. For example, could a court construe MCL 750.14 as making it a crime for a doctor to provide an abortion without providing the woman with certain information at least 48 hours before performing an abortion? Or for a doctor to provide an abortion if she knows that the woman requested the procedure after learning that the child would have Down syndrome? Similarly, could a court construe MCL 750.14 as criminalizing failure to comply with other Michigan abortion regulations, such as the requirement that providers show the patient a depiction, illustration, or photograph and description of a fetus at the gestational age nearest to that of the patient, MCL 333.17015(3)(c), or the requirement that minors receive written consent of a parent, MCL 722.903, or petition for a waiver of parental consent, MCL 722.904, ahead of their procedure?

61. The question of how to construe MCL 750.14 in light of changing federal law, and whether Michigan residents may seek a medically safe and

necessary procedure is pressing now, and may soon become even more so because of the U.S. Supreme Court's imminent decision in *Dobbs*.

C. Abortion in Michigan Today

62. Abortion is a medically safe and necessary procedure. Approximately one in four women in the United States will have an abortion by age 45. Jones & Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States*, 2008–2014, 107 Am J Pub Health 1904, 1907 (Dec 2017).

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

64. Complications from abortion are much less frequent than complications arising during childbirth. National Academies at p 11. The risk of death subsequent to a legal abortion is just a fraction of the risk of death for childbirth (0.7 per 100,000 compared to 8.8 per 100,000). *Id.* at pp 74–75. One study found that the risk of death associated with childbirth is approximately fourteen times higher than that with abortion. Raymond & Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215 (Feb 2012). Abortion-related mortality is also lower than that for colonoscopies, plastic surgery, and adult tonsillectomies. National Academies at pp 74–75.

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

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

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

68. The denial of abortion harms Michigan women. Women who are denied an abortion must endure comparatively greater risks to their health from

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

continued pregnancy and childbirth, may lose educational opportunities, may face decreased opportunities to advance their careers, and are more likely to experience economic insecurity and raise their children in poverty. And if Michiganders are required to seek abortions outside the state, they would face substantially greater expenses and lost income from time away from work or home.

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

70. Women who are denied access to safe and legal abortions will still terminate unintended pregnancies, possibly through unsafe methods. Those who are forced to carry their pregnancies to term face risks in childbirth, and these risks are greater for women of color, especially Black women. Reducing or eliminating access to legal abortion, then, will increase pregnancy-related deaths. See Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, Demography (2021).

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

reproductive healthcare. They deserve to make their own decisions about relationships, partnerships, employment, education, healthcare, and family planning without restrictive laws that put their health and well-being at risk. They deserve freedom and autonomy over their bodies and futures.

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

73. These 27 providers provide abortions in the face of a number of burdensome and medically unjustified regulations that Michigan state law imposes in spite of the safety of abortion procedures. For example, an outpatient facility that performs 120 or more abortions per year and publicly advertises outpatient abortion services must be licensed as a freestanding surgical outpatient facility. MCL 333.20115(2). And each freestanding surgical outpatient facility must have an agreement with a nearby licensed hospital to provide for emergency admission of patients. MCL 333.20821I. See generally State Facts About Abortion: Michigan, Guttmacher Institute (Jan 2022).

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

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

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

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

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

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

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

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

81. The right to privacy has a long pedigree in Michigan. The Michigan Supreme Court has "recognized privacy to be a highly valued right" since 1881. *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich 465, 504 (1976), citing *De May v Roberts*, 46 Mich 160 (1881). The Due Process

Clause in the 1963 Constitution provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. This clause includes a right to privacy. See, e.g., *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich at 504 ("No one has seriously challenged the existence of a right to privacy in the Michigan Constitution . . . .").

82. The right to privacy is also guaranteed by the Unenumerated Rights Clause, which protects rights retained by the people that are not otherwise enumerated in the Michigan Constitution. Const 1963, art 1, § 23. *See* 2 Official Record, 1961 Constitutional Convention, p 3365 (stating that § 23 is "taken from the 9th amendment to the U.S. Constitution" and "recognizes that no Declaration of Rights can enumerate or guarantee all the rights of the people"); see also *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich at 505 (recognizing a right to privacy in art. 1 of the Michigan Constitution, analogous to the federal right derived, in part, from the Ninth Amendment).

83. The right to bodily integrity, a component of the right to privacy, protects against "compelled intrusion into the human body." *Missouri v McNeely*, 569 US 141, 159 (2013). " '[N]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' " *Mays v Snyder*, 323 Mich App 1 (2018) (quoting *Union Pacific R Co v Botsford*, 141 US 250, 251 (1891)), *aff'd Mays v Governor of Michigan*, 506 Mich 157 (2020); cf. *Schmerber v California*, 384

US 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society.").

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

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

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

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

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

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

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

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

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

92. The Equal Protection Clause "requires that all persons similarly situated be treated alike under the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318 (2010). "When reviewing the validity of

state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity." *Id.*

93. Where legislation creates a classification based on gender, it is subject to an intermediate level of scrutiny ("heightened scrutiny"). *People v Idziak*, 484 Mich 549, 570 (2009). "Under th[e heightened scrutiny] standard, a challenged statutory classification will be upheld only if it is substantially related to an important governmental objective." *Phillips v Mirac, Inc*, 470 Mich 415, 433 (2004).

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

95. MCL 750.14 is a sex-based classification.

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

REQUEST FOR RELIEF

For these reasons, Governor Whitmer respectfully requests that this Court:

A. Declare that the Due Process Clause of the Michigan Constitution protects the right to abortion.

B. Declare that MCL 750.14 violates the Due Process Clause of the Michigan Constitution.

C. Declare that MCL 750.14 violates the Equal Protection Clause of the Michigan Constitution.

D. Enjoin Defendants from enforcing MCL 750.14.

Respectfully submitted,

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Exhibit B

Order

Michigan Supreme Court
Lansing, Michigan

May 20, 2022

164256 & (3)(7)(8)(9)(10)(15)

In re EXECUTIVE MESSAGE OF THE GOVERNOR REQUESTING THE AUTHORIZATION OF A CERTIFIED QUESTION.

(GRETCHEN WHITMER, Governor v JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, *et al*.)

SC: 164256

_____/

On order of the Court, the motions for immediate consideration and motions for leave to respond or reply are GRANTED. The Executive Message of the Governor pursuant to MCR 7.308(A)(1) was received on April 7, 2022, requesting that this Court direct the Oakland Circuit Court to certify certain questions for immediate determination by this Court. Having received responses from several county prosecutors, as well as amici briefs, we direct the Governor to file a brief with this Court within 14 days of the date of this order, providing a further and better statement of the questions and the facts. MCR 7.308(A)(1)(b). Specifically, the Governor shall address: (1) whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination; (2) whether there is an actual case and controversy requirement and, if so, whether it is met here; (3) given the infrequent application of the Executive Message process by current and former governors, what is required under MCR 7.308(A) and, specifically, whether the question is of "such public moment as to require an early determination"; (4) whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question; and (5) whether the questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here.

The county prosecutors may file responsive briefs. Amici who have filed briefs with the Court to date are invited to file supplemental briefs addressing the questions identified in this order. Other persons or groups interested in the determination of the

issues presented in this case may move the Court for permission to file briefs amicus curiae. All responsive and amicus curiae briefs shall be filed within 14 days of the Governor's brief.

The Executive Message, motion to intervene, and motion to dismiss remain pending.

BERNSTEIN, J. (*concurring*).

Given the gravity of the issues presented in this case, I believe we should strive to open the courtroom doors to as many voices as possible. In the interest of fairness, I strongly prefer to allow the county prosecutors, as well as any other persons or groups interested in these issues, the same two-week briefing period that we are giving the Governor. While I believe an expedited briefing schedule is warranted under the circumstances, the schedule we have set in our order balances our interest in timely considering these issues while giving everyone a full and fair opportunity to participate.

CAVANAGH, J. (*concurring in part and dissenting in part*).

I join the Court's order granting further briefing in this case on these important threshold procedural questions. I dissent only with regard to the briefing schedule. Given the potential urgency underlying the issues in this case, I would have ordered that the supplemental briefing be completed within two weeks. If the injunction issued by the Court of Claims gives the Governor the relief she seeks, the timing will not matter. If not, and if this Court believes we should grant the Governor's request to authorize the circuit court to certify the questions posed by the Governor in the pending lawsuit, the schedule the majority has set here may leave insufficient time to determine the merits of the case. Although I echo Justice BERNSTEIN's sentiment that we should strive to allow all interested persons the opportunity to have their voices heard, operating on an expedited basis—as we are often called on to do—in no way closes the courtroom doors to any interested voices. Because I believe the Court's order today fails to treat this case with the urgency it deserves, I respectfully dissent from the majority's refusal to expedite this supplemental briefing schedule.

MCCORMACK, C.J., and WELCH, J., join the statement of CAVANAGH, J.

Exhibit C

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.

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[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.*

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[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