STATE OF MICHIGAN
IN THE SUPREME COURT

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

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

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

Defendants.

RESPONDENT PROSECUTING ATTORNEYS SAVIT, LEYTON, SIEMON, GETTING, WIESE, MCDONALD, AND WORTHY'S SUPPLEMENTAL BRIEF IN SUPPORT OF GOVERNOR'S EXECUTIVE MESSAGE

Supreme Court Case No. 164256

Oakland Circuit Court No. 22-193498-CZ

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Dated: June 8, 2022

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   Respondent Prosecuting Attorneys' answer: No.

2. Is there an actual case and controversy requirement and, if so, is it met here?

   Respondent Prosecuting Attorneys' answer: No, and yes.

3. What is required under MCR 7.308(A) and specifically, are these questions of "such public moment as to require an early determination"?

   Respondent Prosecuting Attorneys' answer: Yes.

4. Does the Executive Message process limit the Governor's power to defending statutes, rather than calling them into question?

   Respondent Prosecuting Attorneys' answer: No.

5. Should the questions posed be answered before the U.S. Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, and would a decision in that case serve as binding or persuasive authority to the questions raised here?

   Respondent Prosecuting Attorneys' answer: Yes, and no.

ARGUMENT

Respondent Prosecuting Attorneys Savit, Leyton, Siemon, Getting, Wiese, McDonald, and Worthy submit the following response to this Court's order dated May 20, 2022. As explained in our initial filing dated May 3, Respondent Prosecuting Attorneys agree with the Governor's request to have this matter heard expeditiously. The legal questions demand final determination by this Court, and Michiganders deserve certainty about their rights under state law—particularly a right so fundamental and central to the economic, social, and medical well-being of so many people in this state. Never before has the U.S. Supreme Court eliminated an individual right so ingrained in our constitutional order. Standing on the precipice of this unprecedented public moment, we urge this Court to move with expediency to ensure that rights of Michiganders are not eroded by a misguided and narrow understanding of fundamental constitutional protections.

Respondent Prosecuting Attorneys agree with and adopt the positions taken by the Governor in response to the five questions posed by this Court's May 20 Order. We write separately to underscore points in response to three of the questions presented. *First*, the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, does not resolve the need for this Court's intervention. *Second,* the public moment analysis has become even clearer since our initial filing in May. Within Michigan, there is significant uncertainty about the scope of underlying law, especially when it comes to exceptions for the life of the mother, that create real and profound complications for the provision of medical care. In addition, access to abortion is likely to be severely curtailed throughout other parts of the country in a matter of weeks or months—eliminating numerous options for care. *Third,* the United States Supreme Court's forthcoming decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, creates the urgent need for this Court's involvement. But whatever is decided in *Dobbs*

does not control this Court's analysis. The Michigan Supreme Court has regularly adopted constitutional standards that are different from those expressed in federal law, and this Court can and should independently analyze state law here. Regardless of what the U.S. Supreme Court concludes, abortion remains a fundamental right protected by both the Due Process and Equal Protection Clauses of the Michigan Constitution, and access to abortion should remain constitutionally protected in Michigan.

1. **Question 1: Whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v. Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination.**

The Court of Claims' grant of a preliminary injunction in *Planned Parenthood v. Attorney General*, 22-000044-MM, does not eliminate the need for this Court's intervention. The *Planned Parenthood* trial court has not issued a final decision on the merits regarding whether the Michigan Constitution provides a right to abortion and, accordingly, whether MCL 750.14 violates the Michigan Constitution. The trial court's preliminary injunction, while a critical step in protecting the constitutional rights of Michiganders, does not definitively resolve the constitutional uncertainty at the heart of this matter and already has been appealed. At any moment the Court of Appeals could overturn the injunction, leaving Michiganders in the same state of uncertainty as they were in prior to the *Planned Parenthood* order. Meanwhile, contradictory opinions on this question could be issued from other trial court courts in Michigan as "it is only opinions issued by the Supreme Court and published opinions of the Court of Appeals that have precedential effect under the rule of stare decisis." *City of Detroit v Qualls*, 434 Mich. 340, 360 n.35 (1990) (citing MCR 7.215(C)(2)). The Governor sought immediate consideration of the questions presented by this Court precisely to avoid this potential rapid change in scope and understanding of constitutional rights. This Court must weigh in, and quickly.

Further, the Court of Claims' injunction extends to the Attorney General and anyone acting under her control and supervision. Regardless of the precise contours of the Attorney General's supervisory authority, it does not extend to all law enforcement agencies. *See* MCL 14.30. To be clear: Respondent Prosecuting Attorneys believe it is appropriate to respect and honor the preliminary injunction issued by the Court of Claims. But we cannot speak for other law-enforcement and judicial actors across Michigan. As emphasized in our original briefing, even if Michigan prosecuting attorneys decline to prosecute abortion cases under MCL 750.14 (or are enjoined from doing so), other law enforcement officials might still investigate and even arrest for supposed violations of that law. They might even do so regardless of the *Planned Parenthood* preliminary injunction. And—especially given that opinions of the Court of Claims lack precedential effect, *see Qualls*, 434 Mich. at 360 n. 35—it is unclear whether and to what extent courts around the State will consider any attempts to enforce MCL 750.14 *ultra vires*. In sum, the Court of Claims' issuance of a preliminary injunction does not resolve the need for immediate determination of the constitutional questions posed to this Court.

2. **Question 2: Whether there is an actual case and controversy requirement and, if so, whether it is met here.**

Respondent Prosecuting Attorneys agree with the Governor's answer and incorporate it herein. No further response is required at this time.

3. **Question 3: Given the infrequent application of the Executive Message process by current and former governors, what is required under MCR 7.308(A) and, specifically, whether the question is of "such public moment as to require an early determination".**

Respondent Prosecuting Attorneys agree with the Governor's answer regarding what is required under MCR 7.308(A). We write to further underscore that the questions posed are emphatically of "such public moment to require an early determination." *First*, other states are not

waiting to take action. In just the month since our last filing, the constitutional right to abortion has been subject to a continued cascade of limitations across the country in anticipation of a decision in *Dobbs* that would scale back or eliminate the *Roe* viability standard. Such new laws further restrain access to reproductive choice around the country, meaning that Michiganders' out-of-state access to abortion will be even more restricted. That development becomes highly relevant should MCL 750.14 spring back into effect. *Second*, continued exploration of the issues presented in this case makes apparent the uncertain contours of the state's abortion law, and how it might affect medical practice—especially when the life of the mother is at risk. Without further clarification on the questions posed, Michigan medical providers may be forced to self-impose limitations on the reproductive care they are able to provide, risking lives and creating unfair ethical challenges. *Third*, any pause in the delivery of care would undoubtedly harm the present and future provision of medical care in Michigan because once abortion care is removed, it can be very difficult to restore.

i. States are not waiting for the *Dobbs* decision to act and are having an immediate impact on the landscape of abortion care.

In the five weeks since our last filing on May 3, the urgency of this "public moment" has become even more clear. Since May 2, when *Politico* published the leaked draft opinion in *Dobbs*, state legislatures have accelerated their efforts to enact restrictive abortion measures—a troubling pattern given the staggering pace of lawmaking on the topic *before* the leak.[1] Indeed, at least two

[1] Elizabeth Nash et al., *2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate*, Guttmacher Inst. (updated May 26, 2022), https://www.guttmacher.org/article/2022/03 (noting that the leaked opinion indicating that a majority of justices are prepared to overturn *Roe* "could further bolster efforts by anti-abortion policymakers at the state level"). The numbers discussed herein do not include the record-breaking 2021 legislative session: "The 108 abortion restrictions enacted in 2021 far surpasse[d] the previous post-*Roe* record of 89, set in 2011." Elizabeth Nash, *State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century*, Guttmacher Inst. (updated Jan. 5, 2022), https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century.

bills have been filed in the Michigan House since April 2022 that would impose additional restrictions on abortion.[2] Legislators in at least eight other states—all of which already have abortion bans that would likely go into effect if *Roe v Wade*, 410 U.S. 113 (1973), is overturned—called for special legislative sessions to consider additional restrictions.[3] The change is so quick, and has accelerated so rapidly in the last few months, that news outlets update their trackers on state changes to abortion rights on an almost daily basis.[4]

Recently proposed and enacted abortion restrictions "vary from outright criminalization of abortion to measures that make getting an abortion nominally legal but practically impossible," including by making it illegal for an individual to travel to another state to obtain an abortion.[5] Since our last filing, states have enacted nine additional restrictive measures on abortion, and three additional bans of abortion.[6] As just one of many examples, on May 25, the Governor of Oklahoma signed into law a total ban on abortion from the moment of fertilization: Oklahoma House Bill 4327 is the first such ban since *Roe* was decided.[7] Because the Oklahoma law has a private

[2] *See, e.g.*, H.B. 6011, 101st Leg., Reg. Sess. (Mich. 2022), https://www.legislature.mi.gov/documents/2021-2022/billintroduced/House/pdf/2022-HIB-6011.pdf; H.B. 6069, 101st Leg., Reg. Sess. (Mich. 2022), https://www.legislature.mi.gov/documents/2021-2022/billintroduced/House/pdf/2022-HIB-6069.pdf.

[3] Christine Vestal, *After Leaked Roe Ruling, GOP Weights Stricter Abortion Bans*, PEW, (May 17, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/17/after-leaked-roe-ruling-gop-weighs-stricter-abortion-bans.

[4] *See, e.g.*, Allison McCann et al., *How State Abortion Laws Could Change if Roe Is Overturned*, N.Y. Times, (updated June 3, 2022), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

[5] Rob Garver, *After Leak, Some State Legislators Propose More Restrictive Abortion Laws*, Voice of America, (May 9, 2022) https://www.voanews.com/a/after-leak-some-state-legislators-propose-more-restrictive-abortion-laws-/6564434.html.

[6] In addition, in 2022, three states have enacted 18 restrictions on medication abortion. An additional 42 abortion restrictions and bans have passed in at least one legislative chamber in 11 states. These restrictions and bans are in addition to those cited in our previous filing on May 3, 2022. Nash et al., *supra* note 1.

[7] H.B. 4327, 58th Leg., 2nd Sess. (Okla. 2022), http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20ENR/hB/HB4327%20ENR.pdf; Nash et al., *supra* note 1; Oriana Gonzalez, *Oklahoma Gov. signs into law near-total abortion ban starting at fertilization*, Axios, (updated May 25, 2022), https://www.axios.com/2022/04/28/oklahoma-abortion-ban-texas-law-stitt-pass.

enforcement mechanism (similar to the one utilized by Texas's SB 8) that went into effect immediately, abortion care has been eliminated in that state even while *Dobbs* is pending.[8]

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

Uncertainty as to the validity (and scope) of MCL 750.14 threatens to chill potentially life-saving medical care. As elected prosecutors, our charge is to promote the public health and safety of our communities. Ensuring continued access to abortion care—especially care that protects the life of the pregnant person—is thus of critical importance.[9] Without further clarification by this Court, many medical decisions about abortion (some of which can be required in a matter of moments during a medical emergency) will be both legally and ethically fraught. Our providers and our residents deserve greater clarity so they can make informed decisions together. *See, e.g.*, *Roe*, 410 U.S. at 163 (noting that decisions related to abortion are guided by discussions between medical provider and patient).

To return to the statute at hand, MCL 750.14 allows for abortion if "necessary" to "preserve the life" of a pregnant person. If all abortions are illegal, except for those necessary to preserve life, the exception becomes the sole means by which abortion care can be offered. If that is the case, understanding what is permitted is absolutely essential. At this juncture, no one—

[8] Caroline Kitchener, *Empty clinics, no calls: The fallout of Oklahoma's abortion ban*, Wash. Post (June 4, 2022), https://www.washingtonpost.com/nation/2022/06/04/oklahoma-abortion-roe/?request-id=126067cf-6a7e-4f48-a5af-7ff35d16bb76&pml=1.

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

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. As one leading Michigan medical provider explained in the *New England Journal of Medicine*:

> 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.[10]

If doctors are chilled from providing potentially lifesaving care, people may die or have worse and more complicated medical outcomes, such as losing their ability to have children in the future. This risk of grave injury or death is harrowing considering that 59% of people who seek abortions already have children, meaning that any new harm experienced by the pregnant person could have significant ripple effects on their families and communities.[11]

The confusion around the contours of MCL 750.14 will have negative effects on the health of Michiganders unless this Court intervenes. For one, it presents providers with a medically unethical dilemma: rather than weighing the risks and benefits of a medical procedure for the patient, a provider must weigh the medical risks to the patient against the *legal* risks the *provider* is willing to shoulder. This is a flagrant inversion of medical ethics, as enshrined by the Michigan State Medical Society: "A physician must recognize responsibility to patients first and foremost . . . A physician shall, while caring for a patient, regard responsibility to the patient as

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

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

paramount."[12] But faced with potential criminal liability, providers, hospitals and medical systems—and even medical education and training programs—may refrain from performing, studying, or teaching certain aspects of medical care. Such care could include, among others: (1) care for miscarriages, especially emergency miscarriages; (2) reproductive care such as in-vitro fertilization; and (3) referrals and so-called "warm hand-offs" of patients to other jurisdictions where abortion care is offered legally.[13] For many patients, confusion and hesitancy about whether to provide medical care could result in no care at all.

Moving one step further, without immediate clarification from this Court, Michiganders will have to resolve these myriad and very real uncertainties case by case. True consensus regarding the scope of legal abortion and medical care in Michigan could remain elusive for years. Without a clearly established right under state law, medical providers will likely pause or altogether eliminate certain services. A temporary pause in the provision of abortion services may lead to a gradual, but absolute, erosion of the overall abortion infrastructure in Michigan. As explained below, abortion services, once stopped, do not readily restart. Providers and other personnel may move into other positions, resources may expire, and training may cease so that future providers are unable and unqualified to provide care altogether. These fears are not hypothetical. As outlined below, states that have imposed stark restrictions in abortions have *already* seen such permanent erosion in care.

iii. The infrastructure of care erodes once abortion restrictions are imposed.

Other states that have experienced rapid changes in the permissibility of abortion demonstrate this negative trend. In the short term, new restrictions and uncertainty about the state

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

[13] Harris, *supra* note 10.

of abortion restrictions result in clinics having to close or pause services. For example, in the weeks after Oklahoma enacted a six-week abortion ban in April, "clinics in Oklahoma—where neighboring Texans had been seeking abortions ever since their state effectively prohibited the procedure last year—were forced to abruptly stop performing most abortions, though [clinics] remain open to provide other reproductive health needs."[14] Weeks later, on May 25, Oklahoma enacted a total ban on abortion from the time of fertilization, throwing patients "into a state of chaos and fear . . . [that] will only intensify as surrounding states cut off access as well."[15] Clinics in the state have been forced to cancel appointments and send patients home. While the clinics are pursuing litigation, the executive administrator at the Tulsa Women's Clinic "does not expect the clinic to last long under the current ban."[16]

Even when uncertainty and restrictions are *not* permanent, the damage to clinics often is: again, once an abortion clinic closes, it often does not reopen.[17] Texas provides a clear example of the permanent implications of abortion restrictions on clinics, implications that remain even when the restriction is eventually vacated or overturned.[18] In 2013, the Texas legislature enacted burdensome and unnecessary requirements and restrictions on abortion clinics and providers. While abortion providers' legal challenge to the law worked its way through the courts, many

[14] Christine Vestal, *After Leaked Roe Ruling, GOP Weights Stricter Abortion Bans*, PEW, (May 17, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/17/after-leaked-roe-ruling-gop-weighs-stricter-abortion-bans.

[15] Luke Vander Ploeg & Kate Zernike, *Oklahoma Governor Signs Bill That Bans Most Abortions*, N.Y. Times, (May 25, 2022), https://www.nytimes.com/2022/05/25/us/oklahoma-abortion-ban-law-governor.html.

[16] *Id*.; see also Adam Kemp, *Oklahoma passes near-total ban on abortions*, PBS New Hour, (updated May 19, 2022 5:45 PM EDT) https://www.pbs.org/newshour/nation/oklahoma-approves-the-nations-most-restrictive-abortion-ban.

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

[18] Ashley Lopez, *Despite Supreme Court Win, Texas Abortion Clinics Still Shuttered*, KHN (Nov. 18, 2019), https://khn.org/news/despite-supreme-court-win-texas-abortion-clinics-still-shuttered/.

clinics had to stop providing services.[19] In 2016, the U.S. Supreme Court struck down the Texas law in *Whole Woman's Health v Hellerstedt*, 579 U.S. 582 (2016). Nonetheless, most of the Texas clinics that previously shuttered because of the law did not reopen.[20] Reopening a clinic presents challenges that often prove insurmountable, including finding new staff, raising funds to re-purchase medical equipment, going through the lengthy bureaucratic process of applying for a new state-issued license to operate, finding office space willing to host an abortion clinic, navigating state laws and an evolving legal landscape, and managing the increasing costs of providing abortions with a patchwork of insurance coverage.[21]

Accordingly, regardless of whether certain procedures are ultimately deemed constitutional, pauses and slowdowns in the provision of medical services will pose immediate constitutional and medical harms to Michiganders. The question of what medical care is allowed under MCL 750.14 and the Michigan Constitution makes the posed questions truly of such public moment as to require this Court's immediate intervention.

4. **Question 4: Whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question.**

Respondent Prosecuting Attorneys agree with the Governor's answer and incorporate it herein. No further response is required at this time.

5. **Question 5: Whether the questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here.**

[19] *Id.*

[20] *Id.*

[21] Abrams, *supra* note 17; *see also* Lopez, *supra* note 18.

Respondent Prosecuting Attorneys agree with the Governor's answer. We emphatically believe that the questions posed should be answered by this Court before the U.S. Supreme Court issues its decision in *Dobbs*. As explained in our response to Question 3, the questions posed are of such public moment as to require expeditious review by this Court. Michiganders face uncertainty regarding the scope of a core constitutional right (one that was clearly established 50 years ago). This uncertainty also poses real threat of criminal liability and medical harm. In addition, it is a right upon which so many people rely when it comes to bodily autonomy, family formation, economic security, the health and safety of children, and equality under the law.[22] A person who becomes pregnant tomorrow faces the real prospect that, if they wait to decide to seek abortion care over the next few weeks, the decision may be made for them by the U.S. Supreme Court. Given the centrality of this right to equal participation in society and equal dignity before the law, few questions could demand more expediency.

While *Dobbs* may be the catalyst of intervention, it is not outcome determinative. Preliminarily, the leaked opinion in *Dobbs* has flawed logic and analysis. It rests on a narrow conception of the federal constitution and fails to robustly address critical questions of *stare decisis*—including, most prominently, the reliance that so many have built around a right that has been recognized as fundamental for the past half-century. For that reason alone, it should not be given much consideration. More fundamentally, though: whatever the final opinion in *Dobbs* says or does not say, questions of state constitutional law are ultimately for this Court to decide alone. The Michigan Supreme Court has long recognized its authority and obligation to interpret the state constitution independent of federal law, including to the extent that the Michigan Constitution may include protections that exceed those of federal protections. *Sitz v Dept. of State Police*, 443 Mich.

[22] In 2019, over 629,850 abortions were performed in the United States, with over 27,500 reported in Michigan. Kortsmit**,** et al., *supra* note 11.

744 (1993) (concluding that the Michigan Constitution offers more protections against property seizures than those provided under the U.S. Supreme Court's interpretation of the Fourth Amendment). "Because the [the Michigan Constitution and the U.S. Constitution] were written at different times by different people, the protections afforded may be greater, lesser, or the same," and it is this Court's responsibility to determine these differences. *Id.* at 762. This analysis applies with full force to the Due Process and Equal Protection Clauses of the Michigan Constitution—the clauses at issue in this case. *See* Supplemental Brief of the House Democratic Caucus Leader Donna Lasinski and the House Democratic Caucus and Senate Minority Leader Jim Ananich and the Senate Democratic Caucus as *Amici Curiae* in Support of Plaintiff, *Whitmer v. Linderman*, No. 164256 (Mich. Docket June 7, 2022), at 23-41 (explaining why the Due Process and Equal Protection Clauses of the Michigan Constitution are not coterminous with the parallel provisions of the U.S. Constitution).

Indeed, there are several examples where Michigan courts have concluded that the Michigan Constitution contains rights that ultimately exceed the scope of rights under the U.S. Constitution. *See, e.g., People v Bullock*, 440 Mich. 15 (1992) (concluding that the Michigan Constitution's protection against cruel *or* unusual punishment—Mich. Const. 1963, art. 1, § 16—offers broader protections than the U.S. Constitution's protection against cruel *and* unusual punishment); *Charter Twp. of Delta v Dinolfo*, 419 Mich. 253 (1984) (interpreting the rights of unrelated persons to share a house in a broader manner than the U.S. Supreme Court); *People v Turner*, 390 Mich. 7, 19 (1973) (concluding that, when reviewing the constitutionality of police entrapment, "while the opinion of the United States Supreme Court is deserving of consideration, we are not bound by its holding in this matter"); *People v Gonzalez*, 197 Mich. App. 385 (1992) (holding that even though the double jeopardy clause of the U.S. Constitution's Fifth Amendment

would not have prohibited the prosecution from retrying the defendant for felony murder, the Michigan Constitution did prohibit this particular prosecution). The U.S. Supreme Court, for its part, has consistently affirmed that states may find greater protection of rights under their respective state constitutions.[23] A limitation on federal constitutional rights consequently does not impose a limit on Michigan constitutional rights, especially if those Michigan rights arise out of provisions unique from the federal constitutional scheme.

There are additional state law questions potentially presented by the *Dobbs* decision if it results in an overruling of *Roe*. For example, it is not entirely clear that MCL 750.14 would spring back into effect immediately, given that the law has been mostly dormant for 50 years. While Michigan law does not generally apply the concept of desuetude to statutes, *see, e.g.*, *Bd. of Cnty. Rd. Comm'rs of Washtenaw Cnty. v Michigan Pub. Serv. Comm'n*, 349 Mich. 663, 682 (1957), this is not just a situation of a law being unenforced for a long period of time. Instead, this case presents remarkable circumstances regarding the undercutting of a fundamental right clearly established for half a century. This Court must take up the questions posed to begin this urgently needed analysis.

CONCLUSION AND RELIEF REQUESTED

Respondent Prosecuting Attorneys respectfully request that this Court direct the Oakland Circuit Court to certify the controlling questions of law presented here.

[23] *Florida v Powell*, 559 U.S. 50, 59 (2010) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution"); *City of Mesquite v Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee"); *Oregon v Hass*, 420 U.S. 714, 719 (1975) (" . . . a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court (the U.S. Supreme Court) holds to be necessary upon federal constitutional standards").

Respectfully submitted,

DATED: June 8, 2022

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/s/ Karen D. McDonald
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DATED: June 8, 2022

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PROOF OF SERVICE

I, Eli Savit, hereby affirm that on the date stated below I delivered a copy of Respondents Savit, Leyton, Siemon, Getting, Wiese, McDonald, and Worthy's Supplemental Brief in Support of Governor Whitmer's Executive Message, upon all counsel stated above, via the Court's MiFile system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: June 8, 2022

/s/ Eli Savit
Eli Savit
Prosecuting Attorney
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