



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

April 7, 2022

Michigan Supreme Court
925 W. Ottawa Street
Lansing, MI 48913

Re: *Whitmer v. Linderman, et al.*

Dear Chief Justice McCormack and Justices of the Michigan Supreme Court,

Today, I brought a lawsuit under the Michigan Constitution to protect reproductive freedom and enjoin enforcement of the state's criminal abortion statute. See 1963 Const, art 5, § 8 (authorizing the governor to "initiate court proceedings in the name of the state to enforce compliance with any constitutional or legislative mandate, or 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").

Because the case involves "a controlling question of public law" that "is of such public moment as to require an early determination," MCR 7.308(A)(1), I ask this Court to authorize the trial court to certify to the Supreme Court the questions of whether MCL 750.14 violates the Due Process and Equal Protection Clauses of the Michigan Constitution, and whether the Michigan Constitution guarantees the right to abortion.

In Michigan today, abortion is a common, safe medical procedure. The nearly 30,000 women in Michigan who choose to have abortions each year do so for a variety of reasons—some because of a severe fetal anomaly, some because of a risk the pregnancy poses to their own health, some because they cannot financially support another child, and some because it is not the right time to have a child. However Michiganders personally feel about abortion, a sizable majority agree that it must remain legal. We need to trust women—our family members, neighbors, and friends—to make decisions that are best for them about their bodies and lives. The ability of Michigan women to access safe, legal abortions is critical to their health and safety.

Since 1846, Michigan has criminalized abortions unless necessary to preserve the life of the woman. The current version of Michigan's criminal abortion statute, MCL 750.14, was enacted in 1931. That statute, and those that came before it, were all rooted in an effort to control women. In 1973, after the U.S. Supreme Court decision in *Roe v Wade*, the Michigan Supreme Court construed the statute to ban abortions only to the extent permissible under *Roe*. See *People v Bricker*, 389 Mich 524, 531 (1973). While the Michigan Court of Appeals once held that the Michigan Constitution does not protect the right to abortion, *Mahaffey v Attorney General*, 222 Mich App 325, 339 (1997), that decision was incorrect and the Michigan Supreme Court has never considered that question.

The Michigan criminal abortion statute is unconstitutional under the Michigan Constitution for two reasons. First, Michigan's Due Process Clause provides rights to privacy and bodily autonomy that are violated by the State's near-total criminal prohibition of abortion. Second, Michigan's Equal Protection Clause forbids discriminatory laws like MCL 750.14, a nineteenth-century sex-based classification based on paternalistic justifications and overbroad generalizations about women.

In its decisions analyzing the criminal abortion law, this Court explicitly tied the law's enforceability to the federal right recognized in *Roe*. But the current status of *Roe* is muddled at best. In the nearly 50 years since *Roe* was decided, the contours of the right to abortion protected by the U.S. Constitution have shifted, the protections secured by *Roe* have been fundamentally undermined, and this Court has been silent on what, if anything, MCL 750.14 currently prohibits. There is also significant uncertainty as to what the statute will prohibit if the U.S. Supreme Court further contracts the right in *Dobbs v Jackson Women's Health Organization*, which it is expected to do sometime in the next few months.

The right of Michigan women to choose safe and lawful abortions is entitled to robust protection under the Michigan Constitution. To protect that right, this Court should provide an early determination of this important question of public law. If this Court were to wait to consider the right to abortion under the Michigan Constitution until after *Dobbs* is decided, it may well be too late for many women. Should *Dobbs* overrule *Roe*, or significantly limit its reach, healthcare providers may feel constrained to restrict access to abortion services to avoid potential criminal liability. Some providers are already preparing for that possibility. And any litigation initiated after *Dobbs* will take time to reach its conclusion, especially if required to proceed through the lower courts first, which are currently bound to rule that the Michigan Constitution does not protect the right to abortion. See *Mahaffey*, 222 Mich App at 339. These issues have been made abundantly clear in Texas, where abortion has been effectively outlawed for months as challenges to the state's draconian new abortion laws wind their way through the courts.

The people of Michigan deserve to know whether abortions will still be available in this state this summer, no matter what the U.S. Supreme Court does this term. Only with that certainty can the citizens of Michigan effectively order their lives, and healthcare providers sensibly order their practices. Because the right to abortion under the Michigan Constitution is a controlling question of public law that is of such public moment as to require its early determination by this Court, MCR 7.308(A)(1), I ask that you authorize the circuit court to certify the issue for immediate consideration by this Court.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gretchen Whitmer". The signature is fluid and cursive, with a large initial "G" and a long horizontal stroke at the end.

Gretchen Whitmer
Governor