

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

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

Supreme Court No 164656
Court of Appeals No 361470
Court of Claims No 22-000044-MM

Plaintiffs.

**BRIEF OF AMICUS CURIAE
GOVERNOR GRETCHEN WHITMER**

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INTEREST OF AMICUS CURIAE

Gretchen Whitmer is the Governor of Michigan. Under the Michigan Constitution, “the executive power is vested in the governor” and “the governor shall take care that the laws be faithfully executed.” Const 1963, art 5, §§ 1, 8.

INTRODUCTION

The state of Michigan law governing abortion is currently changing by the day and even by the county, a precariousness that carries very real and irreparably damaging consequences for Michiganders' rights and health. Since shortly after last month's issuance of *Dobbs v Jackson Women's Health Organization*, 597 US ____ (2022), the criminal prohibition of abortion in MCL 750.14 has been enjoined statewide because of the Court of Claims' preliminary injunction in *Planned Parenthood of Michigan v Attorney General*. Opinion and Order, Court of Claims, entered May 17, 2022 (Docket No. 22-000044-MM). Under that order, the Attorney General and the county prosecutors were bound not to enforce the criminal abortion statute, MCL 750.14.

That temporary stability crumbled on August 1, when the Court of Appeals determined that the county prosecutors were not bound by that injunction. Immediately, healthcare providers halted rendering abortion services; others could not advise their patients whether their appointments in the coming days could be honored. That uncertainty persists despite Governor Whitmer's successful motion for a temporary restraining order (TRO) in the Oakland Circuit Court in a similar case. Oakland Cir Ct No. 22-193498-CZ.¹ That TRO only governs the defendants in that case—thirteen prosecutors whose counties have standalone facilities that offer abortion care. Not only does the threat of criminal prosecution hover over abortion

¹ An Executive Message from the Governor remains pending before this Court in Docket No. 164256.

care in the rest of Michigan's 83 counties, the threats of prosecution from several of those covered counties have also caused massive confusion among healthcare professionals about whether caring for their patients could mean felony charges. Even the islands of protection currently offered by the TRO are not firm enough to ensure the provision of abortion care for pregnant women and to protect their constitutional rights.

This Court should put the law back on a stable foundation until it can answer whether the Michigan Constitution protects the right to abortion or requires invalidation of MCL 750.14. Otherwise, this whipsaw could continue for the foreseeable future, with lifechanging medical decisions dependent on the state of the law that day of the week. Granting Planned Parenthood's motion to stay would restore calm to make way for proper consideration of the important constitutional issues concerning abortion.

This Court should immediately grant Planned Parenthood's motion to stay the Court of Appeals' order limiting the scope of the Court of Claims' preliminary injunction.

BACKGROUND AND ARGUMENT

On April 7, 2022, the Governor filed a complaint in the Oakland Circuit Court, seeking to protect Michiganders’ constitutional right to abortion and to strike down Michigan’s criminal abortion statute, MCL 750.14. She also filed an Executive Message with this Court, asking it to certify the constitutional questions presented. That same day, Planned Parenthood of Michigan and Dr. Sarah Walleit filed suit in the Michigan Court of Claims, seeking similar relief.

On May 17, 2022, the Court of Claims preliminarily enjoined the Attorney General and all county prosecutors (including Defendants) from enforcing MCL 750.14, holding that the statute likely violated the Michigan Constitution’s Due Process Clause and would result in irreparable harm if not enjoined. *Planned Parenthood of Michigan, et al v Attorney General of the State of Michigan*, unpublished opinion and order of the Court of Claims, issued May 17, 2022 (Docket No. 22-000044-MM).

On August 1, 2022, the Michigan Court of Appeals issued an order holding that the injunction issued by the Court of Claims in the *Planned Parenthood* case “does not apply to county prosecutors” because “jurisdiction of the Court of Claims does not extend to them.” *In re Jarzynka*, unpublished order of the Court of Appeals, issued August 1, 2022 (Docket No. 361470), pp 3, 5 (attached as App’x A). The Court of Appeals did not otherwise disturb the decision of the Court of Claims—including that MCL 750.14 likely was unconstitutional and its enforcement would cause irreparable harm—and the Attorney General remains bound by the Court of Claims’ injunction. The Court of Appeals’ technical ruling regarding the Court of

Claims’ jurisdiction, however, cleared a path for county prosecutors to begin enforcing the criminal abortion statute in full, which several such prosecutors have publicly said they mean to do. And health-care providers in Michigan, in turn, suddenly faced the prospect of having to choose whether to continue offering critical and time-sensitive health-care services to women in Michigan or to potentially face criminal prosecution.

The Governor took action in response that same day, moving the Oakland Circuit Court on August 1 for a temporary restraining order against enforcement of MCL 750.14 in *Governor v Linderman* (Docket No. 22-193498-CZ). The circuit court granted the request by the end of that day, “order[ing] that Defendants must [r]efrain from enforcing MCL 750.14 until further Order of the Court.” Unpublished order of the Oakland County Circuit Court, issued August 1, 2022 (Docket No. 22-193498-CZ) (attached as App’x B). Thus, for the time being, the thirteen county prosecutors named as Defendants in that case are prohibited from enforcing the criminal abortion statute.

The rapid churn of these lower-court rulings over the course of August 1—a single day—was enough to plunge Michiganders into a state of confusion and uncertainty about what their rights and healthcare options may be, and how those answers may change from one county in the state to the next. See, e.g., “Where Michigan stands after a tumultuous day for abortion rights,” *Detroit Free Press*, August 2, 2022 (“It was the most tumultuous day for abortion rights in Michigan since late June, when the U.S. Supreme Court overturned the national right to an

abortion by reversing *Roe v. Wade*.”);² “Michigan abortion ban is — then isn’t — in effect after two court rulings,” *Bridge Michigan*, August 2, 2022 (“It was a head-spinning day on an issue that was thrown into uncertainty after the U.S. Supreme Court overturned *Roe vs. Wade* in June and left the legality of abortion to individual states.”).³

Even after the circuit court’s issuance of the TRO, providers across the State were left scrambling, unsure whether their job may now involve committing a felony. “They came to Michigan for an abortion. Now, that’s uncertain too,” *Michigan Radio*, August 1, 2022 (“uncertainty” because of the Court of Appeals August 1 order, “still plagued providers Monday evening, after an Oakland Circuit judge issued a temporary restraining order at about 5 p.m. . . . And several clinicians said the legal limbo couldn’t have come at a worse time”).⁴ For example, “doctors at the University of Michigan had to tell patients they had no idea if they’d be able to get the abortions they were scheduled for.” *Id.* And Northland Family Planning Centers announced that they will, for now, stop providing abortion care at their Macomb County clinic given Defendant Macomb County Prosecutor Lucido’s pledge to prosecute. *Id.*

² <<https://www.freep.com/story/news/politics/2022/08/02/michigan-abortion-rights/10206131002/>> (last accessed August 3, 2022).

³ <<https://www.bridgemi.com/michigan-government/michigan-abortion-ban-then-isnt-effect-after-two-court-rulings>> (last accessed August 3, 2022).

⁴ <<https://www.michiganradio.org/criminal-justice-legal-system/2022-08-01/they-came-to-michigan-for-an-abortion-now-thats-uncertain-too>> (last accessed August 3, 2022).

And even before the developments on August 1, the judiciary itself illustrated the need for this Court's intervention. In a case concerning whether a circuit court had jurisdiction to hear a minor child's request for waiver of parental consent to an abortion under MCL 722.901 *et seq.*, Michigan Court of Appeals judges were at odds about the legal status of MCL 750.14. Compare *In re AST Minor*, published order of the Court of Appeals, issued July 29, 2022 (Docket No. 362349) (Riordan, P.J., concurring) ("Therefore, MCL 750.14 remains valid law in Michigan. It merely is enjoined from being enforced on a temporary basis by the public officials identified in the preliminary injunction"), with *id.* (GARRETT, J., concurring in judgment only) ("[T]he Presiding Judge erroneously asserts that 'because MCL 750.14 remains valid law in Michigan, the PRRA prohibits any abortion that is prohibited by MCL 750.14.' This understanding of the effect of the Court of Claims' preliminary injunction is untenable. The Presiding Judge's concurrence ignores that MCL 750.14 is currently unenforceable based on a binding court order finding that its enforcement violates a woman's fundamental due-process right to bodily integrity.") (attached as App'x C).

Throughout our state, Michiganders need assurance that their constitutional rights are intact and will be respected by the courts; women need confidence that they can safely access reproductive health care just as they have been able to do for decades; doctors and nurses need certainty that they can continue to provide that care without facing criminal prosecution and jail time; and the bench and bar need clarity about the state of the law. So long as the present state of uncertainty

persists, it will work to deny Michiganders their rights under the Michigan Constitution and have profound and irreversible consequences on their lives.

CONCLUSION AND RELIEF REQUESTED

The Governor respectfully requests this Court grant the emergency motion of Planned Parenthood of Michigan and Dr. Sarah Walleit to issue an order staying the Court of Appeals' decision limiting the scope of the Court of Claims' preliminary injunction.

Respectfully submitted,

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