EXHIBIT A

Complaint

Oakland County Circuit Court
Case No. 22-193498-CZ; Hon. D. Langford Morris

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.

Case No. 22- -CZ

Hon.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

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

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

FACTUAL ALLEGATIONS

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

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

A. The History of MCL 750.14

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Abortion in Michigan Today

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95. MCL 750.14 is a sex-based classification.

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

REQUEST FOR RELIEF

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

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

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

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

D. Enjoin Defendants from enforcing MCL 750.14.

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