STATE OF MICHIGAN
IN THE SUPREME COURT

In re EXECUTIVE MESSAGE OF THE GOVERNOR REQUESTING THE AUTHORIZATION OF A CERTIFIED QUESTION.

GRETCHEN WHITMER, in her capacity as Governor 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.
/

Supreme Court No. 164256

BRIEF OF *AMICUS CURIAE* COMMITTEE TO PROTECT HEALTH CARE IN SUPPORT OF GOVERNOR'S EXECUTIVE BRIEF

Oakland Circuit Court
No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

This case involves a claim that a state governmental action is unconstitutional.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the Committee to Protect Health Care, a national mobilization of doctors, health care professionals, and advocates who are dedicated to protecting and expanding pro-patient health care in America to ensure everyone has the health care they need to thrive. Additionally, the more than 500 individual physicians practicing in the State of Michigan listed in Appendix A have signed on to add their names in support this brief.[2]

The potential reinstatement of Michigan's 1931 criminal abortion statute, which bans abortions and criminalizes administering abortion medicine and procedures, profoundly impacts access to safe, effective health care for patients across Michigan. As practicing physicians, the Committee to Protect Health Care's members, including the hundreds of Michigan physicians supporting this brief, share a common interest in protecting patient health, safety, and welfare. Michigan's own doctors are uniquely positioned to opine on issues of medical safety and standards of care for their patients. Indeed, Michigan doctors are ethically obligated to put their opposition to the reinstatement of the 1931 abortion law before this Court. The AMA Principles of Medical Ethics specifically require that physicians carry "a responsibility to seek changes in [any legal] requirements which are contrary to the best interests of the patient." (AMA Principles of Medical Ethics, Principle III.)

Amicus curiae submits this brief to provide the Court with information about the science and practice of medicine in Michigan regarding abortion care from the perspectives of those in Michigan's medical community. The 1931 abortion ban would force on today's patients and physicians an obsolete standard of care that has no basis in current science or the practice of health

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The names, titles, and cities of the physicians supporting this brief are attached in Appendix A.

care in the State. Michigan's criminal abortion statue also is impossibly vague, putting practicing physicians in the untenable position of determining when the risk to a patient's life is sufficient to decriminalize providing appropriate medical care—without the benefit of any meaningful or science-based guidance about how or when to do so.

Medical decisions for Michigan patients should be made solely by patients in consultation with physicians. The government has no place in the exam room between a physician and patient.

ARGUMENT

I. Abortion Is A Safe, Standard, And Essential Health Care Procedure.

The current landscape of modern medical practice and the standards of care by which Michigan physicians provide abortion health care clearly demonstrate that abortion is an extremely safe, necessary, and common health care procedure.[3] In 2021, over 30,074 abortions were performed in in Michigan, of which less than 0.001% had any reported immediate complications.[4] The risk of death from abortion is extraordinarily rare – nationally, fewer than one in 100,000 patients die from abortion-related complications.[5] By contrast, the risk of death associated with childbirth is approximately fourteen times greater than the risk of death from an abortion.[6] Indeed,

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[3] *See, e.g.*, National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States* 10, Washington, DC: The National Academies Press (2018), https://doi.org/10.17226/24950 ("The clinical evidence clearly shows that legal abortions in the United States - whether by medication, aspiration, D&E or induction - are safe and effective. Serious complications are rare."); World Health Org., *Safe Abortion: Technical and Policy Guidance for Health Systems*, 21 (2d ed. 2012), https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf ("When performed by skilled providers using correct medical techniques and drugs, and under hygienic conditions, induced abortion is a very safe medical procedure.").

[4] Mich. Dept. of Health & Human Servs., *Characteristics of Induced Abortions Reported in Michigan* (2021), https://www.mdch.state.mi.us/osr/abortion/summary.asp

[5] Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012).

[6] *Id.*

many common medical procedures, such as colonoscopies and liposuction, have higher rates of mortality than abortions.[7]

II. The 1931 Abortion Law Significantly Harms Patients' Physical And Mental Health And Safety.

The Michigan Constitution requires that laws regulating health care must serve the interests of the public's health and wellbeing: "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health." Mich. Const. art. 4, § 51. As this Court has previously recognized, this provision "must be held to limit the powers of the legislature and of government generally to such legislative acts and such governmental powers as exhibit a public purpose." *City of Gaylord v. Beckett*, 378 Mich 273, 295 (1966). Any regulation of medical care, including abortion, by the Michigan government must have evidence-based medical or scientific justification and must prioritize protecting and improving patients' health and quality of medical care.

The 1931 abortion ban is an archaic law that fulfills none of these Constitutional requirements. Indeed, the ban would result in worse health care outcomes across Michigan. Medical professionals across the United States concur on this point. The American Medical Association, for example, has opposed laws that criminalize the provision of abortion medical services – like Michigan's statute – as "a violation of human rights "whe[re] government intrudes into medicine and impedes access to safe, evidence-based reproductive health services, including

[7] Deborah A. Fisher, et al., *Complications of Colonoscopy*, 74 GASTROINTESTINAL ENDOSCOPY 745, 747 (2011); Grazer & de Jong, *Fatal Outcomes from Liposuction: Census Survey of Cosmetic Surgeons*, 105 PLASTIC & RECONSTRUCTIVE SURGERY 436, 441 (2000); Advancing New Standards in Reproductive Health, *Safety of Abortion in the United States*, ISSUE BRIEF NO. 6, 2 (2014), https://www.ansirh.org/sites/default/files/publications/files/safetybrief12-14.pdf

abortion and contraception."[8] Consistent with widely accepted medical opinion, Michigan courts also have recognized that, in light of the extremely safe abortion care services currently available, the 1931 law no longer serves the purpose of protecting women's health and safety. *See, e.g.*, *People v. Nixon*, 42 Mich. App. 332, 339 (1972). The 1931 law has no place in Michigan patient health care today.

A. Denying Access to Abortion Care Increases Risk For Negative Maternal Health Outcomes.

Medical evidence and studies show that denying patient access to abortion services directly leads to a significant increase in maternal death, as well as greater risks for mental health problems and domestic abuse.[9]

In the "Turnaway Study," a research team from the University of California San Francisco led a prospective longitudinal study that examined the effects of abortion and abortion denial on the socioeconomic, physical and mental well-being of women.[10] The study followed nearly 1,000 women over a five-year period and compared a variety of outcomes for women who received abortions with those who sought but were denied abortions because their pregnancies were beyond the gestational age cut-off for provision of abortion services.[11]

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[8] *AMA bolsters opposition to wider criminalization of reproductive health,* American Medical Association (June 14, 2022), https://www.ama-assn.org/press-center/press-releases/ama-bolsters-opposition-wider-criminalization-reproductive-health

[9] World Health Org., *supra* note 3, at 87-90.

[10] Advancing New Standards in Reproductive Health, *Introduction to the Turnaway Study*, University of California San Francisco (2022), https://www.ansirh.org/sites/default/files/publications/files/turnawaystudyannotatedbibliography.pdf ("Introduction to the Turnaway Study").

[11] *Id.*

Significantly, the Turnaway Study found that denying access to abortion care does *not* improve women's physical or mental health outcomes—in fact, it has the opposite effect.[12] The study illustrated the increased patient health and safety risks from labor and childbirth as compared with abortion. Women who are forced to carry their pregnancy to term have increased risk of complications, injury, and death associated with pregnancy and childbirth.[13] Compared with women who received abortion services, women who were denied abortion were much more likely to experience serious and life-threatening complications from pregnancy and labor, including eclampsia, postpartum hemorrhage, and death.[14] Tragically, two women in the Turnaway Study who sought but were denied an abortion died after giving birth due to pregnancy-related complications.[15] The women denied abortions also were more likely to experience poor physical health for years after the pregnancy, including chronic pain and gestational hypertension.[16]

These patient health dangers are even greater in certain populations of Michigan patients, including women of color and low-income women, who already experience racial and economic disparities in medical and prenatal care and pregnancy-related risk. From 2014 to 2018, Black women in Michigan were nearly three times more likely to die from pregnancy-related causes than

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[12] *Id.*; M. Antonia Biggs, et al., *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74(2) JAMA Psychiatry 169, 177 (2017).

[13] Raymond & Grimes, *supra* note 5, at 216.

[14] Caitlin Gerdts, et al., *Side effects, physical health consequences, and mortality associated with abortion and birth after an unwanted pregnancy*, 26(1) WOMEN'S HEALTH ISSUES 55, 55-59 (Nov. 2015), https://www.sciencedirect.com/science/article/pii/S1049386715001589

[15] Lauren J. Ralph, et al., *Self-reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion Services: A Cohort Study*, 171 Annals of Internal Med. 238, 245 (2019).

[16] *Id.*

white women.[17] Black women in Michigan also have higher risks for severe maternal morbidity – the unexpected outcomes of labor and delivery that result in significant short- or long-term health consequences.[18] Additionally, Black women have among the highest prevalence rates of serious chronic health conditions such as hypertension, diabetes, and heart disease, which also create increased risk for maternal mortality.[19]

In addition to serious health consequences, the Turnaway Study found that women who carried an unwanted pregnancy to term after they were denied an abortion also have a four-times increased likelihood of living below the federal poverty level, which only perpetuates the negative effects on their health and safety.[20] Economically disadvantaged communities also experience greater occurrences of self-managed and potentially unsafe abortion options.[21]

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[17] Mich. Dept. of Health & Human Servs., *Maternal Deaths in Michigan, 2014-2018 Update*, at 6, https://www.michigan.gov/mdhhs/-/media/Project/Websites/mdhhs/MCH-Epidemiology/MMMS_2014-2018_Pub_Approved.pdf

[18] Mich. Dept. of Health & Human Servs., *Overview of Severe Maternal Morbidity in Michigan 2011-2019*, https://www.michigan.gov/-/media/Project/Websites/mdhhs/Folder50/Folder5/SMM_Report_Final_10521.pdf

[19] Mich. Dept. of Health & Human Servs., *Michigan Maternal Mortality Surveillance: Executive Summary*, at 2 (2018), https://www.michigan.gov/mdhhs/-/media/Project/Websites/mdhhs/Folder3/Folder48/Folder2/Folder148/Folder1/Folder248/Maternal_Mortality_Executive_Summary_1_2018__Final.pdf; Rahul Aggarwal et. al., *Rural-Urban Disparities: Diabetes, Hypertension, Heart Disease, and Stroke Mortality Among Black and White Adults*, 1999-2018, 77 J. of the Am. Coll. of Cardiology 1480, 1480–1481 (2021), https://doi.org/10.1016/j.jacc.2021.01.032

[20] Introduction to the Turnaway Study, *supra* note 10; Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Pub. Health 407, 409-413 (2018).

[21] *See, e.g.*, Lauren J. Ralph, et al., *Prevalence of Self-Managed Abortion Among Women of Reproductive Age in the United States*, 3(12) JAMA Network Open, at 7 (Dec. 18, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774320; Liza Fuentes et al., *Texas women's decisions and experiences regarding self-managed abortion*, 20(6) BMC Women's Health, at 11 (2020), https://doi.org/10.1186/s12905-019-0877-0; Daniel Grossman et al., *Self-Induction of Abortion Among Women in the United States*, 18(36) Reprod. Health Matters 136, 143 (2010), https://www.tandfonline.com/doi/pdf/10.1016/S0968-

In addition to these increased risks, denying access to women seeking abortions negatively impacts the risks for intimate partner violence from the man responsible for the pregnancy. The Turnaway Study revealed that women who received and women who were denied abortions had historically experienced similar rates of physical violence from their intimate partners.[22] However, women who received abortions experienced a *decrease* in physical violence over time, while women who sought but were denied abortions had no statistically significant change in physical violence from their intimate partners.[23] Continued intimate partner violence during pregnancy and after childbirth results in substantial and lasting physical, mental, and emotional harm to women and their children.[24]

Far from safeguarding women's health, the 1931 abortion ban jeopardizes women's health and safety by denying access to essential, safe, and evidence-based abortion healthcare services.

8080%2810%2936534-7; Sarah Raifman, et al., *"I'll just deal with this on my own": a qualitative exploration of experiences with self-managed abortion in the United States*, 18(91) Reprod. Health, at 9-10 (May 2020), https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01142-7; *Texas Women's Experiences Attempting Self-Induced Abortion in the Face of Dwindling Options*, Texas Pol'y Evaluation Project Res., at 1 (2015), https://ibisreproductivehealth.org/sites/default/files/files/publications/TxPEPTexaswomensexperiencesselfinductionResearchBrief_17Nov2015.pdf

[22] SCM Roberts, et al., *Risk of violence from the man involved in the pregnancy after receiving or being denied an abortion*, 12 BMC MED. 144 (2014), https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-014-0144-z

[23] *Id.*

[24] *Id.*; Foster, et al., *Effects of Carrying an Unwanted Pregnancy to Term on Women's Existing Children*, 205 J. Pediatr. 183,185-187 (2019), https://www.jpeds.com/article/S0022-3476(18)31297-6/fulltext; Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA Pediatr. 1053, 1058 (2018), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2698454

B. The 1931 Law Requires Physicians To Make An "Impossible Choice" When Pregnant Women Have Medical Complications That Arise.

The 1931 law purports to permit abortions that are "necessary to preserve the life" of the pregnant woman, but this exception only further burdens patients and physicians because it is far too vague and uncertain to provide any meaningful guidance.

The law forces physicians to exercise discretion in determining whether an abortion may be deemed "necessary" and "life-preserving", with no assurances as to the potential legal consequences if Michigan law enforcement, a prosecutor, or a court disagrees with the physician's professional medical judgment. Indeed, Respondent Prosecuting Attorneys have acknowledged that "[a]t this juncture, no one—not providers, not prosecutors, and not patients—have a clear understanding of what preserving the life of a pregnant person means with any real specificity." (Resp. Supp. Br. June 8, 2022 at 6-7.)

Most importantly, the consequences of misjudging when a woman's death is sufficiently imminent to "permit" life-saving abortion care are, quite literally, deadly. As Dr. Lisa Harris, an obstetrician/gynecologist and Associate Chair of Obstetrics and Gynecology at the University of Michigan warned – how imminent must death be?

> In Michigan, we'll be able to continue providing "life preserving" abortion care. When my family planning colleagues and I perform abortions in critically ill patients in the intensive care unit (ICU), it's reasonably clear that we're working to "preserve the life" of a pregnant patient. Pregnancy demands intense work from all organ systems, which the bodies of critically ill people often cannot accommodate. Ending a pregnancy is an effort to save them. These patients may have severe exacerbations of underlying conditions, such as heart failure or lupus. Or they may have pregnancy-related illnesses in the first or second trimester, such as eclampsia or chorioamnionitis with sepsis.
>
> Beyond such cases, however, it's unclear what, precisely, "lifesaving" means. What does the risk of death have to be, and how imminent must it be? Might abortion be permissible in a patient with pulmonary hypertension, for whom we cite a 30-to-50% chance of dying with ongoing pregnancy? Or must it be 100%? When we diagnose a new cancer during pregnancy, some patients decide to end their pregnancy to permit immediate surgery, radiation, or chemotherapy,

> treatments that can cause significant fetal injury. Will abortion be permissible in these cases, or will patients have to delay treatment until after delivery? These patients' increased risk of death may not manifest for years, when they have a recurrence that would have been averted by immediate cancer treatment. We've identified countless similar questions.[25]

Nor are these hypothetical questions by Michigan's medical community. Recently, a pregnant woman from the United States traveling in Malta awoke in a pool of blood and was rushed to the hospital. She hemorrhaged due to her placenta detaching, and she started to miscarry.[26] Although doctors confirmed her pregnancy was no longer viable and she was at risk to develop a life-threatening infection without an abortion, the hospital denied her an abortion—unless she became "on the brink of death"—due to Malta's abortion ban.[27] After a week in the hospital waiting to see whether she developed a sufficiently life-threatening condition, she was evacuated to Spain for medical treatment.[28]

Physicians should not be forced to make judgment calls about the point at which their patient's life is sufficiently imperiled to warrant abortion procedures, especially while under the threat of criminal punishment. *Amicus curiae* opposes the 1931 abortion statute because it results in a restraint on medical care that defies medical consensus and endangers both patients and physicians.

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[25] Lisa H. Harris, *Navigating Loss of Abortion Services – A Large Academic Medical Center Prepares for the Overturn of Roe v. Wade*, 386 NEW ENGLAND J. MED. 2061, 2061-62 (2022), https://www.nejm.org/doi/full/10.1056/NEJMp2206246

[26] Maggie Rulli, *US woman on vacation in Malta denied lifesaving abortion*, ABCNEWS (June 23, 2022), https://abcnews.go.com/International/us-woman-vacation-malta-denied-lifesaving-abortion/story?id=85594901

[27] *Id.*

[28] *Id.*

C. The 1931 Abortion Ban Interferes With The Relationship Between Patients And Their Doctors And Compromises Medical Care.

The 1931 abortion ban also impermissibly interferes with the ability of Michigan physicians to offer appropriate medical treatment options and care to their patients. Patient safety is of the utmost importance when providing medical treatment, and physicians bear the "ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others."[29] Patients are entitled to their physicians' best professional medical judgment. To fulfill this obligation, physicians must have the ability to counsel and provide their patients with recommended treatments and alternatives based on patients' medical situations and the best available scientific evidence.[30] Michigan's criminal abortion statute, however, limits the scope of reproductive health services and advice that physicians may recommend or perform – even where a patient would benefit from those services and advice. The ninety-one year old views of the lay lawmakers who passed the 1931 abortion ban should not substitute for a physician's expert medical judgment.

Moreover, the antiquated law's blanket restriction on physicians' medical judgment and patients' treatment decisions not only has no medical basis, but it also is unnecessary. Even without the 1931 abortion ban, Michigan law already requires informed patient consent (including the provision of specific information by physicians to patients), a waiting period, and parental

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[29] *Patient-Physician Relationships, Code of Medical Ethics Opinion 1.1.1*, American Medical Association, https://www.ama-assn.org/system/files/code-of-medical-ethics-chapter-1.pdf ("The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare.").

[30] *Id.*

consent for patients under 18, all before the provision of abortion care.[31]

Physicians – not lawmakers – should be providing healthcare recommendations and services in Michigan. Likewise, Michigan patients – not lawmakers – should be making the decisions about their own medical care in consultation with their physicians.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to declare the 1931 abortion ban unconstitutional.

Dated: September 21, 2022

Respectfully submitted,

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[31] Mich. Dept. of Health & Human Servs., *Michigan's Informed Consent for Abortion Law*, https://www.michigan.gov/mdhhs/adult-child-serv/informedconsent/michigans-informed-consent-for-abortion-law

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WORD COUNT CERTIFICATION

In compliance with MCR 7.212(B)(3), counsel for *amicus curiae* certifies that this brief contains 3,077 words, inclusive of footnotes.

APPENDIX A:

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Committee to Protect Health Care's Motion for Leave to File Brief *Amicus Curiae* and exhibit(s) thereto was filed and served upon all counsel of record using the MiFile e-Filing system.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. Executed on September 21, 2022, at San Francisco, California.

Monica R. Brennan