

STATE OF MICHIGAN
IN THE SUPREME COURT

GRETCHEN WHITMER, on behalf
of the State of Michigan,

Plaintiff,

v

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County, DAVID S. LEYTON,
Prosecuting Attorney of Genesee
County, NOELLE R.
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County, CAROL A. SIEMON,
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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.

Supreme Court Case No. 164256

**BRIEF IN OPPOSITION TO
GOVERNOR WHITMER'S REQUEST
FOR CERTIFICATION UNDER MCR
7.308**

**This case involves a claim that state
governmental action is invalid**

Oakland Circuit Court No. 22-193498-
CZ

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Introduction

Plaintiff Governor Gretchen Whitmer asks this Court to short-circuit the litigation process and authorize the Oakland County Circuit Court to certify for this Court's review the issues raised by her challenge to the constitutionality of MCL 750.14, Michigan's 91-year-old statute protecting innocent, unborn life. No matter how the Court views the merits of that challenge, it would be improper to certify.

The main reason this Court should decline certification is that the Governor's claims are unripe. "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). Yet the Governor's claims are founded on multiple layers of speculation about whether the U.S. Supreme Court will overrule *Roe v Wade*, how prosecutors might choose to respond to such a ruling, and whether individuals and abortion clinics might change their conduct as a result. But there is no way to know even what the federal high Court will do, much less how others might respond. And, in the meantime, there is no one under imminent threat of prosecution for violating MCL 750.14. The Governor's claims are unripe because they depend on multiple contingent future events that may never occur.

There are other reasons why this Court should decline to get involved right now. To begin, there is no reason for this Court to allow the Governor to skip review by the trial court or the Court of Appeals. The current state of affairs—namely, that MCL 750.14 is on the books but is judicially limited to comply with *Roe*—has

existed unchanged for almost 50 years. The Governor fails to establish the sort of exigencies necessary to skip straight to this Court.

Even more problematic, certification under MCR 7.308 requires trial courts to include statements of fact that “make clear the *application* of the question.” But that’s impossible here. The Governor’s lawsuit involves no actual facts, only mere legal possibilities. A broad ruling that reads an unlimited right to abortion into the silence of Michigan’s Constitution would go much farther than *Roe* itself—or any other similar decision, for that matter—and could not possibly take into account the nuances of circumstances and other laws that will be affected.

Finally, the Governor’s proposed certified issues raise thorny questions of federal constitutional law that should be vetted through the lower courts, in the ordinary course, before this Court tackles them. For example, a court will have to decide whether the Governor’s novel theory is nullified by the Fourteenth Amendment to the U.S. Constitution, which prohibits any state from depriving “any person of life” without due process, where medical science establishes definitively that life begins at conception. A court would also have to decide whether reading an abortion right into the silence of Michigan’s Constitution violates the federal Republican Form of Government Clause. It would benefit not only this Court but the U.S. Supreme Court—which will be the ultimate arbiter of those and other possible federal questions—to have this case fully briefed and argued beginning in a trial court, as is typical of constitutional litigation.

For multiple reasons, then, this Court should decline the Governor's request to authorize the trial court to certify the questions presented by her lawsuit for this Court's review. The Governor must advance her political agenda through the democratic process, not through judicial fiat in a matter that lacks even the hint of a true case or controversy warranting the exercise of jurisdiction.

Background

In 1931, Michigan legislators enacted MCL 750.14, a law that bans the performing of an abortion unless necessary to save the life of the mother. The law does not regulate or target women, only medical professionals or others who seek to take innocent, unborn life. The law is 91 years old, and for nearly 60 years has existed side-by-side peaceably with the Constitution that Michigan citizens ratified in 1963. In 1973, this Court in *People v Bricker*, 389 Mich 524; 208 NW2d 172 (1973), judicially modified MCL 750.14 so that it would comport with the U.S. Supreme Court's *Roe* decision. And the Michigan Court of Appeals has already expressly held that Michigan's Constitution does *not* secure a right to abortion that is independent of the abortion right that the U.S. Supreme Court found in the constitutional "penumbra" in *Roe. Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997).

Against this backdrop, the Governor, Attorney General, and Planned Parenthood have concocted an extraordinary, three-pronged attack on Michigan law of which this case represents one part. All three attacks are premised on a hypothetical future event: that the U.S. Supreme Court in *Dobbs v Jackson Women's Health Org*, No 19-1392, may overrule *Roe*. See, e.g., 4/7/2022 Br. in

Support of Governor’s Executive Message, pp 10–11, *Whitmer v Linderman*, Mich Sup Ct No 164256 (raising the same concerns about “the U.S. Supreme Court’s looming decision in *Dobbs*”); **Ex. 1**, 4/7/2022 Planned Parenthood Verified Compl ¶¶ 27–28 (“The Michigan Supreme Court’s construction of” MCL 750.14 incorporates a federal constitutional abortion doctrine that is “at risk of significant modification by the United States Supreme Court’s forthcoming decision in the *Dobbs* case, which presents the question whether *Roe v Wade*—on which the *Bricker* construction is founded—should be overruled. The United States Supreme Court could issue its decision in *Dobbs* any day” now.).

Argument

I. This Court should decline to authorize the trial court to certify the issues in this case for lack of ripeness.

This Court should decline the Governor’s invitation to authorize the trial court to certify the issues raised in her complaint because they are unripe for judicial review at any level of the Michigan court system.

The Michigan Constitution vests Michigan courts with “the judicial power of the state.” Const 1963, art 6, § 1. This Court has “described that power as ‘the right to determine *actual controversies* arising between *adverse litigants*, duly instituted in courts of proper jurisdiction.” *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 243 (2019) (Clement, J, concurring) (emphasis added) (quoting *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), itself quoting *Amway v Grand Rapids R Co*, 211 Mich 592, 616; 179 NW 350 (1920)). So, even when a party seeks a

declaratory judgment, a Michigan court only has jurisdiction to provide declaratory relief in “a case of actual controversy within its jurisdiction.” MCR 2.605(A)(1). And, “to satisfy the ‘actual controversy’ requirement, a plaintiff’s claim must be justiciable.” *Van Buren Charter Tp v Visteon Corp*, 503 Mich 960; 923 NW2d 266, 269 (2019) (Viviano, J., dissenting); *Shavers v Kelley*, 402 Mich 554, 589, 267 NW2d 72 (1978) (“[A] plaintiff must allege and prove an actual justiciable controversy.”).

Justiciability requires a ripe dispute. *League of Women Voters of Michigan v Secretary of State*, 506 Mich 561, 586 n 31; 957 NW2d 731 (2020) (MCR 2.605 incorporates the doctrine of...ripeness.”). A Michigan “court is not empowered to decide ... abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.” *Amway*, 211 Mich at 615. Ripeness prevents courts from adjudicating hypothetical claims before any actual injury has taken place. *King v Mich State Police Dept*, 303 Mich App 162, 188; 841 NW2d 914 (2013); *Shaw v City of Dearborn*, 329 Mich App 640, 657; 944 NW2d 153 (2019).

Accordingly, a claim is not ripe if it depends on “contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Thomas v Union Carbide Agricultural Prods Co*, 473 US 568, 580–81 (1985) (citation omitted); *Mich Chiropractic Council v Com’r of Office of Fin and Ins Servs*, 475 Mich 363; 716 NW2d 561 (2006) (Opinion of Young, J.), overruled on other grounds, *Lansing Schools Educ Ass’n v Lansing Bd of Ede*, 487 Mich 349; 792 NW2d 686 (2010) (same); *Citizens Protecting Michigan’s Constitution v Secretary of State*, 280 Mich

App 273, 282; 761 NW2d 210 (2008) (“A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all.”); see also *In re Independent Citizens Redistricting Comm’n for State Legislative and Congressional District’s Duty to Redraw Districts by Nov. 1, 2021*, 507 Mich 1025; 961 NW2d 211, 213 (2021) (“a majority of this Court believes that the anticipatory relief sought is unwarranted”).

Consistent with these principles, this Court has declined to rule on constitutional challenges to state statutes for lack of ripeness where, as here, the government has not exercised its authority to enforce the statute. *Dept of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 388-389; 455 NW2d 1 (1990) (mem) (“The Court does not decide whether the [statutory] financial disclosure provisions violate the defendants' rights of the free exercise of religion and freedom of association, since the state has not exercised its statutory authority to compel financial disclosure, making these issues unripe for review.”); see also *Katt v Dykhouse*, 983 F2d 690 (CA 6, 1992) (“Under Michigan law, a constitutional challenge to a state statute is unripe unless it is clear that the state authorities intend to enforce the statute against the plaintiff”).

Indeed, this Court has declined similar requests for authorization of certified questions where the issues presented simply aren’t justiciable. *In re Executive Message of Governor Requesting Authorization of a Certified Question*, 755 NW2d 153 (Mich, 2008) (“[I]n response to the Executive Message, we respectfully decline the request to authorize the certified question because it is effectively moot.”)

Here, there is no way around the fact that the Governor’s claims are unripe. No one is under any imminent threat of prosecution for violating MCL 750.14 by engaging in conduct protected by *Roe* and other U.S. Supreme Court precedent. *Roe* has protected the taking of innocent, unborn, human life for nearly half a century and continues to do so. There is no present “controversy.” And *Dobbs* doesn’t change that. It is not clear how the U.S. Supreme Court will rule in *Dobbs*. And even if *Dobbs* eventually overturns *Roe* in whole or in part, a Michigan mother would still need to choose to take the life of her unborn child in Michigan, a Michigan abortion provider would still need to help the mother do so, and a prosecutor would still need to make the decision to enforce MCL 750.14 against the provider in those circumstances.

In sum, at its core, the Governor’s claims depend on multiple “contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Thomas*, 473 US at 580–81 (citation omitted). This case is not ripe for consideration by the Oakland County Circuit Court, much less this Court. And given the highly charged political context here—where the Governor and Attorney General abandoned their constitutional obligations to execute and defend the law, and in which Planned Parenthood and its allies are already asking for the same relief the Governor requests through a ballot initiative—this Court’s institutional credibility would suffer permanent damage if it agreed to take jurisdiction over the proposed certified questions.

II. This Court should decline to order certification of any issues presented for several additional reasons.

Even if the U.S. Supreme Court were to rule in *Dobbs* that *Roe* is no longer good law, there is still no basis for this Court to exercise jurisdiction. This Court has no obligation to grant any request for authorization of a certified question. MCR 7.308(A)(5); MCR 7.308(A)(1)(a) (“may authorize [the trial court] to certify questions to the Court.”). The Court’s power in this regard is discretionary. See *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 567; 886 NW2d 113 (2016) (“The use of the term ‘may’ indicates discretionary, rather than mandatory, action.”); *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994) (use of the term “may” indicates “discretionary” action).

Here, in addition to the fact that the issues raised by the Governor are not justiciable, there are multiple reasons why this Court should decline to authorize the trial court to issue certified questions and instead allow this case to proceed through the normal course.

First, there is no indication that the Governor’s attempt to invalidate the constitutionality of a Michigan law, MCL 750.14, is so important and urgent “as to require an early determination.” MCR 7.308(A)(1)(a). There is nothing in the Governor’s brief supporting her request for certification establishing that this Court needs to intervene now, instead of allowing the judiciary’s normal process to function. The asserted exigency at the foundation of the Governor’s request—her concern that medical providers may be subject to criminal liability if *Roe* is overruled—is entirely speculative and unsupported by any record. It is unclear how

the U.S. Supreme Court will rule in *Dobbs*. Maybe it will entirely overrule *Roe*. Maybe it will affirm *Roe* in its entirety. Or maybe it will take an in-between approach that splits the difference somehow. Regardless, there is no way to know for sure. And, until the Supreme Court issues its opinion in *Dobbs*, the Governor's request is premature. At this point, there is no more need for this Court to shortcut the normal judicial process than there has been since 1931, when MCL 750.14 was enacted. For that reason alone, this Court should decline the certification request.

Second, authorizing the trial court to certify questions at this early juncture is inconsistent with the plain language of MCR 7.308(A)(1)(a), which requires the lower court "to certify the question to [this] Court with a statement of the facts sufficient to make clear the application of the question." See also 6 Mich. Ct. Rules Prac., Text § 7308.2 (7th ed.) ("Any legal question certified to the Supreme Court must be accompanied by a statement of facts sufficient to make clear the application of the question."). And "if sufficient facts are not given, the Court may require a further and better statement of the question or of the facts." MCR 7.308(A)(1)(b). But "[i]f that is not possible, the high court may decline to review the matter at that time." 6 Mich. Ct. Rules Prac., Text § 7308.2 (7th ed.).

Here, because this is an anticipatory lawsuit that has only just begun (the defendants have not even answered the Governor's complaint), there are no facts or even controversies presented on which a court could opine. For example, if this Court were to "find" a constitutional right to abortion in Michigan's 1963 Constitution—which is just as silent about the subject as is the federal Constitu-

tion—it would have to articulate the contours of that right. Does that purported right prevent laws that reasonably require medical providers to notify the parents of minor children before performing an abortion procedure? Does it stop the State from imposing requirements that protect the health and safety of women undergoing hospital procedures, such as admission privileges at a nearby hospital? Does it cut short the State’s ability to require that a mother is adequately informed before she consents to have the life of her baby taken? It is impossible to answer these questions without facts and an actual controversy. As a result, authorizing the trial court to certify questions to this Court would be pointless because there is no world in which the trial court could provide this Court with “a statement of the facts sufficient to make clear the application of the question.” MCR 7.308(A)(1)(a).

Finally, there are difficult federal legal issues embedded in the Governor’s proposed certified questions. For example, if this Court accepts the Governor’s contention that a silent Michigan Constitution creates a right to an abortion, then Right to Life of Michigan and the Michigan Catholic Conference will demonstrate to this Court—and to the U.S. Supreme Court if necessary—that the U.S. Constitution supersedes that right because the Fourteenth Amendment protects all life beginning at conception. And if this Court were to take seriously the Governor’s claim that MCL 750.14 has been invalid for the past 59 years, since the moment the Michigan Constitution became effective in 1963, then Right to Life of Michigan and the Michigan Catholic Conference’s response will be that the U.S. Constitution’s Republican Form of Government Clause requires this Court—and the U.S. Supreme

Court if necessary—to honor the language and the silence of Michigan’s Constitution, rather than impose language and rights that the People of Michigan have never endorsed nor ratified through the democratic process. Both this Court and the U.S. Supreme Court would benefit greatly from having such thorny issues briefed, argued, and decided at each level of the judiciary, as is typical, rather than rushing to judgment now.

Accordingly, there are multiple prudential concerns that militate against this Court authorizing the trial court to certify the questions raised in the Governor’s complaint. Instead, it should decline the certification request and allow this case to proceed in the trial court, if appropriate, and any subsequent appeals pursued through the usual channels in the ordinary course.

Conclusion

For the reasons stated above, this Court should decline the Governor’s request to authorize the Oakland County Circuit Court to certify the issues raised in the Governor’s complaint.

Respectfully submitted,

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Dated: April 22, 2022

EXHIBIT 1

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients; and **SARAH WALLETT, M.D., M.P.H., FACOG**, on her own behalf and on behalf of her patients,

Plaintiffs,

v

ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
in her official capacity,

Defendant.

Case No. 22- -MM

Hon.

VERIFIED COMPLAINT

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VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, now between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this court.

/s/ 
DEBORAH LABELLE (P31595)

Plaintiffs Planned Parenthood of Michigan (PPMI), on behalf of itself, its physicians, its staff, and its patients, and Sarah Wallett, M.D., M.P.H., FACOG, on behalf of herself and her patients (together, “Plaintiffs”), by and through their counsel, bring this verified complaint for declaratory and injunctive relief against the above-named Defendant and her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, including all persons supervised by the Defendant, all in their official capacities, and in support thereof, allege as follows:

INTRODUCTION

1. A 1931 Michigan statute criminalizes abortion, even in cases of rape, incest, or grave threats to the pregnant person’s health. Under this law as written, providing an abortion at any point in pregnancy is punishable as a felony, unless the abortion is necessary to save the pregnant person’s life. MCL 750.14 (the “Criminal Abortion Ban”).

2. The Criminal Abortion Ban violates the rights to liberty, privacy, bodily integrity, and equal protection guaranteed by the Michigan Constitution and the Elliott-Larsen Civil Rights Act, and it is unconstitutionally vague.

3. Despite the Criminal Abortion Ban's unconstitutionality, the Michigan Supreme Court has never addressed the Ban's legality as a matter of Michigan law. And no Michigan court has ruled on the statute's facial vagueness. While the Michigan Supreme Court in *People v Bricker*, 389 Mich 524, 531; 208 NW2d 172 (1973), construed the Criminal Abortion Ban to be unenforceable to the extent it conflicts with the federal substantive due process right to abortion as set forth in *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), the Court construed the statute as remaining otherwise enforceable, and no injunction currently prevents Michigan prosecutors from initiating prosecutions under the Criminal Abortion Ban as written or otherwise contrary to this construction.

4. In the nearly 50 years since *Bricker*, the Supreme Court of the United States has repeatedly altered and clarified the scope of the federal right to abortion. Any day now, it is likely to do so again in *Dobbs v Jackson Women's Health Organization* ("*Dobbs*"), No 19-1392 (US, docketed June 18, 2020), which squarely presents the question whether *Roe* should be overruled. Once that Court rules, the Michigan Supreme Court's saving construction may no longer protect abortion providers from felony prosecution under the Criminal Abortion Ban. Accordingly, recognition of the Criminal Abortion Ban's unconstitutionality as a matter of Michigan law is both urgently needed and long overdue.

5. Plaintiff PPMI or its predecessors has provided sexual and reproductive health services to people in Michigan for about one hundred years. Today, PPMI provides those services, including abortions, at its 14 health centers. As a Michigan-licensed physician and the Chief Medical Officer at PPMI, Plaintiff Dr. Sarah Wallett provides abortions and other sexual and reproductive health care to patients throughout the state.

6. If the Criminal Abortion Ban were enforced as written, it would have devastating consequences for PPMI's physicians, including Dr. Wallett; its staff; its patients; its patients' families; and communities across Michigan.

7. Accordingly, Plaintiffs bring this lawsuit, on behalf of themselves and others, to enjoin the enforcement of the Criminal Abortion Ban as written; to obtain fair notice of what the Criminal Abortion Ban proscribes; and to declare their patients' right to obtain abortions as protected by the Michigan Constitution and the Elliott-Larsen Civil Rights Act.

JURISDICTION

8. This Court has jurisdiction over Plaintiffs' claims in this action pursuant to MCL 600.6419(1)(a), giving the Court of Claims jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court."

PARTIES

9. Plaintiff PPMI, which itself or through its predecessors has been in operation for at least the last one hundred years, is a not-for-profit corporation operating 14 health centers in Michigan, with headquarters in Ann Arbor. PPMI's mission is to promote healthy communities and the right of all individuals to manage their sexual health by providing reproductive health care and education, and serving as a strong advocate for reproductive justice. PPMI's health centers provide a wide range of reproductive and sexual health services to patients, including testing and treatment for sexually transmitted infections; contraception counseling and provision; HIV prevention services; pregnancy testing and options counseling; preconception counseling;

gynecologic services including menopause care; well-person exams; cervical and breast cancer screening; treatment of abnormal cervical cells; colposcopy; miscarriage management, and abortion. PPMI faces possible criminal prosecution, licensure penalties, and other civil enforcement actions for providing abortions in violation of the Criminal Abortion Ban as written. PPMI sues on its own behalf, on behalf of its physicians and staff, and on behalf of its patients, who are at imminent risk of losing access to abortion in violation of their state constitutional and statutory rights.

10. Plaintiff Sarah Wallett, M.D., M.P.H., FACOG, is a board-certified obstetrician-gynecologist (OB/GYN) licensed to practice medicine in Michigan and a resident of the State of Michigan. Dr. Wallett has been the Chief Medical Officer of PPMI since March 2019. Dr. Wallett is also an adjunct clinical assistant professor at the University of Michigan Medical School in Ann Arbor. Dr. Wallett began providing abortions in 2009. For providing abortions in Michigan, Dr. Wallett would face possible felony criminal prosecution and licensure penalties under the Criminal Abortion Ban as written, should it be enforced. Dr. Wallett sues on her own behalf and on behalf of her patients, who are at imminent risk of losing access to abortion in violation of their state constitutional and statutory rights.

11. Defendant Attorney General of the State of Michigan is the top law enforcement official in the state. She is charged with defending and enforcing the proper laws in the state, as well as supervising all county prosecutors charged with enforcing the criminal statutes of Michigan. MCL 14.28–14.30; Const 1963, art 5, §§ 1, 3. The Attorney General also acts in a representative and advisory capacity with respect to Michigan administrative agencies, including the Michigan Department of Licensing and Regulatory Affairs (LARA), which can impose penalties on Michigan-licensed health care facilities and physicians. See MCL 333.16221(b)(v);

MCL 333.16226(1); MCL 333.20165; MCL 333.20168(1); MCL 333.20177; MCL 333.20199(1). Indeed, “it is universally recognized that among the primary missions of a state attorney general is the duty to give legal advice . . . to . . . agencies of state government.” *Sch Dist of City of East Grand Rapids, Kent Co v Kent Co Tax Allocation Bd*, 415 Mich 381, 394; 330 NW2d 7 (1982). The Attorney General is the appropriate defendant in a suit over the constitutionality of the Criminal Abortion Ban. See, e.g., *Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997). The Michigan Attorney General is sued in her official capacity.

FACTS

HISTORY OF MICHIGAN’S 1931 CRIMINAL ABORTION BAN

12. Michigan’s Criminal Abortion Ban provides:

Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall 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, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed. [MCL 750.14.]

13. Violating the Criminal Abortion Ban is an unclassified felony, punishable by up to four years’ imprisonment, a fine of up to \$5,000, or both. MCL 750.503. Physicians convicted of violating the Criminal Abortion Ban may also face administrative penalties from LARA, including permanent license revocation. MCL 333.16221(b)(v); MCL 333.16226(1). Michigan-licensed health care facilities that employ physicians who violate the Criminal Abortion Ban may face possible penalties as well, including criminal prosecution, see MCL 750.10; MCL 333.20199(1),

license revocation through administrative enforcement by LARA, see MCL 333.20165; MCL 333.20168(1), or actions to enjoin operation of their licensed facility, MCL 333.20177.

14. As articulated by the Court of Appeals, the Criminal Abortion Ban's predecessor statute, 1846 RS, ch 153, § 34, was enacted in the mid-nineteenth century. *People v Nixon*, 42 Mich App 332, 335 & n 5; 201 NW2d 635 (1972), remanded 389 Mich 809; 387 NW2d 921 (1973), on remand 50 Mich App 38; 212 NW2d 797 (1973). Previously, under common law, it was not a crime to terminate a pregnancy prior to "quickening," *id.* at 335, which was defined as the point in pregnancy when the pregnant person could first sense fetal movement, generally recognized as occurring in the fourth or fifth month of pregnancy, *id.* at 335 n 3, citing Stedman, *Medical Dictionary* (21st ed), p 1340.

15. The earlier version of the Criminal Abortion Ban made it a misdemeanor to "wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or [to] 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" *Id.* at 336 & n 7, quoting 1846 RS, ch 153, § 34. Two companion provisions were passed at the same time as 1846 RS, ch 153, § 34. The first provision established that "[t]he 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, shall be deemed manslaughter." *Nixon*, 42 Mich App at 335 & n 5, citing and quoting 1846 RS, ch 153, § 32.

16. The second provision established that anyone who "administer[ed] to any woman pregnant with a quick child, any medicine, drug or substance whatever, or [who] use[d] or employ[ed] any instrument or other means, with intent thereby to destroy such child," would be guilty of manslaughter if either the "quick child" or the pregnant person died, unless doing so was

necessary to save the pregnant person's life. *Id.* at 336 & n 6, citing and quoting 1846 RS, ch 153, § 33.

17. In 1931, the Michigan Legislature amended and consolidated the abortion statutes, creating two consolidated sections that remain in the Michigan Code today as MCL 750.14 (the Criminal Abortion Ban) and MCL 750.15. A version of 1846 RS, ch 153, § 33 remains in the Michigan Code today as MCL 750.323.

18. The Legislature's 1931 revision makes it a felony to perform an abortion at any point in gestation (termed in the statute as "procur[ing] the miscarriage of any [pregnant] woman"), unless necessary to save the pregnant person's life. MCL 750.14.

19. In 1973, in *Roe v Wade*, the United States Supreme Court held that a Texas statute making it a crime to "procure an abortion," except for the purpose of saving the pregnant person's life, violated the Fourteenth Amendment to the United States Constitution. 410 US at 117–118. The Court held that the Fourteenth Amendment right to privacy barred a state from banning abortion before viability, or after viability where necessary to preserve the pregnant person's life or health. *Id.* at 164–165.

20. Immediately after *Roe* was decided, in *People v Bricker*, the Michigan Supreme Court relied solely on the federal constitution to find the Criminal Abortion Ban unconstitutional to the extent it prohibits abortions protected under *Roe*. *Bricker*, 389 Mich at 531. The Court did not separately address the Criminal Abortion Ban's legality as written or as a matter of Michigan constitutional law. Instead, the Michigan Supreme Court construed the statute not to apply to abortions protected under *Roe*. See *id.*

21. Specifically, *Bricker* held as follows:

In light of the declared public policy of this state and the changed circumstances resulting from the federal constitutional doctrine

elucidated in *Roe and Doe* [*v Bolton*, 410 US 179; 93 S Ct 739, 35 L Ed 2d 201 (1973)], we construe [the Criminal Abortion Ban] 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. . . .

We hold that, except as to those cases defined and exempted under *Roe v Wade* and [its companion case] *Doe v Bolton*, . . . criminal responsibility attaches. [389 Mich at 529–531.]

22. Accordingly, under *Bricker*, the Criminal Abortion Ban does not prohibit pre-viability abortions performed by a physician, or post-viability abortions necessary to preserve the pregnant person’s life or health.

23. Because *Bricker* was a criminal appeal, no injunctive relief was requested or considered by the Court in construing the Criminal Abortion Ban. See *Bricker*, 389 Mich 524.

24. Similarly, in *Larkin v Cahalan*, 389 Mich 533; 208 NW2d 176 (1973), the Michigan Supreme Court construed MCL 750.323—one of the companion statutes to the Criminal Abortion Ban, which criminalizes abortions provided after the point of “quickening” as manslaughter—so as not to apply to abortions provided by a physician before viability, in order to preserve that statute’s constitutionality under *Roe v Wade*. *Larkin*, 389 Mich at 541–542. As in *Bricker*, the court did not enjoin the statute.¹

25. The Michigan Supreme Court has never addressed the Criminal Abortion Ban’s constitutionality as a matter of Michigan law. While the Michigan Court of Appeals held in *Mahaffey v Attorney General* that the Michigan Constitution does not protect a privacy right to

¹ Accordingly, for all the reasons articulated herein as to MCL 750.14, Plaintiffs also seek declaratory and injunctive relief against MCL 750.323, and any other Michigan statute or regulation to the extent it prohibits abortions.

abortion that is separate and distinct from the federal right, 222 Mich App at 339, 345, *Mahaffey* did not have the legality of the Criminal Abortion Ban before it.

26. The Michigan Supreme Court has also never construed or re-examined the Criminal Abortion Ban in light of subsequent doctrinal changes to the federal substantive due process right to abortion recognized in *Roe*. The United States Supreme Court reaffirmed that federal right in *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), but held that states can regulate abortion before viability so long as the regulation does not impose an “undue burden” on the right to abortion, *id.* at 874 (plurality opinion). The United States Supreme Court again reaffirmed the federal right in *Gonzales v Carhart*, 550 US 124, 146; 127 S Ct 1610; 167 L Ed 2d 480 (2007), while also upholding for the first time a law banning a particular abortion method, *id.* at 164–165, 167. In *Whole Women’s Health v Hellerstedt*, 579 US 582; 136 S Ct 2292; 195 L Ed 2d 665 (2016), the United States Supreme Court again reaffirmed the federal right to abortion, striking down Texas abortion restrictions because they imposed an undue burden on the right, 136 S Ct at 2310–2311, 2314–2318. Most recently, in *June Medical Services LLC v Russo*, ___ US ___; 140 S Ct 2103; 207 L Ed 2d 566 (2020), the Court struck down a Mississippi law nearly identical to the one it had invalidated in *Whole Woman’s Health*, see *June Med*, 140 S Ct at 2129–2130, 2132 (plurality opinion), though it did so in a series of splintered opinions that have been applied differently in the federal courts of appeals, see generally *id.* at 2112–2133 (plurality opinion); *id.* at 2133–2142 (Roberts, C.J., concurring in the judgment). Compare *EMW Women’s Surgical Ctr v Friedlander*, 978 F3d 418, 433 (CA 6, 2020) (Sixth Circuit holding that Chief Justice Roberts’s concurrence in *June Medical* is controlling), with *Planned Parenthood of Ind & Ky, Inc v Box*, 991 F3d 740, 748

(CA 7, 2021) (Seventh Circuit holding that Chief Justice Roberts’s *June Medical* concurrence cannot control), pet for cert docketed, No 20-1375 (US, April 1, 2021).

27. The Michigan Supreme Court’s construction of the Criminal Abortion Ban thus appears to incorporate by reference a federal constitutional doctrine that has shifted over time. Beyond *Bricker*’s holding explicitly applying the specific federal protections announced in *Roe*—that the Criminal Abortion Ban could not be enforced against physicians who provide abortions before viability, or after viability where necessary to save the patient’s life or health—the parameters of the Criminal Abortion Ban’s prohibitions are otherwise unclear, given the changing standards in federal abortion doctrine.

28. This construction is also at risk of significant modification by the United States Supreme Court’s forthcoming decision in the *Dobbs* case, which presents the question whether *Roe v Wade*—on which the *Bricker* construction is founded—should be overruled. Brief for Petitioners, at i, *Dobbs v Jackson Women’s Health Org*, 2021 WL 3145936, at *i (US, July 22, 2021) (Docket No 19-1392); see also *id.* at 14 (“This Court should overrule *Roe* and *Casey*.”); *Dobbs*, 141 S Ct 2619 (granting certiorari). The United States Supreme Court could issue its decision in *Dobbs* any day, endangering the constitutional rights Michiganders have relied on for the past five decades, and further obscuring the scope and prohibitions of the Criminal Abortion Ban in defiance of principles of fair notice.

29. The Criminal Abortion Ban has never been repealed, and the Michigan Court of Appeals has held that it has not been repealed by implication. *People v Higuera*, 244 Mich App 429, 436–437; 625 NW2d 444 (2001).

STATEMENT OF FACTS RELATIVE TO EACH PLAINTIFF**A. PPMI**

30. PPMI is a not-for-profit corporation that currently operates 14 health centers across Michigan, in Ann Arbor, Detroit, Ferndale, Flint, Grand Rapids, Jackson, Kalamazoo, Lansing, Livonia, Marquette, Traverse City, Petoskey, and Warren.

31. PPMI or its predecessors have been operating in Michigan since at least 1922.

32. PPMI's health centers provide a wide range of reproductive and sexual health services to patients, including abortion, see *supra* ¶ 9.

33. PPMI's health centers provide medication abortion, where the patient takes a set of pills to end their pregnancy, up to 11 weeks of pregnancy, as measured from the first day of the pregnant person's last menstrual period (LMP).

34. PPMI's Ann Arbor East and Kalamazoo health centers also provide procedural abortion, where a physician uses suction and sometimes instruments to empty the patient's uterus, up to 19 weeks, 6 days LMP, and its Flint health center provides procedural abortion up to 16 weeks, 6 days LMP. Each of these three health centers is licensed as a Freestanding Outpatient Surgical Facility by LARA.

35. Other physicians and hospitals also provide medication abortion and procedural abortion in Michigan.

36. In Fiscal Year 2020, PPMI provided 8,448 abortions. Of those, 6,626 were medication abortions, and 1,822 were procedural abortions.

37. Between July 2020 and June 2021, PPMI saw 615 abortion patients who traveled to its health centers from other states—7% of the total number of abortion patients seen in that

time period. By comparison, in that same time frame, 3% of the patients PPMI saw for *all* health care services (including abortion) came from out of state.

38. PPMI employs full-time physicians and part-time physicians, as well as physicians who perform contracted work through arrangements with teaching hospitals and universities. All physicians employed by PPMI currently have admitting privileges at University of Michigan Hospital in Ann Arbor.

39. At its health centers, PPMI trains medical students, OB/GYN residents, family medicine residents, family medicine fellows, and OB/GYN fellows to provide abortion and other health care.

40. By its terms, the Criminal Abortion Ban outlaws the abortions that PPMI provides.

41. But for the enforcement of the Criminal Abortion Ban, PPMI intends to continue to provide abortions to people in Michigan.

42. If the Criminal Abortion Ban is enforced according to its terms and contrary to *Bricker* and *Roe*, PPMI will be forced to stop providing abortions at its health centers in Michigan.

B. SARAH WALLETT, M.D., M.P.H., FACOG

43. Dr. Wallett is a board-certified OB/GYN licensed in Michigan. Since 2019, she has been the Chief Medical Officer of PPMI. Dr. Wallett is also an adjunct clinical assistant professor at the University of Michigan Medical School.

44. As Chief Medical Officer at PPMI, Dr. Wallett oversees all clinical care and operations. This entails overseeing more than 10 physicians, more than 20 clinicians, licensed and non-licensed health center staff, and a rotating set of medical students, residents, and fellows who come to PPMI to complete training in abortion and other health care. Dr. Wallett is responsible for training, proctoring, and conducting annual assessments of clinical skills for this team.

45. At PPMI, Dr. Walleth provides abortions to people from Michigan as well as people who travel to Michigan from other states.

46. By its terms, the Criminal Abortion Ban outlaws the abortions that Dr. Walleth provides at PPMI.

47. But for the enforcement of the Criminal Abortion Ban as written, Dr. Walleth intends to continue to provide abortions to people in Michigan.

48. If the Criminal Abortion Ban is enforced according to its terms and contrary to *Bricker* and *Roe*, Dr. Walleth will be forced to stop providing abortions at PPMI health centers in Michigan.

**PREGNANCY HAS SIGNIFICANT MEDICAL,
FINANCIAL, AND PERSONAL CONSEQUENCES**

49. To understand why abortion is essential and constitutionally protected health care, it is important first to understand the ways in which pregnancy affects people, both during the pregnancy itself and for years afterward.

50. People experience their pregnancies in a range of different ways. While pregnancy can be a celebratory and joyful event for many families, even an uncomplicated pregnancy challenges a person's entire physiology. Pregnancy can also be a period of physical and personal discomfort; some pregnant people experience significant mental health challenges, including dysphoria.

51. Pregnancy and childbirth carry significant medical risk. Maternal mortality is a serious and worsening problem in the United States. Women of color, and Black women in particular, face heightened risks of maternal mortality and pregnancy-related complications compared to non-Hispanic white women. This disparity between the maternal mortality rates for women of color and non-Hispanic white women has been exacerbated in the past year.

52. Every pregnancy necessarily involves significant physical change. A typical pregnancy generally lasts roughly 40 weeks LMP. During that time, the pregnant person experiences a dramatic increase in blood volume, a faster heart rate, increased production of clotting factors, breathing changes, digestive complications, and a growing uterus.

53. As a result of these changes and others, pregnant individuals are more prone to blood clots, nausea, hypertensive disorders, and anemia, among other complications. Many of these complications are mild and resolve without the need for medical intervention. Some, however, require evaluation and occasionally urgent or emergent care to preserve the patient's health or save their life.

54. Pregnancy may aggravate preexisting health conditions such as hypertension and other cardiac disease, diabetes, kidney disease, autoimmune disorders, obesity, asthma, and other pulmonary disease.

55. Other health conditions, such as preeclampsia, deep-vein thrombosis, and gestational diabetes, may arise for the first time during pregnancy. People who develop a pregnancy-induced medical condition are at higher risk of developing the same condition in a subsequent pregnancy.

56. Many pregnant people seek care in the emergency department at least once during pregnancy. People with comorbidities (including both people with preexisting comorbidities and those who develop comorbidities as a result of their pregnancy), such as asthma, obesity, hypertension, or diabetes, are significantly more likely to seek emergency care.

57. A relatively common complication of pregnancy is ectopic pregnancy, which occurs when a fertilized egg implants anywhere other than in the endometrial lining of the uterus.

If an ectopic pregnancy ruptures, it can kill the pregnant person. Ruptured ectopic pregnancy is a significant cause of pregnancy-related mortality and morbidity.

58. Every pregnancy also carries a risk of miscarriage, as well as a risk of preterm premature rupture of membranes. Complications from miscarriage can lead to infection, hemorrhage, and even death. By comparison, the risk of death following a miscarriage is roughly twice the risk of death following an abortion (the risk of death following abortion is approximately 0.7 deaths per 100,000 procedures).

59. Mental health conditions may emerge for the first time during pregnancy or in the postpartum period. A person with a history of mental illness may also experience a recurrence of their illness during pregnancy. Pregnant people with a prior history of mental health conditions also face a heightened risk of postpartum mental illness.

60. Separate from pregnancy, childbirth itself is a significant medical event. Even a normal pregnancy can suddenly become life-threatening during labor and delivery. During labor, increased blood flow to the uterus places the patient at risk of hemorrhage and, in turn, death; indeed, hemorrhage is the leading cause of severe maternal morbidity.

61. People who undergo labor and delivery can experience other unexpected adverse events such as transfusion, perineal laceration, ruptured uterus, and unexpected hysterectomy.

62. A substantial proportion of deliveries occurs by cesarean section (C-section), an open abdominal surgery requiring hospitalization for at least a few days. While common, C-sections carry risks of hemorrhage, infection, and injury to internal organs.

63. Vaginal delivery often leads to injury, such as injury to the pelvic floor. This can have long-term consequences, including fecal or urinary incontinence.

64. A person carrying a pregnancy to term may also experience post-pregnancy mental health issues.

65. Pregnant people may also face an increased risk of intimate partner violence, with the severity sometimes escalating during or after pregnancy. Homicide has been reported as a leading cause of maternal mortality, the majority caused by an intimate partner.

66. Pregnancy and childbirth are expensive. Pregnancy-related health care and childbirth are some of the costliest hospital-based health services, particularly for complicated or at-risk pregnancies. While insurance may cover most of these expenses, many pregnant patients with insurance must still pay for significant labor and delivery costs out of pocket.

67. The financial burdens of pregnancy and childbirth weigh even more heavily on people without insurance, who are disproportionately people of color, and on people with unintended pregnancies, who may not have sufficient savings to cover pregnancy-related expenses. A costly pregnancy, particularly for people already facing an array of economic hardships, could have long-term and severe impacts on a family's financial security.

68. Almost half of the pregnancies in the U.S. are unintended, and people of color and people with low incomes experience unintended pregnancy at a disproportionately higher rate, in large part due to systemic barriers to contraceptive access.

69. Beyond childbirth, raising a child is expensive, both in terms of direct costs and due to lost wages. On average, women experience a large and persistent decline in earnings following the birth of a child, an economic loss that compounds the additional costs associated with raising a child.

70. Given the impact of pregnancy and childbirth on a person’s mental and physical health, finances, and personal relationships, whether to become or remain pregnant is one of the most personal and consequential decisions a person will make in their lifetime.

71. Certainly, many people decide that adding a child to their family is well worth all of these risks and consequences. But if abortion becomes unavailable in Michigan—as might happen any day now—thousands of pregnant people in this state will be forced to assume those risks involuntarily.

ABORTION IS SAFE, COMMON, AND ESSENTIAL HEALTH CARE

72. Abortion is one of the safest and most common medical services performed in the United States today. Indeed, legal abortion carries far fewer risks than childbirth.

73. A woman’s² risk of death associated with childbirth, specifically, is more than 12 times higher than that associated with abortion, and the total risk of maternal mortality is 34 times higher than the risk of death associated with abortion. Every pregnancy-related complication is more common among women having live births than among those having abortions.

74. Of the 29,669 induced abortions performed in Michigan in 2020, the Michigan Department of Health reports just seven immediate complications.³ The average three-year rate of immediate abortion complications between 2017 and 2019 was 3.5 per 10,000 induced abortions: just 0.035%.⁴

² Plaintiffs occasionally use “woman” or “women” as a short-hand for people who are or may become pregnant, while recognizing that people of all gender identities may become pregnant and seek abortion services. Plaintiffs also use “woman” or “women” when citing or quoting research that reports its results in terms of “women,” to preserve the accuracy of those results.

³ Mich Dep’t of Health, Div for Vital Records & Health Stats, *Table 22, Number, Percent and Rate of Reported Induced Abortions with Any Mention of Immediate Complication by Type of Immediate Complication, Michigan Occurrences, 2020* <https://www.mdch.state.mi.us/osr/abortion/Tab_13.asp> (accessed April 4, 2022).

⁴ *Id.*

75. Approximately one in four women in this country will have an abortion by age forty-five.

76. There are two general categories of methods used to provide abortion: medication abortion and procedural abortion.

77. For early medication abortion, patients take a regimen of two prescription drugs approved by the U.S. Food and Drug Administration (FDA). Together, the medications cause the pregnancy to pass in a process similar to miscarriage.

78. This medication abortion regimen is widely used to terminate pregnancies through 11 weeks LMP. After 11 weeks LMP, only procedural abortion is generally available.

79. For procedural abortion, a clinician uses instruments and/or medication to widen the patient's cervical opening and empty the uterus. Procedural abortion is a straightforward and brief procedure almost always performed in an outpatient setting. Although procedural abortion is sometimes referred to as "surgical" abortion, it is not what is commonly understood to be surgery, as it involves no incisions, no need for general anesthesia, and no need for a sterile field.

80. Starting around 18 to 20 weeks LMP, an additional procedure may be performed to ensure that the patient's cervix is adequately dilated for the procedural abortion. This may occur on the same day as the abortion, or the day prior to the abortion.

81. There is no typical abortion patient, and pregnant people seek abortions for a variety of deeply personal reasons.

82. In addition to cisgender women, gender-nonconforming people, transmasculine people, and trans men have abortions.

83. Most abortion patients nationally already have at least one child. Most also report plans to have children (or additional children) at another time in their lives.

84. Nearly three-fourths of abortion patients say they cannot afford to become a parent or to add to their families, and the same proportion also cites responsibility to other individuals (such as children or elderly parents), or that having a baby would interfere with work and/or school, as their reason for ending their pregnancy.

85. Some people decide to have an abortion because they do not want children at all.

86. Some people decide to end their pregnancy because it is dangerous to their mental or physical health, or because it threatens their life.

87. Some people seek abortions because they are experiencing intimate partner violence. Many of these patients fear that carrying the pregnancy to term and giving birth would further tie them to their abusers.

88. Some people seek abortions because the pregnancy is the result of rape.

89. Some people decide to have an abortion because of an indication or diagnosis of a fetal medical condition. Some families feel they do not have the resources—financial, medical, educational, or emotional—to care for a child with special needs, or to do so while providing for the children they already have.

90. Some people decide to have an abortion because of a fetal diagnosis of a condition that means after delivery the baby would never be healthy enough to go home. While some may decide to carry such a pregnancy through delivery, others may decide that they wish to terminate the pregnancy.

91. In summary, the decision to terminate a pregnancy is often motivated by a combination of complex and interrelated factors that are intimately tied to the pregnant person's identity and values, mental and physical health, and economic circumstances.

92. Pregnant people in Michigan need access to safe and legal abortion to exercise autonomy over their lives and to engage fully and equally in society. For centuries, women's roles and lives have been designed by their families, partners, religious leaders, and government, in reliance on the stereotype that pregnancy—or even the capacity to become pregnant—determines the course a person's life can take. This stereotype reinforces the subordination of women. Everyone who can become pregnant has a right to design their own future and to make decisions about their relationships and life opportunities without government interference that puts their health and well-being at risk.

93. In Michigan, women and others who can become pregnant have ordered their lives, organized their intimate relationships, and determined their identities and their place in society in reliance on the right and availability of safe access to abortion. If the Criminal Abortion Ban becomes enforceable as written, contrary to *Roe v Wade* and the Michigan Supreme Court's construction in *Bricker*, it would chill PPMI's and Dr. Wallett's provision of abortion. In turn, it would pose an imminent threat to patients who today justifiably rely upon the right to obtain an abortion, and would deny women the right to participate equally in the economic and social life of this state, facilitated by their ability to control their reproductive lives.

**IF ENFORCED AS WRITTEN, THE CRIMINAL ABORTION BAN
WILL OUTLAW VIRTUALLY ALL ABORTIONS IN MICHIGAN**

94. The Criminal Abortion Ban, as written, prohibits abortions, even in cases of rape, incest, or grave threats to the pregnant person's health. The only exception is for abortions necessary to save the pregnant person's life.

95. For nearly the last 50 years, abortion providers in Michigan have relied on the Michigan Supreme Court's construction of the Criminal Abortion Ban in *Bricker*, which incorporates the federal protections in *Roe* and therefore allows physicians to provide abortion

before viability, or after viability where necessary to save the patient's life or health. But no court order currently enjoins any Michigan official from enforcing the Criminal Abortion Ban.

96. Moreover, should the United States Supreme Court modify those federal protections—which it is likely to do imminently in *Dobbs*—the Michigan Supreme Court's construction of the Criminal Abortion Ban may no longer protect Michigan abortion providers from felony prosecution for providing an abortion in this state.

97. If the Criminal Abortion Ban becomes enforceable, PPMI, its physicians including Dr. Wallett, and their staff and patients will lack clear notice of what the Ban actually prohibits. This will hinder PPMI's and Dr. Wallett's ability to care for their patients, and it will cause confusion and panic among patients themselves.

98. First, it is unclear whether the Michigan Supreme Court's *Bricker* construction imports the full history of federal abortion jurisprudence through its reference to *Roe* and *Doe v Bolton*, or only the specific holding of *Roe* itself. When that federal doctrine is further modified by the United States Supreme Court's decision in *Dobbs*, abortion providers and patients in Michigan will lack notice of the extent to which the Criminal Abortion Ban is enforceable.

99. Second, the Criminal Abortion Ban's plain text fails to provide fair notice of which conduct is prohibited. For example, the word "abortion" is not mentioned in the statute. MCL 750.14. Instead, the statute criminalizes the acts of "[a]ny person" who administers "any medicine, drug, substance or thing whatever" by "any . . . means whatever" to "procure the miscarriage of any [pregnant] woman." *Id.* These terms may be construed broadly or contrary to their commonly understood medical meanings by prosecutors and law enforcement who are

emboldened or even merely confused.⁵

100. In this way, the Criminal Abortion Ban's terms are so indefinite that sheriffs, prosecutors, and courts could have broad discretion to assert that a range of undetermined medical practices are a crime, putting Dr. Wallett and other PPMI staff in the precarious position of not knowing what acts could subject them to criminal investigation or prosecution.

101. Third, the Criminal Abortion Ban as written does not include an exception for abortions necessary to save the pregnant patient's health. While the Michigan Supreme Court read that exception into the Ban based on its understanding of what *Roe* requires, the Ban's text does not recognize this exception. When federal abortion doctrine is modified by the United States Supreme Court's decision in *Dobbs*, abortion providers in Michigan may not know whether they can provide medically necessary abortions to patients, even when doing so is urgently needed to avert grave bodily harm.

102. It is clear, however, that if the Criminal Abortion Ban becomes enforceable as written, it would effectively end access to abortion in Michigan. PPMI and Dr. Wallett would be forced to stop providing abortion under virtually any circumstance—that, or face felony prosecution, licensure penalties, and/or civil enforcement proceedings. PPMI would no longer be able to offer abortion at any of its health centers statewide. The Criminal Abortion Ban would thus have devastating consequences for PPMI's patients, for PPMI, and for Dr. Wallett personally.

⁵ For example, people who lack a complete or accurate understanding of reproductive medicine may interpret the Criminal Abortion Ban to criminalize conduct that is not abortion at all, such as prescribing emergency contraception. Oosting, *A Michigan Abortion Ban Could 'Shock' State Politics Ahead of 2022 Election*, Bridge Mich (February 22, 2022) <<https://www.bridgemi.com/michigan-government/michigan-abortion-ban-could-shock-state-politics-ahead-2022-election>> (accessed April 4, 2022).

103. People seeking an abortion in Michigan will not know whether they can still come to PPMI for an abortion, or whether they will need to try to make arrangements to travel to another state where the right to abortion is protected, if they have the resources to do so. Those lacking the necessary resources would be forced to seek ways to end their pregnancies without medical supervision, some of which may be unsafe, or to carry a pregnancy to term against their will.

104. Many people would not be able to travel to another state to access abortion, or would be significantly delayed by the cost and logistical arrangements required to do so, such as navigating inflexible or unpredictable work schedules and child care needs.

105. Because abortion becomes more expensive as pregnancy progresses, people trying to save money for an abortion, plus money to pay for the necessary travel out of state, could find themselves in a vicious cycle of trying to raise the necessary funds while the cost grows, resulting in more delay. This delay could, in turn, push some people past the point in pregnancy where abortion is legally or practically available in nearby states, forcing them to carry the pregnancy to term against their will.

106. Delays in accessing abortion, or being unable to access abortion at all, pose risks to patients' health. While abortion is very safe at any point in pregnancy, the risks of abortion increase with gestational age. And because pregnancy and childbirth are far more medically risky than abortion, forcing people to carry a pregnancy to term exposes them to an increased risk of physical harm.

107. If abortion is no longer available, people will instead be forced to remain pregnant and give birth in a health care system that does not adequately keep pregnant people safe, especially pregnant people of color.

108. Further, people who are unable to access abortion will face increased risks to their mental health, their professional prospects, their finances, the well-being of their existing children, and the well-being of the child they are forced to have.

109. Enforcing the Criminal Abortion Ban would most harm pregnant people who are poor or have low incomes, pregnant people living in rural counties or urban areas without access to adequate prenatal care or obstetrical providers, and Black pregnant people in Michigan. As discussed above, pregnancy and childbirth are more dangerous for Black women than for white women. Banning abortion in Michigan would force Black women to bear this disproportionate risk to their health and their lives.

110. Because the Criminal Abortion Ban does not allow exceptions for pregnancies resulting from rape or incest, it would have a uniquely devastating impact on survivors of those crimes, who would be forced either to carry the pregnancy to term or to find a way to access abortion in another state.

111. If the Criminal Abortion Ban becomes enforceable as written, given the barriers to accessing abortion out of state, some people will likely find ways to self-manage abortion in Michigan; some who do may experience one of the rare complications from medication abortion. Against the backdrop of a felony abortion ban, people who experience complications after self-managing their abortions may be too afraid to seek necessary follow-up care.

112. Given the Criminal Abortion Ban's extraordinarily narrow exception for abortions necessary to preserve the pregnant person's life, pregnant people with dangerous medical conditions could be forced to wait to receive an abortion—even an urgently medically necessary abortion—until they are literally dying. This is already happening in Texas, where emergency

room physicians are afraid to terminate patients' pregnancies because they are afraid of being sued for violating Texas's law banning abortion at roughly six weeks.⁶

113. The Criminal Abortion Ban would directly harm PPMI's mission to provide comprehensive sexual and reproductive health care to the communities it serves, and PPMI's standing in the eyes of its patients and supporters. If PPMI could no longer provide abortion to people seeking that care, some might misunderstand why PPMI is no longer providing abortion and think that it is because PPMI no longer wants to, undermining patients' trust in PPMI. Worse, PPMI might no longer be seen as a safe place where people can be open and honest about their health care histories and needs. This would not only harm PPMI's reputation as a health care provider; it would interfere with PPMI's ability to provide other care. Some PPMI staff might leave the organization because they would simply be unable to bear turning patient after patient away in their time of need.

114. Additionally, absent judicial clarification of what the law permits or proscribes, local prosecutors or other state officials with enforcement authority may attempt to use the Criminal Abortion Ban to take action against PPMI or its staff based on an incorrect understanding of reproductive science and medicine. PPMI and Dr. Walleth could be forced to defend against these misguided investigations or charges, and some staff might prefer to leave PPMI rather than work with these threats and risks.

115. Enforcing the Criminal Abortion Ban would also harm Dr. Walleth personally. Her work as an abortion provider is a core part of her identity. It is also her area of professional expertise. If she were no longer able to provide abortions in Michigan, she would be forced to

⁶ Nat'l Pub Radio, *Doctors' Worst Fears About the Texas Abortion Law Are Coming True* (March 1, 2022) <<https://www.npr.org/2022/02/28/1083536401/texas-abortion-law-6-months>> (accessed April 4, 2022).

choose between continuing to provide other medical care to Michigan patients or uprooting her life and her family and moving to a state where abortion remains legal so that she could use her extensive expertise to continue to provide this vitally important health care.

116. Each of these consequences constitutes irreparable harm to PPMI and Dr. Wallett, PPMI physicians and staff, and their patients, and would violate the rights to which pregnant people are entitled under the Michigan Constitution and the Elliott-Larsen Civil Rights Act.

117. Plaintiffs have no adequate remedy at law.

CLAIMS FOR RELIEF

COUNT I

Michigan Constitution – Due Process – Vagueness

118. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

119. By failing to provide fair notice of what conduct it proscribes, and by imposing severe penalties on Plaintiffs, the Criminal Abortion Ban harms Plaintiffs and Plaintiffs' patients because it is unconstitutionally vague in violation of the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17.

120. A statute may be challenged for vagueness if “the statute fails to provide fair notice of the proscribed conduct,” or “it is so indefinite that it confers unfettered discretion on the trier of fact to determine whether the law has been violated.” *People v Rogers*, 249 Mich App 77, 94–95; 641 NW2d 595 (2001).

121. Because the Michigan Supreme Court's construction of the Criminal Abortion Ban is based on, and seemingly incorporates, federal case law, the meaning of the statute may constantly evolve and change, leaving Plaintiffs and their patients without fair notice of what conduct the statute proscribes at any given moment in time. The United States Supreme Court's

imminent decision in *Dobbs* will further modify that federal doctrine, in turn potentially revising the Criminal Abortion Ban's construction and creating further uncertainty about whether the conduct it proscribes is the same as, or different than, the conduct proscribed when the Michigan Supreme Court construed the statute in *Bricker* in 1973.

122. Additionally, the Criminal Abortion Ban's terms are so indefinite that, if it can be enforced as written, sheriffs, prosecutors, and courts would have such broad discretion to impose criminal liability based on their own beliefs about what constitutes a violation of the Ban that they would put Plaintiffs and their patients in the precarious position of structuring their conduct without knowledge of what acts could subject them to criminal prosecution.

123. As well, the Criminal Abortion Ban as written does not include an exception for abortions necessary to save the pregnant patient's health. When federal abortion doctrine is modified by the United States Supreme Court's decision in *Dobbs*, abortion providers in Michigan may not know whether they can provide medically necessary abortions to patients, even when doing so is urgently needed to avert grave bodily harm.

124. Because it criminalizes conduct of an indeterminate nature, the Criminal Abortion Ban violates the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17.

COUNT II

Michigan Constitution – Due Process – Liberty and Bodily Integrity

125. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

126. By banning abortion, the Criminal Abortion Ban violates Plaintiffs' patients' right to bodily integrity, as guaranteed by the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17.

127. The Michigan Due Process Clause protects the right to bodily integrity. See *Mays v Governor of Mich*, 506 Mich 157, 192–195; 945 NW2d 139 (2020); *Mays v Snyder*, 323 Mich App 1, 59–60; 916 NW2d 227 (2018), aff'd 506 Mich 157; 954 NW2d 139 (2020).

128. The right to bodily integrity underpins the common-law doctrine of informed consent in medical decision-making. See *In re Rosebush*, 195 Mich App 675, 680; 491 NW2d 633 (1992). Animated by this doctrine, Michigan's constitutional right to bodily integrity guards against nonconsensual physical intrusions.

129. The Criminal Abortion Ban infringes the right to bodily integrity by forcing people to remain pregnant without their consent.

130. The Criminal Abortion Ban also infringes the right to bodily integrity by forcing people to remain pregnant and endure labor and delivery, in turn requiring them to face increased medical risk and to undergo more invasive medical interventions without their consent.

131. Because the Criminal Abortion Ban infringes on a fundamental right, it is subject to strict scrutiny.

132. The Criminal Abortion Ban advances no compelling government interest. And even assuming such an interest, the Criminal Abortion Ban is not narrowly tailored to serve it, and therefore is unconstitutional.

COUNT III

Michigan Constitution – Equal Protection

133. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

134. By banning abortion, the Criminal Abortion Ban violates the equal protection rights of Plaintiffs' patients, as guaranteed by the Equal Protection Clause of the 1963 Michigan Constitution, art 1, § 2.

135. The Michigan Equal Protection Clause provides that “[n]o person shall be denied the equal protection of the laws[.]” *Id.*

136. The Michigan 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; 783 NW2d 695 (2010).

137. The Michigan Equal Protection Clause prohibits the State from denying access to a fundamental right on the basis of a classification that is not narrowly tailored to advance a compelling state interest.

138. The Criminal Abortion Ban deprives pregnant people who choose to terminate their pregnancies of their fundamental right to make decisions about their body, while allowing pregnant people who want to continue their pregnancy the full enjoyment of that fundamental right.

139. The Criminal Abortion Ban advances no compelling government interest. And even assuming such an interest, the Criminal Abortion Ban’s classification of pregnant people based on their intention for the pregnancy is neither necessary nor narrowly tailored to serve it. Therefore, the Criminal Abortion Ban is unconstitutional.

140. The Michigan Equal Protection Clause also prohibits the State from employing suspect classifications, including sex-based classifications, that give legal force to stereotypes.

141. By its own terms, the Criminal Abortion Ban creates a sex-based classification in its text; the law specifically and repeatedly singles out the “pregnant *woman*” and “such *woman*.” MCL 750.14 (emphases added).

142. By banning abortion, the Criminal Abortion Ban further relies on and entrenches stereotypical, antiquated, and overbroad generalizations about the roles and relative abilities of men and women.

143. The Criminal Abortion Ban is based on paternalistic and archaic notions of what the State believes is best for women rather than respecting pregnant people's bodily autonomy.

144. The Criminal Abortion Ban creates risks to physical and mental health, financial stability, and ability to seek out life opportunities for women and not men, which in turn perpetuates the subordination of women.

145. Because the Criminal Abortion ban is a sex-based classification rooted in paternalistic and stereotypical ideas, it is subject to heightened scrutiny.

146. The Criminal Abortion Ban cannot survive heightened scrutiny because it employs a sex-based classification that is not substantially related to an important government interest.

COUNT IV

Elliott-Larsen Civil Rights Act – MCL 37.2302 – Sex Discrimination in Public Accommodations and Services

147. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

148. By banning abortion, the Criminal Abortion Ban discriminates on the basis of sex in violation of the Elliott-Larsen Civil Rights Act, which is constitutionally mandated implementing legislation, see Const 1963, art 1, § 2, and, protects against discrimination on the basis of sex in the full and equal enjoyment of public accommodations and services, MCL 37.2302(a).

149. By eliminating access to abortion—a vital health care service that gives people the ability to plan their own future—the Criminal Abortion Ban deprives women of the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of public accommodations and public services. These deprivations perpetuate the subordination of women.

150. The Criminal Abortion Ban relies on and entrenches stereotypes about the roles and relative abilities of men and women, which the Elliott-Larsen Civil Rights Act was designed to eliminate.

151. The Criminal Abortion Ban is based on paternalistic and archaic notions of what the State believes is best for women rather than respecting pregnant people's bodily autonomy.

152. The Criminal Abortion Ban creates risks to physical and mental health, financial stability, and ability to seek out life opportunities that perpetuate the subordination of women.

153. The Criminal Abortion Ban thus deprives women of the full and equal enjoyment of public accommodations and services such as education, employment, and housing.

154. Defendant Attorney General of the State of Michigan provides a public service to all Michiganders within the meaning of the Elliott-Larsen Civil Rights Act by serving as the State's top lawyer and law enforcement official, enforcing the laws of the State of Michigan, and supervising and overseeing the work of all county prosecutors.

155. Defendant's enforcement of the Criminal Abortion Ban also violates MCL 37.2302 by denying women the full and equal enjoyment of their right to make decisions about their bodies.

COUNT V

Michigan Constitution – Retained Rights – Liberty and Privacy

156. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

157. By banning abortion, the Criminal Abortion Ban violates the liberty and privacy rights of Plaintiffs' patients to abortion, as guaranteed by the Retained Rights Clause of the 1963 Michigan Constitution, art 1, § 23.

158. The Retained Rights Clause provides that "[t]he enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people." Const

1963, art 1, § 23; see also *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10)*, 396 Mich 465, 504; 424 NW2d 3 (1976) (recognizing a right to privacy under the Michigan Constitution).

159. The purposes of the Retained Rights Clause are to “recognize[] that no Declaration of Rights can enumerate or guarantee all the rights of the people—that it is presently difficult to specify all such rights which may encompass the future in a changing society,” II Official Record, Constitutional Convention 1961–62, p 3365 (emphasis added), and that “liberty under law is an ever growing and ever changing conception of a living society developing in a system of ordered liberty,” I Official Record, Constitutional Convention 1961–62, p 470 (emphasis added).

160. The Retained Rights Clause anticipates—and authorizes Michigan courts to recognize and enforce—constitutional rights not recognized by the 1963 Constitution’s text that are nonetheless necessary in a society that has changed and evolved significantly since then.

161. Society and medicine have changed dramatically since the Criminal Abortion Ban was enacted. The Ban was enacted based on an antiquated belief in the need to control women’s bodies for their own good, and required an acceptance of how women’s lives, roles, and autonomy would be circumscribed as a result. Today, society recognizes that women and other pregnant people are autonomous individuals with a fundamental right to make decisions about their lives and bodies without undue government interference.

162. Michigan’s constitutional rights to privacy and individual liberty therefore encompass a person’s right to make decisions about whether or not to terminate a pregnancy.

163. Because the Criminal Abortion Ban infringes on a fundamental right, it is subject to strict scrutiny.

164. The Criminal Abortion Ban advances no compelling government interest. And even assuming such an interest, the Criminal Abortion Ban is not narrowly tailored to serve it, and therefore is unconstitutional.

COUNT VI

Michigan Constitution – Due Process – Liberty and Privacy

165. Plaintiffs incorporate by reference the foregoing paragraphs of this Complaint as though fully set forth herein.

166. By banning abortion, the Criminal Abortion Ban violates the liberty rights of Plaintiffs' patients to abortion, as guaranteed by the Due Process Clause of the 1963 Michigan Constitution, art 1, § 17.

167. The Michigan Due Process Clause provides that “[n]o person shall . . . be deprived of life, liberty or property, without due process of law.” Const 1963, art 1, § 17.

168. Michigan's due process protections are at least coextensive with those of its similarly worded federal counterpart, see, e.g., *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013), and in some circumstances afford individuals more expansive rights than the federal constitution, *People v Vaughn*, 491 Mich 642, 650 n 25; 821 NW2d 288 (2012).

169. The Due Process Clause protects the right to privacy, see *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10)*, 396 Mich at 504–505, citing *De May v Roberts*, 46 Mich 160; 9 NW 146 (1881), which in turn prohibits government interference with activities that are “fundamental to our concept of ordered liberty” unless a “compelling state interest” justifies that interference, *id.* at 505, quoting *Roe*, 410 US at 155.

170. The Due Process Clause's protection of the rights to privacy and individual liberty encompasses a person's right to make decisions about whether or not to terminate a pregnancy.

For decades, Michiganders have relied on the availability of abortion in this state, and Michiganders today have the right to continue to do so.

171. Because the Criminal Abortion Ban infringes on a fundamental right, it is subject to strict scrutiny.

172. The Criminal Abortion Ban advances no compelling government interest. And even assuming such an interest, the Criminal Abortion Ban is not narrowly tailored to serve it, and therefore is unconstitutional.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Declare that MCL 750.14, and any other Michigan statute or regulation to the extent that it prohibits abortion, violates:

- a. the Due Process Clause of the Michigan Constitution;
- b. the Equal Protection Clause of the Michigan Constitution;
- c. the Elliott-Larsen Civil Rights Act; and
- d. the Retained Rights Clause of the Michigan Constitution;

B. Issue preliminary injunctive relief enjoining Defendant, her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, including all persons supervised by the Defendant, from enforcing or giving effect to MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person;

C. Issue permanent injunctive relief, enjoining Defendant, her successors, agents, servants, employees, and attorneys, and all persons in active concert or participation with them,

including all persons supervised by the Defendant, from enforcing or giving effect to MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortion;

D. Award Plaintiffs their costs and reasonable attorneys' fees incurred in bringing this action; and

E. Grant such other relief as this Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

* *Pro hac vice application forthcoming*

** *Student attorney practicing
pursuant to MCR 8.120*

Dated: April 7, 2022

VERIFICATION

STATE OF MICHIGAN)
)ss
COUNTY OF WASHTENAW)

I declare that the above statements set forth in this Verified Complaint are true to the best of my knowledge, information, and belief.

Denise Thal
Denise Thal, Interim CEO,
on behalf of Planned Parenthood of Michigan

Subscribed and sworn before me this
5th day of April, 2022.

Signed, Betsy Lee Lewis

Printed name: Betsy Lee Lewis, Notary Public
Ingham Co., MI, Acting in Washtenaw Co., MI
My Commission Expires: 01/23/2027

BETSY LEE LEWIS
Notary Public - State of Michigan
County of Ingham
My Commission Expires Jan 23, 2027
Acting in the County of Washtenaw



