

STATE OF MICHIGAN
IN THE SUPREME COURT

In re EXECUTIVE MESSAGE OF THE
GOVERNOR REQUESTING THE
AUTHORIZATION OF A CERTIFIED
QUESTION.

SC No. 164256

Upon Certification From Oakland County
Circuit Court

GRETCHEN WHITMER, on behalf of the
State of Michigan

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

Plaintiff,

Oakland Circuit Court No. 22-193498-CZ

v

Hon. Edward Sosnick

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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
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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.

**SUPPLEMENTAL BRIEF OF THE HOUSE DEMOCRATIC CAUCUS LEADER
DONNA LASINSKI AND THE HOUSE DEMOCRATIC CAUCUS AND SENATE**

**MINORITY LEADER JIM ANANICH AND THE SENATE DEMOCRATIC CAUCUS
AS AMICI CURIAE IN SUPPORT OF PLAINTIFF**

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INTEREST OF AMICI CURIAE¹

The House Democratic Caucus and Senate Democratic Caucus each represent the values of Michigan residents through policymaking and legislative work to defend, protect and uphold their rights as supported by the Michigan Constitution of 1963. Although the Senate Democratic caucus and the House Democratic caucus are discrete entities within the legislature, with their own views, and are recognized as such in several places in statutes and House and Senate Rules, as legislators they have a keen interest in the interpretation of the laws which prior legislatures have enacted, which in turn informs their decisions as they consider legislation in this area in the near future.

The Michigan Senate Democratic Caucus consists of sixteen state senators serving in the upper chamber of the Michigan Legislature. Collectively, the Senate Democratic Caucus represents approximately 4.2 million Michigan constituents. The Caucus is recognized by both the Senate Rules and Michigan law as a distinct entity.²

The Michigan House of Representatives Democratic Caucus consists of fifty-three state representatives serving in the lower chamber of the Michigan Legislature, also representing approximately 4.2 million Michigan constituents. The Caucus is recognized by both the House Rules and Michigan law as a distinct entity.³

¹ Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

² Senate Rule 1.104: Election of Officers (providing that the Senate majority and minority caucuses elect their own officers). Additionally, several statutes provide appointment power to the Senate Minority Leader, including the Michigan Infrastructure Act. See 2018 PA 323; MCL 21.603.

³ Standing Rules of the House of Representatives, Chapter 1, Rule 2(4) (providing separate caucus rooms for Democrats and Republicans); MCL 4.61(2) (requiring the minority leader of the house of representatives to “assign each member of the minority caucus to a seat”).

QUESTIONS PRESENTED

1. Whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination?

Amici's answer: No.

2. Whether there is an actual case and controversy requirement and, if so, whether it is met here?

Amici's answer: No; and yes.

3. Given the infrequent application of the Executive Message process by current and former governors, what is required under MCR 7.308(A) and, specifically, whether the question is of "such public moment as to require an early determination"?

Amici's answer: MCR 7.308(A) involves a holistic, context-specific judgment that does not turn on specific defined factors; and yes.

4. Whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question?

Amici's answer: No.

5. Whether the questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, and whether a decision in that case would serve as binding or persuasive authority to the questions raised here?

Amici's answer: Yes, or as soon as possible thereafter. The United States Supreme Court's decision in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, will be at most persuasive authority to the questions raised here.

INTRODUCTION

The need for this Court to quickly and definitively resolve the lawfulness of Michigan's criminal abortion ban has become more urgent since amici filed their original brief in support of the plaintiff Governor. *Politico* released a leaked draft opinion of the United States Supreme Court in *Dobbs v Jackson Women's Health Organization*, No. 19-1392 (US, docket June 18, 2020), that would overrule *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), and *Planned Parenthood v Casey*, 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992). See Josh Gerstein, Alexander Ward, & Ryan Lizza, *Read Justice Alito's initial draft abortion opinion which would overturn Roe v. Wade*, *Politico* (May 2, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> (accessed May 23, 2022) ("Draft *Dobbs* Opinion"). Press outlets have since reported that there remain five votes to overrule *Roe* and *Casey*. See, e.g., Josh Gerstein, Alexander Ward, & Ryan Lizza, *Alito's draft opinion overturning Roe is still the only one circulated inside Supreme Court*, *Politico* (May 11, 2022), <https://www.politico.com/news/2022/05/11/alito-abortion-draft-opinion-roe-00031648> (accessed May 23, 2022).

Once the United States Supreme Court overrules *Roe* and *Casey* – or even if the Court ultimately chooses to substantially narrow those decisions – there will immediately be uncertainty about whether Michigan's criminal abortion ban can be enforced. Currently, the ban cannot be enforced only to the extent that it conflicts with the federal constitutional rights recognized in *Roe* and *Casey*. *People v Bricker*, 389 Mich 524, 531; 208 NW2d 172 (1973). Yet this Court has never determined whether the ban conflicts with constitutional rights under the Michigan Constitution.

The time to answer that question is now. Once there is uncertainty about whether the criminal abortion ban can be enforced, abortion care may end in Michigan, since practitioners who

provide abortions would face possible felony charges. See MCL 750.14. Any period in which there is uncertainty about whether the criminal abortion ban can be enforced will have profound and irreversible consequences on Michiganders' lives. People need abortions when they need them. If abortion care is unavailable when a woman needs an abortion, she may not be able to exercise her right to have an abortion at all.⁴ That will have dramatic effects on her life, her well-being, and her family for at least a generation if not more. There is no reason to subject Michiganders to that perilous uncertainty and to deny them their rights under the Michigan Constitution. The time to certify the questions posed in the Governor's Executive Message is now.

I. The Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, does not resolve the need for certification.

The Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, does not obviate the need for this Court to direct the Oakland Circuit Court to certify the questions posed in this case for immediate determination. While amici believe the Court of Claims decision in *Planned Parenthood* is correct, it is not the final word on whether the Michigan Constitution allows the criminal abortion ban to be enforced. The inevitable appellate process in the *Planned Parenthood* case creates a risk that the abortion ban could go into effect at some point; it also underscores that this Court will inevitably need to answer the questions posed in this case. Because time is of the essence – and because any appellate process that allows the abortion ban to go into effect could deny Michiganders their constitutional rights at the only moment they can be exercised – this Court should direct certification now.

⁴ Amici recognize that transgender men may also seek abortions. However, because the group of people seeking abortions is overwhelmingly women, amici use women throughout their brief.

The Court of Claims decision can be appealed to the Court of Appeals and then to this Court. Indeed, because the Court of Claims issued a preliminary injunction, its decision may be appealed to the Court of Appeals now, before the Court of Claims issues a final decision about whether Michigan’s criminal abortion ban is constitutional. See, e.g., *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 145; 809 NW2d 444 (2011) (reviewing and reversing grant of preliminary injunction after this Court vacated order peremptorily reversing preliminary injunction); *Int’l Union v State*, 211 Mich App 20; 535 NW2d 210 (2005) (treating an appeal from preliminary injunction as an interlocutory appeal); MCR 7.203(B)(1) (providing that the court of appeals “may grant leave to appeal from . . . a judgment or order of the circuit court and court of claims that is not a final judgment appealable of right”). If that happens, then the preliminary injunction could be vacated and the criminal abortion ban could go into effect while the *Planned Parenthood* litigation continues to unfold. Indeed, one attempt at an immediate appeal in *Planned Parenthood* appears to already be underway.

A complaint for superintending control has been filed in the Michigan Court of Appeals by two prosecutors who are defendants in this litigation, together with Right to Life Michigan and the Michigan Catholic Conference. See *In re Jerard M. Jarzynka et al*, No. 361470 (Mich Ct App docket May 25, 2022). The Court of Appeals has already granted the motion for immediate consideration of the complaint for superseding control, ordered an expedited briefing schedule, and will be submitting the matter for decision on the briefs without oral argument. See Ex C to Supp Brief in Support of Governor’s Executive Message, *In re Executive Message of the Governor Requesting The Authorization of A Certified Question*, No. 164256 (Mich docket May 25, 2022).

Even without an interlocutory appeal, the possibility of future appellate processes after a final decision by the Court of Claims means that the Court of Claims’ injunction does not and

cannot ensure that Michigan’s criminal abortion ban would not go into effect at some point before this Court ultimately resolves whether the ban is unconstitutional. The ensuing appellate process could take a considerable amount of time. Under Michigan Court Rules, the trial court must hold a trial on the merits “within 6 months after the injunction is granted” and issue a “decision on the merits within 56 days after the trial is completed.” MCR 3.310(A)(5). If the case is appealed to the Court of Appeals, and this Court does not grant a bypass application, “it typically takes on average between 13 and 14 *months* for the Court of Appeals to dispose of a case by opinion.” *House of Representatives v Governor*, 944 NW2d 706, 709 (2020) (mem) (CAVANAUGH, J., concurring) (emphasis in original).

As amici explained in their original brief in support of the plaintiff Governor, any uncertainty surrounding whether Michigan’s criminal abortion ban can be enforced – and any period in which the criminal abortion ban is potentially in effect while this Court has not definitely resolved its lawfulness – runs the risk of dramatically curbing access to abortion care in Michigan. Because abortion providers would be risking felony criminal charges if they provided abortion care, the prospect of Michigan’s criminal abortion ban being enforceable may end abortion care in the state. And the resulting harms to Michiganders will be harms that cannot be undone. Access to abortion care is unique: if abortion care is not available for a period of time, people may not be able to access abortion care at all. People need abortions when they need them – not weeks or months later, once the appellate process in *Planned Parenthood* is resolved.

As it stands, the *Planned Parenthood* litigation currently involves two questions: one, whether the case presents a justiciable controversy; and two, whether the criminal abortion ban violates the state’s constitution. On appeal, a third question about possible intervenors is likely to arise. While amici believe the Court of Claims correctly decided the first two questions in enjoining

the criminal abortion ban, the Court of Appeals may see things differently, even if in error. That may result in a period of time during which Michigan's criminal abortion ban goes into effect.

That possibility explains why the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, does not obviate the need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination. Some appellate process is inevitable; the appellate process will involve some additional, distinct legal issues; and the *Planned Parenthood* injunction does not change the fact that the lawfulness of the state's criminal abortion ban will inevitably need to be decided by this Court. The time to decide that question is now, before there are harms to Michiganders that cannot be undone.

This Court could hypothetically consider a bypass application to review the Court of Claims decision in *Planned Parenthood*. See MCR 7.305(B)(4)(b) (allowing an application for leave to appeal "before a decision of the Court of Appeals . . . from a ruling that . . . a Michigan statute . . . is invalid"). But there too, the possibility of appellate review of the Court of Claims' decision confirms that the Court of Claims decision is not the final say over whether Michigan's criminal abortion ban could be enforced. The decision in the *Planned Parenthood* litigation does not obviate the need for this Court to decide whether the ban can be enforced. Certification is the appropriate vehicle to do so because the questions posed are pure questions of law suitable for this Court's review now. *Planned Parenthood* involves additional questions that could require this Court's review on any bypass application, whereas this Court's supplemental briefing order in this case has already secured briefing on all of the relevant issues in this case.

On at least one occasion, this Court has concluded that a decision of the Court of Appeals obviated the need for use of the certified question procedure. But that case involved the constitutionality of a state law that transferred control over two airports from a county to a

statutorily created airport authority; it did not concern individuals' constitutional rights or access to time-sensitive health care. See *In re Executive Message from Governor*, 467 Mich 1208; 651 NW2d 747 (2002) (mem); *Wayne Cty Bd of Com'rs v Wayne Cty Airport Auth*, 253 Mich App 144, 149; 658 NW2d 804 (2002). Moreover, the parties "to th[at] case" could have sought "review of the Court of Appeals decision by filing an application for leave to appeal to this Court." *In re Executive Message from Governor*, 467 Mich at 1208. But this case does not involve the same parties or all of the same issues as the *Planned Parenthood* case. The two cases involve distinct jurisdictional and justiciability issues: Any hypothetical bypass application in the *Planned Parenthood* litigation would involve additional questions about who proper intervenors may be, and whether they can intervene to appeal the Court of Claims decision. This Court has not yet received briefing on those issues, but it has received briefing on the relevant issues in this case. The hypothetical possibility of a successful bypass application in the *Planned Parenthood* litigation, which depends on someone being able to intervene and appeal the Court of Claims decision in that case, does not obviate the need for certification in this case.

The questions in this case are also too urgent to defer: Waiting to resolve them injects unnecessary uncertainty about whether Michigan's criminal abortion ban can be enforced and risks unnecessary dramatic and long-term effects on Michiganders' lives and well-being. The questions will inevitably reach this Court, and because the questions are purely legal ones, they are ripe for this Court's review now.

II. There is not an actual case or controversy requirement here, but if there was, it would be met.

Certified question cases do not require an actual case or controversy. A single Michigan Court Rule addresses "Certified Questions and Advisory Opinions," grouping the two kinds of

cases together. See MCR 7.308. And MCR 7.308(A)(1) requires only that there be a “pending” “action or proceeding involving a controlling question of public law, and the question is of such public moment as to require an early determination according to executive message of the governor addressed to the Supreme Court” It does not mention or require a “case or controversy.” By contrast, previous versions of the provision did: The “Certified Questions” provisions of both the 1963 and 1984 versions of the Michigan Court Rules explicitly required a “pending case or controversy.” GCR § 797 (1963) (“any controlling question or questions of public law involved in a pending case or controversy”); GCR § 797 (1984) (“any controlling question or questions of public law involved in a pending case or controversy”). The omission of any reference to “case or controversy” in the current version of the Certified Question Rule confirms there is no longer any such case or controversy requirement.

Several members of this Court have explained why certified questions cases from other courts necessarily involve advisory opinions, and accordingly do not resolve an actual case or controversy. See, e.g., *In re Certified Question from US Dist Court for Western Mich*, 493 Mich 70, 83 n 1; 825 NW2d 566 (2012) (YOUNG, J., dissenting) (collecting cases in which Justice YOUNG argued that certified question cases produced unconstitutional advisory opinions); *In re Certified Question from US Dist Court for Eastern Dist of Mich*, 485 Mich 1116, 1117 n 1; 779 NW2d 248 (2010) (WEAVER, J., dissenting) (same for Justice WEAVER); *In re Certified Question*, 432 Mich 438, 461-71; 443 NW2d 112 (1989) (separate opinion of LEVIN, J.) (expressing concern about the constitutionality of the Certified Questions Rule). These Justices maintained that certified question opinions were advisory because they did not have a binding effect on the parties. E.g., *In re Certified Question from US Dist Court for the Eastern Dist of Mich*, 622 NW2d 518, 518-20 (2001) (mem) (WEAVER, J., dissenting). As Chief Justice MCCORMACK recently reiterated,

certified question opinions do not result in a judgment of this Court. *In re Certified Questions from the US District Court, Western District of Michigan*, 506 Mich 933, 933 n 1; 949 NW2d 274 (2020) (mem) (MCCORMACK, J., concurring).

But by this point it is well established that this Court has the power to issue certified questions opinions, even if there is no actual case or controversy. See, e.g., *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 244 n 5 (2019) (mem) (CLEMENT, J., concurring) (quoting Ortnier, Fayz & DeQuick, *Annual Survey of Michigan Law: June 1, 1989–May 31, 1990, Civil Procedure*, 37 Wayne L Rev 373, 380 n 29 (1991) (“The authority of the supreme court to render advisory opinions is indirectly conferred by the authority granted the legislature or governor to request an advisory opinion[.]”). The Justices who doubted this Court’s ability to decide certified questions cases conceded that their position had “failed to carry the day.” *In re Certified Question from US Dist Court for Eastern Dist of Mich*, 485 at 1117 n 1 (WEAVER, J., dissenting). And there is a litany of examples of this Court issuing certified question opinions, including in cases from the federal courts, where this Court’s decision would be enforceable only because of federal law (the *Erie* doctrine), not because this Court has the power to compel a federal court’s adherence to its certified question opinion and bind the parties. E.g., *In re Certified Questions from US Dist Ct, Western Dist of Mich*, 506 Mich 332; 958 NW2d 1 (2020); *In re Certified Questions from US Court of Appeals for Sixth Circuit*, 696 NW2d 687, 690 (2005) (mem).

But were this Court to conclude that certified questions cases that arise from state courts do require an actual case or controversy, that requirement is met here. The issue about the lawfulness of the criminal abortion ban is ripe for this Court’s resolution. See *Adair v State*, 486 Mich 468, 490; 785 NW2d 119 (2010) (“We have also consistently held that ‘a court is not

precluded from reaching issues before actual injuries or losses have occurred.”). The United States Supreme Court traditionally releases opinions in argued cases by the end of June, three weeks after briefing in response to this Court’s order will be complete. No matter whether the United States Supreme Court adheres to what was an apparent majority to overrule *Roe* or whether it shifts course and substantially narrows *Roe*, there will be immediate questions about whether and under what circumstances Michigan’s criminal abortion ban can be enforced. The looming injury to Michiganders is accordingly right around the corner. Abortion providers in Michigan would be risking felony criminal charges if they provide abortion care. Because healthcare providers face the prospect of felony charges against them, this Court can resolve the constitutionality of the criminal abortion ban now. See *Associated Builders & Contractors v Dir of Consumer & Indus Servs Dir*, 472 Mich 117, 127; 693 NW2d 374 (2005) (explaining that there does not have to be “evidence of a threat of imminent prosecution” in order to address a challenge to a criminal statute), overruled on other grounds by *Lansing Schs Educ Ass’n v Lansing Bd of Educ*, 487 Mich 349; 792 NWd 686 (2010). The prospect of Michigan’s criminal abortion ban being enforceable may end abortion care in the state. Even without the risk of criminal penalties, abortion care immediately stopped in the state of Texas once abortion providers faced the threat of civil liability under S.B. 8. *Whole Woman’s Health v Jackson*, __ U S __, __; 141 S Ct 2494, 2499 n 1; 210 L Ed 2d 1014 (2021) (SOTOMAYOR, J., dissenting); *Whole Woman’s Health v Jackson*, __ U S __, __; 142 S Ct 522, 545; 211 L Ed 2d 316 (2021) (SOTOMAYOR, J., concurring in the judgment and dissenting in part); see Tex Health & Safety Code Ann 171.208(a). And Michigan women depend on the availability of abortion care in this state.

There is also sufficient adversity. At least two prosecutors have an apparent interest in enforcing the criminal abortion ban. See, e.g., Sarah Rahal, *Great Lakes Justice Center to*

represent 2 county prosecutors named in *Whitmer's abortion suit*, The Detroit News (April 18, 2022), https://www.detroitnews.com/story/news/local/michigan/2022/04/18/whitmer-abortion-ban-suit-great-lakes-justice-center-county-prosecutors/7362884001/Error!_Bookmark_not_defined. (accessed May 2, 2022) (quoting Jackson County prosecutor as saying “The State’s highest compelling interest is to protect life. Moreover, I will vigorously defend the right of all prosecutors to be free from political pressure in charging decisions.”). They are currently seeking a Court of Appeals decision that would overrule the Court of Claims injunction preventing them from enforcing the law. See *In re Jerard M. Jarzynka et al*, No. 361470 (Mich Ct App docket May 25, 2022).

And Governor Whitmer has an interest in ensuring that Michiganders are not deprived of their constitutional right to abortion care, and that state and local officers are not engaged in constitutional violations. This Court has held that standing in Michigan courts is “a limited, prudential doctrine” that only requires a litigant have “a legal cause of action.” *LSEA*, 487 Mich at 372. Governor Whitmer has a cause of action under the Michigan Constitution “to enforce compliance with any constitutional . . . mandate or to restrain violations of any constitutional . . . right.” Const 1963, art 5, § 8. And her responsibility to “take care that the laws be faithfully executed,” *id.*, gives her a special interest in ensuring that state and local officers are not engaged in constitutional violations. See *infra* Part IV (explaining why the Executive Message process is not limited to cases where the Governor defends a statute).

The stakes of this case are clear, and the risk of looming injury apparent. The legal issues are also developed and suitable for this Court’s resolution. The issues in this case are pure questions of law – whether the criminal abortion ban violates different provisions in the Michigan Constitution. This Court has also just received supplemental briefing on other issues it deemed

relevant to this case. This Court can resolve the issues in this case now. There is a case or controversy here.

III. The question in this case is of “such public moment as to require an early determination” because it will affect many Michiganders in profound ways that cannot be undone.

The Executive Message process under MCR 7.308(A) requires only that a case involve a controlling question of public law that is of “such public moment as to require an early determination.” Because that necessarily entails a holistic, context-specific judgment, this Court has not spelled out a dispositive list of considerations or factors that inform the decision. Perhaps because the determination required under MCR 7.308(A) is so open-ended, some Justices have said that this Court owes deference to the Governor’s determination that an issue is of such public moment as to require an early determination. See *In re Executive Message of Governor*, 490 Mich 999, 1000; 807 NW2d 302 (2012) (mem) (MARKMAN, J., dissenting) (“I also believe that we owe an obligation of comity to the chief executive authority of this state when it seeks to invoke our authority to certify questions of Michigan law in order to expedite the consideration of a case by showing that the case involves a ‘controlling question of public law, and the question is of such public moment as to require early determination’”); cf. *Alan v Wayne Cty*, 388 Mich 210, 242; 200 NW2d 628 (1972) (certifying questions related to bonds to finance a baseball stadium for the Detroit Tigers).

The cases in which this Court has declined or granted certification pursuant to an Executive Message, or taken some other related action pursuant to an Executive Message, suggest that relevant considerations may include the number of people affected; how the issue in the case affects them; and the related costs of any delay or uncertainty. See, e.g., *In re Apportionment of*

State Legislature-1992, 439 Mich 715, 715, 724 n 29; 486 NW2d 639 (1992) (in a case “concerning a public question of substantial importance to the whole body politic” the Governor had requested certification pursuant to an Executive Message). For example, this Court granted certification pursuant to an Executive Message in two cases affecting state-wide access to healthcare. In *Westland Convalescent Center v Blue Cross & Blue Shield of Michigan*, this Court directed a circuit court to certify questions pursuant to the Governor’s Executive Message. 414 Mich 247, 274 n 3; 324 NW2d 851 (1982) (LEVIN, J., concurring). The questions in the case concerned whether health care providers were entitled to an evidentiary hearing under Michigan statutes or the Michigan Constitution before the state insurance commissioner approved an insurance company’s change in payment rates for the providers’ services. *Id.* at 258. The plaintiffs alleged that “the new rates would not cover their costs and that services . . . would have to be discontinued.” *Id.* at 260. The prospect of withdrawal of health care for the insurance company’s subscribers apparently made the issue “of such public moment as to require an early determination.” MCR 7.308(A). Health care is needed when it is needed, so even if this Court had ultimately reinstated rates at which the insurance company would have covered plaintiffs’ services, there would have been some period of time during which the services were not available to Michiganders. That damage could not be corrected.

In the second case, *Blue Cross & Blue Shield of Michigan v Milliken*, this Court also granted certification pursuant to an Executive Message when the legal issue in the case could have resulted in the withdrawal of health care services and health insurance to Michiganders. 422 Mich 1, 10; 367 NW2d 1 (1985). The issue in that case was whether the statute granting the Insurance Commissioner power to regulate insurance rates for hospital and physician services was unconstitutional. *Id.* at 17. This issue, like *Westland Convalescent Center*, was of such public

moment as to require an immediate determination because it affected a large number of Michiganders' access to healthcare. It also involved pure questions of law about whether particular statutes complied with the Michigan Constitution.

By contrast, in *Matulewicz v Governor of Michigan*, this Court “directed the Ingham Circuit Court to establish an accelerated schedule of proceedings” rather than directing certification in response to the Governor’s Executive Message. 174 Mich App 295; 435 NW2d 785 (1989). That case addressed whether a Michigan statute unconstitutionally eliminated several civil service positions and replaced them with political appointments; unlike issues affecting health care for Michiganders, the elimination of some individuals’ jobs was not of such importance as to require certification, but was important enough to merit expedited consideration. *Id.* at 298-99.

The only way to avoid the looming harms to Michiganders’ health care, families, and lives from the criminal abortion ban is for this Court to certify questions about whether Michigan’s criminal abortion ban conflicts with the Michigan Constitution now. Once the United States Supreme Court overrules or modifies *Roe*, there will be immediate uncertainty about whether Michigan’s criminal abortion ban can be enforced. That uncertainty will curtail, if not eliminate, access to abortion care in the state, which will have dramatic and long-term effects on Michiganders’ lives that cannot be magically undone. The controlling question of public law in this case is accordingly of “such public moment as to require an early determination.” MCR 7.308(A).

When the United States Supreme Court overrules or narrows *Roe*, there will be uncertainty about whether Michigan’s criminal abortion ban can and will be enforced. *People v Bricker* held that Michigan’s criminal abortion ban is unenforceable only to the extent that it conflicts with the federal constitutional substantive due process right to abortion recognized in *Roe*. 389 Mich at

531. Eliminating the basis for Michigan’s criminal abortion ban being unenforceable could lead to a period of time during which there would be uncertainty about whether Michigan’s criminal abortion ban could be enforced. Some prosecutors in Michigan have expressed an interest in preserving the option to enforce the criminal abortion ban. See, e.g., Sarah Rahal, *Great Lakes Justice Center to represent 2 county prosecutors named in Whitmer’s abortion suit*, The Detroit News (April 18, 2022), <https://www.detroitnews.com/story/news/local/michigan/2022/04/18/whitmer-abortion-ban-suit-great-lakes-justice-center-county-prosecutors/7362884001/> (accessed May 2, 2022) (quoting Jackson County prosecutor as saying “The State’s highest compelling interest is to protect life. Moreover, I will vigorously defend the right of all prosecutors to be free from political pressure in charging decisions”); *In re Jerard M. Jarzynka et al*, No. 361470 (Mich Ct App docket May 25, 2022). Prosecutors have also attempted to punish people who are suspected of having ended a pregnancy, sometimes by resorting to nonexistent, irrelevant, or arcane criminal statutes. See Brief of the House Democratic Caucus Leader Donna Lasinski and the House Democratic Caucus and Senate Minority Leader Jim Ananich and the Senate Democratic Caucus As Amici Curiae in Support of Plaintiff 13-15, *Whitmer v Linderman et al*, No 164256 (Mich docket May 2, 2022) (listing examples).

The possibility that the criminal abortion ban would be enforced, and the uncertainty about whether the ban could be enforced consistent with the Michigan Constitution, may mean the temporary demise of abortion care in the state since abortion providers would be risking felony criminal charges if they continued to provide abortion care. The resulting harms to Michiganders will be harms that cannot be undone. Access to abortion care is unique: if abortion care is not available for some period of time, people may not be able to access abortion care at all. People

need abortions when they need them – not six months or nine months later, once courts have allowed cases challenging the criminal abortion ban to develop. When people decide to have an abortion, they cannot wait a few months to see whether doctors in the state will be willing to provide one. Indeed, some people who need abortions or who choose to have them may not even be able to wait a few weeks. Abortion care is healthcare, and in order for it to be meaningful, it must be available when it is needed and when it is selected – not at some hypothetical, uncertain point in the future. See, e.g., NPR, *The New Texas Abortion Law Is Putting Some Patients in Danger*, NPR Consider This (March 2, 2022), <https://www.npr.org/transcripts/1083990987> (accessed April 28, 2022) (describing how a Texas woman was put on a plane to Colorado to receive abortion care when, after an apparent miscarriage, the fetus was no longer viable and she was at risk of sepsis); MSNBC News, *‘We Are Seeing A New Level of Despair’: Latinas Decry Impact of Texas Abortion Law*, (Jan. 26, 2022), <https://www.nbcnews.com/news/latino/-are-seeing-new-level-despair-latinas-decry-impact-texas-abortion-law-rcna12961> (accessed April 28, 2022) (describing how a Texas clinic was forced to turn away a rape victim).

Denying Michigan women access to abortion care will have substantial and long-lasting consequences. Access to reproductive health services like abortion is integral to health care, to family relationships, and to Michiganders’ lives as they know them. “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Casey*, 505 US at 856; see Brief of the House Democratic Caucus Leader Donna Lasinski and the House Democratic Caucus and Senate Minority Leader Jim Ananich and the Senate Democratic Caucus As Amici Curiae in Support of Plaintiff 11-13, *Whitmer v Linderman et al*, No 164256 (Mich docket May 2, 2022) (elaborating).

That is why the question in this case “is of such public moment as to require an early determination.” MCR 7.308(A)(1). Once Michigan’s criminal abortion ban becomes enforceable – or at least, once the basis for Michigan’s criminal abortion ban being unenforceable is eliminated – the criminal abortion ban will shape the behavior of private parties, corporate entities, and state institutions. There is an urgent need to address these issues now, before Michiganders’ constitutional rights are taken from them during the time in which they are needed, and during the time in which they can be exercised.

IV. The Executive Message process does not limit the Governor’s power to defending statutes.

The text of the Executive Message rule, together with past practice, as well as the structure of the rule and the Michigan Constitution confirm that the Governor may request this Court to certify questions in cases where the Governor has reason to believe that a state statute or regulation is unconstitutional.

Michigan Court Rule 7.308(A)(1)(a) allows the governor to request this Court to direct Michigan courts to certify questions “[w]henver a trial court or tribunal” “has pending before it an action or proceeding involving a controlling question of public law, and the question is of such public moment as to require an early determination.” MCR 7.308(A)(1)(a). The only requirements in the text of the rule are that the case “involv[e] a controlling question of public law” and that the question be “of such public moment as to require an early determination.” *Id.* The Executive Message process is not limited to instances where the Governor believes or intends to argue that the controlling question of public law should be resolved in a particular way. Accordingly, because the case need only involve “a controlling question of public law,” the Governor may request this Court to certify questions in cases where the Governor believes that a state statute is

unconstitutional. In those cases, as well as ones where the Governor believes that a state statute is constitutional, there is a “controlling question of public law” – whether the state (or federal) Constitution permits a state statute to be enforced. If the statute is unconstitutional, it cannot be enforced; if it is constitutional, it can be.

Other Michigan Court Rules, by contrast, do distinguish between cases based on whether they involve a determination that a state statute is invalid or valid. Michigan Court Rule 7.204(D)(3)(c) requires a party filing an appeal to note whether the case involves “a ruling that a provision of the Michigan Constitution, a Michigan statute . . . or any other action of the legislative or executive branch of state government is invalid.” MCR 7.204(D)(3)(c). The same is true for briefs in this Court. See MCR 7.212(C)(1). This Court gives priority in its calendar to “appeals of decisions holding that a provision of the Michigan statute, a rule or regulation . . . or any other action of the legislative or executive branch of state government is invalid.” MCR 7.213(C)(5). Publication standards depend on whether the case “decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan statute . . . or any other action of the legislative or executive branch of state government is invalid.” MCR 7.215(B). The rules similarly permit a party to seek leave to appeal “before a decision of the Court of Appeals” if “the appeal is from a ruling that a provision of the Michigan Constitution, a Michigan statute . . . or any other action of the legislative or executive branches of state government is invalid.” MCR 7.305(B)(4)(b). The Michigan Court Rules sometimes distinguish between cases depending on whether they involve a determination that a state statute is invalid or valid, but the Executive Message Court Rule does not. The clear implication is that the Executive Message process is available no matter whether the Governor believes that a state statute is constitutional. The

Executive Message process does not depend on who is arguing what; it is available based solely on the subject matter of the case and whether it involves a controlling question of public law.

Prior instances where the Executive Message process has been used confirm this understanding and also help to explain it. In *Milliken v. Green*, this Court granted the Governor's Executive Message request to certify questions in a case brought "by the Attorney General and the Governor to test the constitutionality of the Michigan public school financing system." 389 Mich 1, 10; 203 NW2d 457 (1972) (*Milliken I*), *vacated on other grounds* 390 Mich 398; 212 NW2d 711 (1973). In that case, the Governor was one of the plaintiffs arguing that the state's method of school financing was unconstitutional. *Id.* at 10, 35. While this Court subsequently vacated the opinions in *Milliken I* after concluding that the Governor's request to certify questions was improvidently granted, there was no indication that was because the Governor had argued that state statutes were unconstitutional rather than constitutional. *Milliken v Green*, 390 Mich 389; 212 NW2d 711 (1973) (*Milliken II*). Instead, as Justices KAVANAUGH and LEVIN explained in their concurrence, the case "presented . . . generalized arguments concerning the nature of educational opportunity in this State," not any "concrete claim by either individual students or by school districts that they are suffering from particular specified educational inadequacies." *Id.* at 392 (KAVANAUGH AND LEVIN, J., concurring). And so, the concurrence concluded, on the merits, that there was "no discrimination violative of Michigan's Equal Protection Clause" in "the Michigan financing system." *Id.* at 408. A law review article about the case likewise concluded:

. . . that the court did not feel compelled to dismiss the case because of a technicality. Rather, the court seems to have recognized that the legislature, set in motion partly by the court's earlier decision, had moved as far and as fast as the court could reasonably have expected. The case had become moot, but for some reason the court unwilling to so rule.

Hain, *Milliken v. Green: Breaking the Legislative Deadlock*, 38 L & Contemp Problems 350, 359 (1974).

The Executive Message process has also been used in certified question cases that do not involve any claim about whether a statute is constitutional. For example, in *Beech Grove Investment Co v Civil Rights Commission*, Governor George Romney requested this Court to certify a question about whether the Michigan Civil Rights Commission had jurisdiction, absent legislation, to address complaints involving housing discrimination. 380 Mich 405, 417; 157 NW2d 213 (1968).⁵ There, the Governor used the Executive Message process to determine the scope of state agencies' authority under the Constitution; the process was not limited to the Governor defending state statutes. This case also involves a question about executive officers' authority under the state Constitution. Even though there is a claim that a state statute is invalid, this case still involves the same kind of controlling question of public law that *Beech Grove Investment* did –whether possible actions by executive officials comply with the Michigan Constitution.

This Court has also granted the Governor's request to certify questions in cases to which the Governor is not a party, where the Governor's position may very well be unclear or undetermined. Indeed, in one such case, *City of Gaylord v Beckett*, some Justices urged the state to appoint lawyers to argue that a state statute was *unconstitutional*. *City of Gaylord v Beckett*, 378 Mich 273, 345 n 7; 144 NW2d 460 (1966) (BLACK, J., dissenting). Several Justices dissented from the order granting certification in that case. Justice BLACK's dissent explained, however, that certification would have been proper if “the Attorney General . . . provide[d] a team from his staff to brief and argue the constitutional positions the defendant city clerk has taken plus any others

⁵ See also *Frey v Dep't of Mgm't & Budget*, 429 Mich 315; 414 NW2d 873 (1987) (noting that the Governor had requested certification, pursuant to an Executive Message, in a case about the effective date of a statute, and whether the state Constitution permitted a law to take immediate effect without a two-thirds vote of the legislature).

such team may wish to submit.” *Id.* “That was done” in two prior cases, Justice Black observed (*People v Alger*, 323 Mich 523; 35 NW2d 669 (1949), and *Lockwood v Commissioner of Revenue*, 357 Mich 517; 98 NW2d 753 (1959)), and it supplied “a good way to assure that ‘friendly’ lawsuits” ensured that people received a “true day in court.” *Id.* In that case, *City of Gaylord*, the “defendant city clerk refused to complete the transaction” authorized under state law and argued that the statute was unconstitutional. *Id.* at 287-88. So even the Justices who would have denied certification would have granted certification pursuant to the Governor’s Executive Message so long as state officers were willing to argue that a state statute was *unconstitutional*.

The structure and design of the rule confirm that the Executive Message process is available when the Governor believes that state or local action may be unconstitutional, as well as when the Governor believes it is constitutional. “[T]he certification of state questions ensures that such questions will be resolved by the state’s highest court in as expeditious a manner as possible.” *In re Executive Message of Governor*, 490 Mich 999, 1000; 807 NW2d 302 (2012) (mem) (MARKMAN, J., dissenting). That need exists whether or not the Governor’s position is that a state statute is constitutional. Whether a case involves a controlling question of public law does not depend on whether the Governor is defending or challenging a state statute; the (state) constitutional question controls the outcome of the case either way. Whether a question about the constitutionality of a state statute is of “such public moment as to require an early determination” similarly does not depend on whether the Governor is defending or challenging a state statute. It depends instead on what the state statute is; how many people the statute affects; how the statute affects their lives; and other considerations related to the importance and time-sensitivity of the underlying issue in the case. That does not necessarily depend on the Governor’s litigating position.

Reading the rule in light of the Michigan Constitution confirms that the Executive Message process is available in cases where the Governor believes that a state statute is unconstitutional. Article V, Section 8 of the Michigan Constitution provides that “[t]he governor shall take care that the laws be faithfully executed.” Const 1963, art 5, § 8. The provision goes on to explain that the “governor may 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.” *Id.* If the Executive Message process was available only in cases where the Governor believed a state statute to be constitutional, that would undermine her authority to take care that the laws be faithfully executed. The Constitution specifically allows the governor to “initiate court proceedings” in order “to enforce compliance with” a “constitutional . . . mandate” or “to restrain violations of” a “constitutional” provision, which may occur where a state statute is unconstitutional. *Id.* Eliminating the Executive Message process in those cases would undermine the structure and design of the state Constitution. At a minimum, given the Governor’s constitutional authority to initiate court proceedings to enforce the state Constitution, it would be reasonable to expect that the Executive Message Rule would specifically limit the Executive Message process to cases where the Governor was seeking to enforce statutes, but not the state constitution. Yet no such limit exists in the text or design of the rule.

The facts of this case underscore why that is. If Michigan’s criminal abortion ban goes into effect only to be invalidated later, state officers may face civil liability in the event they enforce the criminal abortion ban. See *Smith v Dep’t of Public Health*, 428 Mich 540; 410 NW2d 749 (1987) (recognizing damages remedies against the state for violations of the state Constitution); *Johnson v Wayne Co.*, 213 Mich App 143; 540 NW2d 66 (1995) (same). Other state employees like healthcare workers may face potential civil liability, or even criminal liability, in the event

that they refuse to provide abortion care out of fear of criminal penalties. See, e.g., NPR, *The New Texas Abortion Law Is Putting Some Patients in Danger*, NPR Consider This (March 2, 2022), <https://www.npr.org/transcripts/1083990987> (accessed April 28, 2022) (describing how a doctor arranged for a Texas woman to fly on a plane to Colorado to receive abortion care when, after an apparent miscarriage, the fetus was no longer viable and the woman faced a life-threatening risk of sepsis at some point in the future). The Executive Message process in this case allows the Governor to avoid potential liability for state employees.

Limiting the Executive Message process to cases where the Governor defends a statute rather than challenges one would also produce odd consequences. It would mean, for example, that the Governor could request this Court to certify a question about whether private entities were discriminating on the basis of race in violation of the Elliot Larsen Civil Rights Act, but could not request this Court to certify a question about whether state entities were discriminating on the basis of race in violation of the state Constitution's Equal Protection Clause. In the former case, the Governor would ostensibly be defending a state statute, while in the latter she could be challenging one. There is no coherent reason why the Executive Message process would be available in the former case but not the latter. If anything, there could be a stronger case for certification in the latter case where the Governor would be challenging a state statute. Whether state actors are engaged in unconstitutional discrimination or violations of other individual constitutional rights may involve some of the more pressing and important questions for this Court to resolve. There is no reason to read the Executive Message process to exclude those cases entirely.

V. The questions posed should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women’s Health Organization*, No. 19-1392, or as soon as possible, as a decision in *Dobbs* would serve as, at most, persuasive authority here.

Ideally, the questions posed in this case should be answered before the United States Supreme Court issues its decision in *Dobbs v Jackson Women’s Health Organization*, No. 19-1392 (US, docket June 18, 2020). At a minimum, the questions should be answered as expeditiously as possible, even if the briefing schedule in this case pushes a decision about whether to certify the questions posed, and any possible resolution of the certified questions, until after the United States Supreme Court’s decision in *Dobbs*.

Waiting for a decision in *Dobbs* risks the temporary demise of abortion care in Michigan, and with it, profound and irreversible consequences on Michiganders’ lives. It is also unnecessary because the United States Supreme Court’s decision in *Dobbs* would serve as, at most, persuasive authority to this Court’s resolution of the questions in this case. The constitutional claims in this case arise under the Equal Protection and Due Process Clauses of the Michigan constitution. Those claims are both independent and distinct from the federal constitutional claims at issue in *Dobbs*.

A. The equal protection claim under the Michigan Constitution does not depend on the United States Supreme Court’s resolution of the federal equal protection claim in *Dobbs*.

1. The Michigan Equal Protection Clause is not coextensive with the federal Equal Protection Clause.

The equal protection claims in this case will not be governed by the United States Supreme Court’s decision in *Dobbs*. In equal protection cases, this Court has made clear that “federal case law can only be persuasive authority, not binding precedent, in resolving” a case “which involves only questions of state law.” *Sharp v City of Lansing*, 464 Mich 792, 802-03; 629 NW2d 873

(2001). While the Equal Protection Clause in the Michigan Constitution is similar to the Equal Protection Clause in the federal Constitution, and this Court has sometimes looked to federal precedents when interpreting the Michigan Constitution's Equal Protection Clause, the federal precedents are not dispositive. Despite some casual statements that the Michigan and federal Equal Protection Clauses are "coextensive," *Harvey v State*, 469 Mich 1, 6; 664 NW2d 767 (2003), this Court's cases on the Michigan Equal Protection Clause have departed from federal cases on the federal Equal Protection Clause. For example, the United States Supreme Court has recognized a cause of action for damages under the federal Constitution's Equal Protection Clause for claims of sex discrimination. See *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979). But this Court has held that there is no cause of action for damages under the Michigan Equal Protection Clause for claims of sex discrimination. *Lewis v State*, 464 Mich 781; 629 NW2d 868 (2001).

Cases on Michigan's Equal Protection Clause should depart from federal cases on the federal Equal Protection Clause because there are important differences between the state and federal Equal Protection Clauses. There are textual differences between the two. The Equal Protection Clause in the Michigan Constitution contains additional language that does not appear in the federal Equal Protection Clause. The Michigan constitutional provision says that "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin." Const 1963, art 1, § 2. The federal Constitution's Equal Protection Clause, by contrast, lacks the accompanying language that prohibits denials of "the enjoyment of . . . civil or political rights." See US Const Am XIV, § 1. The additional clause in the state Constitution sheds light on the meaning of the state Constitution's Equal Protection Clause because

the state's Equal Protection Clause cannot be read as duplicative of the additional clause about civil or political rights, whereas the federal Constitution's Equal Protection Clause could be.

The state and federal Equal Protection Clauses also have distinct histories that shape their different meanings. Michigan's Equal Protection Clause was adopted in the early 1960s, whereas the federal Equal Protection Clause was adopted in 1868. "Equal protection of the laws" meant something different in 1868 than in the early 1960s. Cf. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale LJ 408 (2010) (arguing that the Due Process Clauses under the Fifth and Fourteenth Amendments to the federal Constitution mean different things because due process meant something different in 1791 than in 1868). In 1868, when the federal Constitution's Equal Protection Clause was ratified, there were still coverture regimes that denied married women legal personhood, including in Michigan. By the early 1960s, when Michigan guaranteed equal protection of the laws to Michigan citizens, married women were understood to be legal persons. Indeed, at the Michigan constitutional convention, Delegate Norris specifically recognized that "under the common law" that previously existed, "a woman was a chattel; she did not exist in her sole and separate person." 2 Official Record, Constitutional Convention 1961, p 3090. But, Delegate Norris continued, "[s]ince that time there has been a tremendous development in the law to a position of status wherein a woman in law exists as a sole and separate person. This transition is one that has been recognized in Michigan." *Id.* Delegate Norris also explained how these shifting views mattered to the Equal Protection Clause that Michigan was about to enact: "The situation has changed and we may envision, on the trajectory of the past, a future in which even greater dignity and status will be accorded to women." *Id.* The 1963 Michigan Constitution also abolished coverture. Const 1963, art 10, § 1. Here too, this additional provision in the Michigan Constitution helps to shed light on the meaning of Michigan's Equal Protection Clause, and the absence of a

similar provision in the federal Constitution underscores that the state and federal Constitutions mean different things.

There is also a distinct enactment history for the state's Equal Protection Clause that is especially relevant to assessing sex discrimination claims brought under the Equal Protection Clause. Michigan's Equal Protection Clause does not specifically list sex as a protected class or characteristic. But unlike the Equal Protection Clause of the federal Constitution, there were proposals at the Michigan constitutional convention to add sex to the list of prohibited forms of discrimination under the state's Equal Protection Clause. The resulting discussions surrounding those proposals went back and forth about what kinds of sex discrimination would be prohibited under an Equal Protection Clause that specifically mentioned sex versus an Equal Protection Clause that did not. 2 Official Record, Constitutional Convention 1961, pp 3091-92. All of that history sheds light on what the people who wrote and ratified the Michigan Constitution understood the state's Equal Protection Clause to prohibit by way of sex discrimination. None of that history is particularly relevant to the United States Supreme Court's decision in *Dobbs* or to the meaning of the federal Equal Protection Clause, but it is relevant to assessing the Michigan Equal Protection Clause claim at issue in this case.

2. Michigan's criminal abortion ban differs in material ways from the Mississippi law at issue in *Dobbs*.

Another reason why the equal protection claim at issue in this case will not be governed by *Dobbs* is because the state law at issue in this case has a unique history that is distinct from the state law at issue in *Dobbs*. The law being challenged in *Dobbs* is a Mississippi statute, enacted in 2018, that prohibits abortions from being performed on persons after 15 weeks of pregnancy. HB 1510 § 1(4), 2018 Leg Reg Sess (Miss 2018). By contrast, the statute at issue in this case prohibits

abortions throughout a person's pregnancy, and it was originally enacted in 1846 before being recodified in its current form in 1931.

The distinct timing and scope of the two statutes affects the Equal Protection Clause analysis because, in sex discrimination cases such as this one, the government must identify an important governmental objective and demonstrate that the challenged law actually furthers that objective. *Dep't of Civil Rights ex rel Forton v Waterford Twp Parks & Recreation Dep't*, 425 Mich 173, 191; 387 NW2d 821 (1986). The "[e]valuation of the importance of the asserted governmental interest is performed on a case-by-case basis." *Id.* at 192. Moreover, what matters in sex discrimination cases is the government's actual reason for enacting a law, not some hypothetical justification that did not actually motivate the legislators. See *id.*; cf. *United States v Virginia*, 518 US 515, 535-40; 116 S Ct 2264; 135 L Ed 2d 735 (1996).

There is substantial evidence that sex-role judgments about pregnancy and motherhood motivated Michigan's criminal abortion ban even if they did not motivate Mississippi's 15-week abortion restriction. Sex-role judgments about pregnancy and motherhood are not "important governmental objectives" that can justify sex discrimination. *Dept of Civil Rights ex rel Forton*, 425 Mich at 191-92. Indeed, they are not even legitimate reasons that could justify a facially neutral law that does not discriminate on the basis of sex. Cf. *Blue Cross and Blue Shield of Mich v Milliken*, 422 Mich 1, 79, 82; 367 NW2d 1 (1985) (invalidating a provision requiring Blue Cross and Blue Shield of Michigan to provide listed coverage to certain contract holders because "the risk factor has no correlation with the discriminatory treatment" and lacked "an adequate or reasonable basis").

When Michigan's criminal abortion ban was originally enacted, women could not vote. The same legislature that enacted Michigan's criminal abortion ban enacted laws declaring that

“nothing ... shall be construed to authorize any married woman to give, grant or sell any such real or personal property during coverture without the consent of her husband,” 1846 Senate Journal Ann 50. Two years later, the Senate rejected a proposal to allow women to vote on questions at school district meetings. 1848 Senate Journal Ann 472. Over the same time period in which the legislature reenacted and strengthened the state’s criminal abortion ban, the legislature repeatedly rejected calls to extend the franchise to women as well as calls to offer higher education opportunities to women. 1858 Senate Journal 680 (rejecting calls for women to vote); 1861 Senate Journal 194, 1047 (education); 1871 Senate Journal 810 (voting); 1877 Senate Journal Vol 2 1200 (education). The Senate recorded pardons for crimes of rape that were given because of “the reputation of the woman in the case.” 1887 Senate Journal 65; see also 1871 Senate Journal 49; 1899 Senate Journal Vol 1 29, 31-32. Even in 1929, the Governor vetoed a statute allowing a married woman to contract because it was not “in the interest of public welfare.” 1929 Senate Journal pt 2 1170.

As Michigan enacted and strengthened its criminal abortion ban, a physician named Dr. Horatio Storer was leading the campaign to ban abortion. Storer claimed that childbearing was “the end for which [married women] are physiologically constituted and for which they are destined by nature.” See Horatio Storer, *Why Not? A Book For Every Woman* 75-76 (1866); James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800–1900*, 78, 89, 148 (1978) (recounting Storer’s role in persuading Americans to ban abortion). He also maintained that avoiding this pre-ordained biological and social role would lead to a woman’s physical and social ruin. See Storer, *supra*, at 37 (“[A]ny infringement of [natural laws] must necessarily cause derangement, disaster, or ruin.”). Several presentations to local medical societies specifically invoked Dr. Storer and his writings in support of Michigan’s restrictions on abortion. See Stewart,

Criminal Abortion: Read Before the Wayne County Medical Society at its December Meeting, 2 Detroit Rev Med & Pharmacy 1, 1 (1867) (invoking Storer); Smith, *Foeticide: Paper Read Before the Southern Michigan Medical Association*, 10 Detroit Rev Med & Pharmacy 211, 211 (1875) (same). One of the doctors who invoked Storer likewise claimed that ending a pregnancy is “an interruption” that is “a shock to the entire economy of the female.” Stewart, *Criminal Abortion: Read Before the Wayne County Medical Society at its December Meeting*, 2 Detroit Rev Med & Pharmacy 1, 4-5 (1867). And echoing Storer’s idea that a woman’s role was that of a mother, the doctor continued that “in its physiological relations [abortion] is equally destructive, inasmuch as by it the beautiful harmony of nature is broken.” *Id.* at 11. Another paper read to local medical societies justified Michigan’s abortion restrictions on the ground that there was “a widespread determination on the part of many who are married to avoid the labor of caring for and rearing children;” the paper encouraged doctors to ignore the pleas of “some poor woman . . . whose health is overtaxed with the demands of a numerous family.” Smith, *Foeticide: Paper Read Before the Southern Michigan Medical Association*, 10 Detroit Rev Med & Pharmacy 211, 211, 213 (1875). The people in this “state medical society played a leading role” in strengthening Michigan’s anti-abortion policies throughout this time period. Mohr, *supra*, at 221; see also Hitchcock, Report on Criminal Abortion (1876). After being initially enacted in 1846, Michigan’s criminal abortion ban was recodified and strengthened in 1871. CL 1871, §§ 7543, 7544. The American Medical Association’s 1871 Report on Criminal Abortion denounced women who ended a pregnancy in these terms: “[s]he becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract.” O’Donnell & Atlee, *Report on Criminal Abortion*, 22 Transactions Am Med Ass’n 239, 241 (1871).

During the same time period, doctors also justified abortion restrictions on the ground that women were not competent to make decisions about sex and childbearing. Anti-abortion advocates viewed childbearing as the “end for which [women] are psychologically constituted and for which they are destined by nature,” and they claimed that the termination of a pregnancy is “disastrous to a woman’s mental, moral, and physical well-being.” Storer, *supra*, at 75-76. One local medical journal argued that interrupting a pregnancy produced feminine hysteria in part because women were prone to hysteria and lacked the decisional capacity to make decisions about motherhood. See Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 Detroit Rev Med & Pharmacy 145, 146 (1867) (noting that “violence against the physiological laws of gestation” would cause a “severe and grievous penalty” because of “the intimate relation between the nervous and uterine systems manifested in the various and frequent nervous disorders arising from uterine derangements”). Another paper presented locally argued that a woman’s decision to avoid motherhood conferred “a moral as well as a physical taint” that “stamps its effects indelibly on the constitution of the female.” Mulheron, *Foeticide: A Paper Read Before the Wayne County Medical Society*, 10 Peninsular J Med 385, 390 (1874).⁶

These were the contemporaneous justifications for Michigan’s restrictions on abortion as Michigan enacted and strengthened its criminal abortion ban. Unsurprisingly, this way of thinking about women, sex, and childbearing was reflected in the Michigan legislature’s decision to retain

⁶ Physicians claimed that abortion would “insidiously undermine[]” women’s reproductive organs, and “permanently incapacitate[] [women] for conception.” Storer, *supra*, at 50. A woman who has an abortion “destroys her health ... [and] sooner or later comes upon the hands of the physician suffering with uterine disease.” Phelps, *Criminal Abortion: Read Before the Calhoun County Medical Society*, 1 Detroit Lancet 725, 728 (1878). According to anti-abortion advocates, these and other health issues were a “direct result of this interference with nature’s laws.” Griswold et al., *Additional Report from the Select Committee to Whom Was Referred S.B. No. 285*, 1867 Ohio Senate J Appendix 233, 234.

and strengthen the criminal abortion ban through 1931. An 1897 House Journal that catalogued state legislation described Michigan's criminal abortion ban as "good in its moral effect." 1897 House Journal 584. A House Journal from around the same time period referred to women's delicacy. 1899 House Journal 441. And a 1921 House Journal recorded statements that women would be desirably "softened" through an association with children. 1921 House Journal 32. The current version of the criminal abortion ban was also recodified the same year that the Michigan legislature enacted a statute prohibiting rape except in cases of marriage. See *People v Kubasiak*, 98 Mich App 529; 296 NW2d 298 (1980), superseded by amendments to MCL 750.5201; GCL 750.5201 (1931).

Michigan's criminal abortion ban discriminates on the basis of sex in violation of the Michigan Constitution's Equal Protection Clause because it singles out women, without adequate justification, and coerces them into performing the traditional sex role of motherhood. Michigan's criminal abortion ban classifies individuals on the basis of sex: it imposes felony penalties on people who administer "to any pregnant *woman*" an abortion-inducing drug or who employ other means to induce an abortion "of any such *woman*." MCL 750.14 (emphases added). The abortion ban imposes unique disadvantages on health care providers when they provide reproductive health care to women. It accordingly triggers intermediate scrutiny under Michigan's Equal Protection Clause. See, e.g., *Dept of Civil Rights ex rel Forton*, 425 Mich at 190-91.

The criminal abortion ban compels resistant women to continue their pregnancies and to become mothers against their will, enforcing women's role as mothers. Compelling a woman to give birth still presses her motherhood, with all of the attendant physical and physiological burdens of pregnancy and childbirth, even if the woman ultimately chooses to place her child for adoption.

See infra Part V.B.2 (detailing threats to bodily integrity from forced pregnancy and childbirth). In most cases, she does not choose to place her child for adoption. See Sisson et al, *Adoption Decision Making among Women Seeking Abortion*, 27 Women's Health Issues 136 (2017) (in study of women denied abortions, finding that over 90% of those who gave birth chose parenting rather than adoption).

B. The due process claim under the Michigan Constitution does not depend on the United States Supreme Court's resolution of the federal due process claim in *Dobbs*.

1. Michigan's Due Process Clause is not coextensive with the federal Due Process Clause.

The due process claims at issue in this case will similarly not be governed by the United States Supreme Court's decision in *Dobbs* because the Michigan Constitution's Due Process Clause is distinct from the federal Constitution's Due Process Clause. While the two clauses are worded similarly, they are not coextensive. Even with respect to "similarly worded provisions of the Michigan and United States Constitutions," this Court has "emphasize[d] strongly that [it is] never bound to such an interpretation of the former." *AFT Mich v Mich*, 497 Mich 197, 214; 866 NW2d 782; 320 Ed Law Rep 398 (2015); see *People v. Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004) ("In interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical."); *Sitz v Dept of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993) ("We are obligated to interpret our own organic instrument of government."). Rather, a "searching examination to discover what law 'the people have made'" is required. *Sitz*, 443 Mich at 759 (quoting *People v Harding*, 53 Mich 481, 485; 19 NW 155 (1884)).

This Court has already independently interpreted Michigan's Due Process Clause from its federal counterpart. In *Mays v Governor of Michigan*, 506 Mich 157; 954 NW2d 1359 (2020), this

Court recognized a damages remedy for plaintiffs' claimed violation of their right to bodily integrity under Michigan's Due Process Clause even though the United States Supreme Court has not recognized a damages remedy for the violation of any right to bodily integrity that may exist under the federal Due Process Clause. *Id.* at 199-200. The federal and Michigan Due Process Clauses are not synonymous. They have distinct enactment histories that lead to divergent meanings, the clauses are interpreted based on different lines of common law, and the structural considerations that inform the contours of the federal Due Process Clause have less force with respect to Michigan's Due Process Clause.⁷

The enactment history of Michigan's Due Process Clause indicates that it has a different scope than the federal Constitution's Due Process Clause. See *People v Nash*, 418 Mich 196, 209; 341 NW2d 439 (1983) ("Regard must also be given to the circumstances leading to the adoption of the provision and the purpose sought to be accomplished."). When Michigan's Constitution was ratified in 1963, there was already a well-established body of law recognizing the right to bodily integrity. See, e.g., *Rochin v California*, 342 US 165, 173; 72 S Ct 205; 96 L Ed 183 (1952); *Screws v United States*, 325 US 91; 65 S Ct 1031; 89 L Ed 1495 (1945) (holding that an individual's right to bodily integrity was violated when he was beaten to death in state custody, but remanding to determine whether the beating was willfully done to deprive the individual of constitutional rights). The convention history underscores that people understood those rights to be part of Michigan's Constitution. For example, the Committee on the Declaration of Rights, Suffrage and Election's

⁷ There are also textual differences between the clauses. The federal Due Process Clause provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law," US Const, Am XIV, § 1, whereas the Michigan Due Process Clause reads, "No person shall . . . be deprived of life, liberty or property, without due process of law," Const 1963, art 1, § 17. The Fourteenth Amendment focuses on state deprivations, whereas the Michigan constitution explicitly focuses more on the rights of persons, suggesting a broader scope for the rights of persons under the latter than the former.

comment to the proposal for the Due Process Clause states that “it may be observed that a considerable body of federal constitutional law with respect to federal investigations ... has evolved in the last ten years.” 1 Official Record, Constitutional Convention 1962, p 468. The Committee understood that the Due Process Clause “would make Michigan practice consistent with this development.” *Id.*; see *Nash*, 418 Mich at 209 (“The constitutional convention debates and the address to the people, though not controlling, are relevant.”).

The distinct enactment histories suggest that a right to bodily integrity was well established and implicit in due process by 1963, when Michigan’s Due Process Clause was ratified, even if it was not so well established and implicit in 1868, when the federal Due Process Clause was ratified. Many judicial decisions post-dating the enactment of the Fourteenth Amendment had recognized a right to bodily integrity by the time Michigan had ratified the state Constitution in 1963. See, e.g., *Pratt v. Davis*, 118 Ill App 161; 1905 WL 1717 (1905) (“[U]nder a free government at least, the free citizen’s first and greatest right, which underlies all others—the right to the inviolability of his person ... bodily integrity.”), *aff’d* 224 Ill 300; 79 NE 562 (1906); *Schloendorff v Soc’y of New York Hospital*, 211 NY 125, 129; 105 NE 92 (1914) (Cardozo, J.) (“Every human being of adult years and sound mind has a right to determine what shall be done with his own body[.]”), abrogated on other grounds by *Bing v Thunig*, 2 NY2d 656; 143 NE2d 3; 163 NYS2d 3 (1957). That includes myriad cases in Michigan. See, e.g., *Lebel v Swincicki*, 354 Mich 427, 440; 93 NW2d 281 (1958); *People v Corder*, 244 Mich 274, 287-88; 221 NW 309 (1928). Since then, other state courts have recognized a right to bodily integrity under their state’s common law or constitution. See, e.g., *In re L.*, 42 Conn Supp 562; 632 A2d 59 (1993); *In re E.G.*, 133 Ill 2d 98; 549 NE2d 322 (1989); *In re Baby Boy Doe*, 260 Ill App 3d 392; 632 NE2d 326 (1994) (recognizing right to bodily integrity under Illinois constitution that allowed a woman to refuse cesarean section); *In re A.C.*,

573 A2d 1235; 58 USLW 2644 (DC 1990) (recognizing that a forced cesarean section, which resulted in the death of the pregnant woman and the fetus, violated a woman's right to bodily integrity under DC common law).

“The right [to bodily integrity] is implicit in [Michigan's] Due Process Clause and would have been obvious to those who ratified our Constitution.” *Mays*, 506 Mich at 212-13 (BERNSTEIN, J., concurring). “[C]ommon notions of liberty in this state are so inextricably entwined with physical freedom and freedom from state incursions into the body” that the right to bodily integrity is protected by Michigan's Due Process Clause. *Id.* at 212-13. The “well-established right [to bodily integrity] is among the most fundamental.” *Id.* at 214 n 1 (MCCORMACK, C.J., concurring). When the United States Supreme Court, in 1891, declared that “[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law,” the Court relied on the writings of Michigan Judge Thomas Cooley. *Union Pac Ry Co v Botsford*, 141 US 250, 251; 11 S Ct 1000; 35 L Ed 734 (1891) (quoting Cooley, *Cooley on Torts* 29 (1st ed 1888)). And when the United States Supreme Court recognized a right to be free from intrusive police searches in *Rochin*, 342 US 165, Justice Douglas mentioned Michigan as one of “the only states” that recognized a right to bodily integrity. *Id.* at 177-78 & n 2 (Douglas, J., concurring) (citing *People v Corder*, 244 Mich 274; 221 NW 309 (1928)).

How the two Due Process Clauses are interpreted underscores that they have different meanings. In addition to textual differences between the state and federal Constitutions, this Court has considered state constitutional and common-law history when determining whether state and federal constitutional provisions mean different things. See, e.g., *People v Collins*, 438 Mich 8, 32; 475 NW2d 684 (1991); *Sitz v Dept of State Police*, 193 Mich App 690, 696-99; 495 NW2d

135 (1992) (construing Const 1963, art 1, § 11 differently than the Fourth Amendment to the federal Constitution). For purposes of the federal Constitution, the *Dobbs* draft opinion would determine the reach of the federal Constitution’s Due Process Clause by asking whether a right is “deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered liberty.” Draft *Dobbs* Opinion, p 5. Yet the drafters of the Michigan Constitution understood that “liberty under law is an ever-growing and ever-changing conception of a living society developing in a system of ordered liberty.” 1 Official Record, Constitutional Convention 1962, p 470.⁸ Accordingly, when ascertaining the scope of Michigan’s Due Process Clause, this Court has asked only whether the right is implicit in the concept of ordered liberty. See, e.g., *AFT Mich*, 497 Mich at 245 (defining “fundamental rights” protected under the Michigan Constitution’s Due Process Clause as those “implicit in the concept of ordered liberty”). The common law and other state law that existed in 1963, when Michigan’s Due Process Clause was ratified, had developed an additional 75 years beyond when the federal Constitution’s Due Process Clause was ratified. That period included the emphatic recognition of the right to bodily integrity.

The *Dobbs* draft opinion also adopts a different approach to defining constitutional rights than this Court uses under the Michigan Due Process Clause. The draft *Dobbs* opinion narrowly defines the asserted right under the federal Constitution as the “right to an abortion,” Draft *Dobbs* Opinion, p 14, and criticizes “appeals to a broader right to autonomy” as being at too “high level of generality,” *id.* at p 32. The draft opinion specifically ties this way of framing rights under the federal Due Process Clause to the aspect of the United States Supreme Court’s jurisprudence which focuses on whether a right is “deeply rooted in history.” *Id.* As described above, however, that is

⁸ The provision in the Michigan Constitution that contains the Due Process Clause also contains a separate provision guaranteeing “fair and just treatment in the course of legislative and executive investigations and hearings.” Const 1963, art I, § 17.

not and should not be an element of inquiries under Michigan’s Due Process Clause. The specificity with which the United States Supreme Court appears to define the asserted right in *Dobbs* is not the specificity with which this Court assesses rights under the Michigan Due Process Clause. For example, in the case recognizing the right to bodily integrity under the Michigan Constitution, Chief Justice MCCORMACK specifically rejected the idea that the right asserted in that case should be framed as a more narrow and specific right “not to be exposed to contaminated water” rather than a more general “right to bodily integrity.” *Mays*, 506 Mich at 214 n 1 (MCCORMACK, C.J., concurring). That is for good reason. The Convention history for the Michigan Constitution indicates that the Committee that drafted the Due Process Clause understood that “[t]he meaning of reasonableness and of due process are matters for judicial construction.” 2 Official Record, Constitutional Convention 1961, p 2272. That Committee was also informed by the Chairman of the Commission on Civil Rights that the Michigan Constitution would protect “inherent rights.” Journal of the Committee on Declaration of Rights, Suffrage and Elections, Constitutional Convention 1961, p 49.

More generally, lock-stepping the Michigan Constitution to its federal counterpart ignores the different structural features of the federal and Michigan Constitutions that call for different interpretations of them. One reason why federal judges may be inclined to narrowly construe the federal Due Process Clause is because federal judges are unelected, and their interpretation of the Due Process Clause will decide an issue for the entire country. See, e.g., *Collins v City of Harker Heights*, 503 US 115, 128-29; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (explaining that the question in the case “involve[s] a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country”). The same is not true when this Court construes the Michigan Constitution; the

Justices of this Court are elected, and their interpretation of the Michigan Due Process Clause will not decide an issue for the entire country. Departing from the federal Constitution would also enhance federalism by contributing to a diversity of protections and policies across different states, rather than ensuring uniformity among them. See *New State Ice Co v Liebmann*, 285 US 262, 311; 52 S Ct 371; 76 L Ed 747 (1932) (Brandeis, J., dissenting) (approvingly explaining how federalism results in regulatory diversity).

Now is a particularly important time to clarify that the federal and state Constitutions are not coextensive with one another. We appear to be entering a period of remarkable instability with respect to the federal Constitution. See, e.g., *Davis v Ermold*, 141 S Ct 3, 3-4; 208 L Ed 2d 137 (2020) (THOMAS, J., concurring in denial of certiorari) (raising question whether *Obergefell v Hodges*, 576 US 644; 135 S Ct 2586; 192 L Ed 2d 609 (2015), which recognized right to marriage equality, should be overruled); *Box v Planned Parenthood of Indiana & Kentucky, Inc*, 139 S Ct 1780, 1784; 204 L Ed 78 (2019) (THOMAS, J., concurring) (arguing that advocates of contraception supported eugenics, and urging the Court to revisit *Roe* and the federal constitutional right to an abortion on those grounds). Rejecting a lock-step approach to the Michigan Constitution would avoid both instability and the losses of important rights to Michiganders.

2. The criminal abortion ban violates the right to bodily integrity under the Michigan Constitution.

The criminal abortion ban violates the right to bodily integrity under the Michigan Constitution because it forces women, against their will, to undergo the physically taxing and invasive feat of continued pregnancy and childbirth.

The U.S. mortality rate associated with live births from 1998 to 2005 was 8.8 deaths per 100,000 live births, and maternal mortality rates have increased since then. Raymond & Grimes,

The Comparative Safety of Legal Induced Abortion and Childbirth in the United States, 119 *Obstetrics & Gynecology* 215, 216 (2012); MacDorman et al, *Recent Increases in the U.S. Maternal Mortality Rate: Disentangling Trends from Measurement Issues*, 128 *Obstetrics & Gynecology* 447 (2016) (finding a 26.6% increase in maternal mortality rates between 2000 and 2014). In contrast, the mortality rate associated with abortions performed from 1998 to 2005 was 0.6 deaths per 100,000 procedures. Raymond & Grimes, *supra*, at 216. A woman's risk of death associated with childbirth is accordingly approximately 14 times higher than any risk of death from an abortion. And Black women are more than three times as likely to die from pregnancy-related causes as white women. Pregnancy Mortality Surveillance System, Ctrs for Disease Control & Prevention (Nov 25, 2020), <https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm> (accessed June 5, 2022) (for every 100,000 live births from 2014- 2017, 13.4 non-Hispanic white women died of pregnancy-related causes compared to 41.7 non-Hispanic black women).

In addition to maternal mortality, continued pregnancy and childbirth also entail other substantial health risks for women. Even uncomplicated pregnancies cause significant stress on the body and involve physiological and anatomical changes. See American College of Obstetricians & Gynecologists, *Your Pregnancy and Childbirth* (7th ed 2021); Irin Carmon, *I, Too, Have a Human Form*, *New York Magazine* (May 19, 2022), <https://nymag.com/intelligencer/2022/05/roe-v-wade-draft-opinion-pregnant-body-erased.html> (accessed May 23, 2022). Continuing a pregnancy to term can exacerbate underlying health conditions or cause new conditions. For example, approximately 6 to 7% of pregnancies are complicated by gestational diabetes mellitus, which may cause both the mother and child to develop diabetes later in life. American College of Obstetricians & Gynecologists (ACOG)

Practice Bulletin No. 190, *Gestational Diabetes Mellitus* (Feb 2018). Another complication is preeclampsia, a disorder associated with new-onset hypertension that can result in blood pressure swings, liver issues, and seizures, among other conditions, or eclampsia, a potentially fatal seizure condition. ACOG Practice Bulletin No. 222, *Gestational Hypertension and Preeclampsia* (Dec 2018); NIH, What are the risks of preeclampsia & eclampsia to the mother?, <https://www.nichd.nih.gov/health/topics/preeclampsia/conditioninfo/risk-mother> (accessed May 23, 2022). Labor and delivery are likewise not without significant risk, including that of hemorrhage, placenta accreta spectrum, hysterectomy, cervical laceration, pelvic floor damage, and debilitating postpartum pain, among others. ACOG Practice Bulletin No. 183, *Postpartum Hemorrhage* (Oct 2017); ACOG Obstetric Care Consensus No 7, *Placenta Accreta Spectrum* (July 2012, reaff'd 2021); ACOG Practice Bulletin No. 198, *Prevention and Management of Obstetric Lacerations at Vaginal Delivery* (Sept. 2018); Fonti et al., *Post Partum Pelvic Floor Changes*, 3(4) J Prenatal Med 57–59 (2009). And approximately one in three women who give birth in the United States do so by cesarean delivery, a procedure that carries risk of complications. CDC, National Vital Statistics Reports Vol. 70, No. 2, Births: Final Data for 2019 (2021); ACOG, Obstetric Care Consensus No. 1, *Safe Prevention of the Primary Cesarean Delivery* (Mar 2014, reaff'd 2016).

Maternal morbidity is also a major problem following pregnancy and childbirth. “Severe maternal morbidity” refers to cases in which pregnancy outcomes significantly affect a person’s health, such as when a pregnant or recently postpartum woman faces a life-threatening diagnosis or must undergo a life-saving medical procedure, including a hysterectomy, blood transfusion, or mechanical ventilation, in order to avoid death. Howell, *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61 Clinical Obstetrics & Gynecology 387, 387 (2018); Bruce et al., *Maternal Morbidity Rates in a Managed Care Population*, 111 Obstetrics & Gynecology 1089,

1092 (2008); CDC, Pregnancy Complications, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html> (accessed May 23, 2022). For every maternal death in the country, there are close to 100 cases of severe maternal morbidity. Howell, *supra*, at 387. In 2014, the most recent year for which national data is available, severe maternal morbidity affected more than 50,000 women in the United States. See CDC, Severe Maternal Morbidity in the United States, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/severematernalmorbidity.html#anch or _References (accessed May 23, 2022). As with maternal mortality, the state of maternal morbidity is worsening. From 1993 to 2014, the overall rate of severe maternal morbidity in the United States increased by 200%. See *id.*

The criminal abortion ban violates the right to bodily integrity protected under Michigan's Due Process Clause. It forces women to undergo pregnancy and childbirth, one of the most physically taxing and risky decisions, against their will. After childbirth and pregnancy, a woman's body will never be the same. She should have a say in whether that happens to her.

CONCLUSION

Michigan women do not have the luxury of being able to wait weeks, months, or years to know whether abortion care may continue in this state after the United States Supreme Court overrules or substantially narrows *Roe*. This Court should direct certification of the questions posed in this case now.

Respectfully submitted,
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