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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 No. 164256

Upon Certification From Oakland Circuit Court

Oakland Circuit Court
No. 2022-193498-CZ

GOVERNOR'S RESPONSE IN OPPOSITION TO MOTION TO INTERVENE OF RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE

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ARGUMENT

Governor Whitmer respectfully submits this response in opposition to the motion to intervene filed by Right to Life of Michigan and the Michigan Catholic Conference.

First, the proposed intervenors assert that they have the right to intervene in this Court under MCR 2.209(A)(3), which provides a limited right of intervention, available only to those parties with an interest in the subject matter of the litigation:

> On timely application a person has a right to intervene in an action . . . when the applicant claims an interest relating to the . . . transaction which is the subject of the action and is so situated 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. [MCR 2.209(A)(3).][1]

Neither of the proposed intervenors has demonstrated any cognizable interest at stake in this case. Surely it is true that the intervenors are "interested" in the outcome of this case in the colloquial sense—as are millions of other Michiganders who, like the proposed intervenors, have a policy preference as to whether abortion should be criminalized. But this is not the sort of "interest" that Rule 2.209 requires. If a mere preference in the outcome of the case were a cognizable "interest" under Rule 2.209, there would be no end to individuals and groups who

[1] It bears noting that the proposed intervenors have not yet moved to intervene in the circuit court where this case is currently pending, opting instead to seek intervention from this Court in the first instance. The proposed intervenors appear to presume that the Governor's filing of an executive message authorizes this procedural maneuver, but they offer no authority or explanation to that effect.

would not only seek to intervene in cases like this, but who would claim a rule-conferred *right* to intervene.

Proposed intervenors do not identify any case holding otherwise. One of the proposed intervenors asserts that it has "regularly" been allowed "to intervene in lawsuits challenging the constitutionality of abortion laws." (Mot. ¶ 28.) In support, their motion cites two cases from three decades ago, in neither of which was there any appellate ruling on whether intervention was appropriate.[2] In both cases, the motion to intervene was made in the trial court, and it appears from the registers of actions in each case (attached as Exhibits A and B) that no party opposed intervention in either case. To cite two unopposed trial-court orders from more than 30 years ago generally is thin support for the assertion that something is "regularly allowed," but it is no support at all for the notion that intervention should be allowed in this case. It is not at all unusual for a trial court to grant an unopposed motion, and future courts should not read anything into such orders.

Second, the proposed intervenors also seek permissive intervention under MCR 2.209(B)(2), but they do not demonstrate that they have any "claim or defense," as required by that subrule.

Neither proposed intervenor has alleged that their legal rights or obligations will be expanded or restricted in any way depending on the outcome of this case. The motion does not cite a single case in which intervention has been permitted

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[2] *Doe v Dep't of Social Services*, 439 Mich 650 (1992); *Ferency v Bd of State Canvassers*, 198 Mich App 271 (1993).

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over a party's objection simply because the proposed intervenor cares deeply about the outcome of the lawsuit. Rather, intervention has been limited to instances in which the proposed intervenor has a legal right or obligation at stake. For example, in laying out the background law on permissive intervention, the proposed intervenors cite *Burg v B&B Enterprises, Inc*, a case in which the proposed intervenor "personally had a claim against plaintiff which had questions of law and fact common to the main action." 2 Mich App 496, 498 (1966).[3]

Likewise, in *Hill v LF Transportation, Inc*, the proposed intervenor contended that it was entitled to a share of the money distributed by the trial court, and intervened to appeal the trial court's distribution of funds. 277 Mich App 500, 502 (2008). And in *League of Women Voters of Michigan v Secretary of State*, this Court held that the Legislature—the proposed intervenor in that case—"has a sufficient 'interest in defending its own work' " to give it standing to appeal in a case in which the Attorney General does not defend the constitutionality of a statute, such that the Legislature is "essentially taking the place of defendants." 506 Mich 561, 579 (2020). Neither proposed intervenor has asserted anything like these interests here.

Consider also *State Treasurer v Bences*, 318 Mich App 146 (2016). In that case, the Treasurer sued Bradley Bences, an MDOC prisoner, under the State Correctional Facility Reimbursement Act,[4] seeking reimbursement from Bences for

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[3] *Burg* is of limited persuasive value in any event because it applied a version of the court rule with very different language than the current MCR 2.209.

[4] MCL 800.401 et seq.

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the costs of his incarceration. *Id.* at 148–149. Bences was imprisoned for, among other things, stabbing one John Burtle, and Burtle sought to intervene in the SCFRA action to recover restitution for his injuries at Bences' hands. *Id.* at 149. Plainly, Burtle had, in some sense of the word, an *interest* in how Bences' money would be distributed—like the successful intervenors in *Hill*, he had a colorable claim to a share of that money. Nevertheless, the Court of Appeals held that Burtle's interest was not sufficient to require intervention in that case:

> In this case, the trial court correctly concluded that Burtle did not have a sufficient interest in the property at issue in the State Treasurer's SCFRA action against Bences to mandate his intervention because he did not have a perfected interest arising from the restitution order. At the time Burtle moved to intervene, he had not yet filed a personal injury action against Bences. Although Burtle was awarded restitution as part of Bences's sentence, Burtle provided no evidence confirming that Bences failed to satisfy the restitution order, and he failed to seek enforcement of the order beyond moving to intervene in the State Treasurer's SCFRA action. [*Id.* at 150.]

Here, the proposed intervenors do not have even as strong an interest as Burtle's insufficient one—they have no interest at all beyond a bare preference in how the case is decided, which is, again, something they share in common with millions of other individuals and organizations in the state.

Moreover, even if the proposed intervenors had an interest, that fact alone would not be enough to warrant intervention. Even a proposed intervenor who can show an interest will still be denied intervention if that interest is adequately represented by an existing party. For example, in the subsequent *League of Women Voters* litigation, the Legislature moved to intervene in the Court of Claims, and that court denied the motion because a team of attorneys employed by the Attorney

General appeared to fully defend the constitutionality of the challenged laws. (Exhibit C.) Likewise, in *Mothering Justice v Nessel*, the Legislature moved to intervene to defend the constitutionality of 2018 PA 368 and 369, and was similarly denied because one of the defendants in the case is also defending the same position. (Exhibit D.) So although an interest in the subject of the litigation is *necessary* to warrant intervention, it is not *sufficient*.

Here, as in those cases, any purported interest represented by proposed intervenors is adequately represented by an existing party. The intervenors raise the possibility that one of the defendants might be replaced with a prosecutor who agrees with the plaintiffs. Though the wheels of justice sometimes turn slowly, every defendant in this case has more than 30 months remaining in their term. Nevertheless, if the unexpected occurs and *all* adverse defendants exit the case during its pendency and *none* of them is replaced with a like-minded prosecuting attorney, this Court could certainly consider a motion to intervene at that time, assuming one was filed by a proposed intervenor with an actual, cognizable interest in the outcome of the litigation.

The proposed intervenors' concern that the defendants are "place[d] in a difficult political and legal position" by this lawsuit is not relevant to the motion to intervene. (Mot. ¶ 25.) While the proposed intervenors are correct to intuit that the wholesale criminalization of abortion is unpopular in Michigan, it is premature to suppose that the defendants who might wish to defend § 14 would be cowed from doing so by political pressures—especially before the defendants have even weighed in on their willingness to defend the statute. Indeed, it already appears that this

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case will not lack for adversity. Two defendants have already appeared in this Court to oppose certification and ask that the Governor's lawsuit be dismissed, which makes the proposed intervenors' fears unlikely to manifest.

Further, the proposed intervenors' concern that the defendants might omit certain novel legal arguments the proposed intervenors find convincing (Mot. ¶ 27) does not warrant permitting intervention. Even if the proposed intervenors are right that the defendants will not find these arguments worth raising, that does not mean that there must be a party added to the case who will raise them. In a high-profile case like this, there may be many strangers to the case who think they could defend it better than the defendants, or prosecute it better than the plaintiffs. But where those persons have no interest in the litigation beyond a preference as to the outcome, intervention is not appropriate.

Finally, denying the motion to intervene does not deny the proposed intervenors the opportunity to air their views before the Court. When a person is "interested" in how a case is decided and wants to make their views known to the Court, whether they have any legally *cognizable* interest in the case or (as here) not, that person can participate as *amicus curiae*. That vehicle allows non-parties who care about a case to weigh in without complicating the litigation by adding parties to it. The Governor does not object to an amicus filing by the proposed intervenors.

In sum, the proposed intervenors have strongly held beliefs about the outcome of the case and a perspective they believe the Court will find helpful, and they are prepared to raise arguments they believe the parties might not—all the ingredients of proper amici curiae. But they do not demonstrate that they have any

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of the ingredients of proper intervenors, such as rights that might be curtailed by this litigation, obligations that might be increased, or claims they might seek to raise against any of the parties. This Court should deny the motion.

CONCLUSION

For these reasons, Governor Whitmer respectfully requests that this Court deny the motion to intervene.

Respectfully submitted,

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