IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Borello, PJ; Kelly & Gadola, JJ

In re JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County; CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County; RIGHT TO LIFE OF MICHIGAN; and THE MICHIGAN CATHOLIC CONFERENCE,

Plaintiffs-Appellees,

Supreme Court Case No. 164656

Court of Appeals Case No. 361470

PLAINTIFFS' ANSWER TO NON-PARTIES PLANNED PARENTHOOD OF MICHIGAN AND DR. SARAH WALLETT'S APPLICATION FOR LEAVE TO APPEAL, OR, IN THE ALTERNATIVE, COMPLAINT FOR SUPERINTENDING CONTROL

Lower Court Case: *Planned Parenthood of Michigan v Attorney General*, Court of Claims Case No. 22-000044-MM

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals' order correctly held that the Court of Claims lacks jurisdiction over county prosecutors who are local officials.

Non-parties Planned Parenthood and Wallett answer:	No
Defendant Court of Claims Judge:	Did not answer
Plaintiffs-Appellees answer:	Yes
The Court of Appeals answered:	Yes

INTRODUCTION

Planned Parenthood claims that independently elected county prosecutors, whose office is established by the Michigan Constitution, are merely the Attorney General's "'officers, agents, servants, [or] employees.'" Application, p 24 (quoting MCR 3.310(C)(4). But nothing in the law supports that extreme theory of county prosecutors' subservient position and constitutional unimportance. Planned Parenthood has no valid grounds to seek leave to appeal. And its alternative request for an order of superintending control is baseless. The application for leave to appeal or, in the alternative, complaint for superintending control should be denied.

BACKGROUND

On April 7, 2022, the ACLU filed suit on behalf of Planned Parenthood and its chief medical officer against Attorney General Dana Nessel, as the sole defendant, in the Court of Claims. The ACLU and Planned Parenthood argued that, notwithstanding *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104, 108 (1997), the Court of Claims should declare that the Michigan Constitution includes a right to abortion and enjoin the Attorney General and all county prosecutors from enforcing MCL 750.14 (along with other abortion regulations).

Right after filing the complaint, Planned Parenthood also filed a motion for preliminary injunction in the Court of Claims. It sought an order enjoining the enforcement of MCL 750.14 and any other Michigan statute or regulation to the extent that it prohibits abortions authorized by a licensed physician before viability, or even *after viability* in various circumstances.

Just hours after the plaintiffs filed their lawsuit and motion for preliminary injunction in the Court of Claims, Attorney General Dana Nessel—the sole defendant—issued a press release declaring that she would not defend MCL 750.14 and would support Planned Parenthood's legal position.

Right to Life of Michigan and the Michigan Catholic Conference filed an amici brief with the Court of Claims explaining that the Court lacked jurisdiction because, among other things, there was no adversity between the parties, no actual controversy existed, and the case was not ripe because the Attorney General did not intend to defend or enforce Michigan law. The Attorney General's submissions recognized that the Court of Claims lacked jurisdiction—just as Right to Life of Michigan and the Michigan Catholic Conference's amici brief had explained.

Without adversarial briefing or argument by the parties, without a public hearing, and without jurisdiction or even a ripe controversy, the Court of Claims issued an opinion and order on May 17, 2022, that preliminarily enjoins the Attorney General from enforcing MCL 750.14. The injunction was issued over a month before the U.S. Supreme Court rendered its decision in *Dobbs v Jackson Women's Health Organization*, 142 S Ct 2228 (2022), and purported to enjoin all state and local officials acting under the Attorney General's supervision—including all county prosecutors in the State—even though they are not parties to the action and are not state officials.

Though the Attorney General consistently argued that the Court of Claims lacked jurisdiction, she praised the court's rejection of her jurisdictional arguments and issuance of an overly broad preliminary injunction. She declined to file a motion to dismiss or to appeal the injunction. Within hours of the issuance of the preliminary injunction, the Attorney General e-mailed all 83 county prosecutors a copy of the opinion and order, stating that all Michigan county prosecutors are now enjoined from enforcing MCL 750.14. This includes Appellees Jarzynka and Becker, the elected prosecutors of Jackson and Kent Counties, respectively.

Appellees Jarzynka and Becker, Right to Life of Michigan and the Michigan Catholic Conference jointly filed a complaint for order of superintending control in the Michigan Court of Appeals on May 20, 2022. They requested that the Court of Appeals order the Court of Claims to

dismiss the case and/or vacate the preliminary injunction. They further requested that Judge Gleicher be recused on the ground that (among other things) she is a current financial donor to Planned Parenthood and had previously represented Planned Parenthood on behalf of the ACLU in abortion cases, as well as the plaintiffs in *Mahaffey*, arguing—and losing—the very issue presented in the Court of Claims action: whether a right to abortion can be read into the silence of Michigan's Constitution.

On August 1, 2022, the Court of Appeals ruled that the Court of Claims lacked jurisdiction over county prosecutors because they are local—not state—officials. As a result, the Court of Claims' preliminary injunction had never applied to county prosecutors and Appellees Jarzynka and Becker were free to enforce MCL 750.14. The Court of Appeals dismissed Plaintiffs' complaint for superintending control based on standing.

Planned Parenthood filed the instant application for leave to appeal, or, in the alternative complaint for superintending control.

ARGUMENT

I. PLANNED PARENTHOOD HAS NO VALID GROUNDS FOR SEEKING LEAVE TO APPEAL UNDER MCR 7.305(B).

Planned Parenthood asserts four grounds for seeking leave to appeal the Court of Appeals' order under MCR 7.305(B). None have merit. Accordingly, this Court should deny Planned Parenthood's application.

A. The Court of Appeals' standing decision does not involve a substantial question about the validity of a legislative act.

The focus of Planned Parenthood's application is on MCL 750.14's constitutionality. Application at 16–17. But the Court of Appeals' order *did not even address* the merits of that constitutional question.

Plaintiffs' complaint for order of superintending control requested that the Court of Appeals either (1) order the Court of Claims to dismiss the case for lack of jurisdiction, or (2) order the Hon. Elizabeth Gleicher to recuse herself. 5/20/22 Compl for Order of Superintending Control at 48. The Court of Appeals granted neither form of relief because it concluded that "the core nature of a county prosecutor is that of a local, not a state official" and that the "jurisdiction of the Court of Claims does not extend to them." 8/1/22 Order at 3, *In re Jarzynka*, Court of Appeals No. 361470. So, Appellees Jarzynka and Becker "are not and could not be bound by the Court of Claims' May 17, 2022[,] preliminary injunction because the preliminary injunction does not apply to county prosecutors." *Id.* at 5. The Court of Appeals therefore dismissed the complaint "for lack of standing." *Id.* at 6.

The Court of Appeal's decision does not "involve[ ] a substantial question about the validity of a legislative act." MCR 7.305(B)(1). In fact, the court studiously *avoided* addressing the substance of Appellees' complaint for order of superintending control. As a result, Planned Parenthood's request for leave to appeal on that ground is meritless.

B. The Court of Appeals' standing ruling is not of significant public interest.

Planned Parenthood claims that the Court of Appeals' ruling that county prosecutors are local officials is of significant public interest. Application at 15–17. That is incorrect. As explained above, the Court of Appeals' order did not address MCL 750.14's constitutionality or the many flaws associated with Planned Parenthood's lawsuit against a non-adverse defendant. The *scope* of the Court of Claims' preliminary injunction is important only to Planned Parenthood and its most stalwart allies, no one else.

On August 1, 2022, the Court of Appeals' order clarified that the Court of Claims lacks jurisdiction over county prosecutors and that its preliminary injunction order never applied to

them. That same day Governor Whitmer requested and received an *ex parte* temporary restraining order from the Oakland County Circuit Court, which enjoined thirteen county prosecutors with abortion clinics in their jurisdictions from enforcing MCL 750.14 *completely*, without any adversarial briefing or argument. **Exhibit 1**, 8/1/22 Order Granting Temporary Restraining Order, *Whitmer v Linderman*, Oakland Cir Ct No. 22-193498-CZ.

Following an August 3, 2022, hearing, in which counsel for Right to Life of Michigan and the Michigan Catholic Conference were barred from participating, the circuit court extended the temporary restraining order until the parties could brief, and the court could hold an evidentiary hearing on, Governor Whitmer's motion for a preliminary injunction. **Exhibit 2**, 8/3/22 Order Regarding Temporary Restraining Order Hearing on August 3, 2022, *Whitmer v Linderman*, Oakland Cir Ct No. 22-193498-CZ. Counsel for Prosecutors Becker and Jarzynka was allowed to make a brief oral argument at this hearing.

On August 17–18, 2022, the circuit court held an evidentiary hearing on Governor Whitmer's motion for preliminary injunction from which Right to Life of Michigan and the Michigan Catholic Conference were again excluded after the circuit court denied their renewed motion to intervene and rejected their proposed brief opposing the preliminary injunction.[1] Again, counsel for Prosecutors Becker and Jarzynka were allowed to participate in this hearing.

On August 19, 2022, the circuit court made an oral ruling from the bench and issued a written order enjoining county prosecutors "from any and all enforcement of MCL 750.14." **Exhibit 3**, 8/19/22 Order of Prelim Inj at 1, *Whitmer v Linderman*, Oakland Cir Ct No. 22-193498-CZ.

[1] Right to Life of Michigan and the Michigan Catholic Conference plan to appeal the circuit court's denial of their renewed motion to intervene.

Thirteen county prosecutors with abortion clinics in their jurisdictions, including Appellees Jarzynka and Becker, have thus been enjoined from enforcing MCL 750.14 against *anyone* since the day the Court of Appeals order issued. And the circuit court intends to keep a preliminary injunction against enforcing the law in place until after it holds a trial on the merits and (inevitably) issues a permanent injunction. The pretrial conference is set for November 21, 2022. *Id.*

Under these facts, the *scope* of the Court of Claims' preliminary injunction is irrelevant. The injunction itself has important consequences, including serving as a basis for the circuit court's issuance of its own preliminary injunction. But that separate circuit court injunction already covers the only prosecutors willing to enforce MCL 750.14, including Appellees Jarzynka and Becker. As a result, the *scope* of the Court of Claims' injunction is not of "significant public interest." MCR 7.305(B)(2). The Attorney General has *always* refused to enforce the statute, injunction or not. And county prosecutors, including Appellees Jarzynka and Becker—who are named defendants in Governor Whitmer's action—are *already* subject to the circuit court's injunction.

Nor is the public interest well served by making MRC 750.14's enforceability turn on Planned Parenthood's case, which has been plagued by a lack of adversity and standing, as well as ripeness and mootness problems, from the start. The Attorney General has made clear that she is on Planned Parenthood's side and that the Court of Claims lacked jurisdiction as a result.[2] And

[2] *E.g.*, 5/5/22 Def's Resp to Pls' Mot for Prelim Inj at 1, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM ("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."); 5/12/22 Def's Surreply Br to Pl's 5/6/22 Reply at 2, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM (It is "adversity between the parties [that] creates the controversy" and "it cannot be said that there is a genuine, live controversy between Plaintiffs and the Attorney General where the Attorney General has admitted the unconstitutionality of MCL 750.14 and that she will not enforce the statute.").

that lack of an actual controversy between the original parties has corroded the Court of Claims litigation throughout. For instance, an adverse defendant would have:

- Filed a motion to dismiss, as opposed to the Attorney General agreeing with Planned Parenthood that "[t]he legal issues in this case are important." 5/5/22 Def's Resp to Pls' Mot for Prelim Inj at10, *Planned Parenthood v Attorney General*, Ct of Claims No 22-000044-MM.

- Demanded a public hearing on the preliminary-injunction motion, instead of the Attorney General stipulating with Planned Parenthood that no public hearing was necessary, even though neither party defended MCL 750.14's constitutionality on the merits. 5/17/22 Op & Order at 25, *Planned Parenthood v Attorney General*, Ct of Claims No 22-000044-MM.

- Filed a motion for recusal, rather than the Attorney General ignoring the appearance of impropriety caused by the trial-court judge presiding over the Court of Claims action and writing around the precedent she litigated and lost (*Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997)) and furtively stipulating with Planned Parenthood that the trial judge "should not be disqualified," despite the judge's status as a current and longstanding financial donor to Planned Parenthood, 6/9/22 Planned Parenthood of Mich & Dr Sarah Wallett's Answer to Compl for Order of Superintending Control at 14, *In re Jarzynka*, Ct of Appeals No 361470, and

- Appealed the Court of Claims' preliminary injunction ruling in place of the Attorney General trumpeting her own defeat, refusing to appeal, and seeking to insulate the Court of Claims' order from this Court's review. 5/18/22 Mich Dep't of Att'y Gen, AG Nessel Statement on Court of Claims Order, https://bit.ly/3wnRnpu, filed as Exhibit 10 to Compl for Order of Superintending Control, *In re Jarzynka*, Ct of Appeals No. 361470.

Because there were no adverse parties in the Court of Claims litigation and none of the above-stated actions occurred, there is no significant public interest justifying Planned Parenthood's appeal.

C. The Court of Appeals' standing decision is not of major significance to the state's jurisprudence.

Planned Parenthood claims that the Court of Appeals' decision that county prosecutors are local officials is of major legal importance. Application at 15. But the application never explains why, and for good reason. The Court of Appeals' unpublished order causes no jurisprudential harm. Plaintiffs who wish to enjoin the enforcement of an allegedly unconstitutional criminal law can do what they have always done: sue adverse prosecutors in circuit court. No valid justification

exists for Planned Parenthood's decision to sue the Attorney General in the Court of Claims, a court of limited, as opposed to general, jurisdiction. The Attorney General agrees with Planned Parenthood's legal theories and poses no possible threat to its interests. Suing a friendly government official in a court of limited jurisdiction might make it easier to circumvent *Mahaffey* and contrive a nonexistent right to abortion but it does not involve a question of major legal significance.

The Court of Claims has been operational for decades. In all that time, Planned Parenthood cites no prior case in which anyone has sued in the Court of Claims to enjoin the enforcement of a criminal statute statewide. Nor does Planned Parenthood explain why such a litigation tactic, which smacks of improper gamesmanship, is necessary. If the issue were of major legal importance, it would have arisen previously.

Planned Parenthood tried a novel litigation strategy and failed. That failure may be unfortunate from Planned Parenthood's point of view. But it does not mean the Court of Appeals' order "involves a legal principle of major significance to the state's jurisprudence." MCR 7.305(B)(3). Planned Parenthood went out of its way to file suit against the Attorney General (a non-adverse party) in the Court of Claims, even though it could have joined Governor Whitmer's suit in the Oakland County Circuit Court or filed its own lawsuit in circuit court, as the Attorney General suggested. Any impediment is of Planned Parenthood's own creation, easily remediable, and does not present a legal issue of major importance.

D. The Court of Appeals's standing holding is not clearly erroneous and does not cause any injustice.

Planned Parenthood maintains that the Court of Appeals' holding that county prosecutors are local officials is clearly erroneous and will cause material injustice. Application at 18–30. Yet Planned Parenthood does not even attempt to show that the Court of Claims' decision is clearly

wrong. And the material injustice in Michigan today does not adhere to abortion advocates, but rather is being imposed at their behest.

First, this Court recognized 75 years ago that "[t]he court of claims is a court of limited jurisdiction." *Farrell v State*, 317 Mich 676, 680; 27 NW2d 135 (1947). All agree that the Court of Claims' jurisdiction "does not extend to local officials." *Mays v Snyder*, 323 Mich App 1, 47; 916 NW2d 227 (2018) (citing *Doan v Kellogg Cmty Coll*, 80 Mich App 316, 320; 263 NW2d 357 (1977)). The only question is whether county prosecutors are state officials within the Court of Claims' jurisdiction or local officials outside it.

Second, this Court and the Court of Appeals have both described county prosecutors as local officials. "The county prosecutor and the sheriff are clearly local officials elected locally and paid by the local government." *Hanselman v Killeen*, 419 Mich 168, 188; 351 NW2d 544 (1984). No one doubts that county prosecutors are "the chief law enforcement officer of the county." *Matthews v Blue Cross & Blue Shield of Mich*, 456 Mich 365, 384; 572 NW2d 603 (1998). So, any list of "local officials" necessarily includes "the sheriff, *prosecutor*, judges, the county commissioners, and the county executive." *Muskegon Cnty Bd of Comm'rs v Muskegon Cir Judge*, 188 Mich App 270, 274; 469 NW2d 441 (1991) (emphasis added). Planned Parenthood never addresses these cases, which refute any notion that the Court of Appeals clearly erred.

Third, the Attorney General admits that county prosecutors are local officials with prosecutorial discretion that is not subject to her control. She has made this point crystal clear:

> I don't believe that I as attorney general of this state have the authority to tell duly elected prosecutors what they can and what they cannot charge . . . . If that were the case, I don't even know why we would elect our county prosecutors in the first place, if they're not allowed to make their own decisions. [**Exhibit 4**, Beth LeBlanc, Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence, The Detroit News (May 3, 2022), https://bit.ly/3LrKaZJ.]

The Attorney General's understanding is not clearly wrong, nor is the Court of Appeals' corresponding ruling.[3]

In fact, the pro-abortion prosecutors' amicus brief confirms the Attorney General's views by recognizing that (1) "prosecuting attorneys are independently elected," (2) "maintain independent authority to carry out [their] duties consistent with the needs of [their] communities" and (3) "[t]he Attorney General cannot simply tell county prosecutors what to do." 8/8/22 Br of *Amici Curiae* Prosecuting Attorneys Savit, Leyton, Siemon, Getting, Wiese, McDonald, and Worthy at 10, *In re Jarzynka*, S Ct No. 164656.

Fourth, when there is doubt as to the Court of Claims' jurisdiction, this Court has established a four-factor test to use in determining whether the party in question is "predominantly state or predominantly local." *Manuel v Gill*, 481 Mich 637, 654; 753 NW2d 48 (2008). The Court of Appeals based its holding that county prosecutors are predominantly local on this Court's *Manuel* factors. 8/1/22 Order at 2–4, *In re Jarzynka*, Court of Appeals No. 361470. But Planned Parenthood's application never addresses those factors. Without engaging the Court of Appeals' reasoning, Planned Parenthood's application cannot possibly show that the Court of Appeals' "decision is clearly erroneous." MCR 7.305(B)(5)(a).

In terms of injustice, the shoe is on the other foot. Planned Parenthood, Governor Whitmer, and their allies have convinced two trial courts to ignore *Mahaffey* and completely enjoin prosecutors from enforcing MCL 750.14 on state constitutional grounds. One judge did it as a current donor and past honoree of Planned Parenthood who litigated and lost *Mahaffey*; the other

[3] Planned Parenthood's claim that the Legislature agrees with its theory that the Attorney General may bind county prosecutors' enforcement decisions is false. Application, pp 24–25. The quote it provides from the Legislature's brief merely recognizes that the Court of Claims' preliminary injunction *purports* to bind county prosecutors from enforcing MCL 750.14, not that the injunction's scope was proper.

judge initially did it on an *ex parte* basis in a mere hour on August 1, 2022, after having mothballed the litigation before him for months, without contacting the prosecutors until after the TRO had issue, and by excluding Right to Life of Michigan and the Michigan Catholic Conference from participating at every step. The U.S. Supreme Court's holding in *Dobbs v Jackson Women's Health Organization*, 142 S Ct 2228, 2257 (2022), allowed "the people's elected representatives [to] decide[ ] how abortion should be regulated." The Legislature passed and the Governor signed MCL 750.14 to do just that. But, in Michigan, there are fewer abortion regulations now than ever thanks to two unsupportable trial court injunctions.

Far from maintaining the status quo (*i.e.*, that MCL 750.14 is enforceable to the extent it does not conflict with *Roe v Wade*, 410 US 113; 93 S Ct 705 (1973)), two court orders prevent prosecutors from enforcing MCL 750.14 *in any circumstance*, even after viability and even against non-physicians. Right now, a non-physician could abort a baby at six months' gestation and get away scot-free. Or one of Planned Parenthood's physicians could abort a baby at nine months' gestation, for no medical reason, and there may be little to nothing Appellees Jarzynka and Becker or the Attorney General can do. Certainly, there is injustice while innocent human lives are lost; abortionists enjoy free rein; courts ignore the law and enjoin statutes to alter the status quo; those who promoted, sponsored and defended Michigan's pro-life laws are excluded from key court proceedings; and the public's confidence in a fair and impartial judiciary plummets. But none of those injustices support granting Planned Parenthood's application.

II. THE COURT OF APPEALS' RULING THAT COUNTY PROSECUTORS ARE LOCAL OFFICIALS NOT SUBJECT TO THE COURT OF CLAIMS' JURISDICTION IS CORRECT.

Far from being clearly erroneous, the Court of Appeals' holding that county prosecutors are local officials outside the Court of Claims' jurisdiction is correct. Precedent makes this clear,

as explained above. And the *Manuel* factors confirm this conclusion. Planned Parenthood ignores all this and relies on a few alternative arguments that are largely irrelevant and fail to withstand scrutiny.

A. The *Manuel* factors confirm that county prosecutors are predominantly local officials.

This Court uses four factors to determine whether "an entity is a state agency" subject to the Court of Claims' jurisdiction. *Manuel*, 481 Mich at 653. And it describes those factors as follows:

> (1) whether the entity was created by the state constitution, a state statute, or state agency action, (2) whether and to what extent the state government funds the entity, (3) whether and to what extent a state agency or official controls the actions of the entity at issue, and (4) whether and to what extent the entity serves local purposes or state purposes. [*Id.* (footnote omitted).]

Courts use these *Manuel* factors to determine "the core nature of an entity, *i.e.*, whether it is predominantly state or predominantly local; hence, the fact that one factor suggest that the entity is an agency of the state is not necessarily dispositive." *Id.* at 654 (internal citation omitted).

As to county prosecutors' creation, the Court of Appeals noted that the "'Local Government'" section of the Michigan Constitution provides for "'a prosecuting attorney, whose duties and powers shall be provided by law.'" 8/1/22 Order at 2, *In re Jarzynka*, Court of Appeals No. 361470 (quoting Const 1963, art 7, § 4). The statute outlining county prosecutors' authority restricts them to appearing for the state or county "'*in their respective counties*.'" *Id.* at 3 (quoting MCL 49.153). So, the Court of Appeals rightly concluded that "the first *Manuel* factor cuts against a finding that county prosecutors are state officials." *Id.*

Concerning funding, the Court of Appeals turned to precedent. This Court's decision in *Hanselman* recognized that "county prosecutors are generally locally funded." *Id.* (citing 419 Mich at 189). That second factor also supports deeming county prosecutors local officials.

When it came to state control, the Court of Appeals recognized that the Attorney General has certain supervisory and consultative duties in regard to county prosecutors. *Id.* "Yet . . . county prosecutors retain substantial discretion in how to carry out their duties under MCL 49.153," including "'broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings.'" *Id.* (quoting *Fieger v Cox*, 274 Mich App 449, 466; 734 NW2d 602 (2007)). Accordingly, the Court of Appeals rightly held that "[b]ecause county prosecutors have substantial discretion to carry out their duties to prosecute and defend cases in their respective counties, the fact that the Attorney General has supervisory authority does not transform what is otherwise a local official into a state official." *Id.* The third factor also confirms that county prosecutors are local officials.

Lastly, in regard to function, the Court of Appeals reasoned that county prosecutors' "authority only extends to matters in their respective counties and they exercise independent discretion in carrying out those duties." *Id.* As a result, "they serve primarily local purposes involving the enforcement of state laws within their respective counties." *Id.* The fourth factor too supports regarding county prosecutors as local officials.

Planned Parenthood's application does not contest the Court of Appeals' reasoning. Nor could it. "[U]nder the totality of the circumstances, the core nature of a county prosecutor is that of a local, not a state official." *Id.* And "[b]ecause county prosecutors are local officials, jurisdiction of the Court of Claims does not extend to them." *Id.* The Court of Appeals' preliminary injunction thus could not bind Appellees Jarzynka and Becker, nor could those county prosecutors "intervene . . . and . . . appeal . . . the Court of Claims'[s] decision." *Id.* at 4.

B. When the Legislature intends to give state officers control over local officials, it knows how to do so, and there is no such grant of statutory authority to the Attorney General.

Where the Legislature intends to give state officers control over local officials, it certainly knows how to do so. *E.g.*, MCL 168.21 ("The secretary of state shall be the chief election officer of the state and shall have *supervisory control* over local election officials in the performance of their duties under the provisions of [the Michigan Election Law]") (emphasis added); MCL 168.31(1)(b) ("The secretary of state shall … [*a*]*dvise and direct* local election officials as to the proper methods of conducting elections") (emphasis added); *accord League of Women Voters of Mich v Secretary of State*, 333 Mich App 1, 5; 959 NW2d 1 (2020). Nothing provides the Attorney General with a similar grant of control over elected county prosecutors.

The Attorney General's power is much more limited. For example, the Legislature created an "office of prosecuting attorneys coordination" in the Attorney General's Office. MCL 49.103(1). The head of that office leads "the prosecuting attorneys coordinating council." MCL 49.103(2). But he does not tell prosecuting attorneys who to charge, under what law, or otherwise what to do. In fact, the Attorney General's powers are predominantly geared towards "advis[ing]" and "consult[ing]" with county prosecutors, and making reports of their activities to the Legislature. MCL 14.30. In unusual circumstances, the Attorney General may appoint "a special prosecuting attorney to perform the duties of the prosecuting attorney in any matter in which the prosecuting attorney is disqualified or until the prosecuting attorney is able to serve," MCL 49.160(2), as the Court of Appeals' order recognized, 8/1/22 Order at 5 & n3, *In re Jarzynka*, Court of Appeals No. 361470. But that stop-gap measure does not equate to supervisory control over all county prosecutors' work.

C. Planned Parenthood's contrary arguments are largely irrelevant and fail to withstand scrutiny.

None of Planned Parenthood's cited state law authorities throw the Court of Appeals' conclusion into doubt. That court's decision in *Meda v City of Howell*, 110 Mich App 179, 183; 312 NW2d 202 (1981), predates this Court's *Manuel* holding by 27 years. Application at 27, 29. It cannot show that the Court of Appeals' application of the *Manuel* factors is incorrect. Nor does the Court of Appeals' off-hand reference in *Shirvell v Department of Attorney General*, 308 Mich App 702, 751; 866 NW2d 478 (2015), to MCL 14.30 help Planned Parenthood's case. Application at 24. The Court of Appeals' order accounted for both *Shirvell* and MCL 14.30. 8/1/22 Order at 3, *In re Jarzynka*, Court of Appeals No. 361470. In a similar vein, *Michigan Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 263; 964 NW2d 816 (2020) ("*MARA*"), is irrelevant. Application at 24 n14. No one doubts that the Court of Claims may enter an injunction against the Attorney General in an appropriate case, and that's all *MARA* said.

Planned Parenthood cites *People v Williams*, 244 Mich App 249; 625 NW2d 132 (2001), but that case does not help its cause. Application, p 24. *Williams* shows that county prosecutors are local officials with independent authority and discretion who are not mere agents or servants of the Attorney General. It emphasizes county prosecutors' (1) status "as the chief law enforcement officer of a county," 244 Mich App at 253; and (2) independent "prosecutorial prerogative," "exclusive authority to decide whom to prosecute," and "broad discretion to decide whether to prosecute or what charges to file," *id.* at 251–53.

Finding no support in state law, Planned Parenthood turns to federal cases. But whether county prosecutors are predominantly state or local officials is a state law matter that federal courts may not definitely resolve. A federal court's reading of state law "is obviously not binding on state authorities." *Broadrick v Oklahoma*, 413 US 601, 617 n16; 93 S Ct 2908 (1973). The Court of

Appeals and this Court are the "ultimate expositors of state law." *Mullaney v Wilbur*, 421 US 684, 691; 95 S Ct 1881(1975).

What's more, none of Planned Parenthood's federal cases are informative. Application, pp 25–28. The Sixth Circuit in *Cady v Arenac County*, 574 F3d 334, 343 (CA 6, 2009), dealt with an Eleventh Amendment immunity question and merely recognized that county prosecutors "are responsible for enforcing criminal laws on behalf of the state." No one disputes that fact. *Cady* did not contemplate—let alone answer—the state law question at issue here, which is whether county prosecutors are "predominantly state or predominantly local" officials, *Manuel*, 481 Mich at 654, or whether county prosecutors are subject to the jurisdiction of the statutorily created Court of Claims.

In *Platinum Sports Ltd v Snyder*, 715 F3d 615 (CA 6, 2013), the Sixth Circuit held that the plaintiff lacked standing because two signage laws that were permanently enjoined by stipulation and also moribund caused the plaintiff no harm. *Id.* at 617–18. "[N]o one ha[d] threatened" to enforce those laws. *Id.* at 619. Yet the Sixth Circuit went on to state in dicta that any attempt by a county prosecutor to do so "would be *ultra vires*" and contrary to the Attorney General's supervision. *Id.* This reference to MCL 14.30, which the court directly quoted, does not help Planned Parenthood. Ultimately, the court recognized that county prosecutors were never a real concern because the plaintiff did not "name *any* prosecutors in *this* case but sued only the Governor and the Attorney General." *Id.* And if the Sixth Circuit believed that county prosecutors were merely the Attorney General's agents or servants, as Planned Parenthood claims, there would have been no need to name them as defendants—suing the Attorney General would have been enough.

D. Appellees Jarzynka and Becker are not acting in active concert or participation with the Attorney General.

Planned Parenthood argues that county prosecutors are subject to the Court of Claims' preliminary injunction because they act "'in active concert or participation with'" the Attorney General. Application, p 28 (quoting MCR 3.310(C)(4)). It cites (without explanation) several cases about "privity" in the collateral-estoppel context, which has never been an issue here. But this theory is also based on the notion that county prosecutors are "subject to [the Attorney General's] control," *id.* (quotation omitted), and as the Court of Appeals' held and Appellees have explained, that is simply not the case.

Nor is there any basis for arguing that Appellees Jarzynka and Becker are acting in concert or participation with the Attorney General. They have been actively defending MCL 750.14 for months, while the Attorney General has refused to enforce or defend the law and trumpeted the Court of Claims' order enjoining it. If Appellees Jarzynka and Becker were acting in concert with the Attorney General, they would be opposing MCL 750.14 and pose *no threat* to Planned Parenthood's interests. The reason that Planned Parenthood is fighting so fiercely to ensure that Appellees Jarzynka and Becker are covered by the Court of Claims' injunction is because they have committed to enforcing that validly enacted statute in an appropriate case. And that places them in direct opposition to—not in concert or participation with—the Attorney General.

III. PLANNED PARENTHOOD'S REQUEST FOR AN ORDER OF SUPERINTENDING CONTROL IS MERITLESS.

If this Court declines to grant Planned Parenthood's application for leave to appeal, it asks this Court to construe the application as a complaint for order of superintending control. Application, pp 32–33. There is no basis for that request. An order of superintending control is appropriate only when "a lower court exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, or [otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*,

273 Mich App 594, 598; 733 NW2d 65 (2007). Because the Court of Appeals' order faithfully applied this Court's decision in *Manuel*, Planned Parenthood cannot possibly show that the Court of Appeals failed to proceed according to law.

Additionally, to obtain an order of superintending control, the plaintiff must show (1) that a lower court "has failed to perform a clear legal duty" and (2) the "plaintiff is otherwise without an adequate legal remedy." *Id.* Neither is true. The Court of Appeals had no clear legal duty to ignore the *Manuel* factors and accept Planned Parenthood's extreme notion of county prosecutors' servility to the Attorney General and second-rate constitutional status. Nor is Planned Parenthood without an adequate legal remedy. It has filed an application for leave to appeal. And "[w]hen an appeal . . . is available, it must be utilized and a complaint for superintending control must be dismissed." *Barham v WCAB*, 184 Mich App 121, 127; 457 NW2d 349 (1990) (citing MCR 3.302(D)(2)). Full stop.

IV. EVEN IF PLANNED PARENTHOOD'S ARGUMENTS HAD MERIT, THE APPROPRIATE REMEDY WOULD BE REMAND TO THE COURT OF APPEALS FOR A RULING ON THE MERITS OF THE COMPLAINT FOR AN ORDER OF SUPERINTENDING CONTROL.

In addition to holding that the county prosecutors lacked standing because the Court of Claims injunction doesn't cover them, the Court of Appeals ruled that Right to Life of Michigan and the Michigan Catholic Conference lacked standing, albeit for different reasons. 8/1/22 Order at 5–6, *In re Jarzynka*, Court of Appeals No. 361470. Accordingly, the Court of Appeals dismissed the superintending-control action without reaching the merits because it concluded that none of the four plaintiffs had standing. *Id.*

Planned Parenthood's application proposes a variety of forms of relief, most of which involve a remand for the Court of Appeals to dismiss the complaint for an order of superintending

control. Application, p 34. While there is no merit to any of Planned Parenthood's arguments, in the unlikely event that this Court determines that county prosecutors *are* within the Court of Claims' jurisdiction because they are state rather than local officials, the appropriate remedy is a remand to the Court of Appeals with directions to resolve the complaint for an order of superintending control on the merits. Bursch, *Applications for Leave to Appeal in the Supreme Court*, § 13.25, p 393, in Michigan Appellate Handbook (Shannon & Gerville-Réache eds, 3d ed., January 2021 update), citing *Clarkston v Independence Twp*, 437 Mich 914; 465 NW2d 569 (1991) (remanding to Court of Appeals for further proceedings).

The Court of Appeals' jurisdictional ruling prevented it from reaching the merits of Appellees' well-founded superintending-control complaint. If that jurisdictional ruling proved mistaken, the Court of Appeals would be obliged to consider and rule on the complaint's substance, not dismiss the complaint out of hand, as Planned Parenthood suggests. Indeed, as Appellees explain in their independent application for leave to appeal, they have standing to file the complaint for order of superintending control, and the Court of Appeals was obliged to rule on that complaint regardless.

CONCLUSION

Planned Parenthood's arguments are meritless and its application unjustified. For the reasons explained above and in Plaintiffs' answer in opposition to Planned Parenthood's motion for a stay pending appeal, the application for leave to appeal/complaint for superintending control should be denied. Alternatively, in the unlikely event that this Court finds merit to Planned Parenthood's arguments, it should remand to the Court of Appeals for reinstatement and resolution of Appellees' complaint for an order of superintending control.

Respectfully submitted,

GREAT LAKES JUSTICE CENTER

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Attorneys for Plaintiffs-Appellees Right to Life of Michigan and the Michigan Catholic Conference

Dated: August 31, 2022

EXHIBIT 1

STATE OF MICHIGAN
IN THE 6TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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.

Oakland Circuit Court No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

This case involves a claim that state governmental action is invalid

ORDER GRANTING TEMPORARY RESTRAINING ORDER

ORDER GRANTING TEMPORARY RESTRAINING ORDE

At a session of Court on August _1_, 2022
In Pontiac, Michigan at _____
Honorable James J. Cunningham
Circuit Court Judge

This matter came before the Court on Plaintiff's Ex Parte Motion for Temporary Restraining Order.

The Court has considered the Emergency Ex Parte Motion for Temporary Restraining Order, the supporting Affidavit, and the Certification by Plaintiff's Counsel under MCR 3.310(B)(1).

The Court finds:

1. The Plaintiff's Motion seeks a Temporary Restraining Order prohibiting Defendants from enforcing MCL 750.14, which bans nearly all abortions in the State of Michigan.

2. A Temporary Restraining Order is necessary to preserve the last actual, peaceable, uncontested status quo pending further order from the Court.

3. The last actual, peaceable, uncontested status quo was that abortion was legal in Michigan under the framework provided in the United States Supreme Court decision *Roe v Wade*, as provided by *People v Bricker*.

4. The Plaintiff has established that Defendants' public statements that they will consider a case against an abortion provider should a law enforcement officer bring one to them, coupled with the Michigan Court of Appeals' August 1, 2022 decision that County prosecutors are not bound by Judge Gleicher's May 17,

2022 preliminary injunction, poses a threat of immediate and irreparable injury to the people of the State of Michigan.

5. A Temporary Restraining Order is necessary to prevent the immediate and irreparable injury that will occur if Defendants are allowed to prosecute abortion providers under MCL 750.14 without a full resolution of the merits of the pending cases challenging that statute.

NOW THEREFORE, pursuant to MCR 3.310(B), it is hereby ordered that Defendants must:

A. Refrain from enforcing MCL 750.14 until further Order of the Court.

IT IS FURTHER ORDERED, parties are ordered to appear via Zoom videoconferencing for a hearing on this matter on Wednesday, August 3, 2022, at 2:30 p.m. Zoom meeting ID: 248 858 0365.

Circuit Judge James J. Cunningham

MY

EXHIBIT 2

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

Case No. 2022-193498-CZ
Hon. JACOB JAMES CUNNINGHAM

-vs-

JAMES R. LINDERMAN, *et al.*,

Defendants.
_____/

ORDER REGARDING TEMPORARY RESTRAINING ORDER HEARING ON AUGUST 3, 2022

At said session of the Sixth Circuit Court held in the County of Oakland, City of Pontiac, State of Michigan, on this 3rd day of August 2022.

The Court issued a temporary restraining order on August 1, 2022, restraining Defendants from enforcing MCL 750.14 in all respects. The Court heard in-person oral argument on the temporary restraining motion and order on August 3, 2022. The hearing was limited to only whether the temporary restraining order entered on August 1, 2022, should remain in place pending an evidentiary hearing on whether a preliminary injunction should issue in this matter. See MCR 3.310(A) and (B).

Prior to oral argument, the Court addressed a technical issue which caused a delay in the issuance of the addendum order issued on August 2, 2022. Defense counsel was offered the opportunity to adjourn the matter until August 4, 2022, to allow further opportunity to file responses given the delay. Counsel did

not avail themselves to the offer and requested the Court proceed with argument on the motion. The Court did have an opportunity to review and considered Defendants' respective responses, if filed, prior to the hearing.

As an initial matter, regarding the alleged procedural defects in the order entered August 1, 2022, the Court finds no alleged defects change the appropriateness or the effectiveness of the August 1, 2022, order and denies Defendants' request to rescind the temporary restraining order on those grounds.

In consideration of oral argument, the underlying briefs, response briefs, and the Court file, and the case law before it, the Court finds it appropriate to extend the temporary restraining order, pending the evidentiary hearing or further order of this Court or a higher court. The Defendants are enjoined from enforcement of MCL 750.14.

Pursuant to MCR 3.310(C), the Court finds extending the temporary restraining order is appropriate. Specifically, the Court made the following findings setting forth the reasons for the issuance of the temporary restraining order: The Court finds the moving party made the required demonstration of irreparable harm; the harm to Plaintiff on behalf of the People of the State of Michigan, absent such an injunction, outweighs the harm it would cause to the adverse party; the moving party showed that it is likely to prevail on the merits; and, there will be harm to the public interest if an injunction is issued. *Detroit Fire Fighters Assn, IAFF Local 344 v City of Detroit,* 482 Mich 18 (2008). Further, the temporary restraining order continues until the scheduled evidentiary hearing on whether a preliminary injunction should issue. The temporary restraining order

specifically restrains Michigan County Prosecutors from charging or enforcing action against any individual or organization under MCL 750.14. MCR 3.310(C).

THEREFORE, Plaintiff shall have seven (7) days from entry of this order to file a motion for a preliminary injunction. MCR 3.310(A). Any responsive briefs, filed by named parties, must be filed by 12:00 p.m. on August 16, 2022. All briefs must be in conformance with MCR 2.119.

The Court schedules an in-person evidentiary hearing on August 17, 2022, at 2:00 p.m. on whether a preliminary injunction should issue pending trial. Plaintiff and Defendants are limited to three (3) witnesses each for purposes of the evidentiary hearing. See MCR 3.310(A).

IT IS SO ORDERED.

Date: AUG 03 2022

Hon. JACOB JAMES CUNNINGHAM
Circuit Court Judge MY

EXHIBIT 3

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

GRETCHEN WHITMER,
on behalf of the State of Michigan,

Plaintiff,

Case No. 2022-193498-CZ
Hon. JACOB JAMES CUNNINGHAM

-vs-

JAMES R. LINDERMAN, *et al.*,

Defendants.
_____/

ORDER OF PRELIMINARY INJUNCTION

For the reasons set forth on the record, the Court hereby orders a Preliminary Injunction enjoining all of the parties and their agents, in their official capacities, from any and all enforcement of MCL 750.14.

The Court finds that Plaintiff has met all four prongs of the test establishing the basis for the issuance of this Preliminary Injunction.

The Court set the in-person pretrial conference date on November 21, 2022, at 9:30 a.m. MCR 3.310(A)(5).

IT IS SO ORDERED.

Date: AUG 19 2022

_____
HON. JACOB JAMES CUNNINGHAM
CIRCUIT COURT JUDGE

EXHIBIT 4

The Detroit News

MICHIGAN

Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence

Beth LeBlanc
The Detroit News

Published 4:48 p.m. ET May 3, 2022 | **Updated 7:47 p.m. ET May 3, 2022**

Attorney General Dana Nessel on Tuesday reiterated her refusal to prosecute physicians or women under Michigan's abortion ban, but criticized a lawsuit filed against her department seeking to overturn the 1931 ban.

Nessel said she believes the lawsuit brought by Planned Parenthood of Michigan should be dismissed for a lack of jurisdiction because there is no case or controversy — or active prosecution — that could serve as a basis for the suit, nor will there ever be while she's in office.

It's unlikely the Democratic attorney general would file a motion to dismiss the case on those grounds since she's vowed not to expend the resources of her office to defend the 1931 law.

At the same time, Nessel noted it would be inappropriate for her to stipulate to any orders or preliminary injunctions with Planned Parenthood given her decision not to defend the case.

"Frankly, I believe that the case should be dismissed for lack of jurisdiction because there's no case or controversy," Nessel told media in a Tuesday Zoom press conference, noting her office is not investigating or prosecuting any cases under the law nor could it without a final decision from the U.S. Supreme Court.

"I've pledged multiple times that I will not enforce this law and unless Planned Parenthood just doesn't believe me and thinks that I'm misrepresenting what my position is, I don't understand why I would need to stipulate to anything," she said.

"Planned Parenthood would be better off if they were focusing on the governor's case and filing an amicus on behalf of the governor and her actions," Nessel said, adding that

prosecutors named in Whitmer's suit could create a case or controversy down the road should Roe be overturned.

Planned Parenthood of Michigan responded by noting Nessel's response to their complaint was due in court Thursday and that she had a "duty to defend."

"We don't litigate our case in the press and will respond in court to their arguments," said Ashlea Phenicie, a spokeswoman for Planned Parenthood Advocates of Michigan.

"PPMI has properly brought suit against the attorney general who by law has a duty to defend and is looking forward to having the merits of their claims evaluated and ruled upon by this court, which as stated in the pleadings has proper jurisdiction in this matter."

John Bursch, the state's solicitor general under Republican former Attorney General Bill Schuette, had made similar arguments to Nessel's in the Planned Parenthood case. He is representing Right to Life of Michigan and the Michigan Catholic Conference as amici in the case on behalf of Alliance Defending Freedom.

"Attorney General Nessel agrees with Right to Life of Michigan and the Michigan Catholic Conference that the Court of Claims lacks jurisdiction and should dismiss the case immediately," Bursch said. " We hope that happens as quickly as possible so this senseless proceeding can come to a quick close."

The clash between Nessel and Planned Parenthood came a day after a leaked U.S. Supreme Court opinion indicated the 1973 federal abortion right was likely to be overturned. It also followed by nearly a month Planned Parenthood and Gov. Gretchen Whitmer filing separate suits seeking to overturn Michigan's 1931 ban on performing abortions — a law that would take full effect if 1973's landmark Roe v. Wade decision is overturned.

Whitmer, who is being represented by Nessel's office, filed her suit in Oakland County Circuit Court April 7 against 13 county prosecutors who would be able to enforce the law at abortion clinics in their counties.

Planned Parenthood filed its case the same day against the attorney general as the state's top law enforcement official tasked with "defending and enforcing" the state's laws and "supervising all county prosecutors."

Nessel on Tuesday took issue with Planned Parenthood's posit that she had any authority to prohibit county prosecutors from charging individuals under the existing 1931 law.

"I don't believe that I as attorney general of this state have the authority to tell duly elected prosecutors what they can and what they cannot charge," Nessel said. "If that were the case, I don't even know why we would elect our county prosecutors in the first place, if they're not allowed to make their own decisions."

She called on the GOP-led Legislature to step in and defend the law if Republican lawmakers are concerned about the future of Michigan abortion statutes, noting an early House budget passed through committee last month included about $750,000 for lawmakers to use to defend the law.

"Come on in and you defend this law," Nessel said of the Legislature. "Because I've made it very clear I think it's unconstitutional, I think it is unethical for me to defend it."

The Planned Parenthood case has drawn criticism from anti-abortion groups who have alleged the litigation is a "friendly suit" in which both the plaintiff and defendant agree on the issue in question but seek a court opinion to change state law.

The suit drew further scorn when it was randomly assigned to a state Court of Claims judge, Elizabeth Gleicher, who disclosed she is a donor to Planned Parenthood of Michigan and represented the group in a 1998 abortion law challenge that will be an integral case in deliberations over the current case.

Gleicher declined to recuse herself and said through a court clerk that she could remain impartial.

Planned Parenthood of Michigan, Nessel's office, and Gleicher had a closed-door scheduling conference via Zoom Monday. The Court of Claims, through the State Court Administrative Office, said the conferences are usually conducted in chambers and would not allow members of public or media into the online proceeding.

So far, Right to Life of Michigan and the Michigan Catholic Conference are the only groups to have sought intervention in the case as amici parties.

In Whitmer's case, Right to Life of Michigan, the Michigan Catholic Conference and state House and Senate Democrats have sought to file as amici.

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STATE OF MICHIGAN
MI Supreme Court

Proof of Service

Case Title:	Case Number:
IN RE JARZYNKA	164656

1. Title(s) of the document(s) served:

Filing Type	Document Title
Answer	MSC (164656) Plfs' Answer to Planned Parenthood's Application for Leave to Appeal

2. On 08-31-2022, I served the document(s) described above on:

Recipient	Address	Type
Adam De Bear Michigan Department of Attorney General P80242	deBearA@michigan.gov	e-Serve
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08-31-2022

Date

/s/ Francine Robinson

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Smith Haughey Rice & Roegge