STATE OF MICHIGAN
IN THE SUPREME COURT

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.
_____/

MSC No. 164256

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

Oakland Circuit Court
No. 22-193498-CZ

Hon. Edward Sosnick

SUPPLEMENTAL BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, *AMICUS CURIAE*, CONCERNING QUESTION #5 OF THE COURT'S MAY 20, 2022 ORDER

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law, including the defense of the sanctity of human life.[1] Counsel for the ACLJ have presented expert testimony before State and federal legislative bodies, and have presented oral argument, represented parties, and submitted *amicus curiae* briefs before the Supreme Court of the United States and numerous State and federal courts in cases involving a variety of issues, including the right to life. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Dobbs v. Jackson Women's Health Org.*, No. 19-1393 (U.S. Sup. Ct.); *June Medical Servs. v. Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016); *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997).

The ACLJ submits this supplemental brief on behalf of itself and more than 413,000 of its supporters (including more than 12,200 in Michigan) who support the protection of the sanctity of life. Pursuant to this Court's order of May 20, 2022, the ACLJ files this brief without a motion as it was previously granted leave to file its initial brief on May 16, 2022, and to appear as an *amicus curiae* in this appeal.

INTRODUCTION

This brief addresses the fifth question raised in this Court's May 20, 2022, order: "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."

[1] Pursuant to MCR 7.312(H)(5), no counsel for any party authored this brief in whole or in part, and no person or entity aside from *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Since the relevant provisions of the Michigan Constitution are coextensive with similar provisions of the federal constitution, the decision in *Dobbs* will be highly relevant and persuasive authority in this case. The Governor's Complaint in the Oakland County Circuit Court even cites the impending issuance of the *Dobbs* decision as a key reason why the lawsuit was filed. Cmplt., ¶¶ 57, 61, 75, 78. As such, this Court should await the issuance of the *Dobbs* decision before proceeding further with this case.

ARGUMENT

I. The 1963 Constitution does not include a right to abortion, or provide greater due process or equal protection rights than the federal constitution.

The Governor's argument in support of finding a new abortion right in the Michigan Constitution amounts to "times have changed." *See, e.g., id.*, ¶ 74 ("The Michigan Supreme Court last opined on the constitutionality of MCL 750.14 in 1973. Much has changed since that time."). Although the Governor complains about a perceived erosion of a federal right to abortion since *Roe v. Wade* was decided in 1973, the Governor ignores the fact that *no such right existed when the 1963 Constitution went into effect ten years before*.

As this Court reiterated earlier this year, "[the] primary goal in construing a constitutional provision is to give effect to the intent of the people of the state of Michigan who ratified the Constitution, by applying the rule of 'common understanding.' We locate the common understanding of constitutional text by determining the plain meaning of the text as it was understood *at the time of ratification*." *League of Women Voters of Mich. v. Sec'y of State*, Nos. 163711-2, 163744-5, 163747-8, 2022 Mich. LEXIS 143 at *10 (Jan. 24, 2022) (quoting *Mich. Coalition of State Employee Unions v. State*, 498 Mich. 312, 323-324 (2015)) (emphasis added); *see also Mich. DOT v. Tomkins*, 481 Mich. 184, 191 (2008) ("Technical legal terms [in the

Michigan Constitution] must be interpreted in light of the meaning that those sophisticated in the law would have given those terms *at the time of ratification*.") (emphasis added).

It is abundantly clear that the 1963 Constitution did not alter then-existing law to create a constitutional abortion right. The reasoning of the Court of Appeals' decision in *Mahaffey v. Attorney General*, 222 Mich. App. 325 (1997), which recognized that there is no right to abortion in the Michigan Constitution, is fully consistent with this Court's precedent:

> When the 1963 constitution was adopted, abortion was a criminal offense. The drafters of a constitutional provision are presumed to have known the existing laws and to have drafted the provision accordingly. Thus, we must presume that the drafters of the 1963 constitution were aware of the statutory prohibition against abortion. The fact that the 1963 constitution itself and the debates of the Constitutional Convention preceding the adoption of the constitution are silent regarding the question of abortion indicates that there was no intention of altering the existing law. We believe that the addition of a fundamental right to abortion to the constitution "would have been such a marked change in the law as to elicit major debate among the delegates to the Constitutional Convention as well as the public at large." Furthermore, less than ten years after the adoption of the constitution, essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute. Under these facts, we cannot conclude that the intent of the people that adopted the 1963 constitution was to establish a constitutional right to abortion.

Id. at 335-36 (citations omitted).

More generally, Michigan courts have repeatedly recognized that the due process and equal protection provisions of the 1963 Constitution are coextensive with the federal constitution's protections. The Governor's Complaint even acknowledged that the "right to privacy in art. 1 of the Michigan Constitution" is "analogous to the federal right." Cmplt., ¶ 82. In *Doe v. Department of Social Services*, 439 Mich. 650 (1992), this Court correctly rejected the claim made by abortion proponents that the Michigan Constitution's Equal Protection Clause provides greater protection than the federal provision does. The Court held that "our Equal Protection Clause was intended to duplicate the federal clause and to offer similar protection." *Id.* at 670-71. As the Court noted, "if

it had been their purpose to create more or different rights than those encompassed in the federal Equal Protection Clause, surely they would not have chosen . . . language [that] is essentially the same as the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 671-72; *see also Crego v. Coleman*, 463 Mich. 248, 258 (2000) ("This Court has found Michigan's equal protection provision coextensive with the Equal Protection Clause of the federal constitution."); *People v. Sierb*, 456 Mich. 519, 523 (1998) (interpreting the Michigan and federal due process provisions as coextensive); *AFT Mich. v. State*, 497 Mich. 197, 244 (2015) (explaining that the Michigan and federal due process provisions are often interpreted coextensively); *Grimes v. Van Hook-Williams*, 302 Mich. App. 521, 530 (2013) ("The due process guarantee of the Michigan Constitution is coextensive with its federal counterpart."); *Cummins v. Robinson Twp.*, 283 Mich. App. 677, 700-01 (2009) (same). As such, the *Dobbs* decision's analysis of the extent to which the federal constitution protects an abortion right is highly relevant to the questions raised in this lawsuit.

II. The Governor seeks an amendment to the 1963 Constitution through litigation, which is improper.

Under *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, the federal right to abortion is not absolute; rather, various tests have been employed by courts to determine whether a regulation of abortion is constitutional. Many types of abortion regulations have been upheld under these tests. For instance, in *People v. Bricker*, 389 Mich. 524 (1973), this Court upheld MCL 750.14 except to the extent it runs contrary to *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973). *Id.* at 529-31. The Court correctly held that the Michigan Legislature's policy determinations concerning abortion must be given effect to the extent permitted under constitutional jurisprudence.

In this case, the Governor *does not* ask this Court to permanently enshrine *Roe* and *Bricker* into Michigan law. Rather, the Governor seeks the creation of *an absolute Michigan constitutional abortion right* that goes far beyond the federal *Roe*-based abortion right. The Complaint's Request

for Relief seeks an injunction that *prevents the enforcement of MCL 750.14 in any and all circumstances*, not just the circumstances in which enforcement of the statute would be contrary to *Roe*. The unprecedented revision of the Michigan Constitution proposed by the Governor—which would create an absolute abortion right that has no basis in existing Michigan or federal law—needs to occur, if it occurs at all, *through the constitutional amendment process*, not through the amendment-by-litigation strategy that this lawsuit represents.

As one Constitutional Convention Delegate explained:

> [W]hen we are dealing with something as fundamental as a constitution, which is a protection against the imposition of the will of the state . . . we should be very careful in the allowance of those particular guarantees to be changed because the constitution is a compact with the people. It represents not only what the position of the people is for the present day but also for the future, for those yet unborn children.

League of Women Voters of Mich., 2022 Mich. LEXIS 143 at *81, n.66 (Zahra, J., concurring in part and dissenting in part) (quoting Convention statement of Delegate O. Lee Boothby). The same type of analysis applies where, as here, a litigant seeks to permanently impede the Legislature and the people from being able to determine State policy on an issue of great interest and importance by arguing for the creation or expansion of a constitutional right. Proponents of policy changes cannot bypass the legislative and constitutional amendment processes through litigation.

Moreover, the Governor's concerns are not accurately conveyed as the decision in *Dobbs* would not make abortion illegal; rather, if the federally-recognized right to an abortion is limited or overturned by *Dobbs*, the authority to regulate abortion would return to the States. Michiganders would once again have the ability to decide how broadly, or narrowly, to permit abortion, as they did from the beginning of the State's existence through 1973. The policy arguments that the Governor asserts in this lawsuit could be presented *to the proper audience*: the Legislature and the public at large. If the Governor's views on abortion are actually reflective of the current views of

Michiganders, *that would be reflected in legislation, ballot initiatives, and non-prosecution policies*. The Governor, the Attorney General, and a large percentage of the Defendant County Prosecuting Attorneys have already made it abundantly clear that they are not going to prosecute anyone for obtaining or providing an abortion, regardless of what *Dobbs* says. What the Governor and like-minded litigants cannot do, however, is retroactively graft their 2022 policy preferences into the 1963 Constitution, which is what they are improperly trying to accomplish here.

CONCLUSION

This Court should await the issuance of the *Dobbs* decision and then reaffirm that the 1963 Constitution does not include a right to abortion.

Respectfully submitted,

/s/ Edward L. White III

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*Not admitted in Michigan

Dated: June 8, 2022

Counsel for Amicus Curiae, the American Center for Law & Justice

PROOF OF SERVICE

I, Edward L. White III, hereby affirm that on June 8, 2022, I delivered a copy of the SUPPLEMENTAL BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, *AMICUS CURIAE*, CONCERNING QUESTION #5 OF THE COURT'S MAY 20, 2022 ORDER upon counsel of record 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.

/s/ Edward L. White III
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& JUSTICE
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