STATE OF MICHIGAN
COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients, and SARAH WALLETT, M.D., M.P.H., FACOG, on her own behalf and on behalf of her patients,

Plaintiffs,

v

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, in her official capacity,

Defendant.

No. 22-000044-MM

HON. ELIZABETH GLEICHER

DEFENDANT ATTORNEY GENERAL DANA NESSEL'S MAY 5, 2022 RESPONSE TO PLAINTIFFS' APRIL 7, 2022 MOTION FOR PRELIMINARY INJUNCTION

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DEFENDANT ATTORNEY GENERAL DANA NESSEL'S MAY 5, 2022 RESPONSE TO PLAINTIFFS' APRIL 7, 2022 MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The right to access safe abortion services in Michigan is now more than ever of significant and grave concern. Plaintiffs' lawsuit places that legal question squarely before the Court in their challenge to the constitutionality of Michigan's criminal abortion statute. It is a rare occasion that the Attorney General declines to defend the constitutionality of a duly enacted law. But this is such an occasion.

Since taking office, and even before then during her candidacy, the Attorney General has been vocal in her support of reproductive rights and in her stance that the criminal abortion statute is unconstitutional. As an elected, executive official, the Attorney General has discretion to defend a law, and she declines to do so here. Defending this archaic and harmful law will not serve the interests of the public and would conflict with her oath to uphold Michigan's Constitution.

Because the parties' interests are aligned, the Court is now confronted with the question of its jurisdiction to hear this matter. For jurisdiction to exist, there must be a live, actual controversy between adverse litigants. Given the Attorney General's decision not to defend the statute, there is presently a lack of adversity sufficient to support jurisdiction. When a court lacks jurisdiction, it loses its power to hear the case. But that need not happen here. Plaintiffs can amend their lawsuit to add an appropriate party to ensure adversity exists. The Attorney General has offered to stipulate to such an amendment. Plaintiffs may then continue to press, and this Court can resolve, the substantial legal questions presented by this case and so important to the women of Michigan.

STATEMENT OF FACTS AND PROCEEDINGS

Attorney General Nessel was elected by the people of Michigan as the State's 54th Attorney General. As a candidate, the Attorney General made clear she would not enforce Michigan's criminal abortion statute, MCL 750.14, and shortly after taking office in January 2019, she reconfirmed that commitment at a conference held by Plaintiff Planned Parenthood of Michigan. (Ex A, Detroit News, 4/16/19, *Nessel: I'd never enforce Michigan abortion ban or let 'women be butchered'.*) The Attorney General has never wavered in her commitment to reproductive freedom, taking numerous actions to protect these rights.[1]

Despite the Attorney General's staunch position and Planned Parenthood's knowledge of that position, on April 7, 2022, Plaintiffs filed the instant complaint against only the Attorney General, seeking a declaration that Michigan's criminal abortion statute is unconstitutional and to enjoin her from enforcing the statute should the United States Supreme Court overrule *Roe v Wade*, 410 US 113 (1973).[2] Notably, on the same day, Governor Gretchen Whitmer, on behalf of the State of

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[1] For instance, the Attorney General has joined amicus briefs in numerous lawsuits to defend access to reproductive health care. See *Whole Woman's Health Alliance, et al v Rokita, et al*, Case Nos. 21-2480 & 21-2573, US Court of Appeals for the Seventh Circuit; *Whole Woman's Health, et al v Jackson, et al* and *US v Texas, et al*, Case Nos. 21-463 & 21-588, US Supreme Court; *Dobbs v Jackson Women's Health Organization, et al*, No. 19-1392, US Supreme Court; *Preterm-Cleveland, et al v Himes,* Case No. 18-3329, US Court of Appeals for the Sixth Circuit; *American College of Obstetricians and Gynecologists v US Food & Drug Admin, et al*, Case Nos. 20-1784, 20-1824, & 20-1970, US Court of Appeals for the Fourth Circuit; *Planned Parenthood South Atlantic v Wilson,* Case No. 21-1369, US Court of Appeals for the Fourth Circuit.

[2] Presently, based on *People v Bricker,* 389 Mich 524 (1973), the statute, MCL 750.14, must be interpreted consistent with *Roe* and other federal precedents.

Michigan, filed suit in Oakland County Circuit Court against 13 county prosecutors, likewise seeking a declaration that the criminal abortion statute is unconstitutional and to enjoin the defendant prosecutors from enforcing the statute. (Ex B, *Whitmer v Linderman, et al*, 22-193498-CZ.)[3] Governor Whitmer further requested that the Michigan Supreme Court authorize the trial court to certify to the Supreme Court the question of the constitutionality of MCL 750.14. (Ex. C, Executive Message.)

The Attorney General swiftly responded to news of Plaintiffs' filing here, publicly stating that she " 'will not use the resources of [her] office to defend Michigan's 1931 statute criminalizing abortion.' " (Ex. D, 4/7/22 Press Release.) In light of her decision, legal counsel for the Michigan House of Representatives and the Michigan Senate were advised of both the Attorney General's intent and that she would not oppose the Legislature's intervention in the lawsuit. Legislative counsel acknowledged receipt of these communications and advised that the matter remains under review.

[3] The duty to enforce Michigan's criminal laws falls principally on the elected prosecutors in the state's 83 counties. See Const 1963, art 7, § 4; MCL 49.153. See also *People v Graves*, 31 Mich App 635, 636 (1971) ("The prosecuting attorney is the chief law enforcement officer of his county. The ultimate police power reposes in the hands of this civilian law enforcement officer who was elected by the people.") While the Attorney General generally "supervise[s] the work of, consult[s] and advise[s] the prosecuting attorneys," MCL 14.30, county prosecutors have broad discretion with respect to charging determinations. See, e.g., *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683 (1972).

ARGUMENT

I. Attorney General Nessel agrees with Plaintiffs that Michigan's criminal abortion statute, MCL 750.14, is unconstitutional.

Plaintiffs' complaint powerfully and persuasively alleges that Michigan's criminal abortion statute, MCL 750.14, violates several provisions of the Michigan Constitution, including the Due Process Clause, art 1, § 17, and the Equal Protection Clause, art 1, § 2. The Attorney General agrees that the statute is unconstitutional under the theories alleged by Plaintiffs.[4] And because she agrees, the Attorney General will not exercise her discretion to defend the statute, a point she made clear the day the lawsuit was filed. This lack of adversity between the parties implicates this Court's subject matter jurisdiction.

A. The Attorney General is not required to defend the constitutionality of every statute, and she has exercised her to discretion not to do so here.

The Attorney General is an elected, executive official. Const 1963, art 5, §§ 3, 21. As the State's chief legal officer, the Attorney General is endowed with common law and statutory duties and powers. *Mundy v McDonald*, 216 Mich 444, 440-451 (1921). The " 'most basic purpose of [the Attorney General's] office is to litigate matters on behalf of the people of the state.' " *Fieger v Cox*, 274 Mich App 449, 465 (2007), quoting *In re Certified Question (Wayne Co v Philip Morris, Inc),* 465 Mich 537, 543 (2002); *Attorney General v Public Service Comm*, 243 Mich App 487, 497 (2000). See also MCL 14.28, MCL 14.29, MCL 600.6416. This duty to provide

[4] The complaint also includes a novel claim under the Elliott-Larsen Civil Rights Act; however, since MCL 750.14 is unconstitutional, it is unnecessary for the Court to address the statutory claim, as the statute will be unenforceable.

representation in the Michigan Supreme Court and to state agencies "when in [her] own judgment the interests of the state require it," MCL 14.28, frequently involves defending the constitutionality of challenged statutes.

But there is no requirement in Michigan law, statutory or otherwise, that the Attorney General defend the constitutionality of *every* challenged statute in *every* case. Indeed, "it is universally recognized that among the primary missions of a state attorney general is the duty to give legal advice, including advice concerning the constitutionality of state statutes, to members of the legislature, and departments and agencies of state government." *Sch Dist of City of E Grand Rapids, Kent Cty v Kent Cty Tax Allocation Bd*, 415 Mich 381, 394 (1982) (noting that former Attorney General had rendered opinion declaring challenged statute unconstitutional). And with respect to litigation, the Attorney General has broad authority to determine the course and disposition of any litigation. See, e.g., *In re Certified Question from US Dist Ct for E Dist of Michigan*, 465 Mich at 547 ("the Attorney General has broad authority to sue and settle with regard to matters of state interest".) See also 7 Am Jur 2d, Attorney General, §§ 27, 29. Further, no client has asked her to defend here because there is no state agency in this case—the lawsuit names only the Attorney General. And the Governor has already spoken "on behalf of the State of Michigan" that MCL 750.14 is unconstitutional. (Ex. B, Whitmer Compl.) See also *Lucas v Bd of Cty Rd Comm'rs of Wayne Cty*, 131 Mich App 642, 663 (1984) ("The Attorney General, albeit a constitutional officer, is a member of the executive branch and thereby constitutionally subservient to the

Governor as repository of the executive power of the state.")

Additionally, the "paramount duty" of the Attorney General is "to protect the interests of the general public." 7A CJS, Attorney General, § 28. See also MCL 14.101 (authorizing intervention by Attorney General in "any action . . . in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state."); *Michigan State Chiropractic Ass'n v Kelley,* 79 Mich App 789 (1977) (The Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed." (citations omitted).

Here, it would be inconsistent with her duty to protect the public to defend a statute that so plainly violates Michigan's Constitution. See, e.g., *Commonwealth ex rel Beshear v Commonwealth of Kentucky, Office of the Governor, et al*, 498 SW3d 355, 364 (2016) ("[T]he Attorney General must defend duly adopted statutory enactments *that are not unconstitutional*.") (emphasis added). Defending an unconstitutional statute also places the Attorney General at odds with her oath to "support . . . the constitution of this state[.]" Const 1963, art 11, § 1. See, e.g., *Berry v School Dist of City of Benton Harbor*, 467 F Supp 630, 634-635 (WD Mich, 1978) (noting that while the Attorney General "swears to support" the Michigan Constitution, the former Attorney General had failed to "fulfill his constitutional duties" to remedy or prevent unconstitutional school segregation.)

The exercise of an executive officer's discretion to decline to defend a statute is, and should be, a rare occurrence; but it is one that has been exercised at the

highest levels of government. See, e.g., *California v Texas*, US Supreme Court Nos. 19-840 & 19-1019 (federal government declined to defend Patient Protection & Affordable Care and instead argued portions of the Act were unconstitutional).

For these reasons, it is well within the Attorney General's discretion to decline to defend the constitutionality of a statute, especially one that threatens the lives and well-being of Michigan women. See, e.g., *Humphrey v Kleinhardt*, 157 FRD 404, 405 (WD Mich 1994) ("[T]he authority of the Attorney General of the State of Michigan is to be liberally construed, and [her] discretion in determining which matters are ones of appropriate concern should only be interfered with where [her] actions are found to be clearly inimicable to the people's interest.") And, respectfully, this Court does not have the power to order the Attorney General to do otherwise. See 7A CJS, Attorney General, § 30; Const 1963, art 3, § 2. See also, *Fieger,* 274 Mich App at 466-467 ("[T]he judiciary generally may not second-guess executive-branch decisions" involving "discretionary actions by the executive branch."); *Hicks v Ottewell*, 174 Mich App 750, 757 (1989) ("The district court and the circuit court lack jurisdiction to compel a discretionary act by an officer in the executive branch of the government.")

B. The lack of adversity between the parties implicates this Court's subject matter jurisdiction.

" 'Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any

stage of the proceeding.' " *Fox v Board of Regents,* 375 Mich 238, 242 (1965) (citation omitted). See also *Yee v Shiawassee Co Bd of Com'rs,* 251 Mich App 379, 399 (2002) ("[A] court is continually obliged to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford[.]") "When a court is without jurisdiction of the subject matter, any action with respect to such a cause . . . is absolutely void." *Fox*, 375 Mich at 242.

Given the Attorney General's exercise of discretion not to defend MCL 750.14, there is at present a lack of adversity. Before the Court can order any declaratory or injunctive relief, there must first be an actual, live controversy before the Court. See *League of Women Voters (LWV II) v Secretary of State*, 506 Mich 561, 585-586 (2020); MCR 2.605(A)(1) ("In a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment [.]") (emphasis added). And for there to be a controversy, there needs to be adversity between the parties, which does not presently exist in this case. See *League of Women Voters, et al (LWV I) v Secretary of State*, 506 Mich 905 (2020) (Viviano, J., concurring). See also *Anway v Grand Rapids R Co,* 211 Mich 592, 616 (1920) ("The judicial power . . . is the right to determine actual controversies arising between *adverse* litigants . . . .") (quotation marks and citation omitted; emphasis added); *Gleason v Kincaid*, 323 Mich App 308, 314 (2018) ("It is our duty to decide actual cases and controversies, that is, actual controversies arising between adverse litigants.") (citation omitted). It is plain an additional party must be brought into this lawsuit to create the

necessary adversity and stave off claims that the suit is nothing more than a "friendly scrimmage brought to obtain a binding result that both sides desire." *League of Women Voters (LWV I)*, 506 Mich at 905 (Viviano, J., concurring).

League of Women Voters (LWV II) v Secretary of State is instructive on this point. There, the Michigan Supreme Court held that where executive branch officials decline to defend a statute, the Michigan Legislature has standing to defend the challenged statute and to intervene for the purpose of doing so. 506 Mich at 578-579 ("[W]e agree the Legislature has a sufficient 'interest in defending its own work' and can fill the breach left by the Attorney General. Therefore, when the Attorney General does not defend a statute against a constitutional challenge by private parties in court, the Legislature is aggrieved and, upon intervening, has standing to appeal.").

Under a similar rationale, an appropriate defendant could be added through amendment of the complaint under MCR 2.118. The various joinder rules also permit the addition of parties to litigation. See MCR 2.205; MCR 2.206; MCR 2.207. It is unclear, however, whether these rules may be used to remedy a jurisdictional defect. Regardless, the Attorney General is prepared to stipulate to the addition of an appropriate party in an appropriate manner. But to be clear, the Attorney General does not agree to and opposes the addition or joinder of staff from her office

to create a team to argue the constitutionality of MCL 750.14—in other words, to create controversy that currently does not exist.[5]

At times, the Attorney General will erect a conflict wall within her office and appoint two separate teams of attorneys to argue opposing views. A recent example is the case of *League of Women Voters, et al (LWV III) v Secretary of State, et al*, ___ Mich ___; 2022 WL 211736 (Jan 24, 2022, Mich), where attorneys intervened on behalf of the Department of Attorney General to defend the constitutionality of various election statutes. But the decision to appoint a conflict team, like the decision to defend a statute, is entirely within the Attorney General's discretion. And here, the Attorney General declines to appoint such a team. The Attorney General firmly believes that the criminal abortion statute is unconstitutional and that there are no defensible arguments to the contrary. Further, it would not be in the public interest, or consistent with her oath, to use either the weight of her office or the resources of this state to defend this archaic and harmful law.

The legal issues in this case are important. For that reason, the Attorney General will not move to dismiss the action. But the matter must be vigorously litigated to ensure a defensible result. This will not happen given the present posture of the case. Plaintiffs, with full knowledge of the Attorney General's

[5] Nor does the Attorney General believe that when controversy is lacking at the outset of a case, it can be created through amicus briefing, although she believes amicus briefs generally assist the Court in arriving at a just resolution. See, e.g., *League of Women Voters (LWV I)*, 506 Mich at 905 (Viviano, J., concurring) (expressing doubt that impressing amici to defend the constitutionality of a statute is an appropriate measure to cure the lack of an actual controversy between parties).

longstanding position regarding this statute, chose to name only her as a defendant. But as the "masters" of their complaint, Plaintiffs can amend to add an additional party to ensure this Court has jurisdiction to hear and resolve the case. See, e.g, *The Fair v Kohler Die & Specialty Co*, 228 US 22, 25 (1913) (Holmes, J.) ("Of course the party who brings a suit is master to decide what law he will rely upon. . . ."). See also *Alexander v Electronic Data Sys Corp*, 13 F3d 940, 943-944 (CA 6, 1994) (asserting in the context of the well-pleaded complaint rule that "the plaintiff is the master of his complaint").

CONCLUSION AND RELIEF REQUESTED

Because the Attorney General has exercised discretion not to defend MCL 750.14, she declines to take a substantive position with respect to the merits of Plaintiffs' motion for a preliminary injunction. This declination should not be viewed as a concurrence in the motion.

Respectfully submitted,

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Dated: April 5, 2022

PROOF OF SERVICE

Heather S. Meingast certifies that on April 5, 2022, she served a copy of the above document in this matter on all counsel of record via MiFILE.

/s/Heather S. Meingast
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