

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

GRETCHEN WHITMER, on behalf of the
State of Michigan,

Plaintiff,

v

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

Defendants.

Oakland Circuit Court No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

**PROSECUTING ATTORNEYS SAVIT,
LEYTON, SIEMON, GETTING, WIESE,
MCDONALD, AND WORTHY'S
RESPONSE IN SUPPORT OF
GOVERNOR WHITMER'S
EMERGENCY MOTION FOR *EX
PARTE* TEMPORARY RESTRAINING
ORDER**

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INTRODUCTION

On August 1, 2022—before this Court issued its Temporary Restraining Order (TRO)—chaos reigned in Michigan. In the aftermath of the United States Supreme Court’s decision overruling *Roe v. Wade*, 410 U.S. 113 (1973), the right to an abortion had remained protected in Michigan. The State of Michigan does maintain archaic laws, dating back to 1846, which criminalize abortion. *See* MCL 750.14. But enforcement of those laws had been blocked thanks to a May 17 preliminary injunction issued by the Court of Claims in *Planned Parenthood of Mich. v Mich. Attorney General*, No. 22-000044-MM.

All of that changed on August 1. That morning, the Court of Appeals issued an order which indicated that the Court of Claims’ “preliminary injunction does not apply to county prosecutors.” But the Court of Appeals did not question the merits of the Court of Claims’ ruling, or its conclusion that Michigan’s anti-abortion laws are likely unconstitutional. Instead, it held that because the Court of Claims has jurisdiction only to hear claims “against the State”—and because county prosecutors are “local officials”—the Court of Claims’ injunction did not bind county prosecutors.

The net result: the Court of Claims’ ruling declaring Michigan’s anti-abortion laws presumptively unconstitutional remained in effect. But, per the Court of Appeals, that ruling formally enjoined *only the Attorney General*, not county prosecutors. Accordingly, despite Michigan’s anti-abortion laws being ruled presumptively invalid, the Court of Appeals’ decision was interpreted by at least some county prosecutors as giving them the green light to criminally prosecute abortion.

The fallout was immediate. At least two county prosecutors with abortion facilities in their jurisdictions indicated that they intended to immediately begin prosecuting abortion cases. Seven

others (the undersigned) reiterated that they would not. Planned Parenthood issued a statement opining that the Court of Appeals’ decision would not take effect until at least 42 days after its issuance, and it would continue providing abortion through that timeframe. The attorney for the Jackson and Kent County prosecutors, however, disputed Planned Parenthood’s assertion. That attorney publicly stated that the Court of Appeals’ decision was effective immediately.

Caught in the middle of all of this were providers, patients, and many others taking action in support of access to foundational reproductive health care. Virtually instantaneously, providers were faced with the possibility that medical procedures that had been constitutionally protected for a half-century could be met with a felony prosecution. Patients—many of whom had scheduled appointments days or weeks in advance—faced the possibility that the legality of their reproductive decisions could be subject to the whims of Michigan county prosecutors. For a full day, chaos and confusion reigned.

That confusion was alleviated by this Court’s late afternoon ruling on August 1. In that ruling, this Court correctly concluded that “immediate and irreparable injury . . . will occur if Defendants are allowed to prosecute abortion providers . . . without a full resolution of the merits of the pending cases challenging that statute.” Order Granting Temporary Restraining Order at 3 (“Order”). Accordingly, this Court granted the Governor’s request for a temporary restraining order enjoining Respondents—the 13 county prosecutors with abortion facilities in their jurisdiction—from prosecuting Michigan’s archaic abortion-criminalization laws. *See id.*

This Court’s decision was correct, and the TRO should remain in effect. “Liberty finds no refuge in a jurisprudence of doubt.” *Planned Parenthood of Se. Pennsylvania v Casey*, 505 U.S. 833, 844 (1992). And to put it mildly, “doubt” will result if the TRO is not extended. Among other things, patients, providers, and others will be forced to make fundamental decisions based not on

personal interests and autonomy—but rather, based on their best guess as to what the next court ruling will say and how prosecuting attorneys will interpret it. Further, without the TRO, Michigan law-enforcement officials will face a byzantine landscape in which Michigan’s anti-abortion laws have been ruled presumptively unconstitutional, but in a ruling that formalistically applies only to the Attorney General. That situation is untenable, cannot be in the public interest, and will cause something that goes far beyond irreparable harm.

Respondent Prosecuting Attorneys—who are named as defendants in their official capacities—are charged with enforcing the law in their communities. All of us understand that the law requires certainty and predictability. Absent an extension of the TRO, that certainty will be elusive in Michigan. Respondent Prosecuting Attorneys thus join Governor Whitmer in her request for an extended TRO. At minimum, the TRO should be extended until “a full resolution of the merits of the pending cases challenging that statute.” Order at 3.¹

STATEMENT OF FACTS AND PROCEEDINGS

Michigan’s Law on Abortion

As a result of the United States Supreme Court’s decision in *Roe v. Wade*, abortion has been constitutionally protected in Michigan since 1973. Michigan, however, maintains a pre-*Roe* criminal abortion statute, which makes it a felony for “[a]ny person” to provide an abortion, except where “necessary to preserve the life of [the pregnant] woman.” MCL 750.14. That law, of course, was rendered unenforceable by *Roe*. But it threatened to spring back into existence after the Supreme Court overruled *Roe* in *Dobbs v. Jackson Women’s Health Organization* (No. 19-1392). Whether Michigan’s law criminalizing abortion is consistent with the Michigan Constitution

¹ In filing this response with the Circuit Court, Respondent Prosecuting Attorneys preserve all rights with respect to proceedings, including any claims or defenses they might assert in an initial responsive pleading.

remains unsettled. The Michigan Supreme Court has never opined on whether the state constitution independently protects the right to an abortion.

Relevant Proceedings

In light of the current state of Michigan law, the *Dobbs* decision, and the substantial reliance interests of individuals and providers on legal access to abortion in Michigan, the Governor filed the instant case in this Court. The Governor contends that MCL 750.14 violates both the due process and equal protection clauses of the Michigan Constitution. Compl. ¶¶ 79–95. The case was filed pursuant to the Governor’s authority under Article 5, § 8 of the Michigan Constitution. The Governor sought to have the Michigan Supreme Court review the questions presented under MCR 7.308. Respondent Prosecuting Attorneys have joined the Governor in that request on several occasions.

At the same time, Planned Parenthood of Michigan and Dr. Sarah Wallet filed a parallel suit in the Michigan Court of Claims on April 7 that also challenged the constitutionality of MCL 750.14. On May 17, the Court of Claims enjoined the Michigan Attorney General and all county prosecutors from enforcing MCL 750.14, concluding that there was “a strong likelihood that plaintiffs will prevail on the merits of their constitutional challenge.” *Planned Parenthood of Michigan v. Attorney General*, No. 22-000044-MM, 2022 WL 2103141 (Mich. Ct. Cl. May 17, 2022). On August 1, the Michigan Court of Appeals issued an order holding that the injunction did not extend to local county prosecutors, because county prosecutors are not subject to the Court of Claims’ jurisdiction. *See In re Jarzynka*, No. 361470, 2022 WL 3041132 (Mich. Ct. App. Aug. 1, 2022). Importantly, however, the Court of Appeals did not disturb the Court of Claims’ conclusion that there was a “strong likelihood” Michigan’s anti-abortion law was unconstitutional. Mere hours after the Court of Appeals issued its decision, this Court issued a temporary restraining

order to prevent the 13 named county prosecutors (all of the prosecutors who have abortion providers in their jurisdictions) from enforcing MCL 750.14. We strongly agree with this Court’s conclusion and urge it to extend the temporary restraining order.

ARGUMENT

The TRO issued by this Court on August 1 should be extended. The factors to be considered when considering injunctive relief are whether: (1) Plaintiff is likely to prevail on the merits; (2) Plaintiff will suffer irreparable harm if a TRO is not issued; (3) the public interest will be harmed if a TRO is not granted; and (4) the injury that Defendant will suffer if a TRO is issued does not outweigh the harm that Plaintiff would suffer if preliminary injunctive relief is not granted. *Detroit Fire Fighters Ass’n IAFF Local 344 v City of Detroit Fire Fighters*, 482 Mich. 18, 34 (2008) (citing *Michigan State Employees Ass’n v Dep’t of Mental Health*, 421 Mich. 152, 157–158 (1984)). Respondent Prosecuting Attorneys agree with and incorporate the Governor’s argument regarding the urgent necessity for a TRO in this case. We also agree on the merits of the Governor’s arguments and have concluded that the Michigan Constitution protects the right to an abortion. We write to further emphasize why the equities weigh so heavily in favor of the TRO extension—in particular, how “there will be harm to the public interest” if the TRO is not extended. *Detroit Fire Fighters Ass’n*, 482 Mich at 34.

I. Recent Legal Developments Create Uncertainty About Michiganders’ Constitutional Rights

Today’s legal landscape in Michigan is unprecedented. The State, including the Attorney General, is prohibited from enforcing MCL 750.14. That is because the Court of Claims found a “strong likelihood” that the *Planned Parenthood* plaintiffs will prevail on their constitutional challenges to the law. Simultaneously, however, county prosecutors—in the absence of this Court’s August 1 temporary restraining order—*may* enforce the law.

The undersigned prosecutors have repeatedly stated their intent to respect the Court of Claims' ruling, and not to prosecute abortion. On the other side, the Jackson, Kent, Macomb, and Saginaw prosecutors have indicated that—in the absence of this Court's temporary restraining order—they would now enforce Michigan's criminal abortion law. The Cass, Charlevoix, Clinton, and Hillsdale County prosecutors also have publicly stated they would enforce the anti-abortion law as they are not covered by the temporary restraining order.²

To summarize this dizzying state of affairs, the state Attorney General (and the State itself) cannot enforce MCL 750.14 due to the Court of Claims' injunction. At least some county prosecutors with abortion facilities in their jurisdictions intend to respect the Court of Claims' ruling that Michigan's anti-abortion laws are likely unconstitutional. Other prosecutors in counties with abortion facilities are seeking to eliminate any restrictions on their ability to enforce anti-abortion laws. And confusing matters even further, some county prosecutors who do not have abortion facilities in their jurisdiction—and thus are not subject to this litigation—have indicated that they intend to enforce MCL 750.14 where they can.

This is madness. The uncertainty created by the barrage of legal decisions threatens the orderly application of the rule of law in Michigan. Michigan medical providers are reacting accordingly. On August 1, the University of Michigan temporarily halted its abortion services as the day's legal wrangling played out, and when this Court issued the TRO, the University resumed the provision of care.³ Northland Family Planning Centers paused its operations in Macomb

² Beth LeBlanc, *Oakland County judge blocks county prosecutors from enforcing abortion ban*, The Detroit New (Aug. 1, 2022), <https://www.detroitnews.com/story/news/local/michigan/2022/08/01/county-prosecutors-can-enforce-abortion-ban-appeals-court-says/10200100002/>; Treas Baldas and Paul Egan, *These Mich. prosecutors will not charge women who have abortions, or doctors who perform them*, Detroit Free Press (June 24, 2022), <https://www.freep.com/story/news/local/michigan/oakland/2022/06/24/michigan-prosecutors-wont-charge-abortions/7725417001/>.

³ Kate Wells, *They came to Michigan for an abortion. Now, that's uncertain too*, Michigan Radio (Aug. 1, 2022), <https://www.michiganradio.org/criminal-justice-legal-system/2022-08-01/they-came-to-michigan->

County and shifted its patients to its facilities in Oakland County, while Planned Parenthood continues providing care.⁴ Henry Ford Health (which operates hospitals in Jackson and Macomb counties) and Beaumont-Spectrum health (which operates hospitals across Michigan) each issued statements indicating they are searching for clear direction regarding which care is permitted for their patients.⁵ Providers are thus shifting resources, patients, and staff to escape patchwork enforcement across the state, with some pausing services altogether rather than risk legal liability.

All Respondent Prosecuting Attorneys have made clear their agreement that the Michigan Constitution protects the right to an abortion at least concurrently with the former *Roe* standard (if not extending further).⁶ Despite these assurances, the residents in the communities we serve, as well as those who come into our communities for care, face imminent and significant harm from MCL 750.14. Even in counties where prosecutors are not inclined to prosecute abortion, criminal abortion cases could still be investigated by *other* county prosecutors or law-enforcement agencies if the temporary restraining order is dissolved. For example, a person traveling through another county to obtain an abortion in one of our counties could plausibly face charges for conspiracy or aiding and abetting abortion in violation of MCL 750.14. *See, e.g., People v. Meredith*, 209 Mich. App. 403, 408 (Mich. App. 1995) (“In a conspiracy case, venue is proper in any county in which an overt act was committed in furtherance of the conspiracy.”).

for-an-abortion-now-thats-uncertain-too; Meredith Bruckner, *Michigan Medicine will continue to provide abortion care following day of court rulings*, All About Ann Arbor (Aug. 2, 2022), <https://www.clickondetroit.com/all-about-ann-arbor/2022/08/02/michigan-medicine-will-continue-to-provide-abortion-care-following-day-of-court-rulings/>

⁴ *Id.*

⁵ LeBlanc, *supra* note 2.

⁶ Press Release, Karen McDonald et al., *Seven Michigan Prosecutors Pledge to Protect a Woman’s Right to Choose Joint Statement* (Apr. 7, 2022) <https://tinyurl.com/nhen4c9s>.

Moreover, in the absence of a temporary restraining order, people could be *arrested* for abortion—even in counties where prosecutors would generally decline such cases. *See* MCL 750.14 (making abortion “a felony”); MCL 764.15 (allowing “[a] peace officer, without a warrant, [to] arrest a person” if (1) “[t]he person has committed a felony although not in the peace officer’s presence”; or (2) “[a] felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it”). To say it plainly, if the temporary restraining order is dissolved, the rights of doctors, patients, and providers would depend not just on the county in which they reside, but the counties through which they travel. That state of affairs is intolerable. And the resulting uncertainty is flatly incompatible with the “public interest.” *Detroit Fire Fighters Ass’n*, 482 Mich at 34.

II. The Attorney General Being Enjoined from Enforcing a State Law—But Not County Prosecutors—Creates Further Chaos and Uncertainty

What is more, the real-world chaos and uncertainty that would result if the temporary restraining order is dissolved would only be exacerbated by the *legal* chaos that would result. To Respondents’ knowledge, never in Michigan’s history has the Attorney General been enjoined, on constitutional grounds, from enforcing a state criminal law while county prosecutors maintain free reign to prosecute it.

Indeed, such a state of affairs is inconsistent with Michigan’s legal design. The Attorney General and prosecuting attorneys have concurrent jurisdiction to “appear for the state” on any criminal matter. MCL 14.28 (Attorney General may “appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal”); MCL 14.153 (“prosecuting attorneys shall, in their respective counties, appear for the state . . . and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.”). The Attorney General “consult[s] and

advise[s] the prosecuting attorneys, in all manners pertaining to the duties of their offices.” MCL 14.30. And if a prosecuting attorney is “disqualified by reason of conflict of interest or is otherwise unable to attend to the duties of the office,” the prosecuting attorney “*shall* file with the attorney general” a petition seeking appointment of a special prosecutor. MCL 49.160 (emphasis added).

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

For example: how (if at all) can the Attorney General “consult and advise the prosecuting attorneys” about the enforcement of a law that the Attorney General has been prohibited from enforcing on constitutional grounds? *See* MCL 14.30. How (if at all) can a prosecuting attorney with a conflict of interest seek the appointment of a special prosecutor on an abortion case? Again: the legal mechanism for such an appointment is to “file with the attorney general” a petition seeking the appointment of a special prosecutor. MCL 49.160. May the Attorney General accept such a petition, or would that cross the line into “enforcement” of an enjoined criminal law? And if she does accept that petition—seeking prosecution of a law that the Attorney General has been told is likely unconstitutional—can the Attorney General assign the case to a different county prosecutor? Or would that violate her legal duty to uphold the Constitution?⁷

⁷ The instant situation—in which the Attorney General has been enjoined from enforcing a law on *constitutional* grounds—is distinct from a situation in which the Attorney General has a conflict in a case. The latter situation can likely be resolved by (1) creating a conflict wall within the Attorney General’s Office, or (2) the Attorney General performing only ministerial tasks relating to the prosecution of a case. Here, however, doing so would put the Attorney General at odds with what a court has said the Michigan Constitution requires. That constitutional taint cannot so easily be resolved.

None of these questions have easy answers. The reason is straightforward. It is antithetical to Michigan’s legal structure for a law to be enjoined as to the Attorney General, but not county prosecutors. Dissolving the temporary restraining order while the Court of Claims’ injunction remains would thus invite further chaos and uncertainty. None of that is in the public interest. *See, e.g., Detroit Fire Fighters*, 482 Mich at 34. And that provides further reason for this Court to keep the temporary restraining order in place.

III. The Risks to Michiganders’ Constitutional Rights, Health, and Well-Being Extend Past this Immediate Moment and Require Intervention

The continuing whiplash regarding abortion’s status in Michigan means that access to abortion care will remain in grave peril absent continued action by this Court. The temporary restraining order assists in both providing some immediate certainty while also reducing long-term risks to Michiganders’ constitutional rights, health, and well-being.

A. Special constitutional considerations attach to questions of abortion.

Questions of abortion have long been granted special timeliness considerations given both their public importance and the unique circumstances of pregnancy. A pregnancy does not wait for the courts. Those who would seek an abortion cannot wait for litigation to wind its way through the judicial system. They urgently need to know whether, and under what circumstances, they can exercise their reproductive rights. This is not some abstract matter. Decisions about current pregnancies, and current decisions about whether to get pregnant, are at issue *today*.

Indeed, *Roe* explained—in a passage that was *not* overruled by *Dobbs*—that “[p]regnancy provides a classic justification for a conclusion of nonmootness. It truly could be capable of repetition, yet evading review.” *Roe*, 410 U.S. at 125 (citation omitted); *Honig v. Doe*, 484 U.S. 305, 335–36, (1988) (Scalia, J., dissenting) (“*Roe* [and other abortion cases] differ from the body of our mootness jurisprudence . . . [by focusing] upon the great likelihood that the issue will recur

between the defendant and the other members of the public at large without ever reaching us”) (emphasis in original). The same rationale merits the Court’s continued action now.

B. The ethical and legal boundaries of life-saving abortion care under MCL 750.14 are uncertain, making this Court’s intervention a critical public health matter.

Both the physical and economic health and well-being of Michigan residents are squarely at issue here. The physical-health analysis is straightforward, and straightforwardly disturbing. Prior to *Roe*, the criminalization of abortion pushed people and providers into the shadows, where they engaged in risky and unsafe abortion procedures. Thousands upon thousands of people died from abortion in the pre-*Roe* era.⁸ Medical advances since *Roe* have dramatically changed the landscape but forcing people to carry a pregnancy to term carries great health risks for the pregnant person and the child. As the U.S. Supreme Court has recognized, childbirth is more dangerous than abortion. *Whole Woman’s Health v. Hellerstedt*, 579 U.S. 582 (2016). According to one study, carrying a pregnancy to term is fourteen times riskier than having an abortion.⁹ The risks of pregnancy and childbirth are greater for people of color and of lower socioeconomic status (*i.e.*, those most likely to be denied abortions).¹⁰ In addition to the significant physical health risks of pregnancy, childbirth, and the post-partum period, forced pregnancies pose immediate and long-term mental health risks.¹¹

⁸ Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?*, 6 Guttmacher Report on Public Policy at 8 (Mar. 2003).

⁹ *Black Women Over Three Times More Likely to Die in Pregnancy, Postpartum Than White Women, New Research Finds*, Population Reference Bureau, (Dec. 6, 2021), <https://www.prb.org/resources/black-women-over-three-times-more-likely-to-die-in-pregnancy-postpartum-than-white-women-new-research-finds/>.

¹⁰ *Id.* (noting that “the maternal mortality rate among non-Hispanic Black women was 3.5 times that of non-Hispanic white women”).

¹¹ Pamela Herd et al., *The Implications of Unintended Pregnancies for Mental Health in Later Life*, Am. J. Pub. Health, (Feb. 17, 2016), https://ajph.aphapublications.org/doi/10.2105/AJPH.2015.302973#_i6 (“Experiencing unwanted pregnancies . . . appears to be strongly associated with poor mental health effects”).

Returning specifically to Michigan, uncertainty as to the validity (and scope) of MCL 750.14 threatens to chill potentially life-saving medical care.¹² MCL 750.14 allows for abortion only if “necessary” to “preserve the life” of a pregnant person. If the temporary restraining order is dissolved so that MCL 750.14 is not enjoined statewide, or even in certain counties, abortions would be subject to criminal prosecution except when “necessary” to “preserve life.” But at this juncture, no one—not providers, not prosecutors, and not patients—has a clear understanding of what preserving the life of a pregnant person means with any real specificity.¹³ Reports from around the country post-*Dobbs* have demonstrated, time and time again, that doctors and patients in states with similarly vague laws are struggling through horrific choices and medical emergencies.¹⁴ That dystopian reality will arise in Michigan if the TRO is not extended. When doctors are chilled from providing potentially lifesaving care, people may die or have worse and more complicated medical outcomes, such as losing their ability to have children in the future. That risk of grave injury or death is harrowing considering that 59% of people who seek abortions

for women later in life.”); Sarah Fielding, *Adoption is No Substitute for Abortion: Forced Pregnancy Impacts Mental Health*, Verywell Mind, (updated Jan. 14, 2022), <https://www.verywellmind.com/mental-health-implications-of-forced-pregnancy-5212669>.

¹² The federal government has recognized the vital importance of ensuring access to emergency care when the life of a pregnant person is in jeopardy. For example, just yesterday, the Department of Justice announced a lawsuit challenging an Idaho law that failed to include an exception for the life of the mother. See, e.g., Charlie Savage, *Justice Dept. Sues Idaho Over Its Abortion Restrictions*, N.Y. Times (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/politics/biden-abortion-idaho-lawsuit.html>.

¹³ See, e.g., Lisa Harris, *Navigating Loss of Abortion Services — A Large Academic Medical Center Prepares for the Overturn of Roe v. Wade*, New Eng. J. Med. (May 11, 2022), <https://www.nejm.org/doi/full/10.1056/NEJMp2206246>.

¹⁴ J. David Goodman and Azeen Ghorayshi, *Women Face Risks as Doctors Struggle With Medical Exceptions on Abortion*, N.Y. Times (July 20, 2022), <https://www.nytimes.com/2022/07/20/us/abortion-save-mothers-life.html>.

already have children, meaning that any new harm experienced by the pregnant person could have significant ripple effects on their families and communities.¹⁵

If the TRO is not extended, then, the possibility of prosecution will place doctors and patients in an untenable position *at precisely the point in time where a patient's life or health is in danger*. For one, the specter of prosecution presents providers with a medically unethical dilemma: rather than weighing the risks and benefits of a medical procedure for the patient, a provider must weigh the medical risks to the patient against the *legal* risks the *provider* is willing to shoulder. That is a flagrant inversion of medical ethics, as enshrined by the Michigan State Medical Society: “A physician must recognize responsibility to patients first and foremost . . . A physician shall, while caring for a patient, regard responsibility to the patient as paramount.”¹⁶ But faced with potential criminal liability, providers, hospitals and medical systems—and even medical education and training programs—may refrain from performing, studying, or teaching certain aspects of medical care. Such care could include, among others: (1) care for miscarriages, especially emergency miscarriages; (2) reproductive care such as in-vitro fertilization; and (3) referrals and so-called “warm hand-offs” of patients to other jurisdictions where abortion care is offered legally.¹⁷ For many patients, confusion and hesitancy regarding whether to provide medical care could result in no care at all.

Moving one step further, without the temporary restraining order in place, abortion providers may simply shutter their operations, and never return. Without a clearly established right

¹⁵ Katherine Kortsmitt, et.al, *Abortion Surveillance — United States, 2019*, Center for Disease Control (Nov. 26, 2021), <https://www.cdc.gov/mmwr/volumes/70/ss/ss7009a1.htm>.

¹⁶ Michigan State Medical Society, *Policy Manual 2021 Ed.*, 2021, [https://www.msms.org/Portals/0/Documents/MSMS/About_MSMS/2021%20MSMS%20Policy%20Manual%20\(FINAL\).pdf?ver=2021-11-18-175054-277](https://www.msms.org/Portals/0/Documents/MSMS/About_MSMS/2021%20MSMS%20Policy%20Manual%20(FINAL).pdf?ver=2021-11-18-175054-277).

¹⁷ Harris, *supra* note 13.

under state law, medical providers will likely pause or altogether eliminate certain services. A temporary pause in the provision of abortion services may thus lead to the absolute erosion of the overall abortion infrastructure in Michigan. Abortion services, once stopped, do not readily restart. Providers and other personnel may move into other positions, resources may expire, and training may cease so that future providers are unable and unqualified to provide care altogether. These fears are not hypothetical. States that have imposed stark restrictions in abortions have *already* seen such permanent erosion in care.¹⁸

As elected prosecutors, our charge is to promote the public health and safety of our communities. Ensuring continued access to abortion care—especially care that protects the life of the pregnant person—is thus of critical importance.¹⁹ Without further clarification as to whether MCL 750.14 can be enforced, many medical decisions about abortion (some of which can be required in a matter of moments during a medical emergency) will be both legally and ethically fraught. Our providers and our residents deserve greater clarity so they can make informed decisions together.

At the very least, then, the TRO should be extended until the validity and scope of MCL 750.14 has been fully and finally clarified. It would plainly be inimical to the “public interest” for health services to be so severely eroded—particularly before our Supreme Court has weighed in regarding abortion’s legal status in Michigan.

¹⁸ See Abigail Abrams, *Abortion Clinics Are Rapidly Closing. Many Won’t Come Back*, Time (Dec. 2, 2020), <https://time.com/5916746/abortion-clinics-covid-19/>.

¹⁹ “As Michigan’s elected prosecutors, we are entrusted with the health and safety of the people we serve. We believe that duty must come before all else.” *Seven Michigan Prosecutors Pledge to Protect a Woman’s Right to Choose Joint Statement*, (Apr. 7, 2022), <https://bloximages.newyork1.vip.townnews.com/abc12.com/content/tncms/assets/v3/editorial/a/22/a22e73de-b68d-11ec-a8a3-5f2cfac31351/624f0dc153844.pdf.pdf>.

C. Michiganders’ long-term well-being is at risk absent additional intervention.

When determining whether to maintain the temporary restraining order, this Court also should consider the hugely impactful effect of reproductive choice for the economic and social opportunity of people who can become pregnant in Michigan and across the country. *See, e.g., Casey*, 505 U.S. at 856 (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”). Irrespective of changes in Michigan courts, people will continue to seek out and have abortions. But that exercise of reproductive freedom will not be without consequences. A dramatic shift in the law makes abortion care more costly (by, among other things, requiring out-of-state travel),²⁰ riskier (by, among other things, delaying care), and less equitable (by becoming less available to people of less financial means and people of color in general).²¹

For those unable to secure an abortion due to quickly changing legal circumstances in Michigan, the “economic” consequences will be dire indeed. Many Michiganders, forced by the State to give birth, will “bear[] nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring.” Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375, 383 (1985). The economic costs of an unplanned pregnancy, which are disproportionately imposed on those who are already of lower socioeconomic status, are significant. Extending the

²⁰ For example, if abortion were prohibited in Michigan, the average resident would need to travel 260 miles for an abortion as opposed to only 13 as of November 2021. Jenn Schanz, *What a challenge to Roe v. Wade could mean for Michigan*, WXYZ, (Nov. 12, 2021), <https://www.wxyz.com/news/what-a-challenge-to-roe-v-wade-could-mean-for-michigan>.

²¹ In addition to the risk of negative health consequences, pregnant women who are denied access to abortion care are substantially more likely to face economic hardships. *See, e.g., Sarah Miller et al., The Economic Consequences of Being Denied an Abortion*, Nat’l Bureau of Econ. Rsch., p. 3 (Jan. 2020), https://www.nber.org/system/files/working_papers/w26662/w26662.pdf.

TRO would thus help to ensure that legions of people maintain their right to be “an independent, self-sustaining, and equal citizen.” *Id.*

There is, perhaps, no clearer articulation of the “public interest” involved in this case. *Detroit Fire Fighters Ass’n*, 482 Mich at 34. The lives, health, freedom, and well-being of countless Michiganders hang in the balance. Those are the stakes. And that is why the TRO must be extended.

CONCLUSION

For the foregoing reasons, the TRO requested by the Governor should remain in effect, and this Court should issue an order that prohibits Defendants from enforcing Michigan laws criminalizing abortion.

DATED: August 3, 2022

Respectfully submitted,

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DATED: August 3, 2022

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DATED: August 3, 2022

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PROOF OF SERVICE

I, Eli Savit, hereby affirm that on the date stated below I delivered a copy of Respondents Savit, Leyton, Siemon, Getting, Wiese, McDonald and Worthy’s Response in Support of Governor Whitmer’s Emergency Motion for *Ex Parte* Temporary Restraining Order, upon opposing counsel stated above, via the Court’s MiFile system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: August 3, 2022

/s/ Eli Savit
Eli Savit
Prosecuting Attorney
Washtenaw County