

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.

Supreme Court Case No. 164256

**PROPOSED INTERVENORS RIGHT
TO LIFE OF MICHIGAN AND
MICHIGAN CATHOLIC
CONFERENCE'S MOTION TO
INTERVENE PURSUANT TO MCR
2.209 AND MCR 7.311**

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

Oakland Circuit Court No. 22-193498-
CZ

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**PROPOSED INTERVENORS RIGHT TO LIFE OF MICHIGAN AND
MICHIGAN CATHOLIC CONFERENCE'S MOTION TO INTERVENE
PURSUANT TO MCR 2.209 AND MCR 7.311**

Right to Life of Michigan and the Michigan Catholic Conference, pursuant to MCR 2.209 and MCR 7.311, move to intervene in the action pending before this Court as Docket No. 164256, and to ask that the Court deny Plaintiff Gretchen Whitmer's request for certification filed pursuant to MCR 7.308. In support of its motion, Right to Life of Michigan and the Michigan Catholic Conference state as follows.

1. This case involves the constitutionality of MCL 750.14, 1931 PA 328, which prohibits "wilfully administer[ing] 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 doing so was "necessary to preserve the life of [the] woman."

2. MCL 750.14, which had already been on the books for 32 years when the current version of the Michigan Constitution was ratified in 1963, has co-existed peaceably with that Constitution for nearly 60 years. Indeed, the 1963 Constitution is completely silent about abortion. And on information and belief, there is no public record suggesting that those who drafted and ratified Michigan's 1963 Constitution believed that they were invalidating MCL 750.14. The one time a litigant raised the issue in the 1990s, the Court of Appeals definitively held that "there is no right to abortion under the Michigan Constitution." *Mahaffey v Attorney General*, 222 Mich App 325, 336; 564 NW2d 104 (1997). It would be extraordinary for anyone to claim today that hidden somewhere in the 1963 Constitution's silence is a right to abortion that renders MCL 750.14 invalid.

3. Yet here we are. Despite the Michigan Constitution’s demand that the Governor take care “that the laws be faithfully executed,” Const 1963, art 5, § 8, Governor Whitmer, on behalf of the State of Michigan, filed on April 7, 2022, a Complaint for Declaratory and Injunctive Relief in the Oakland County Circuit Court, Case No. 22-193498-CZ, seeking a determination that MCL 750.14 violates the Michigan Constitution’s Due Process and Equal Protection Clauses. Const 1963, art 1, §§2, 17.

4. The same day, Governor Whitmer submitted an Executive Message to this Court, asking it, under MCR 7.308, to authorize the Oakland County Circuit Court to certify three questions for this Court’s review: (1) whether the Michigan Constitution protects the right to abortion; (2) whether Michigan’s abortion statute violates the Due Process Clause of the Michigan Constitution; and (3) whether Michigan’s abortion statute violates the Equal Protection Clause of the Michigan Constitution. Along with her Executive Message, Governor Whitmer filed a brief in support and a Motion for Immediate Consideration.

5. The same day, a plaintiffs group represented by Planned Parenthood filed still another action, this one in the Michigan Court of Claims. *Planned Parenthood of Michigan v Attorney General of the State of Michigan*, Court of Claims No 22-000044-MM. The Attorney General promptly issued a prepared public statement declaring that she would not defend MCL 750.14—even though that is her job—unless a court orders her to do so.

6. All three legal actions are founded on an event that has not happened yet: the possibility that the U.S. Supreme Court may overturn *Roe v Wade*, 410 US 113 (1973). Governor Whitmer then used her flouting of Michigan law to initiate a national fundraising campaign.

7. The Governor's request for certification remains pending in this court.

8. Right to Life of Michigan and the Michigan Catholic conference now bring this Motion to Intervene in Supreme Court Case No. 164256, under MCR 2.209 and MCR 7.311.

9. MCR 2.209(A)(3) provides that, on timely application, a party "has a right to intervene in an action...when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated so that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

10. Put simply, MCR 2.209(A)(3) "allows an intervention of right in cases in which the intervenor's interests are not adequately represented by the parties." *Estes v Titus*, 481 Mich 573, 583; 751 NW2d 493 (2008).

11. Similarly, MCR 2.209(B) provides that, on timely application, a party "may intervene in an action...when an applicant's claim or defense and the main action have a question of law or fact in common." Under that rule, "common question[s] of law and fact alleged should be the basis for granting the motion for leave to intervene unless the court in [its] discretion determines that the intervention

would unduly delay or prejudice the adjudication of the rights of the original parties.” *Burg v B&B Enters, Inc*, 2 Mich App 496, 499; 140 NW2d 788 (1966); *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 575; 957 NW2d 731 (2020).

12. “The rule for intervention should be liberally construed to allow intervention where the applicant’s interests *may be* inadequately represented.” *Hill v LF Transp, Inc*, 277 Mich App 500; 746 NW2d 118 (2008) (emphasis added and citations omitted).

13. A party seeking intervention isn’t required to definitively prove that its interests are inadequately represented. Instead, “the *concern* of inadequate representation of interests need only exist.” *Vestevich v West Bloomfield Tp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001) (emphasis added).

14. “[T]here need be no positive showing that the existing representation is in fact inadequate. All that is required is that the representation by existing parties *may be inadequate*.” *Mullinix v City of Pontiac*, 16 Mich App 110, 115; 167 NW2d 856 (1969) (emphasis added); *Karrip v Cannon Twp*, 115 Mich App 726, 731-732; 321 NW2d 690 (1982) (citations omitted) (“The proposed intervenors satisfied the second requirement by establishing that their representation is or *may be* inadequate.”)

15. The possibly-inadequate-representation rule “is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *D’Agostini v City of Roseville*, 396 Mich 185, 188-189; 240 NW2d 252 (1976), quoting *Trbovich v. United Mine Workers of Am*, 404 US 528, 538 n 10; 92 S Ct 603; 30 L Ed 2d 686 (1972).

16. In this case, Right to Life of Michigan and the Michigan Catholic Conference satisfy all the requirements for intervention by right under MCR 2.209(A)(3).

17. First, this motion is timely. Governor Whitmer sued on April 7 and this motion is being filed two weeks later, before any issues have been decided or any procedural Rubicons have been crossed.

18. Second, Right to Life of Michigan and the Michigan Catholic Conference's interests may be inadequately represented by the parties. At least seven Defendants have already stated publicly that they will not defend the law. And even if a couple of Defendants decide to defend, they could be replaced in a future election by elected officials who change position and decline to defend. What's more, as explained below, Right to Life of Michigan and the Michigan Catholic Conference's interests are different than those of Defendants, all of whom are public officials. So Right to Life of Michigan and the Michigan Catholic Conference are almost certain to advance different legal arguments than Defendants.

19. Right to Life of Michigan is a nonpartisan, nonsectarian, nonprofit organization whose members from all over Michigan are dedicated to protecting the gift of human life from fertilization to natural death. To that end, it provides educational resources to Michiganders and encourages community participation in programs that foster respect and protection for human life across the state. Right to Life of Michigan also seeks to give a voice to the voiceless on life issues like abortion, and fights for the defenseless and most vulnerable humans, born and unborn. As a

result, Right to Life of Michigan, both on its own and on behalf of its members, has a strong interest in maintaining laws that promote life throughout Michigan, including MCL 750.14.

20. The Michigan Catholic Conference serves as the official voice of the Catholic Church in Michigan on matters of public policy. Its mission is to promote a social order that respects the dignity of all persons and to serve the common good in accordance with the teachings of the Catholic Church. Its board of directors includes the active bishops of Michigan's seven Catholic dioceses. The Michigan Catholic Conference has a deep, abiding interest in this matter—the dignity and sanctity of all human life. The Conference is dedicated to preserving and protecting human life at all stages, including by supporting laws like MCL 750.14.

21. As advocates for the rule of law, Right to Life of Michigan and the Michigan Catholic Conference pursued passage of a Human Life Amendment and other laws that promote and protect innocent life, including the lives of the unborn. They also oppose passage of laws that destroy and devalue life, including those that encourage abortion. As part of these efforts, Right to Life of Michigan and the Michigan Catholic Conference have dedicated significant human and financial resources to combating efforts like the misnamed Michigan “Reproductive Freedom for All” Initiative (2022) that seek to undo almost a century of Michigan law by creating a right to take the life of an unborn child at any stage, right up to the moment he or she emerges through the birth canal, while voiding longstanding Michigan laws that (1) ensure women's health and (2) that mothers are fully informed before making

the decision to take their own child's life. Given the resources that they have expended defending the rights of the unborn, Right to Life of Michigan and the Michigan Catholic Conference have a substantial interest in advocating for and defending pro-life legislation, including the 1931 statute the Governor seeks to invalidate.

22. The parties here do not adequately represent Right to Life Michigan and the Michigan Catholic Conference's pro-life interests. Governor Whitmer asks this Court to create a right to an abortion and hold MCL 750.14 unconstitutional. So she is adverse to—and cannot adequately represent—Right to Life of Michigan and Michigan Catholic Conference's interests.

23. As for the prosecutors named as Defendants—seven have already publicly agreed with Governor Whitmer's contention that MCL 750.14 is “unconstitutional” and have declined to defend her lawsuit.¹ Even if some of the remaining prosecutors choose to defend MCL 750.14 and oppose Governor Whitmer's attempt to undermine a Michigan law she is tasked with enforcing, they may not adequately represent Right to Life of Michigan and the Michigan Catholic Conference's interests.

24. To begin, a Defendant who defends this lawsuit could be replaced in an election by a prosecutor who shares Governor Whitmer's views. That would leave this case without the adversity of parties necessary for the courts even to exercise jurisdiction over this matter.

¹ **Exhibit 1**, April 7, 2022 Statement by Seven Michigan Prosecutors.

25. In addition, the Governor's lawsuit places all Defendants in a difficult political and legal position. In the Governor's (and the Attorney General's) view, silence in Michigan's Constitution creates a right to abortion that invalidates MCL 750.14, which has been on the books since before the Constitution's ratification. And, because two of Michigan's constitutional officers have taken the position that MCL 750.14 is unconstitutional, any Defendant who argues that MCL 750.14 is valid will likely be attacked politically—however unfairly—for failing to uphold Michigan's Constitution. Right to Life of Michigan and the Michigan Catholic Conference will have no such constraints on their advocacy.

26. What's more, a prosecutor acts on existing law and concrete facts to make a charging decision. As things stand today, *Roe v Wade* is still good law, and there are no set of facts that would result in a prosecutor charging someone with a violation of MCL 750.14 that *Roe* protects. That reality makes it difficult for a prosecutor to articulate the government's interests in a case like this. In contrast, Right to Life of Michigan and the Michigan Catholic Conference are not constrained to make arguments consistent with hypothetical charging decisions.

27. Most important, Right to Life of Michigan and the Michigan Catholic Conference will advance alternative arguments in this case. 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 since the moment the Michigan Constitution became effective in 1963, then Right to Life of Michigan and the Michigan Catholic Conference 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 imposing language and rights that the People of Michigan never endorsed or ratified through the democratic process.

28. Michigan courts have regularly allowed Right to Life of Michigan to intervene in lawsuits challenging the constitutionality of abortion laws. See, e.g., *Doe v Dep't of Social Services*, 439 Mich 650; 487 NW2d 166 (1992) (Right to Life of Michigan permitted to intervene as defendant in action challenging constitutionality of statute prohibiting use of public funds to pay for abortion unless abortion is necessary to save a woman's life); *Ferency v Bd of State Canvassers*, 198 Mich App 271; 497 NW2d 233 (1993) (Right to Life of Michigan permitted to intervene as defendant in action challenging the constitutionality of proposed legislation entitled "The Parental Rights Restoration Act"). This Court should allow Right to Life Michigan and the Michigan Catholic Conference to intervene by right here.

29. Alternatively, this Court should allow Right to Life of Michigan and the Michigan Catholic Conference to intervene by permission under MCR 2.209(B).

30. In addition to seeking intervention in the proceedings before this Court, Right to Life of Michigan and the Michigan Catholic Conference intend to intervene

in Governor Whitmer’s trial court action, pending in the Oakland County Circuit Court as Case No. 22-193498-CZ, to both defend against the Governor’s claims for declaratory and injunctive relief and, if necessary, assert their own claims for declaratory relief. Those claims and defenses have “question[s] of law or fact in common” with the issues raised in Plaintiff’s request for certification.

31. Permitting Right to Life of Michigan and the Michigan Catholic Conference to intervene will not “unduly delay or prejudice the adjudication of the rights of the original parties.” *Kuhlgert v Michigan State University*, 328 Mich App 357, 378-379; 937 NW2d 716 (2019) (citations omitted). The Governor’s lawsuit and request for certification are in their infancy. Neither this Court nor the trial court have ruled on any motions, held any hearings, or even set any briefing schedules. So the original parties won’t be prejudiced if Right to Life of Michigan and the Michigan Catholic Conference are permitted to intervene.

32. So, in addition to being entitled to intervene by right under MCR 2.209(A)(3), Right to Life of Michigan and the Michigan Catholic Conference should also be permitted to intervene under MCR 2.209(B).

For these reasons, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to: (1) grant this motion and enter an order allowing Right to Life of Michigan and the Michigan Catholic Conference to intervene in Case No. 164256; (2) accept for filing the attached brief in opposition to Governor Whitmer’s request for certification under MCR 7.308; and (3) alternatively, hold that, consistent

with longstanding precedent, the Michigan Constitution does not create a right to abortion and thus MCL 750.14 is a valid exercise of the Legislature's authority.

Respectfully submitted,

Dated: April 22, 2022

ALLIANCE DEFENDING FREEDOM

By /s/ John J. Bursch

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EXHIBIT 1



NEWS RELEASE

For Immediate Release:
April 7, 2022

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**Seven Michigan Prosecutors Pledge to Protect a Woman’s Right to Choose
Joint Statement**

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. For that reason, we are reassuring our communities that we support a woman’s right to choose and every person’s right to reproductive freedom.

Michigan’s anti-abortion statutes were written and passed in 1931. There were no women serving in the Michigan legislature. Those archaic statutes are unconstitutionally and dangerously vague, leaving open the potential for criminalizing doctors, nurses, anesthetists, health care providers, office receptionists – virtually anyone who either performs or assists in performing these medical procedures. Even the patient herself could face criminal liability under these statutes.

We believe those laws are in conflict with the oath we took to support the United States and Michigan Constitutions, and to act in the best interest of the health and safety of our communities. We cannot and will not support criminalizing reproductive freedom or creating unsafe, untenable situations for health care providers and those who seek abortions in our communities. Instead, we will continue to dedicate our limited resources towards the prosecution of serious crimes and the pursuit of justice for all.

Today, our Governor filed a lawsuit to guarantee the right to reproductive freedom in Michigan, and to prevent the arbitrary enforcement of those 90-year-old statutes. These statutes were held unconstitutional five decades ago, and are still unconstitutional today. We support the Governor in that effort.

We hope you will stand with us as we work to protect and serve our communities.

Respectfully,

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Oakland County Prosecutor

Kym L. Worthy
Wayne County Prosecutor

Carol A. Siemon
Ingham County Prosecutor

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Marquette County Prosecutor

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