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

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, *AMICUS CURIAE*, IN SUPPORT OF THE MOTION TO DISMISS FILED BY DEFENDANTS JERARD JARZYNKA, PROSECUTING ATTORNEY OF JACKSON COUNTY, AND CHRISTOPHER BECKER, PROSECUTING ATTORNEY OF KENT COUNTY

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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 brief on behalf of itself and more than 411,000 of its supporters (including more than 12,200 in Michigan) who support the protection of the sanctity of life. This brief urges this Court to grant the motion to dismiss filed by Defendants Jerard M. Jarzynka, Prosecuting Attorney for Jackson County, and Christopher R. Becker, Prosecuting Attorney for Kent County, and to deny Governor Whitmer's request for the certification of questions from the Oakland County Circuit Court.

[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.

INTRODUCTION

The Governor's request for certification does not comply with MCR 7.308 and is based on a lawsuit that is premature and exceeds her authority. The Governor is also making an improper request for an advisory opinion from this Court. This Court should grant the Defendants' motion to dismiss and reject the Governor's request for the certification of questions.

BACKGROUND

Jurisprudence of the Supreme Court of the United States recognizes a federally-protected right to an abortion, and that right is recognized by the State of Michigan. *Roe v. Wade*, 410 U.S. 113 (1973) (and its progeny); MCL § 750.323 (allowing abortion before viability); *see also Larkin v. Wayne Prosecutor*, 389 Mich. 533, 541-42 (1973) (construing MCL § 750.323 in light of *Roe*); *People v. Bricker*, 389 Mich. 524, 529 (1973) (explaining that, even though Michigan's public policy proscribes abortion, this "public policy must now be subordinated to Federal Constitutional requirements" in light of *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973)).

There is concern among those who support abortion rights that the Supreme Court of the United States will limit or erase those rights in its upcoming decision in *Dobbs v. Jackson Women's Health Organization*, Case No. 19-1392. At this point, however, because the Court has not issued a decision in *Dobbs*, those concerns are based on speculation.

Governor Gretchen Whitmer, based on that speculation, filed a lawsuit in Oakland County Circuit Court (Case No. 22-193498-CZ) against a number of County Prosecutors, in counties where providers perform abortion. Although the Michigan Constitution does not include a right to abortion, the Governor's lawsuit seeks the creation of such a right. The lawsuit also seeks to have the County Prosecutors enjoined from enforcing a State law that 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

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> 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 (effective Sept. 18, 1931); *see In re Petition of Vickers*, 371 Mich. 114, 117-18 (1963) (explaining that the pregnant woman cannot be charged under Section 750.14 as a defendant, accomplice, aider, or abettor).

Section 750.14 was upheld by this Court in *Bricker* except to the extent it runs contrary to *Roe* and *Doe*. *Bricker*, 389 Mich. at 529-31. In so ruling, this Court explained that although it was bound to preserve the laws of Michigan, those laws had to be construed to conform to both federal and State constitutional requirements. *Id.* at 528. In construing Section 750.14, this Court explained that the statute *reflects the public policy of Michigan* and its main purpose was "to prohibit all abortions except those required to preserve the health of the mother." *Id.* at 529. In light of *Roe* and *Doe*, however, this Court had to subordinate the public policy of Michigan to the requirements of the federal constitution. *Id.* at 527, 529. As such, Section 750.14 cannot be used to prevent "abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment." *Id.* at 527. This Court explained that its construction of Michigan statutes, based on federal constitutional jurisprudence, "is determinative until changed by the Michigan Legislature or the initiative of the people of this state." *Id.* at 528.

Just as the *Bricker* Court explained in its review of Section 750.14 that the public policy of Michigan is to proscribe abortion, the Michigan Court of Appeals in *Mahaffey v. Attorney General*, 222 Mich. App. 325 (1997), pointed out that when the Michigan Constitution was drafted in 1963, abortion was a criminal offense in Michigan. *Id.* at 335. The appellate court went on to explain

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that 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." *Id.* at 336. Moreover, the appellate court pointed out that less than ten years after the Michigan Constitution was adopted, "essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute [Section 750.14]." *Id.* As a result, the appellate court stated that "we cannot conclude that the intent of the people that adopted the 1963 constitution was to establish a constitutional right to abortion." *Id*. In addition, the appellate court reviewed the precedent of this Court, which bolstered the court's conclusion that "there is no right to abortion under the Michigan Constitution" and that "in Michigan a woman's right to abortion is derived solely from the federal constitution." *Id*. at 336-38, 345.

In addition to filing her lawsuit in Oakland County Circuit Court, the Governor filed her Executive Message (Case No. 164256) asking this Court to authorize the Circuit Court to certify three questions to this Court: whether the Michigan Constitution protects the right to an abortion and whether Section 750.14 violates the Michigan Constitution's Due Process Clause and Equal Protection Clause.

In response to that Executive Message, Defendants Jerard M. Jarzynka, Prosecuting Attorney of Jackson County, and Christopher R. Becker, Prosecuting Attorney of Kent County, filed a motion to dismiss. *Amicus curiae* supports the granting of that motion.

ARGUMENT

I. This Court Should Deny the Governor's Executive Message Request.

Governor Whitmer is seeking relief from this Court pursuant to MCR 7.308. That rule permits this Court to authorize a lower court to certify questions for this Court to resolve while the

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lower court's proceedings are stayed. To grant such a request, the lower court proceedings must involve "a controlling question of public law" that is of "such public moment as to require an early determination." MCR 7.308(A)(1)(a).

Here, there is no controlling question pending in the lower court that requires an early determination. The law of Michigan is unchanged with regard to abortion. If the federally-protected right to an abortion were limited or overturned in *Dobbs*, Section 750.14, which reflects the public policy of this State, *Bricker*, 389 Mich. at 528-31, would go into effect. If a majority of Michiganders want changes to be made to that law, those changes should be made pursuant to the requirements of the Michigan Constitution and not the dictates of the Governor, who lacks the legislative power to change or make law. Governor Whitmer's request for certified questions should be denied.

II. This is a Premature Case and an Invalid Request for an Advisory Opinion.

As the Defendants correctly assert, Governor Whitmer's lawsuit is premature. There is no case or controversy to resolve. *Roe* is still the law of the land, and Section 750.14, even assuming it will be used by a Prosecuting Attorney, is still limited by *Roe* and its progeny. *Bricker*, 389 Mich. at 528-31. Thus, Governor Whitmer is asking the courts to answer an abstract question, something courts do not do. *Anway v. Grand Rapids Railway Co.*, 211 Mich. 592, 599-622 (1920) (noting that this Court dismisses cases that present abstract questions); *see also League of Women Voters of Mich. v. Secretary of State*, 506 Mich. 561, 586 (2020) (noting that courts decide actual controversies and not those that are "hypothetical or anticipated in the future").

Under the circumstances of the non-existent controversy, there is nothing for this Court (or any court) to decide. As this Court has explained, it may only exercise its judicial power when there exists an actual dispute, and this Court does not exercise that power to resolve hypothetical

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questions, political questions, and other non-justiciable controversies. *See Federated Ins. Co. v. Oakland County Road Comm'n*, 475 Mich. 286, 292 (2006) (discussing "judicial power"). The Governor's lawsuit falls into the latter category of cases. It raises questions based on speculation about what, if anything, the Supreme Court of the United States may do in *Dobbs*. Courts do not consider and resolve such questions, and the Governor's request for this Court to do so should be denied. *See Taylor v. Dearborn*, 370 Mich. 47, 56 (1962) (explaining that this Court does not "indulge in speculations as to the future"); *accord League of Women Voters of Mich.*, 506 Mich. at 586; *Anway*, 211 Mich. at 615.

In reality, Governor Whitmer is requesting an advisory opinion from this Court regarding Section 750.14. An advisory opinion is just that: it offers the advice of this Court and does not constitute a precedentially binding decision of this Court. *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich. 441, 460 n.1 (1973) ("It is important to emphasize the fact that an advisory opinion does not constitute a decision of the Court and is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits.").

Although this Court may issue advisory opinions pursuant to Article III, § 8 of the Michigan Constitution, a governor must request an advisory opinion after the legislation has been enacted into law *but before its effective date*. *Id.; see also In re Request for Advisory Opinion*, 395 Mich. 148, 149-50 (1975) (explaining that advisory opinions are limited to requests after a law has passed but before its effective date). Section 750.14, however, has been in effect since 1931. The time for this Court to have issued an advisory opinion (or been asked to issue one) expired 91 years ago, and the Governor's request for such an opinion now must be rejected. *See In re House of Representatives Request for Advisory Opinion*, 505 Mich. 884, 884 (2019) (explaining that the Court lacks jurisdiction to issue an advisory opinion after the effective date of the legislation)

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(Clement, J., concurring). And, as noted above, Section 750.14 has already been reviewed by this Court. This Court determined that Section 750.14 reflects the public policy of Michigan, which had to be subordinated to the requirements of the federal constitution as set forth in *Roe* and *Doe*. *Bricker*, 389 Mich. at 527-31.

In sum, Governor Whitmer's request of this Court is premature and is not a proper request for an advisory opinion. This Court should deny her request to certify questions from the Oakland County Circuit Court.

III. Governor Whitmer Has Exceeded Her Authority.

Governor Whitmer has exceeded her constitutional authority in filing her lawsuit and requesting the certification of questions. As Governor, she may initiate court proceedings on behalf of the State (1) "to *enforce* compliance with any constitutional or legislative mandate" or (2) "to *restrain* violations of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its political subdivisions." 1963 Mich. Const. art. V, § 8 (emphasis added). Neither enforcement nor restraint, as properly understood by any reading of the Michigan Constitution, is at issue here.

First, Governor Whitmer is not trying to compel the Prosecuting Attorneys to enforce any constitutional or legislative mandate. As noted above, *Roe* and its progeny are still the law of the land. There is no indication that the Prosecuting Attorneys are not enforcing any law related to abortion. Rather, the Governor is attempting to prevent the Prosecuting Attorneys from enforcing Section 750.14, assuming it is ever permitted to be validly enforced in full should sometime in the future the federally-protected right to an abortion be limited or overturned by *Dobbs*. This attempt by the Governor to preemptively stop the enforcement of law runs contrary to her constitutionally

imposed mandate to "take care that the laws be *faithfully executed*." 1963 Mich. Const. art. V, § 8 (emphasis added).

Second, Governor Whitmer is not trying to restrain any violations of constitutional or legislative power by the Prosecuting Attorneys. There is no indication that the federally-protected right to an abortion is being threatened by the Prosecuting Attorneys. Moreover, even if that federally-protected right were limited or overturned by the *Dobbs* decision, Governor Whitmer has no grounds to ask this Court to restrain any violations of power; the Prosecuting Attorneys would be free to exercise their discretion in determining whether, or how, to enforce Section 750.14 when, and if, the time comes for that law to be fully enforced, just as they would any other law. This Court has recognized that a prosecutor is a constitutional officer, *see* 1963 Mich. Const. art. VII, § 4, who has discretion in prosecutorial decisions. *See Genesee Prosecutor v. Genesee Circuit Judge*, 386 Mich. 672, 683 (1972); *see also People v. Graves*, 31 Mich. App. 635, 636 (1971) (noting that "the prosecutor has a right to exercise discretion in determining under which applicable statute a prosecution will be instituted"). This Court has further recognized that "[f]or the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers." *Genesee Prosecutor*, 386 Mich. at 684. Through her legal action, Governor Whitmer is attempting to use the judiciary to dictate how the Prosecuting Attorneys should act if future events occur as she speculates will happen, which runs contrary to the independent role of the Prosecuting Attorneys and the separation of powers guaranteed in the Michigan Constitution. *See People v. Jones*, 252 Mich. App. 1, 5 (2002) (noting that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in [the Michigan] constitution.").

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Should the federally-recognized right to an abortion be limited or overturned, the authority to regulate abortion would return to the State legislatures, where the authority rested before *Roe*. Michigan would have the option to keep or change its abortion laws, or amend its Constitution, which currently does not recognize a right to an abortion. *Mahaffey*, 222 Mich. App. at 336-38, 345. These changes (if any) would properly occur through the legislative process, 1963 Mich. Const. art. IV, § 1, through an initiative or referendum of the people, *id.* at art. II, § 9, or through an amendment to the Michigan Constitution, *id.* at art. XII; *see League of Women Voters of Mich.*, 506 Mich. at 571. These changes can only properly occur through the democratic process, not through the lawsuit of Governor Whitmer by which she is asking the courts to create a new constitutional right and not review an actual case or controversy. Governor Whitmer's request for the certification of questions should be denied.

CONCLUSION

Amicus curiae, the ACLJ, requests that this Court grant the motion to dismiss filed by Prosecuting Attorneys Jarzynka and Becker and reject the Governor's request for the certification of questions from the Oakland County Circuit Court.

Respectfully submitted,

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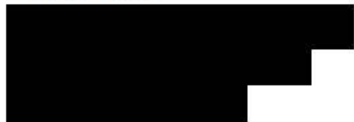

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Dated: May 10, 2022

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PROOF OF SERVICE

I, Edward L. White III, hereby affirm that on May 10, 2022, I delivered a copy of the Proposed *Amicus Curiae* Brief of the American Center for Law & Justice in Support of Defendants Jerard Jarzynka and Christopher Becker's Motion to Dismiss 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.

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