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, Plaintiffs. _____/	Supreme Court No 164656 Court of Appeals No 361470 Court of Claims No 22-000044-MM

BRIEF OF *AMICI* CURIAE PROSECUTING ATTORNEYS SAVIT, LEYTON, SIEMON, GETTING, WIESE, MCDONALD, AND WORTHY

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TABLE OF CONTENTS

INDEX OF AUTHORITITES

CASES

STATUTES

STATE CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici are the prosecuting attorneys of Washtenaw, Genesee, Ingham, Kalamazoo, Marquette, Oakland, and Wayne counties. The combined population of our respective counties (4,388,068) constitutes 43% of the entire population of the state (10,116,069), and all of us serve counties which include at least one abortion provider. Created by Article VII, Sec. 4 of the state constitution, county prosecuting attorneys "appear for the state or county" in all matters, "civil or criminal, in which the state or county may be a party or interested." MCL 49.153. As the chief law enforcement officers of the county, we have an obligation to protect the public health and safety of our communities. We also have an ethical obligation to file only criminal charges that are supported by the law, are provable beyond a reasonable doubt, and are in the interests of justice. *See* American Bar Association, *Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges*.[1]

In the past week, chaos and confusion have erupted across the State as a result of the Court of Appeals' suggestion that (a) the Attorney General is constitutionally prohibited from enforcing Michigan's anti-abortion laws, but (b) county prosecutors are not. All of us believe that we have an obligation not to prosecute a law that the Court of Claims has ruled is presumptively unconstitutional—and indeed, has enjoined the Attorney General from enforcing. But other county prosecutors feel differently. Many of the residents in our communities who urgently need access to reproductive services are confused and frightened. Medical providers have been scrambling to determine what services they can and cannot offer. Providers and patients alike are concerned that their health care choices may be criminally investigated and prosecuted. The resulting confusion threatens to chill the provision of lifesaving medical services in our communities.

[1] https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

Amici thus submit this brief to urge this Court to restore order. We urge this Court to clarify that a law that has been ruled presumptively unconstitutional—and is the subject of a preliminary injunction binding the Attorney General—cannot be enforced by *any* prosecutor in the state so long as that injunction remains in effect.

INTRODUCTION

Last Monday, the Court of Appeals created upheaval throughout the state with its erroneous decision in this case. 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 pursuant to a May 17, 2022 preliminary injunction issued by the Court of Claims in this case. That injunction predated the issuance of the U.S. Supreme Court's decision overruling *Roe* in *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022).

On the morning of August 1, however, the Court of Appeals issued an order indicating that the Court of Claims' "preliminary injunction does not apply to county prosecutors." *In re Jarzynka*, No. 361470, 2022 WL 3041132, at *5 (Mich. App. Aug. 1, 2022). The Court of Appeals did not question the merits of the Court of Claims' ruling, or its conclusion that Michigan's anti-abortion 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. *Id.* at *1, *5.

The net result was the following: 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 unconstitutional, the Court of Appeals' decision was interpreted by at least some county prosecutors as giving them the green light to criminally prosecute abortion immediately, including procedures that had been planned and scheduled while a statewide injunction was in place.

The fallout was immediate. At least two county prosecutors with abortion facilities in their jurisdictions indicated that they intended to begin prosecuting abortion cases. Seven others (the undersigned) reiterated that they would not. Planned Parenthood of Michigan issued a statement opining that the Court of Appeals' decision would not take effect until at least 21 days (and possibly 42 days) after its issuance, and it would continue providing abortion through that timeframe.[2] 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 others involved in the delivery of reproductive health care. Providers were faced with the possibility that medical procedures that had been constitutionally protected for a half-century could be met with a felony prosecution. Patients—many of whom had scheduled appointments days or weeks in advance—faced the possibility that the legality of their reproductive decisions could be subject to the whims of Michigan county prosecutors. Others debated whether driving a friend or loved one to a clinic, or delivering medication, could leave them exposed to criminal sanction. For a full day, chaos reigned in Michigan. That chaos was alleviated only in the late afternoon on August 1, when the Oakland County Circuit Court entered a temporary restraining order against 13 county prosecutors,

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

including *amici*, in a case brought by Governor Whitmer. *Whitmer v. Linderman*, No. 22-193498-CZ, Order (Aug. 1, 2022).[3]

As the Governor noted in her amicus filing with this Court, the temporary restraining order is not "firm enough" to guarantee access to care throughout the state. Br. of Gov. Whitmer at 2. *Amici* likewise strongly urge this Court to intervene immediately and correct the clear error by the Court of Appeals. The court below misapplied the analysis from *Manuel v. Gill*, 481 Mich. 637 (2008), and created an unprecedented situation in which some local prosecutors were led to believe that they were free to enforce a state law that has been ruled presumptively unconstitutional—and which the Attorney General and the State cannot enforce. That outcome is nonsensical and untenable and must be resolved by immediate intervention by this Court.

ARGUMENT

I. Given the Facts and Circumstances of this Case, the Court of Appeals Incorrectly Applied the Manuel Test to County Prosecutors

The aforementioned harm and turmoil stems from the Court of Appeals' misapplication of the *Manuel* test—and its facially erroneous conclusion that local county prosecutors are not state officials when they enforce state criminal laws. A careful review of the factors and the totality of the circumstances makes clear that, in fact, county prosecutors act on behalf of the State when they enforce state-level criminal laws and are accordingly subject to a Court of Claims ruling precluding enforcement of a state law.

State law establishes that the Court of Claims has jurisdiction "to hear and determine any claim or demand, statutory or constitutional against the state or any of its departments or officers."

[3] A copy of the August 1, 2022 order is available online: https://content.govdelivery.com/attachments/MIEOG/2022/08/01/file_attachments/2233798/Granted%20TRO.pdf. Two days later, following a hearing, Judge Cunningham extended the temporary restraining order through August 17, 2022. *Whitmer v. Linderman*, No. 22-193498-CZ, Order (Aug. 3, 2022).

MCL 600.6419(1)(a). Subsection 7 of the law defines "state or any of its departments or officers" to include "any . . . officer . . . acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties." *Id.* § 600.6419(7). This Court has long held that when determining jurisdiction for the Court of Claims "'state' status is determined by a review of all relevant characteristics which, when considered together, indicate the overall character of the [government actor]." *Hanselman v. Killeen*, 419 Mich. 168, 186–87 (1984). The Court distilled this approach in *Manuel*, which held that the following four factors should be considered to determine if an officer is a state officer under MCL 600.6419(1)(a):

> (1) whether the entity was created by the state constitution, a state statute, or state agency action, (2) whether and to what extent the state government funds the entity, (3) whether and to what extent a state agency or official controls the actions of the entity at issue, and (4) whether and to what extent the entity serves local purposes or state purposes.

Manuel, 481 Mich. at 653. "This test essentially constitutes a 'totality of the circumstances' test to determine the core nature of an entity, *i.e.*, whether it is predominantly state or predominantly local," *id.* at 653–54, and "the fact that one factor suggests that the entity is an agency of the state is not necessarily dispositive." *Id.* at 654. The Court of Appeals concluded that all four categories indicated that local county prosecutors were not state officials when they enforce state laws, and accordingly are not bound by a Court of Claims decision precluding enforcement of a state law. *In re Jarzynka*, 2022 WL 3041132, at *4 –*5. That is incorrect.[4]

[4] The Court of Appeals also cited *Hanselman*, 419 Mich. 168, in support of that conclusion, because in that case, this Court explained: "The county prosecutor and the sheriff are clearly local officials elected locally and paid by the local government." *Id.* at 188. However, the case concerned the "state" status of a board that included both the prosecutor and sheriff. This Court in *Hanselman* was not charged with determining whether county prosecutors *themselves* are "state" or "local" officials—much less with the issue whether county prosecutors are "state" officials when they are enforcing state law. In any event, *Hanselman* predates *Manuel*, and the Court therefore did not apply the *Manuel* test.

The first factor is straightforward: Was the entity created by the state constitution, state statute, or state agency action? County prosecutors were expressly created by the Michigan Constitution. "There shall be elected for four-year terms in each organized county . . . a prosecuting attorney, whose duties and powers shall be provided by law." Const 1963, art 7, § 4. The responsibilities and parameters of the state-created prosecutors are in turn detailed by state statute. *See, e.g.*, MCL 49.153 ("The prosecuting attorneys shall, in their respective counties, appear for the state or county, 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 Court of Appeals, however, reasoned that because the relevant article of the constitution is entitled "Local Government"—and because county prosecutors have jurisdiction only in their respective counties—the first *Manuel* factor cut against county prosecutors being state actors. *In re Jarzynka*, 2022 WL 3041132, at *2. That does not make sense. The *Manuel* test includes no caveats regarding where in the state constitution the entity is created, or what the responsibilities and parameters of the entity are. The first factor asks simply whether the entity was created by the state constitution. The fact that each county prosecutor's *jurisdiction* is limited to their respective county does not change the fact that prosecutors are created by the state constitution to serve a state function. Michigan has opted to administer the business of the State in part through the creation of counties (and county prosecutors). These are "political subdivisions *of the state,* created as convenient agencies for exercising such of the governmental powers *of the state* as may be intrusted to them." *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178 (1907) (emphasis added). That county prosecutors have limited geographical responsibilities does not

undercut the fact that prosecuting attorneys are State-created entities, charged with carrying out responsibilities on behalf of the State.

The second and third *Manuel* factors (to what extent the State funds county prosecutors and the degree to which they are supervised by State officials) do tilt in favor of the Court of Appeals conclusion, but they do not weigh exclusively in support of that outcome. Michigan state government provides grants and other funds to county prosecutors. In addition, though county prosecutors are independently elected and are not subject to direct State oversight, the Attorney General has some supervisory responsibilities with respect to county prosecutors. For example, the Attorney General "consult[s] and advise[s] the prosecuting attorneys, in all manners pertaining to the duties of their offices." MCL 14.30. The Attorney General is also charged with appointing a special prosecutor where county prosecutors are unable to proceed with a case. MCL 49.160.

As to the fourth *Manuel* factor, the Court of Appeals concluded that "notwithstanding that county prosecutors represent the State of Michigan, they serve primarily local purposes involving the enforcement of state law within their respective counties." *In re Jarzynka*, 2022 WL 3041132, at *3. This is illogical. The relevant function for county prosecutors in this case is their enforcement and prosecution of *state criminal law*, on behalf of the State and in the name of the State. In such proceedings, county prosecutors represent the People of the State of Michigan and enforce state laws enacted by the State Legislature and signed by the Governor. That local county prosecutors do so in their respective counties is consistent with counties' status as a "convenient agency" of the State, *see* *Hunter*, 207 U.S. at 178. The physical jurisdiction of the county prosecutor does not change the fact that, when enforcing State criminal law, they are fulfilling a state function.

To be sure, Michigan law grants county prosecutors several duties and responsibilities—some on behalf of the county and some on behalf of the State. Michigan law provides that

"prosecuting attorneys shall, in their respective counties, appear for the *state* ***or*** *county*" in all suits, "whether civil or criminal, in which the *state* ***or*** *county* may be a party or interested." MCL 49.153 (emphasis added). In some cases (for example, where a county prosecutor appears as civil counsel to defend a lawsuit brought against a county) the prosecutor is serving a county function. In other cases, a county prosecutor is more clearly a state actor. For example, MCL 445.776 provides that a prosecuting attorney may issue subpoenas with respect to state antitrust violations, but only "with the permission of, or at the request of, the attorney general." MCL 445.776.

Prior to the Court of Appeals' decision in this case, however, Michigan courts have appropriately delineated prosecutors' state function from their county functions. For example, courts have recognized that county prosecutors may "bring civil actions in furtherance of the *state's* interests" in their respective counties, even when they are not representing the *county's* interests. *Wayne Cnty. Prosecuting Att'y v. City of Detroit*, 204 Mich. App. 94, 95 (1994); *see also id.* at 95 n.1 ("The fact that the Wayne County Board of Supervisors decided to employ an attorney to represent the county's interests in civil matters does not prevent plaintiff [the Wayne County Prosecutor] from representing the state's interests in civil matters."). In such actions, county prosecutors are unambiguously acting on behalf of the State.

The same is true here. Again, this case concerns prosecutors' enforcement of a *state criminal law*. Were prosecutors to enforce that law, they would appear on behalf of the People of the State of Michigan, as part of their authority to "appear *for the state*" in criminal matters. MCL 49.153 (emphasis added). What is more, the abortion context in particular concerns an issue of statewide import. The statewide network of abortion providers are physically located in a small percentage of Michigan's 83 counties. Oftentimes, pregnant people travel from one county, through others, and into another to receive care. In some situations, the provider, the medication,

and the patient are all in different counties. That hardly constitutes local activity. And it makes absolutely no sense for the Attorney General to be constitutionally enjoined from enforcing a state law while (some) county prosecutors have free reign to enforce it. Given the totality of the circumstances here, and especially in light of the criminal statute at issue, local prosecutors should be subject to the underlying injunction.

II. The Attorney General Being Enjoined from Enforcing a State Law—But Not All County Prosecutors—Creates Confusion and Uncertainty that this Court Should Remedy Immediately

To *Amici*'s knowledge, never in Michigan's history has the Attorney General been enjoined, on state constitutional grounds, from enforcing a state criminal law while county prosecutors maintain free reign to prosecute it. Indeed, such a state of affairs is inconsistent with Michigan's legal design. Such unusual—and perhaps unprecedented—circumstances warrant this Court's immediate interventions.

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. At the current moment, 13 local prosecutors also are enjoined from enforcing Michigan's archaic anti-abortion law, but that relief does not formally cover all prosecutors who could potentially bring charges under or relating to MCL 750.14.

The current situation, as a result of the Court Appeals decision, raises up thorny questions. For example: how (if at all) can the Attorney General "consult and advise the prosecuting attorneys" about the enforcement of a law that the Attorney General has been prohibited from enforcing on constitutional grounds? *See* MCL 14.30. How (if at all) can a prosecuting attorney with a conflict of interest seek the appointment of a special prosecutor on an abortion case? Again: the legal mechanism for such an appointment is to "file with the attorney general" a petition seeking the appointment of a special prosecutor. MCL 49.160. May the Attorney General accept such a petition, or would that cross the line into "enforcement" of an enjoined criminal law? And if she does accept that petition—seeking prosecution of a law that the Attorney General has been told is likely unconstitutional—can the Attorney General assign the case to a different county prosecutor? Or would that violate her legal duty to uphold the Constitution?[5]

[5] 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 has an easy answer. The reason is straightforward: it is antithetical to Michigan's legal structure for a criminal law to be enjoined as to the Attorney General, but not county prosecutors. The bottom line is that none of these questions should have to be resolved right now, and especially not at the cost of access to essential health care or bodily autonomy. Instead, this Court should intervene and ensure that a statewide injunction is continued as the courts consider the constitutional validity of Michigan's abortion laws.

III. Even if County Prosecutors Are Not Subject to the Jurisdiction of the Court of Claims, the Injunction Issued Should Apply to All Enforcement of the Law

The Court of Appeals decision also significantly undermines the orderly administration of justice, and the supremacy of our state constitution. It is illogical and unworkable to require that all individual counties and individual county prosecutors be named as defendants in constitutional challenges to state law. First, there are very likely venue problems. Because there are limitations on where the prosecutors can be sued, a pre-enforcement challenge to a state law enforceable by all 83 county prosecutors likely would require many different lawsuits in many different places, unless (implausibly) all 83 county prosecutors consent to the suit in a particular venue. It cannot possibly be the case that, in order to enjoin operation of an unconstitutional law, a party must sue every single county prosecutor in every single county court. Such an outcome would be costly and unworkable. It would prevent uniform applicability of state law. And it would result in a situation in which a person's constitutional rights depend on the county in which she resides or travels through.

An example, divorced from the abortion context, may be illustrative. Imagine that the State Legislature passes a patently unconstitutional law which makes it a felony for any person to display a political lawn sign in support of a Republican candidate for office. Republican politicians and their supporters across the State would, of course, want to have that law enjoined before an

election. But the Court of Appeals' reasoning would mean that every county prosecutor would have to be sued, individually, in county court—and that until a ruling came from each county court, people could be prosecuted for displaying Republican lawn signs in each individual county. Such a situation would be untenable. It would indisputably (and unacceptably) chill the exercise of a constitutionally protected freedom. The same is true here. Our state court system does not require so many separate lawsuits to ensure complete relief to all affected by a law. That is especially true when a constitutional right is at issue.

These are hardly new or novel issues. Federal courts are regularly faced with pre-enforcement challenges to unconstitutional laws under *Ex parte Young*, 209 U.S. 123 (1908). But *Ex parte Young* does not require *all* parties with enforcement authority to be named in a lawsuit. Rather, plaintiffs generally sue a single actor (the Attorney General or another individual who acts on behalf of the State). And if the court rules that enforcement of a law is indeed unconstitutional, "the use of the name of the state to enforce an unconstitutional . . . is a proceeding without . . . authority." *Ex parte Young*, 209 U.S. at 159. "It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." *Id.*

The same is true here. The Court of Claims has ruled, in a case that named the Attorney General as a defendant, that enforcement of Michigan's anti-abortion laws should be enjoined on constitutional grounds. That ruling must prevent any "use of the name of the state"—whether by county prosecutors or the Attorney General—to enforce that presumptively unconstitutional law. *See also, e.g., Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (*Ex parte Young* "allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law"). *Amici* are not aware of a case

in which a federal court required all potential enforcers of a law to be named as defendants to ensure complete relief to the moving parties.[6]

IV. There Is Immediate Need for Statewide Relief to Ensure Safe Access to Health Care in Michigan

Beyond the legal analysis set forth above, the facts and circumstances surrounding this case as well as other ongoing legal uncertainties underscore the need for immediate statewide relief.

First, the Court of Appeals' decision created significant confusion that led to disruptions in care. In the immediate aftermath of the decision, and out of an abundance of caution, providers had to turn patients away.[7] On August 1, the University of Michigan temporarily halted its abortion services as the day's legal wrangling played out, and when the Circuit Court issued a temporary restraining order, the University resumed the provision of care.[8] Northland Family Planning Centers paused its operations in Macomb County and shifted its patients to its facilities in Oakland County, while Planned Parenthood continues providing care.[9] Henry Ford Health (which operates hospitals in Jackson and Macomb counties) and Beaumont-Spectrum health (which operates

[6] To the extent that any individual prosecutor or other state entity is concerned about the means and manner of the Attorney General's defense of a law, there are remedies available. Such prosecutors could seek to intervene and/or file an amicus brief in support of the law. The administration of justice does not, however, require separate suits in separate locations subject to potentially contrary consults, just because of such a disagreement.

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

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

[9] *Id.*

hospitals across Michigan) each issued statements indicating they are searching for clear direction regarding which care is permitted for their patients.[10] 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.[11]

Second, there is considerable confusion about the scope of the anti-abortion statute—creating due process concerns, as well as both legal and medical ethical challenges. Among other things, providers and patients are unclear as to where relevant acts occur that might give rise to criminal liability. 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 for acts relating to the abortion in the *other* county. 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 (1995) ("In a conspiracy case, venue is proper in any county in which an overt act was committed in furtherance of the conspiracy."); *see also* MCL 762.8 ("Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which any one of said acts was committed."). To be clear, it is *amici's* view that any such prosecution would be unlawful, given both the constitutional injunction by the Court of Claims and the temporary restraining order issued by the Oakland County Circuit Court. But we cannot purport to predict how other county

[10] 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/.

[11] While the Circuit Court's temporary restraining order has alleviated many of these concerns, the relief is not statewide. In addition, there is no guarantee that it will extend beyond August 17.

prosecutors might act in the absence of a statewide injunction unambiguously prohibiting them from enforcing Michigan's anti-abortion laws.

And the stakes, quite literally, are life and death. Uncertainty as to the validity (and scope) of MCL 750.14 threatens to chill potentially life-saving medical care as well.[12] MCL 750.14 allows for abortion only if "necessary" to "preserve the life" of a pregnant person. If MCL 750.14 is not enjoined statewide, 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] 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 already have children.[15]

[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; *see also* Tessa Weinberg and Allison Kite, *Missouri doctors fear vague emergency exception to abortion ban puts patients at risk*, Missouri Independent (July 2, 2022), https://missouriindependent.com/2022/07/02/missouri-doctors-fear-vague-emergency-exception-to-abortion-ban-puts-patients-at-risk/.

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

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.[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.[17] For many patients, confusion and hesitancy regarding whether to provide medical care could result in no care at all.

Third, an injunction applying to the Attorney General and a restraining order against certain county prosecutors are not enough. There are other actors who might seek to enforce MCL 750.14, and such activity must cease to ensure protection of a constitutional right. Even in counties where prosecutors are not inclined to prosecute abortion, criminal abortion cases could still be investigated by law enforcement if MCL 750.14 springs back into full effect. Worse, people could still 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

[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.

[17] Harris, *supra* note 13.

has reasonable cause to believe the person committed it"). The threat of criminal investigation and arrest alone infringes upon the constitutional rights of residents.

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For the past half-century—since the United States Supreme Court's decision in *Roe*—abortion has been legal, safe, and protected in Michigan. Now, in the aftermath of a litany of confusing and chaotic court orders, that certainty has been undermined in this State. This Court should act quickly to restore order. At bottom, *amici* ask only that the state of affairs that has existed in Michigan for the past half-century be restored, pending a final court determination as to whether Michigan's anti-abortion laws are constitutional.

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992). It is unfair and unworkable for the confusion created by the Court of Appeals' decision in this case to linger. Our legal system, residents, and medical providers deserve order and certainty as these cases continue.

CONCLUSION AND RELIEF REQUESTED

Amici Prosecuting Attorneys respectfully requests this Court grant the emergency motion of Planned Parenthood of Michigan and Dr. Sarah Wallett 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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