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

Defendants.

Oakland Circuit Court No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

GOVERNOR GRETCHEN WHITMER'S MOTION FOR PRELIMINARY INJUNCTION

This case involves a claim that state governmental action is invalid

GOVERNOR GRETCHEN WHITMER'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Governor Gretchen Whitmer, on behalf of the State of Michigan, brings this motion for a preliminary injunction pursuant to MCR 3.310. A preliminary injunction is necessary to prevent irreparable injury before the courts can resolve the merits of the Governor's lawsuit challenging the constitutionality of MCL 750.14, a near-total ban on abortion. For these

reasons, and as set forth more fully in the brief in support of this motion, the Governor respectfully requests that the Court enter a preliminary injunction enjoining Defendants from enforcing MCL 750.14 until further order of the Court.

In accordance with Local Rule 2.119, undersigned counsel has made personal contact with counsel for defendants on August 10, 2022, requesting concurrence in the relief sought in this motion. Counsel for defendants Jarzynka and Becker have denied concurrence. Counsel for defendants Getting, Siemon, Savit, Leyton, McDonald, and Worthy concur in the relief requested. Counsel for other defendants have not responded to the request as of the time of filing.

Dated: August 10, 2022

Respectfully submitted,

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GOVERNOR GRETCHEN WHITMER'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

This case involves a claim that state governmental action is invalid

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ORAL ARGUMENT REQUESTED

INTRODUCTION

MCL 750.14 criminalizes abortion from the first moment of a pregnancy. It contains no exception other than for abortions "necessary to preserve the life" of the mother. *Id.* It makes it a felony for a physician to provide an abortion even in cases of rape, incest, fetal anomalies, or risk of substantial and irreversible physical harm to the woman. The statute denies Michiganders their fundamental constitutional right to make the intimate, personal, and profound decision whether to bear a child. And it does so with the unconstitutionally discriminatory purpose of forcing women to perform the traditional sex role of motherhood. The criminal abortion ban thus violates the Michigan Constitution's Due Process and Equal Protection Clauses.

The Michigan Supreme Court has never addressed the validity of MCL 750.14 under the Michigan Constitution. Nonetheless, Michigan women have been able to exercise their right to abortion for nearly 50 years because of *Roe v Wade*, 410 US 113 (1973). The U.S. Supreme Court changed all that in *Dobbs v Jackson Women's Health Org*, 142 S Ct 2228 (2022), which overruled *Roe* and severely curtailed women's rights under the U.S. Constitution.

Absent an injunction to block MCL 750.14's enforcement under the Michigan Constitution, individuals and entities across the State will suffer irreparable harm. Women will again be relegated to second-class citizenship, prohibited from making their own free choices about whether and when to procreate—even when they are victims of rape or incest, and even when their health is imperiled. Health-care providers will face the threat of prosecution and serious professional and civil consequences for abiding by their oath. And State entities will suffer institutional harms as they attempt to carry out their duties in the face of an outright ban on necessary medical care. Defendant Prosecutors, on the other hand, will not be harmed by an injunction putting them in the same position they have been in for the preceding five decades.

For these reasons, Governor Whitmer seeks a preliminary injunction pursuant to MCR 3.310 prohibiting enforcement of MCL 750.14, pending this Court's determination of whether MCL 750.14 violates the Michigan Constitution.

STATEMENT OF FACTS

MCL 750.14 bans nearly all abortion in Michigan

MCL 750.14, enacted in its current form in 1931, makes 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." Violations are punishable by up to four years in prison. MCL 750.503.

Abortion at common law and the subsequent legislative restrictions

Under the common law, abortion of an unquickened fetus—that is, abortion before a woman perceives fetal movement—was not an offense. In 1898, our Supreme Court explained that "at the common law, it [was] no offense to attempt to produce an abortion upon a woman pregnant, but not with a quick child, with her consent." *People v Abbott*, 116 Mich 263, 265–266 (1898).[1]

Starting around 1840, there was a "dramatic surge of abortion in the United States after 1840 [which] was attributed . . . to the increasing use of abortion by white, married, Protestant, native-born women who either wished to delay their childbearing or already had all the children

[1] Courts across the country recognized this distinction, allowing abortions during the earlier part of pregnancy but permitting restrictions on later ones. See Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan L Rev 261, 281–282 (1992).

they wanted."[2] These women were viewed as "domestic subversives," and "many nineteenth-century physicians blamed the sudden willingness of married women in America to practice upon what twentieth-century writers would label consciousness."[3]

In response, states enacted stricter abortion restrictions than had existed at common law. Michigan passed its first criminal abortion statute in 1846. 1846 RS, ch 153, § 34, at 662. That law criminalized abortion at any stage in a pregnancy unless necessary to save the life of the woman, in language substantially similar to that of MCL 750.14. See *id.* At the same time, the Legislature enacted two provisions unique to abortions of "quickened" fetuses, imposing a greater penalty for a post-quickening abortion and an even greater penalty if a post-quickening abortion resulted in the death of the mother. See 1846 RS, ch 153, § 33, at 662; 1846 RS, ch 153, § 32, at 662. Despite this ban, Michigan women continued to obtain abortions. An 1881 State Board of Health report estimated that one third of pregnancies were terminated.[4] The report also said that "[t]he majority of people"—including "[l]egislators," "police officers," and "courts and jurors"—believe "there is no crime committed" when a woman ends her pregnancy before the "fourth month of pregnancy."[5]

In the years after Michigan enacted its first abortion ban, physicians launched a concerted effort to further restrict abortions and increase criminal penalties. These physicians were motivated in large part by a desire to keep women in their "natural" place as mothers in the home. Physicians asserted that abortion was "destroying American women physically and

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[2] Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* pp 46–47, 75–76 (1978). See also *id.* at 86–88, 90, 117–118.
[3] *Id.* at 105.
[4] *Ninth Annual Report of the Secretary of the State Board of Health of the State of Michigan for the Fiscal Year Ending Sept. 30, 1881: Report of Committee on Criminal Abortion* (1881), p 165.
[5] *Id.*

mentally, and, worst of all, undermining the basic relationships between them and men insofar as a willingness to abort signified a wife's rejection of her traditional role as a housekeeper and child raiser."[6] These physicians supported total abortion bans.

In 1931, the Legislature amended the criminal abortion statute, creating the version that exists today. The 1931 revision consolidated the abortion statutes, eliminated the distinction between an unquickened and quickened fetus in line with the efforts by physicians discussed above; made abortion a felony; and made the death of a woman from an abortion manslaughter. The 1931 Legislature had the same intent in enacting MCL 750.14 as the 1846 Legislature did. See *People v Nixon*, 42 Mich App 332, 337 (1972) ("[W]e find nothing to indicate that the intent of the legislature in 1931 was any different than that of the legislature in 1846.").

Abortions have been legal in Michigan since 1973

Our Supreme Court has addressed the validity of MCL 750.14 in only two cases, both after *Roe*. First, in *People v Bricker*, the Court construed the statute to avoid its then-patent unconstitutionality under the U.S. Constitution. 389 Mich 524 (1973). Specifically, *Bricker* held that, after *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 . . . ," *id.* at 527, and 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. Second, in *Larkin v Cahalan*, the 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." 389 Mich 533, 542 (1973). Thus, since 1973, all abortions in the first trimester and abortions necessary to preserve the life or health of the mother have been legal in Michigan.

[6] Mohr, *supra*, at p 108.

Abortion in Michigan today

Abortion is a common, safe, and medically necessary procedure. In the United States, approximately one in four women will have an abortion by age 45.[7] In 2020, a total of 29,669 induced abortions were reported in Michigan.[8] Complications arising from abortions are rare. Of the 29,669 abortions induced in 2020, just seven immediate complications were reported. The average three-year rate of complications between 2017 and 2019 was 3.5 per 10,000 induced abortions: just 0.035%.[9] The risk of death after a legal abortion is just a fraction of the risk of death from childbirth (0.7 per 100,000 compared to 8.8 per 100,000).[10]

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 grow their families. Some end pregnancies because of a severe fetal anomaly, or because they have become pregnant as a result of rape or incest. Some choose not to have biological children, and some end a pregnancy because they cannot financially support another child, or because continuing with a pregnancy could pose a significant risk to their health.

The criminal abortion ban's effect

If allowed to go into effect in full, MCL 750.14 would make it impossible to access legal abortion care in Michigan, except in the narrowest of circumstances. Providers will stop providing abortions in Michigan out of fear of criminal prosecution and other consequences.

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[7] Jones and Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am J Pub Health 1904, 1907 (Dec 2017).

[8] Michigan Dep't of Health & Human Servs, Induced Abortions in Michigan: January 1 through December 31, 2020 (June 2021), <https://www.mdch.state.mi.us/osr/abortion/Tab_A.asp>.

[9] Michigan Dep't of Health & Human Servs, Induced Abortions, at p 2.

[10] *Id.* at pp 74–75.

Michigan's criminal abortion ban therefore effectively eliminates the ability to obtain safe and legal abortions in Michigan.

This ban harms Michigan women. For many women, travel to another state may not be an option due to time and expense. This is particularly true of low-income women, who make up the majority of patients seeking abortions.[11] These patients are more likely to be subject to delays in seeking medical care because of costs. Those who can travel to another state will incur significant costs, including unpaid time off work, travel (airfare or hundreds of miles' worth of gas), lodging, and—for those who are already parents—childcare.

Those unable to obtain care out of state would be forced to either carry to term and give birth against their will—incurring irreparable physical, economic, emotional, and psychological harms—or resort to potentially unsafe methods of abortion.[12] Reducing or eliminating access to legal abortion will increase pregnancy-related deaths.[13] One study found that the risk of death associated with childbirth is approximately fourteen times higher than that with abortion.[14] These consequences will be disproportionately felt by communities of color. In 2020, 52.9% of

[11] See Natl Academies of Sciences, Eng & Medicine, *The Safety and Quality of Abortion Care in the United States*, 6 (2018).

[12] Natl Inst of Child Health & Human Dev, *What Are Some Common Complications of Pregnancy?*, <https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/complications> (identifying as "common complications of pregnancy" high blood pressure, gestational diabetes, infections, preeclampsia, preterm labor, depression and anxiety, pregnancy loss or miscarriage, and stillbirth); Zephyrin et al, *The staggering toll of complications related to pregnancy and childbirth*, STAT (Nov 23, 2021), <https://www.statnews.com/2021/11/23/staggering-toll-pregnancy-childbirth-related-complications>; *Severe Maternal Morbidity in the United States*, Centers for Disease Control and Prevention, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/severematernalmorbidity.html>.

[13] See Stevenson, *The Pregnancy-Related Morality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, Demography (2021).

[14] Raymond & Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215 (Feb 2012).

Michiganders who obtained abortions were Black, while the Black community represented only 12.4% of Michigan's population. And the maternal mortality rate in Michigan is significantly higher for Black women: Black women are 2.8 times more likely to die from pregnancy-related causes than white women. Women forced to carry pregnancies to term will also lose educational opportunities, face decreased opportunities to advance their careers, and are more likely to experience economic insecurity and raise their children in poverty.[15]

Procedural history

On April 7, 2022, Governor Whitmer filed a complaint in this Court, seeking to protect Michiganders' constitutional right to obtain abortions and to strike down Michigan's criminal abortion statute, MCL 750.14. Simultaneously, the Governor sent an executive message addressed to the Michigan Supreme Court, asking that Court to authorize certification of the questions raised in the complaint.

The same day, Planned Parenthood of Michigan and Dr. Sarah Wallett filed suit in the Michigan Court of Claims, seeking a declaration that MCL 750.14 is unconstitutional under the Michigan Constitution and requesting an injunction barring its enforcement. On May 17, 2022, the Court of Claims preliminarily enjoined MCL 750.14, finding a substantial likelihood that the statute violates Michigan's Due Process Clause and that irreparable harm would result if its enforcement were not enjoined. *Planned Parenthood of Mich v Attorney General*, May 17, 2022 (Docket No. 22-000044-MM) ("*Planned Parenthood*").

On June 24, 2022, the U.S. Supreme Court overruled *Roe* and *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992). See *Dobbs*, 142 S Ct at 2279.

[15] See Foster, *The Turnaway Study: The Cost of Denying Women Access to Abortion* (2020); Miller et al, *The Economic Consequences of Being Denied an Abortion*, National Bureau of Economic Research (Working Paper 26662 Jan 2022) p 36.

On August 1, 2022, the Court of Appeals issued an order in *Planned Parenthood* dismissing a complaint for superintending control by two local prosecutors (and named defendants in this case), Jerard Jarzynka and Christopher R. Becker, and two organizations. *In re Jarzynka*, unpublished order of the Court of Appeals, issued August 1, 2022 (Docket No. 361470). The court noted that "[b]ecause county prosecutors are local officials, jurisdiction of the Court of Claims does not extend to them[,]" and, thus, "Jarzynka and Becker are not and could not be bound by the Court of Claims' May 17, 2022 preliminary injunction[.]" *Id.* at 3, 5. The Court of Appeals did not otherwise disturb the decision of the Court of Claims.

However, several county prosecutors have publicly stated that they intend to enforce MCL 750.14, and the order by the Court of Appeals cleared a path for them to do so. In the immediate aftermath of the Court of Appeals' jurisdictional ruling, health-care providers in Michigan were forced to choose whether to continue offering health-care services to women or potentially face criminal prosecution, creating irreparable harm for women who need health care now. Governor Whitmer therefore filed an emergency motion for an *ex parte* temporary restraining order on August 1, 2022, which this Court granted the same day. The Governor now asks this Court to preliminarily enjoin county prosecutors from enforcing MCL 750.14.

ARGUMENT

In determining whether to issue a preliminary injunction, a court must consider four 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." *Mich AFSCME Council 25 v Woodhaven-*

Brownstown Sch Dist, 293 Mich App 143, 148 (2011) (citation omitted). All factors weigh in favor of the Governor.

I. Governor Whitmer will prevail on the merits.

Governor Whitmer is likely to prevail on the merits of her claim that the criminal abortion statute is unconstitutional. The Court of Claims already has held that MCL 750.14 is likely unconstitutional and that decision was left undisturbed by the Court of Appeals' order. This Court should hold the same.[16]

A. The Michigan Due Process Clause protects the fundamental right to abortion.

The Michigan Constitution's broad protections for individual liberties under Article I, Sections 17 and 23 include the right to abortion.

First, as the Michigan Supreme Court has acknowledged, the Michigan Constitution can—and does—provide greater protection for individual rights than the federal Constitution, including under Article I, Section 17. See, e.g., *Woodland v Mich Citizens Lobby*, 423 Mich 188, 202 (1985). Michigan courts are "obligated to interpret [their] own organic instrument of government," *Sitz v Dep't of State Police*, 443 Mich 744, 763 (1993), and are not bound to follow the U.S. Supreme Court's contraction—or elimination—of a corresponding federal right,

[16] Governor Whitmer anticipates that defendants opposing this motion will repeat their meritless challenges to justiciability. Governor Whitmer has previously responded to such challenges in this Court, and incorporates by reference that response here. (5/27/22 Opp to Def Lucido's Mot for Summ Disp.) By way of summary, the Governor has standing to bring this action on behalf of the State, as expressly authorized by article 5, § 8 of the Michigan Constitution. The claim is neither unripe nor moot because, in the absence of an injunction, the threat of enforcement of MCL 750.14 will *immediately* chill the constitutional right to an abortion. The fact that no Michigan appellate court has yet expressly recognized a constitutional right that protects abortion is no barrier to this suit, as article 5, § 8 is not limited to previously recognized constitutional rights. And the Governor is not prohibited from challenging the constitutionality of a statute merely because she has a duty to take care that the laws be faithfully enforced—after all, the Michigan Constitution is also state law, and it is that law that she seeks to enforce here.

see *id.* ("[O]ur courts are not obligated to accept what we deem to be a major contraction of citizen projections under our constitution simply because the United States Supreme Court has chosen to do so.").

Second, the Court of Claims correctly concluded that the right to bodily integrity likely protects the right to abortion. In *Mays v Governor of Michigan*, the Michigan Supreme Court first expressly recognized that the Michigan Constitution's Due Process Clause protects the right to bodily integrity, 506 Mich 157, 197 (2020), but courts in this State have long recognized that people should be protected against nonconsensual bodily intrusions by the government, see, e.g., *People v Corder*, 244 Mich 274, 287–289 (1928). Michigan has long recognized the related doctrine of informed consent, which includes "the right to be free from nonconsensual physical invasions," *In re Rosebush*, 195 Mich App 675, 680 (1992), and "the right not to consent," *In re Martin*, 450 Mich 204, 216 (1995). As "Michigan's own Blackstone, Justice Thomas M. Cooley," *People v Szalma*, 487 Mich 708, 716 (2010), wrote in his seminal torts treatise, "The right to one's person may be said to be a right of complete immunity; to be let alone." *Union Pacified R Co v Botsford*, 141 U.S. 250, 251 (1891) (quoting approvingly Cooley, Torts, 29)).

MCL 750.14's criminalization of nearly all abortions, regardless of the woman's health, needs, or circumstances, is an egregious invasion of the bodies of Michigan women. Through enforcement of this criminal abortion ban, the State effectively conscripts unwilling women to carry pregnancies to term, fundamentally altering their lives and bodies, and putting them at serious risk of harm. These are risks and disruptions many women voluntarily choose, but the State cannot force a woman to face those risks and disruptions when there are safer alternatives. As Judge Gleicher aptly explained, "[i]f 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." *Planned Parenthood*, at 22–23.

Third, the right to privacy also protects the right to abortion. Governor Whitmer recognizes that the Court of Appeals held otherwise in *Mahaffey v Attorney General*, 222 Mich App 325 (1997), and that that decision binds this Court. But Governor Whitmer respectfully submits that *Mahaffey* was erroneous and preserves this argument for appeal. And in any event, as Judge Gleicher correctly recognized, *Mahaffey* is no impediment to concluding that the Michigan Constitution's independent right to bodily integrity protects the right to abortion.

Fourth, the Michigan Constitution's reservation of rights provision further supports the fundamental right to abortion. That provision states, "The enumeration in this Constitution of certain rights shall not be construed to deny or disparate others retained by the people." Const 1963, art 1, § 23. As the Journal of the Convention explains, "[t]h[is] language recognizes that no Bill of Rights can ever enumerate or guarantee all the rights of the people and that liberty under law is an ever-growing and ever-changing conception of a living society developing in a system of ordered liberty." Journal, p 283. For nearly 50 years, Michigan women have relied on the availability of safe, legal abortions in organizing their lives. During that time, "people have . . . made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." *Casey*, 505 US at 856.

B. MCL 750.14 violates the Michigan Equal Protection Clause.

MCL 750.14 is directed at controlling the bodies of woman as a class.[17] The historical context leading to the enactment of MCL 750.14 demonstrates that it was enacted for

[17] Though people of all genders can become pregnant and bear children, this section uses the terms "woman" and "women" because these terms have a particular significance in equal

discriminatory purposes: to police women's compliance with restrictive gender norms and thereby ensure their inferior status in society. And by its own terms, the law is directed at controlling the bodies of women as a class. The law is designed to deprive women of the right to freely choose whether to become a parent, and it specifically infringes on a woman's right to bodily autonomy. As such, it impermissibly burdens women, while subjecting men to no equivalent burden. Courts have held on multiple occasions that similar laws—in which one gender was singled out for additional burdens redounding to the benefit of the other gender—created a gender-based classification. See, e.g., *Rose v Stokely*, 258 Mich App 283, 302–303 (2003) (law apportioning the entirety of certain childcare expenses to the father of a child born out of wedlock). The same is true here.

In addition, the Michigan Constitution's Equal Protection Clause is violated "when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *US v Virginia*, 518 US 515, 532 (1996). Abortion bans such as MCL 750.14 do just that.

C. MCL 750.14 is not narrowly tailored to protect any legitimate state interest.

Regardless whether heightened or intermediate scrutiny applies, MCL 750.14 fails. It is not narrowly tailored or substantially related to any legitimate state interest. The State does not have an important interest in criminalizing nearly all abortions, no matter how early in the pregnancy and regardless of the circumstances. Such a sweeping purported interest is not

protection jurisprudence, the statute uses these terms, and because abortion restrictions have the effect of subordinating woman as a class.

sufficient to satisfy any standard that takes seriously a woman's fundamental right to make her own decisions about her body, health, and future, and her right to equal treatment under the law.

II. Individuals and entities across the State will suffer irreparable harm if relief is not granted, avoiding this irreparable harm is in the public interest, and Defendants will not suffer any harm by the preservation of the status quo.

While individuals and entities across Michigan will suffer irreparable harm if this Court does not enjoin enforcement of MCL 750.14, Defendants face no harm. They would simply be restored to the same position they have been in for nearly 50 years, allowing this case to be resolved in due course without disrupting the lives of countless Michiganders.

A. Individuals and entities across the State will suffer irreparable harm absent an injunction.

Irreparable harm is "evaluated in light of the totality of the circumstances affecting, and the alternatives available to," the party seeking injunctive relief. *State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 166–167 (1984). But "if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Am Civil Liberties Union of Ky v McCreary County*, 354 F3d 438, 445 (CA 6, 2003); *Garner v Mich State Univ*, 185 Mich App 750, 764 (1990) ("[T]emporary loss of a constitutional right constitutes irreparable harm which cannot be adequately remedied by an action at law.") (citation omitted). Because MCL 750.14 violates Michiganders' constitutional rights, failure to enjoin its enforcement will cause irreparable harm across Michigan. This harm is not speculative or abstract—it is real and imminent, and will fall with particular force on three groups: health-care providers, women and girls, and State entities.

As to providers, the threat of criminal investigation and prosecution as well as administrative discipline and penalties is established by the record. Several Defendants have

publicly pledged to enforce the criminal abortion statute, *even before the Court of Appeals held they were not bound by the Court of Claims' injunction*. After *Dobbs*, Defendant Becker stated:

> But I think the clearest thing I can say is, I'm not ignoring this law. It's a validly passed statute. I'm not ignoring it, and we'll go from there."[18]

Similarly, Defendant Jarzynka pledged to prosecute abortion like any other criminal law:

> It's a validly passed statute – I'm not going to ignore it. If a law enforcement agency investigates a violation (of the law), I would review that like any other criminal case and look at the evidence, and make a determination if there's enough evidence to prove a criminal charge beyond a reasonable doubt.[19]

Two other Defendants have pledged to treat this unconstitutional law as if it were any other crime on the books.[20] Others who have not publicly pledged to enforce MCL 750.14 will now have free rein to do so unless this Court enters an injunction.

In addition to criminal investigation and prosecution, medical providers' livelihoods would be in peril. Absent an injunction, providers could have their licenses suspended or

[18] Bridge Michigan, *Abortion providers may face charges in Kent, Jackson counties, attorney says* (June 27, 2022) <https://www.bridgemi.com/michigan-government/abortion-providers-may-face-charges-kent-jackson-counties-attorney-says >.

[19] MLive, *'I'm going to follow the law.' Jackson County prosecutor will enforce state's 1931 abortion ban* (June 30, 2022), <https://www.mlive.com/news/jackson/2022/06/im-going-to-follow-the-law-jackson-county-prosecutor-will-enforce-states-1931-abortion-ban.html>.

[20] Macomb Daily, *Lucido says Macomb County has 'legal duty' to prosecute abortion center complaints* (April 8, 2022), <https://www.macombdaily.com/2022/04/08/lucido-says-macomb-county-has-legal-duty-to-prosecute-abortion-center-complaints/>; News Channel 3, *County prosecutors in Michigan can begin criminalizing abortion, Court of Appeals rules* (August 1, 2022), <https://wwmt.com/news/state/county-prosecutors-michigan-criminalize-abortion-court-of-appeals-ruling-1931-law-illegal-planned-parenthood>.

revoked, and face fines, reprimands, and other consequences.[21] In addition, providers and hospital systems will be forced into a catch-22 of committing a felony or violating federal law.[22]

The criminalization of abortion will also adversely affect women and girls across the State. Indeed, time is of the essence in several circumstances impacted by Michigan's criminal abortion ban. Ectopic pregnancies, nonviable pregnancies, pregnancies resulting in miscarriage, and pregnancies that present a risk to the health of the mother are all situations in which access to abortions is necessary and timing is critical. Confusion regarding the legality of abortions or a physician's inability to provide an abortion will negatively impact the health of pregnant women and girls and increase their risk of death, especially for Black women.[23] In light of these medical realities, even a minor delay can result in a woman needing to use a more dangerous procedure or foreclose the possibility of being able to have the procedure. These outcomes endanger the health and lives of Michiganders.

[21] For example, the Department of Licensing and Regulatory Affairs (LARA) must summarily suspend a license if a regulated provider is convicted of a felony. MCL 333.16233(5). And any disciplinary action by LARA requires public dissemination of the individual's name, address, and the disciplinary action, MCL 333.16241(1), as well as reporting of the disciplinary action to state and federal agencies and "the appropriate professional association." *Id.*

[22] Namely, the federal Emergency Medical Treatment and Labor Act (EMTALA) requires that a patient seeking care at a hospital that accepts Medicare funds for an "emergency medical condition" must be provided treatment necessary to stabilize the patient. Such a condition includes those that "could reasonably be expected to result in . . . placing the health of the individual . . . in serious jeopardy, serious impairment of a bodily function, or serious dysfunction of any bodily organ or part." 42 USC 1395dd(b), (e)(1).

[23] MDHHS Michigan Maternal Mortality Surveillance Program, *Maternal Deaths in Michigan 2014-2018 Data Update*, <https://www.michigan.gov/mdhhs/-/media/Project/Websites/mdhhs/MCH-Epidemiology/MMMS_2014-2018_Pub_Approved.pdf?rev=64078667cce54c58bf7302c749444da1&hash=3376418F29C8C3D91D01E55ECB636E58> ("From 2014-2018, Black women were 2.8 times more likely to die from pregnancy-related causes in Michigan (24.1 and 8.5 per 100,000 live births, respectively).").

Finally, State entities will be harmed in trying to discharge their institutional duties and missions amidst this legal landscape concerning abortion. For instance, the Michigan Department of Health and Human Services (MDHHS) has a statutory duty to "continually and diligently endeavor to prevent disease, prolong life, and promote the public health." MCL 333.2221(1); MCL 333.2221(2)(a) ("The department shall . . . [h]ave general supervision of the interests of the health and life of the people of this state."). MDHHS's Chief Medical Executive ("CME") is also tasked with "advising the Governor and the Department on public health issues, assessing the state of public health in Michigan, and communicating health information to the public." MCL 333.26369. Neither MDHHS nor the CME will be able to carry out these statutory duties—in particular, the duty to "promote the public health" and "communicat[e] health information to the public"—without running headlong into MCL 750.14's ban on nearly all abortion regardless of the woman's health, needs, or circumstances. Similarly, LARA—which licenses tens of thousands of health-care professionals in the State, including nearly 200,000 nurses[24]—would be statutorily required to suspend the licenses of such professionals if they are convicted under MCL 750.14 for providing abortion care necessary to their patients' health. See MCL 333.16233(5). Such circumstances harm not only the affected individuals and the public writ large, but the State entities whose charges and missions pertain to abortion care and protection of the public health.

B. Defendants will not suffer any harm if an injunction is issued.

The harms that will be suffered by Michigan individuals and entities absent injunctive relief outweigh any harm to Defendants if relief is granted. Defendants will just be in the same

[24] LARA-Bureau of Professional Licensing, License Types & Active Counts on 7/20/2022, <https://www.michigan.gov/lara/-/media/Project/Websites/lara/bpl/Shared-Files/BPL-Active-License-Counts.pdf?rev=3554f69e21a24b2da163c88ca6240747> .

position as they have been in for the past five decades. Any interest that Defendants may have in enforcing an unconstitutional ban on abortion that has not been in effect since 1973 is outweighed by the irreparable constitutional harms that will occur without an injunction. Indeed, "[t]he objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Woodhaven-Brownstown Sch Dist*, 293 Mich App at 145. That objective will be served through the issuance of preliminary injunction here.

CONCLUSION AND RELIEF REQUESTED

MCL 750.14 violates the Michigan Constitution and will cause irreparable harm across the State. For these reasons, Governor Whitmer, on behalf of the State, requests that this Court issue a preliminary injunction prohibiting Defendants from enforcing MCL 750.14.

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Respectfully submitted,

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