STATE OF MICHIGAN
IN THE SUPREME COURT

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

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, *et al.*,

Defendants.

Supreme Court Case No: 164256

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

Oakland Circuit Court No. 22-193498-CZ

Hon. Jacob James Cunningham

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BRIEF OF THE MICHIGAN HOUSE OF REPRESENTATIVES AND MICHIGAN SENATE AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF

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INTEREST OF *AMICI CURIAE*[1]

Amici are the Michigan House of Representatives and the Michigan Senate, which together comprise the sole lawmaking body for the State of Michigan (the "Legislature"). Const 1963, art 4, § 1. Among other things, the Michigan Constitution charges the Legislature with "pass[ing] suitable laws for the protection and promotion of the public health." Const 1963, art 4, § 51. This proceeding raises issues of vital importance to that exclusive power to legislate. And no party is more interested in these issues than Michigan's first branch of government.

The Michigan Legislature, like other state legislatures, is currently experiencing divided government, meaning that the Governor's mansion is in the hands of one political party, while the Legislature is controlled by another party. As a result, *Amici* are particularly concerned about safeguarding the separation of powers.

[1] Pursuant to MCR 7.312(H)(5), *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.

CONSTITUTIONAL PROVISION AND COURT RULE INVOLVED

Article 5, Section 8 of the 1963 Michigan Constitution provides:

> 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, duty or right by any officer, department or agency of the state or any of its political subdivisions. This authority shall not be construed to authorize court proceedings against the legislature.

Michigan Court Rule 7.308(A)(1) (certified questions from Michigan courts) provides:

> (a) Whenever a trial court or tribunal from which an appeal may be taken to the Court of Appeals or to the Supreme Court 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 according to executive message of the governor addressed to the Supreme Court, the Court may authorize the court or tribunal to certify the question to the Court with a statement of the facts sufficient to make clear the application of the question. Further proceedings relative to the case are stayed to the extent ordered by the court or tribunal, pending receipt of a decision of the Supreme Court.
>
> (b) If any question is not properly stated or if sufficient facts are not given, the Court may require a further and better statement of the question or of the facts.
>
> (c) The Court shall render its decision on a certified question in the ordinary form of an opinion, to be published with other opinions of the Court.
>
> (d) After the decision of the Court has been sent, the lower court or tribunal will proceed with or dispose of the case in accordance with the Court's answer.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, No. 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination.

   Answer: Due to the myriad jurisdictional deficiencies in Planned Parenthood's case, all of which are present in this case, the Court of Claims improperly reached the merits. Rather than resolve anything in this case, the Court of Claims' preliminary injunction serves only to highlight why this Court should decline the Governor's request.

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

   Answer: There is an actual controversy requirement in this case under the general rules of jurisdiction and the specific rule governing declaratory judgments, MCR 2.605. The controversy requirement is unmet here because the Governor's claims are not ripe and the Governor lacks standing to bring her claims.

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.

   Answer: MCR 7.308(A) lays out three relevant requirements. The underlying case must (1) be an action or proceeding (2) involving a controlling question of public law (3) that is of such public moment as to require an early determination. The jurisdictional issues in this case prevent the Governor from meeting the first two requirements. Similarly, because the case is built on hypothetical events rather than present facts, the merits of this case are not of "such public moment" as to require early determination.

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

   Answer: MCR 7.308(A) limits the Governor's role to sending an Executive Message about whether she believes a "question is of such public moment as to require an early determination." The rule does not allow the Governor to initiate a lawsuit challenging the constitutionality of a statute. Indeed, the Constitution prohibits such conduct.

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.

   Answer: While this Court should not answer the Governor's questions, if it chooses to do so, it should wait until *Dobbs* is decided so the Court can assess the United States Supreme Court's reasoning and determine whether *Dobbs* is binding on Michigan courts.

INTRODUCTION

Governor Gretchen Whitmer has asked this Court to short-circuit the judicial process and permanently remove the issue of abortion from public discourse. There are several reasons this Court should decline the Governor's invitation.

As an initial matter, both the case and the certification request are premature. Governor Whitmer filed suit before the U.S. Supreme Court has ruled on, much less overturned, *Roe v Wade* and before any enforcement, or even threatened enforcement, of the law at issue. Equally important, the Governor has asked this Court to resolve complicated and weighty constitutional questions before the parties and the trial court have had an opportunity to address threshold justiciability issues. Constitutional limits on this Court's judicial power, as well as the text of the declaratory judgment and certification rules, prevent this Court from answering hypothetical questions that would not control the disposition of the case below.

The Governor's request also presents a troubling expansion of her own constitutional authority. The Governor relies on Article 5 Section 8 of the State Constitution, which allows her to bring legal actions against executive officials to "restrain" constitutional rights violations. But not one of the named Defendants is violating any constitutional right. There are no pending or threatened prosecutions under MCL 750.14, and thus, there is nothing to restrain in this case. The Governor is instead using this lawsuit to nullify the law—an action Section 8 explicitly prohibits. Const 1963, art 5, § 8 ("This authority shall not be construed to authorize court proceedings against the legislature."). The Court should decline to answer the questions posed in this hastily filed case without a confirmed justiciable controversy by a chief executive with no constitutional authority to do so.

BACKGROUND

On April 7, 2022, Governor Whitmer took the unprecedented step of filing a lawsuit against thirteen Michigan County Prosecuting Attorneys in the Oakland County Circuit Court, Case No. 22-193498-CZ. The same day, Governor Whitmer submitted an Executive Message to this Court under MCR 7.308. Governor Whitmer requested certification of three questions for this Court's review: (1) whether the Michigan Constitution protects the right to abortion; (2) whether Michigan's abortion statute violates the Due Process Clause of the Michigan Constitution; and (3) whether Michigan's abortion statute violates the Equal Protection Clause of the Michigan Constitution.

Still on the same day, seven of the thirteen Defendants released a statement describing the challenged law as "archaic" and "unconstitutionally and dangerously vague."[2] They "reassur[ed their] communities that [they] support a woman's right to choose and every person's right to reproductive freedom."[3] They promised not to prosecute anyone under the law and made clear that they "support the Governor" in her lawsuit.[4]

Planned Parenthood of Michigan also filed a lawsuit on April 7, 2022, against Attorney General Dana Nessel in the Court of Claims, No. 22-000044-MM, making the same arguments about MCL 750.14's constitutionality. Planned Parenthood claimed the Attorney General was the proper defendant because she is the state's top law enforcement official responsible for "defending

[2] News Release, Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose, Joint Statement, https://tinyurl.com/ya7r5am9 (April 7, 2022) (accessed May 19, 2022) ["April 7 News Release"].

[3] *Id*.

[4] *Id*.

and enforcing" the state's laws and "supervising all county prosecutors."[5]

The Attorney General responded the same way the seven Prosecuting Attorneys did, declaring in no uncertain terms that neither she nor anyone from her office would defend the statute:

> In 2018, when I campaigned to be Michigan Attorney General, I did so knowing the fate of Roe v. Wade was at stake. Unenforced and antiquated pre-Roe abortion bans and laws, like the 1931 Michigan statute criminalizing abortion, could become de facto state law if Roe is overturned.
>
> Let me be very clear, I will not use the resources of my office to defend Michigan's 1931 statute criminalizing abortion. As elected prosecutors and law enforcement officials, we have the opportunity to lead and to offer peace of mind to women and health-care professionals who might otherwise be placed in the untenable position of choosing between the exercise of personal health-care choices and the threat of criminal prosecution.
>
> Abortion care is an essential component of women's health care. As this state's top law enforcement officer, I have never wavered in my stance on this issue, and I will not prosecute women or their doctors for a personal medical decision.[6]

A few weeks later, the day after someone reportedly leaked the United States Supreme Court's draft opinion in *Dobbs v Jackson Women's Health Organization*, No. 19-1932, the Attorney General doubled down. She "reiterated her refusal to prosecute physicians or women under Michigan's abortion ban."[7] Consequently, she stated that she "believes the lawsuit brought by Planned Parenthood of Michigan should be dismissed for a lack of jurisdiction because there is no case or controversy—or active prosecution—that could serve as a basis for the suit, nor will

[5] Complaint ¶ 11, *Planned Parenthood of Mich v Attorney General of the State of Mich*, No. 22-000044-MM (Mich Ct Cl, filed April 7, 2022).

[6] Press Release, Dana Nessel, Mich Attorney General, AG Nessel's Statement on Efforts to Preserve Abortion Rights in Michigan, https://tinyurl.com/2jftwjbh (April 7, 2022) (accessed May 19, 2022) ["Nessel Press Release"].

[7] LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence*, THE DETROIT NEWS, https://tinyurl.com/yc46nmvs (May 3, 2022) (accessed May 19, 2022).

there ever be while she's in office."[8] The Attorney General also admitted that there would be no controversy in this suit unless the prosecutors created one "down the road should *Roe* be overturned."[9]

Despite the Attorney General's position, which she articulated to the Court of Claims, the court held that it had jurisdiction to decide Planned Parenthood's case. Then, despite binding Court of Appeals precedent saying there is no right to abortion under the Michigan Constitution, the trial court created such a right. *Amici* recently filed a motion to intervene and for reconsideration in that case, explaining why the court erred on both the threshold question of jurisdiction and the application of the preliminary injunction factors. See Exhibit 1.

ARGUMENT

I. The Only Effect of the Court of Claims' Injunction on This Case is to Highlight the Impropriety of Judicial Intervention.

As explained in detail in the next section, this case suffers from the same jurisdictional deficiencies as Planned Parenthood's case. The Court of Claims' injunction does not make certification from the Oakland Circuit Court unnecessary; instead, it elucidates why certification is inappropriate.

II. There is an Unmet Controversy Requirement in This Case.

A. Jurisdictional Rules Apply to Certified Questions.

Every exercise of judicial power requires an actual, justiciable controversy. In Michigan, the "judicial power" is the power "to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." *Anway v Grand Rapids Ry Co*, 211 Mich 592, 616 (1920). This "bedrock of Michigan jurisprudence," *In re Estate of Moukalled*, 478 Mich

[8] *Id.*

[9] *Id.*

854, 854 (2007) (KELLY, J., concurring), ensures that every case, including one seeking declaratory relief, features a nonspeculative, live dispute between a proper plaintiff and an adverse defendant in a forum capable of providing a remedy. See *Michigan Chiropractic Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363, 372 (2006), overruled on other grounds by *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2012) ("*Lansing*"); MCR 2.605(A)(1) (requiring "a case of actual controversy" for declaratory relief). These indispensable elements of justiciability—ripeness, mootness, and standing—are jurisdictional; without them "the judiciary [is] constitutionally powerless to adjudicate . . . ." *Michigan Chiropractic Council*, 475 Mich at 372; *Associated Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 125 (2005) (holding that Rule 2.605's "actual controversy" requirement incorporates "the traditional restrictions on justiciability such as standing, ripeness, and mootness"), overruled on other grounds by *Lansing*.[10]

The Governor ignores these basic principles and instead relies on the purpose of a declaratory judgment—"to enable the parties to obtain adjudication of rights before an actual injury occurs." Gov Br 9 (citing *UAW v Central Michigan Univ Trustees*, 295 Mich App 486, 495 (2012)). But the very case the Governor cites for this point makes clear that declaratory judgments are only appropriate if the "actual controversy" requirement, which neither expands nor retracts the subject-matter jurisdiction of courts, is met. *UAW*, 295 Mich App at 495.

[10] This Court's decision in *Lansing* does not change these fundamental principles. While *Lansing* altered the test for standing, it did not remove the standing requirement. See *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371 (2012) ("We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing."). The principles of justiciability, including standing, still apply. Thus, it is still true that "the doctrines of justiciability" affect "judicial power, the absence of which renders the judiciary constitutionally powerless to adjudicate the claim." *Michigan Chiropractic Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363, 372 (2006), overruled on other grounds by *Lansing*.

Declaratory judgment cases involving certified questions are no exception. MCL 600.215(2) states that this Court "has jurisdiction and power over . . . any question of law brought before it in accordance with court rules, by certification by any trial judge of any cause pending or tried before him." And MCR 7.308(A)(1)(a) states that certification is only allowed from a lower court if that court "has pending before it an action or proceeding." The meaning of "cause" and "action" in these provisions is, respectively, "a case" and a "civil or criminal judicial proceeding." *Black's Law Dictionary* (11th ed). Both terms necessarily assume a *justiciable* case or proceeding, as there can be no case or judicial proceeding for this Court (or any court) to adjudicate unless the doctrines of justiciability are met. See *Michigan Chiropractic Council*, 475 Mich at 372; see also Cantone & Giffin, *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U Tol L Rev 1, 19 (2021) (explaining that the "broad consensus" is that courts are within their judicial power to answer certified questions so long as the underlying dispute is "an actual, justiciable controversy.").

On at least two occasions, this Court has refused to answer certified questions in declaratory judgment actions due to justiciability issues. See *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 12 (1985); *Milliken v Green*, 390 Mich 389 (1973). In the first case, Blue Cross & Blue Shield of Michigan sued the Governor, seeking a declaration that a newly enacted law was constitutionally and statutorily infirm. *Blue Cross & Blue Shield*, 422 Mich at 12. This Court noted that the declaratory judgment rule and the certified question rule both required an actual controversy. *Id.* at 72 n 50.[11] And because certain questions were based on "an entirely

[11] The Court relied on the former version of the certified question rule, which had an explicit case-or-controversy requirement. The Governor argues that the certification process is exempt from jurisdictional rules because MCR 7.308(A) no longer uses the phrase "pending case or controversy" and instead now uses the phrase "action or proceeding." Gov Br 5. But in *Blue*

speculative and remote situation" and a "possible future confrontation," rather than an actual (present) controversy, this Court refused to answer those questions. *Id.* at 72, 93.

In *Green*, which the Governor relies on, Governor Milliken brought an action challenging the constitutionality of the Michigan public school financing system. Gov Br 14. The Governor recounts this Court's decision on Governor Milliken's certified questions then states that "without explanation," the Court vacated its opinion. *Id.* But the Court explicitly explained why it vacated its opinion and dismissed the action. The Court stated that the Governor's request for certification "was improvidently granted." *Green*, 390 Mich at 389. And two concurring Justices further explained that the Governor was an improper plaintiff: "We are presented with generalized arguments concerning the nature of educational opportunity in this State . . . we are not presented with a concrete claim by either individual students or by school districts." *Id.* at 392–393 (KAVANAGH & LEVIN, JJ., concurring). The Justices went on to say that the proper plaintiffs, students and school districts, could bring justiciable claims in a separate suit. *Id.* at 393. Rather than supporting the Governor's argument, *Green* (and *Blue Cross & Blue Shield*) reinforce the point that justiciability matters for certification.

Finally, if, as the Governor says, there is no actual controversy requirement for certified question cases, then any decision this Court renders in such a case is not the exercise of judicial

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Cross & Blue Shield, the Court found that the declaratory judgment rule's "actual controversy" requirement applied. 422 Mich at 72 n 50. In other words, justiciability mattered for a reason separate from the certified question rule. Further, there is no explanation for the change in MCR 7.308(A)'s language from "case or controversy" to "action or proceeding." And there is no indication that the previous inclusion of "case or controversy" meant anything other than traditional principles of justiciability, which always apply. As the Court of Appeals has explained, the declaratory-judgment rule's "actual controversy" language "does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness." *UAW v Central Michigan Univ Trustees*, 295 Mich App 486, 495 (2012). Thus, the inclusion or exclusion of "controversy" in the certification rule's text does not change the fact that jurisdictional rules apply.

power. See *Underwood v McDuffee*, 15 Mich 361, 368 (1867) (stating that "judicial power" is "the inherent authority not only to decide, but to make binding orders or judgments"). This Court's decision would instead be a purely advisory opinion, which is not binding on any court. See *In re Requests of Governor & Senate on Constitutionality of Act No 294 of Pub Acts of 1972*, 389 Mich 441, 462 n 1 (1973) (holding that advisory opinions are not precedential precisely because they occur outside the traditional adjudicative setting). A non-binding, advisory opinion on certified questions is incompatible with the plain language of Rule 7.308, which directs the trial court to "proceed with or dispose of the case in accordance with the Court's answer." MCR 7.308(A)(1)(d). It also defeats the purpose of requesting certification, which is to "determin[e]" a controlling question of law. MCR 7.308(A)(1)(a).

The Governor's position also ignores part B of MCR 7.308, which is titled "Advisory Opinions." The rule allows for "[a] request for an advisory opinion by either house of the legislature or the governor" regarding "the constitutionality of legislation after it has been enacted into law but before its effective date." See MCR 7.308(B) and Const 1963, art 3, § 8. Thus, even before a case could be filed, the rule allows this Court to opine on the constitutionality of legislation. This language is a clear exception to justiciability rules. But part A of MCR 7.308, dealing with certification, has no such exception.

In sum, the certification process that Governor Whitmer seeks to use does not allow her to bypass basic jurisdictional principles. And, as discussed below, there are several jurisdictional deficiencies in this case.

B. The Governor's Claims are Premature.

The "requirement of an 'actual controversy' prevents a court from deciding hypothetical issues." *Shavers v Kelley*, 402 Mich 554, 589 (1978). Without a "real, immediate, and substantial controversy," a court lacks subject matter jurisdiction over declaratory-judgment actions.

3 Longhofer, Michigan Court Rules Practice Text (7th ed), § 2605.3; see also *Fieger v Comm'r of Ins*, 174 Mich App 467, 470 (1988). The related principle of ripeness deprives the court of a different type of jurisdiction—constitutional jurisdiction. *Michigan Chiropractic Council*, 475 Mich at 378–379. Because the two requirements are nearly identical and result in the same outcome—no jurisdiction—they are analyzed together.

Claims must be ripe to ensure that the "harm asserted has matured sufficiently to warrant judicial intervention." *Warth v Seldin*, 422 US 490, 499 n 10 (1975). "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Michigan Chiropractic Council*, 475 Mich at 371 n 14 (quotation marks and citations omitted).

When it comes to pre-enforcement harm, the plaintiff must still show "a real and immediate threat to protected constitutional rights." *Dep't of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 410 (1990) (CAVANAGH, J., concurring). The threat of injury cannot be mere speculation. *Id.*; *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 585–587 (2020) ("Though 'a court is not precluded from reaching issues before actual injuries or losses have occurred,' there still must be 'a present legal controversy, not one that is merely hypothetical or anticipated in the future.'"). Thus, in *Emmanuel Baptist Preschool*, this Court refused to decide whether a statute regarding financial disclosures violated the defendants' First Amendment rights because "the state ha[d] not exercised its statutory authority to compel financial disclosure, making these issues unripe for review." 434 Mich at 389.

Neither has the State done so here. There is no real or immediate threat to Governor Whitmer or the healthcare providers and women she claims face uncertainty about abortion availability. Governor Whitmer argues otherwise by relying on counterfactuals and a series of

hypothetical events that may never occur. She first claims, despite no supporting precedent and a Court of Appeals case holding otherwise, that the "Michigan Constitution guarantees the right to abortion and to equal protection of the laws." Whitmer Compl ¶ 1; cf. *Mahaffey v Attorney General*, 222 Mich App 325, 336 (1997) ("[T]here is no right to abortion under the Michigan Constitution."). She then argues that MCL 750.14 violates the Due Process and Equal Protection Clauses of the Michigan Constitution. Next, she claims that in *Dobbs*, the Supreme Court of the United States will overrule, or severely limit, *Roe*. Gov Br 17. Finally, she asserts that once *Dobbs* is decided, "healthcare providers *may* feel constrained to restrict access to abortion services." Executive Message at 2 (emphasis added). And women may feel uncertain about how to "order their lives." *Id.* at 3. But not one of these propositions is currently a legal or factual reality.

In addition, the only information regarding enforcement strongly suggests that prosecutors will *not* enforce the law under any circumstance. Over half of the prosecutors who are named as Defendants in this lawsuit have said just that. On the same day Governor Whitmer filed this lawsuit, seven of the thirteen Defendants released a statement declaring that they "cannot and will not" enforce the law; they will instead "dedicate [their] limited resources towards the prosecution of serious crimes and the pursuit of justice for all."[12] The two prosecutors who have opposed Governor Whitmer's claims on jurisdictional grounds have also said they "have not prosecuted anyone under MCL 750.14, nor are they intending to prosecute anyone." Defs' Br 18.

The Attorney General has said the same: "As this state's top law enforcement officer, I have never wavered in my stance on this issue, and I will not prosecute women or their doctors for a personal medical decision."[13] A few weeks later, she "reiterated her refusal to prosecute

[12] April 7 News Release, *supra* note 2.

[13] Nessel Press Release, *supra* note 6.

physicians or women under Michigan's abortion ban."[14] The Attorney General also admitted that there would be no case or controversy in this lawsuit unless the prosecutors created one "down the road should *Roe* be overturned."[15] And before the Court of Claims in Planned Parenthood's case, the Attorney General made it very clear that she will not defend or enforce the statute and told the court that as a result, it should dismiss the case for lack of jurisdiction. Defs' Resp to PI Motion at 2, *Planned Parenthood v Attorney General*, No. 22-000044-MM (Mich Ct Cl, filed May 5, 2022).

Governor Whitmer argues that criminal laws deserve different treatment, however, stating that this Court "has likewise recognized that there need not be 'evidence of a threat of imminent prosecution' for a challenge to a criminal statute to be justiciable." Gov Br 10. She cites *Associated Builders*, 472 Mich at 127, and *Lansing*, 487 Mich at 349, in support. But the part of *Associated Builders* the Governor quotes dealt with the "concrete harm" requirement of standing, which *Lansing* overruled. Further, in *Associated Builders*, this Court held that the claims were justiciable because of the demonstrated "risks of enforcement of the statute, together with the asserted character of the potential for violations of the" statute. 472 Mich at 128. As explained above, there is no such risk here, and thus, even under the Governor's preferred standard, her claims are unripe.

III. Governor Whitmer Does not Meet the Requirements of MCR 7.308(A).

This Court may authorize a certified question only if it meets three criteria: (1) there must be "an action or proceeding" that (2) involves a "controlling question of public law," (3) which is

[14] LeBlanc, *supra* note 7.

[15] *Id.*

"of such public moment as to require an early determination according to Executive Message of the governor." MCR 7.308(A)(1)(a). The Governor's case does not meet these requirements.

A. Because of the Numerous Jurisdictional Issues, There is no Legitimate "Action or Proceeding" and the Governor's Questions are not Controlling.

As an initial matter, this case is not justiciable because of the lack of a present controversy, which deprives any court of subject-matter jurisdiction over the Governor's claims. *Shavers*, 402 Mich at 589. This means the Governor has not brought a legitimate "action" or "proceeding."

Similarly, because of the jurisdictional issues, the Governor's merits questions are not "controlling." There are several unresolved issues of justiciability that the trial court has not yet had the opportunity to address. This Court has declined to grant prior certification requests for precisely this reason. For example, in *Wood v State Administrative Board*, this Court declined to address a certified question dealing with "the right of plaintiffs to maintain the suit." 255 Mich 220, 223 (1931). As this Court explained, threshold "[q]uestions of this kind are not of the sort contemplated by the rule for certification, as they are not certainly controlling of the suit" and should be reviewed in the normal course of litigation. *Id.*; see also *Blue Cross & Blue Shield*, 422 Mich at 10 (explaining that the Court would not answer several nonjusticiable certified questions).

Lack of justiciability, of course, is not the only reason why a proposed question is not controlling. See *Village of Montrose v Steele*, 255 Mich 628, 631 (1931) (dismissing certified questions because even if answered, questions remained concerning estoppel and waiver). What matters is that "the answers to the questions, whatever they may be, will *finally* determine the suit." *Id.* (emphasis added). If after answering certified questions a case would remain "unsettled and open for further trial and adjudication in the circuit court," this Court refuses to certify. *Id.*

These principles apply here. Suppose this Court certified and resolved the merits questions exactly how the Governor has asked, declaring abortion a constitutional right in Michigan. That

declaration of law still would not affect *this case* because the lower court would have to dismiss the case for myriad jurisdictional reasons. Because answering the Governor's proposed merits questions will not resolve any of the threshold issues here, those merits questions are not controlling. The Governor therefore cannot meet the first two requirements of a certification-worthy question under MCR 7.308(A).

B. There is no Question of "Such Public Moment" That Requires "An Early Determination."

The final part of MCR 7.308(A) requires that the certified question "is of such public moment as to require an early determination according to Executive Message of the governor addressed to the Supreme Court." The Governor argues that this is not "a strictly temporal limitation." Gov Br 16. Then after recounting the few rare instances where any Governor has used an Executive Message to request certification, she states: "There is no particular through-line apparent in these cases, other than that the questions answered were ones of first impression and that the governor had seen fit to request their certification from this Court." Gov Br 16. The Governor's interpretation of the text and caselaw is inaccurate.

First, the Governor's Executive Message does not automatically satisfy the requirement that the certified question be "of such public moment as to require early determination." While it is true that the Governor must send an Executive Message to the Supreme Court, this Court must also agree that the case deserves special treatment. In *W. A. Foote Memorial Hospital, Inc v Kelley*, which the Governor cites in her brief, this Court first noted that the Governor sent an Executive Message about the constitutionality of a statute. 390 Mich 193, 207 (1973) (cited at Gov Br 15 n 7). The Court then pointed out that certified questions via Executive Message are only "permitted if the question is 'of such a public moment as to require early determination.'" *Id.* The Court denied the Governor's request because the presented question did not meet this requirement. *Id.*

Kelley shows that the Governor's message is necessary but not sufficient to meet the "public moment" requirement. Further, the Governor's position improperly removes this Court's role in determining which certified questions it should accept and answer.

Second, there is an exigency, or at least an urgency, requirement that the Governor cannot satisfy here. In arguing that there is no real temporal limit, the Governor ignores the phrases "public moment" and "require[s] an early determination." But those words must mean something. *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 71 (2017) ("This Court, as with all other courts, must give effect to every word, phrase, and clause in a statute, to avoid rendering any part of the statute nugatory or surplusage."). And given the specific use of the words "moment" and "early," there is no reasonable way to read the words outside of a temporal context. The Court need not define the scope of the temporal limitation, though, because relying on the text alone, the Governor's premature claims cannot be of "such public moment as to require an early determination." As shown above, her claims do not even require (or allow) present determination.

State and federal caselaw also contradict the Governor's argument. Although little caselaw interprets the meaning of "public moment," courts have used the phrase to refer to urgent circumstances with immediate and widespread impact. For example, a former Justice of this Court referred to a legal issue as of "public moment" when the issue needed to be addressed "expeditiously" because the pendency of the action was harming the operation of the State's busiest airport, and the outcome would have "a significant negative impact on Michigan's economy." See *In re Executive Message from Governor*, 467 Mich 1208 (2002) (MARKMAN, J., dissenting). In another case, one Justice noted that questions of "public moment" have an element of temporal urgency, which "require early determination" and "warrant bypass of the Court of Appeals." *Kelley*, 390 Mich at 232 (LEVIN, J., dissenting in part and concurring in part) (internal

citation omitted). And the U.S. Supreme Court has said that the "earning capacity of men employed in hazardous occupations" in the state of Washington was of "sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies." *Mountain Timber Co v State of Wash*, 243 US 219, 239 (1917).

These cases show that the certified question must be of pressing public concern. See also 6 Mich Court Rules Practice Text (7th ed) § 7308.2, Certified Questions from Michigan Courts ("From time to time issues arise in the state courts involving a public question of such importance that the executive branch believes it in the public interest that the matter be finally decided in as expeditious a manner as possible."). In other words, this Court cannot answer questions that might have far-reaching consequences at some future time. As with justiciability, the impact must be imminent. Otherwise, there is no justification for bypassing the normal adjudicative process.

Governor Whitmer says that even if there is an exigency requirement, she has met it because of the U.S. Supreme Court's forthcoming decision in *Dobbs*. Gov Br 17. But the Supreme Court has not announced its decision. And thus, Michigan courts are still bound by *People v Bricker*, 389 Mich 524, 527 (1973), which makes MCL 750.14 unenforceable to the extent it conflicts with federal abortion law. The relevance of *Dobbs* at this point is only that it demonstrates how unripe the Governor's case is. Even if the Supreme Court overturns *Roe*, that decision will not alter the fact that there are no pending or threatened prosecutions under MCL 750.14 law. Considering the absence of a final opinion in *Dobbs*, the lack of enforcement of the statute, and the lack of evidence concerning any future enforcement, the Governor's questions are not of "such public moment" that they "require early determination."

IV. The Governor's Executive Power is Limited to Defending Statutes.

The fourth question this Court asked the parties was "whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question." The Governor points to two cases where a Governor sent an Executive Message regarding the constitutionality of a statute. See *Kelley*, 390 Mich 193, and *Green*, 390 Mich 389. But in both cases, this Court ultimately denied the Governor's request.

What is concerning about this case is not only that the Governor sent an Executive Message challenging a statute's constitutionality—it is that she did so after filing the lawsuit on her own behalf. In the one other case where a Governor brought a lawsuit and asked this Court to certify the lawsuit's questions, this Court rejected the questions and noted the justiciability issues with a Governor bringing abstract claims regarding the constitutionality of a statute. *Green*, 390 Mich at 389, 392–393. Governor Whitmer's role as the Plaintiff in this lawsuit is equally defective and troubling.

Governor Whitmer claims to bring this action under Article V, Section 8 of the State Constitution, which allows the Governor to "initiate court proceedings . . . to enforce compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its political subdivisions." Const 1963, art 5, § 8. She says she is using her authority under this provision in two ways—"to protect the right of Michigan women to obtain abortions" and "to enjoin enforcement of Michigan's criminal abortion statute." Compl at 2. The problem is that only the Court of Claims, in defiance of binding precedent, has said the Michigan Constitution contains a right to abortion. Even so, there is no enforcement (or threatened enforcement) of the statute here in violation of any such alleged right. This means Governor Whitmer is asking this

Court to confer a new constitutional right so that she can use that newly created right to restrain a non-existent violation of that right. Such a request is not covered by the plain language in Article V Section 8, which requires an ongoing violation of a constitutional right to "restrain" or a specified constitutional mandate to "enforce." Const 1963, art 5, § 8.

Further, Governor Whitmer's use of this constitutional provision is out of step with how courts have interpreted the Governor's law-enforcement role. "Michigan's Governor is responsible for enforcing Michigan's laws," not creating or nullifying them. *Poe v Snyder*, 834 F Supp 2d 721, 731 (WD Mich 2011). This is exactly why our Constitution emphasizes that the Governor's authority to initiate court proceedings cannot be used "to authorize court proceedings against the legislature." Const 1963, art 5, § 8. As this Court said long ago, the Governor's role in enforcing state law, not creating or changing it, is central to the separation of powers:

> Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, *while the third must see that the laws are executed.* [*People ex rel Sutherland v Governor*, 29 Mich 320, 324–325 (1874) (emphasis added).]

See also *Taxpayers of Mich Against Casinos v State*, 471 Mich 306, 399 (2004) (MARKMAN, J., concurring in part and dissenting in part) ("The 'executive power' is, first and foremost, the power to enforce").

Governor Whitmer's lawsuit is simply a veiled attempt to do what the State Constitution prohibits: use Executive power to sue to create law as she prefers it. This misuse of her authority under the Michigan Constitution creates yet another justiciability issue—a lack of standing—and also threatens the structure of the State's government.

V. If This Court Decides to Answer the Governor's Questions, it Should Wait for the U.S. Supreme Court to Issue its *Dobbs* Decision.

For the reasons stated above, the Court should not answer the Governor's questions. And for the reasons stated by Defendants Jarzynka and Becker, the Court should dismiss this case for lack of jurisdiction. But if the Court chooses to answer the proposed questions, it should wait until after the *Dobbs* opinion is issued.

First, the U.S. Supreme Court's term ends in just a few weeks. Thus, waiting for the *Dobbs* decision will cause no meaningful delay. Second, the Supreme Court's decision could bind this Court, but there is no way to know that until *Dobbs* comes out. Despite the leaked draft, there is no final opinion. If the final opinion differs from the draft, and upholds even part of *Roe*, that decision could bind this Court's interpretation of MCL 750.14. Third, even if *Roe* is overturned, the Court will only benefit from waiting to see the Supreme Court's reasoning and then deciding whether any part of that reasoning matters in Michigan.

CONCLUSION

Governor Whitmer seeks to step outside of her constitutional authority, and she wants this Court to do the same by hastily leapfrogging over the speculative basis for her claims and the many jurisdictional deficiencies arising from that speculation. As the answered questions above demonstrate, this Court should deny Governor Whitmer's request for certification and immediate consideration.

Dated this 8th day of June, 2022

Respectfully submitted,

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EXHIBIT 1

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

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

Plaintiffs,

v.

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

Defendant.

Case No. 22-000044-MM

Hon. Elizabeth Gleicher

JUNE 6, 2022 MOTION OF THE MICHIGAN HOUSE OF REPRESENTATIVES AND MICHIGAN SENATE TO INTERVENE AS DEFENDANTS AND FOR RECONSIDERATION

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**Pro hac vice application forthcoming*

Counsel for Proposed Intervenor-Defendants Michigan House of Representatives and Michigan Senate

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Under Michigan Court Rules 2.209 and 2.119(F), the Michigan House of Representatives and Michigan Senate (together, the "Legislature") respectfully move (i) to intervene as Defendants, and (ii) for reconsideration of the Court's May 17, 2022 Opinion and Order granting Plaintiffs' motion for a preliminary injunction and enjoining enforcement of MCL 750.14 during the pendency of this action (the "PI Order").

In support, the Legislature relies on the attached brief. The Legislature also submits as Exhibit 1 a proposed answer to Plaintiffs' Verified Complaint for Declaratory and Injunctive Relief, in accordance with MCR 2.209(C)(2). On June 6, 2022, counsel for the Legislature sought the concurrence of Plaintiffs' counsel and Defendant's counsel regarding the relief requested in this motion. Plaintiffs' counsel stated that they will not oppose the Legislature's intervention but will oppose any reconsideration of the order granting preliminary injunctive relief. Defendant's counsel stated that they take no position on the motion to intervene.

BRIEF IN SUPPORT OF
THE MICHIGAN HOUSE OF REPRESENTATIVES AND MICHIGAN SENATE'S
MOTIONS TO INTERVENE AS DEFENDANTS AND FOR RECONSIDERATION

INTRODUCTION

Just a few weeks ago, this Court took the extraordinary step of finding a new constitutional right under the Michigan Constitution despite binding precedent saying no such right exists. What is more, the Court did so without receiving any meaningful opposition because the sole defendant—the state official charged with defending the statute in court—informed the Court that she would not defend the statute. The Attorney General argued only—but correctly—that the Court lacked subject matter jurisdiction because there is no adversity between the parties. But instead of dismissing for lack of jurisdiction, the Court granted Plaintiffs' requested injunction, allowing the case to proceed without any genuine defendant. The Legislature now moves to intervene to, first and foremost, challenge this Court's jurisdictional ruling and, if necessary, to defend against Plaintiffs' claims. It also moves for reconsideration to correct the Court's errors.

Regarding intervention, the Legislature is entitled to intervene as of right under MCR 2.209(A)(3). The Legislature's motion to intervene is timely, coming just weeks after the Court entered the PI Order. There is no question that the Legislature has strong interests in ensuring that constitutional challenges to Michigan statutes present an actual controversy suitable for judicial resolution and, when necessary, in defending justiciable challenges. No existing party will adequately represent those interests here—the Attorney General refused to move for summary disposition under MCR 2.116(C)(4) (lack of subject matter jurisdiction) or to otherwise defend the constitutionality of MCL 750.14. Alternatively, and for the same reasons, the Legislature is entitled to permissive intervention under MCR 2.209(B)(2).

The Court should also grant the Legislature's motion for reconsideration. Aside from the lack of adversity at the time the Court issued its Order, there are numerous other jurisdictional

defects that deprive this Court of jurisdiction, most significantly the fact that Plaintiffs' claims are based on a stack of hypotheticals and thus unripe. Even if the Court had jurisdiction, it was a palpable error to grant a preliminary injunction, as binding precedent says there is no right to abortion under the Michigan Constitution and the hypotheticals undergirding Plaintiffs' claims show that they suffer no harm—much less irreparable harm.

PROCEDURAL BACKGROUND

Plaintiffs filed the Verified Complaint on April 7, 2022, seeking a declaration that MCL 750.14 violates the Michigan Constitution and the Elliott-Larsen Civil Rights Act and requesting a permanent injunction barring its enforcement. The same day, Plaintiffs moved for a preliminary injunction to enjoin enforcement of MCL 750.14. The Attorney General agreed that the statute is unconstitutional and said she would not defend it. Def's Response at 4. She also correctly argued there was "a lack of adversity" and thus no "actual, live controversy before the Court" to support jurisdiction. *Id.* at 7–8. For that reason, the Attorney General further suggested that the Court take it upon itself to dismiss this case *sua sponte*. *Id.* at 10. Nonetheless, on May 17, 2022, this Court granted Plaintiffs' motion, enjoining the Attorney General, and those under her control and supervision, from enforcing MCL 750.14 during the pendency of the action. PI Order at 27.

ARGUMENT

I. This Court Should Grant the Legislature's Motion to Intervene to Challenge This Court's Subject Matter Jurisdiction and, if Necessary, to Oppose Plaintiffs' Claims.

A. The Legislature Is Entitled to Intervene as of Right.

"On timely application," MCR 2.209(A)(3) allows intervention as of right if 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.

Intervention as of right therefore requires three elements: (1) a timely request; (2) a disposition of

the action that may, as a practical matter, impair or impede the applicant's ability to protect his interests; and (3) a showing that representation of the applicant's interest by existing parties is or may be inadequate. See *Weber Land & Dev, LLC v Deerfield Twp*, unpublished opinion of the Court of Appeals, issued March 25, 2004 (Docket No. 245392), 2004 WL 595053, at *4 (per curiam) (citing *Oliver v State Police Dep't*, 160 Mich App 107, 115–116 (1987)).[1] The "rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612 (2009) (citing *Precision Pipe & Supply Inc v Meram Constr Inc*, 195 Mich App 153, 156 (1992).

1. The Legislature's motion to intervene is timely.

A motion is timely if it is "asserted within a reasonable time," an inherently contextual standard. *D'Agostini v City of Roseville*, 396 Mich 185, 188 (1976); see also *Cameron v EMW Women's Surgical Ctr, PSC*, 142 S Ct 1002, 1012 (2022) (timeliness under federal intervention rules "is to be determined from all the circumstances").[2] Although Michigan courts have not enumerated the specific factors that should be analyzed in determining timeliness, courts have generally found that "a right to intervene should be asserted within a reasonable time." *D'Agostini*, 396 Mich at 188.

The point at which the need for intervention arises bears directly on the timeliness question. The Court of Appeals permitted intervention as of right eight years after a lawsuit was filed, when the intervening party made its motion soon after learning a court order adversely affected its interests in the real property at issue. See *People v 14925 Livernois*, unpublished opinion of the

[1] This decision, attached as Exhibit 2, is offered to demonstrate how the Court of Appeals has distilled MCR 2.209(A)(3)'s requirements into three elements. See MCR 2.119(A)(2).

[2] "Because of the similarity of the state and Federal provisions," the Michigan Supreme Court "deem[s] it proper to look to the Federal courts for guidance" in applying the intervention rules. *D'Agostini v City of Roseville*, 396 Mich 185, 188 (1976).

Court of Appeals, issued September 15, 2016 (Docket No 327377), 2016 WL 4947279, at *4. Similarly, in *Johnson v Titan Indemnity Co*, unpublished opinion of the Court of Appeals, issued May 21, 2013 (Docket No 308685), 2013 WL 2226962, at *3, the court held timely a hospital's motion to intervene filed after the original parties settled the case because, contrary to a party's expectation, the settlement agreement did not provide for payment of its claim.[3]

Federal caselaw supports these holdings. For example, just a few months ago in *Cameron*, the U.S. Supreme Court reversed the Sixth Circuit's denial of the Kentucky Attorney General's motion to intervene that it filed after years of litigation, a bench trial, and a decision on appeal. 142 S Ct at 1008, 1012. After the Sixth Circuit affirmed the district court's grant of a permanent injunction against enforcing the abortion statute at issue, the state official defending the case decided his office would not seek rehearing or certiorari. See *id.* at 1012. The Attorney General then moved to intervene. The Supreme Court, reversing the Sixth Circuit, held the motion timely, explaining that "the most important circumstance relating to timeliness is that the attorney general sought to intervene as soon as it became clear that the Commonwealth's interests would no longer be protected by the parties in the case." *Id.* (quotation marks and citation omitted).

These authorities confirm that the Legislature's motion to intervene in this case is timely. Despite announcing she would not defend MCL 750.14, the Attorney General questioned the existence of subject matter jurisdiction in this case given the lack of adversity between the parties and the lack of an "actual controversy" within the meaning of the declaratory judgment statute. Def's Response at 8–9. It was only once the Court granted Plaintiffs' motion for a preliminary injunction, despite the Attorney General's argument that the Court lacked jurisdiction, that the

[3] These decisions, attached as Exhibits 3 and 4, are offered as persuasive authority to illustrate Michigan courts have concluded that motions filed far later in the proceedings were nonetheless timely under Rule 2.209. See MCR 2.119(A)(2).

Legislature needed to intervene.

This motion is being made less than three weeks later and within the deadline for seeking reconsideration—a motion any *truly* adverse defendant would have made. Further, discovery has not begun, and the Court has not issued a scheduling order outlining any future proceedings. See *Karrip v Cannon Twp*, 115 Mich App 726, 731 (1982) (motion to intervene was timely when filed two months after lawsuit commenced, because no "proceedings or discovery had been taken."); *United States v Marsten Apartments, Inc*, 175 FRD 265, 267–268 (ED Mich, 1997) (intervention was timely where motion filed "only two months" after movants learned of their potential claims and "the suit is still in the pretrial stage, and although some discovery has been taken the case is not significantly close to trial"). Therefore, the Legislature's motion is timely and will not impact or delay future proceedings.

2. The Legislature has a sufficient interest affected by the disposition of this case.

The Legislature has a sufficient interest in this case, and "the disposition of the action may as a practical matter impair or impede [its] ability to protect [its] interest." *Precision Pipe & Supply*, 195 Mich App at 156 quoting MCR 2.209(A)(3).

The Legislature's interest in defending a statute against constitutional challenge is overwhelming where, as here, the executive branch official charged with defending statutes refuses to do so from the outset. Such an abdication "poses grave challenges to the separation of powers," as the executive is effectively "nullif[ying] [the Legislature's] enactment solely on its own initiative." *United States v Windsor*, 570 US 744, 762 (2013); *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 578 (2020) ("[F]ailure to permit the Legislature's intervention in such circumstances would enable the executive branch to nullify the Legislature's work."). This is particularly true when a constitutional challenge presents no justiciable controversy.

The Michigan Supreme Court has recognized the Legislature's right to intervene in

instances where the executive branch refused to defend the laws of the State:

> An executive's nondefense of statutes thus poses grave risks to our constitutional structure. It also greatly disrupts the proper functioning of our adversary system. In these circumstances, as our Court of Appeals recently observed, the Legislature, as elected representatives of the citizens of Michigan, is essentially taking the place of defendants in this case to ensure an actual controversy with robust contrary arguments. In light of these considerations, we agree the Legislature has a sufficient interest in defending its own work and can fill the breach left by the Attorney General. [*League of Women Voters*, 506 Mich at 578–579 (cleaned up).]

For its part, the U.S. Supreme Court, recognizing that the Legislature is a separate and coequal branch of government, has "long held" that a legislative body "is the proper party to defend the validity of a statute" when the executive charged with enforcing the statute believes "that the statute is inapplicable or unconstitutional." *INS v Chadha*, 462 US 919, 940 (1983). See also *Cameron*, 142 S Ct at 1011–12 (explaining "the weighty interest that a State has in protecting its own laws" and the "strength of the Kentucky attorney general's interest in taking up the defense of" the law when a different Kentucky official "elected to acquiesce" in plaintiffs' challenge to it).

The Court's preliminary injunction order highlights the degree to which the disposition of the case will impede—and even negate—the Legislature's ability to protect its interest in defending against constitutional challenges to state laws. This Court enjoined a state law without the benefit of the full adversarial presentation of the jurisdictional defects in Plaintiffs' claims and the lack of factual and legal bases for the extraordinary remedy of a preliminary injunction. If this case proceeds with no party defending MCL 750.14, the Court could skip discovery and trial, and simply enter final judgment for Plaintiffs. This would upend our adversarial system and degrade the Legislature's role in our constitutional structure.

3. The Legislature's interests are not represented by any existing party.

The burden of showing that representation by existing parties "is or may be inadequate" is "minimal." *Karrip*, 115 Mich App at 731. The Legislature more than satisfies this "minimal"

burden. The Legislature "certainly has an interest in defending" against lawsuits challenging the constitutionality of statutes, *Mich Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 250 (2020), including by ensuring that such challenges present justiciable controversies. The Attorney General publicly announced, then reiterated in her response brief, that she would not defend against Plaintiffs' lawsuit or permit use of her office's resources to do so.[4] Because both existing parties believe the challenged law is unconstitutional, and because the Attorney General refused to move to dismiss this action for lack of jurisdiction and has stated in court papers that she will not defend the statute, no existing party will adequately represent the Legislature's interest. Indeed, it is not that the Legislature's interest "may be inadequately represented;" its interest is *wholly* unrepresented.

B. The Legislature Also Meets the Standard for Permissive Intervention.

In addition to being entitled to intervene as of right, the Legislature also meets the standard for permissive intervention. Such intervention is appropriate when: (1) the application is timely; (2) the applicant's claim or defense has a common question of law or fact with the main action; and (3) there will be no prejudice or delay to the original parties. See *Dean v Dep't of Corrections*, 208 Mich App 144, 150 (1994) citing MCR 2.209(B). The Legislature satisfies these elements.

First, the Legislature's motion is timely as explained above. Second, the Legislature's defense overlaps with the main action because it is the *only* defense in the main action. Third, as shown below in support of its Motion for Reconsideration, the Legislature directly addresses this Court's lack of subject matter jurisdiction and Plaintiffs' challenges to the constitutionality of MCL 750.14. Finally, the Legislature's intervention will not result in any prejudice or delay. The

[4] Press Release, Dana Nessel, Mich Attorney General, AG Nessel's Statement on Efforts to Preserve Abortion Rights in Michigan, https://tinyurl.com/2jftwjbh (April 7, 2022) (accessed June 5, 2022).

Legislature moved to intervene promptly after this Court issued a preliminary injunction, within the deadline for seeking reconsideration, and before any discovery has taken place. As with intervention as of right, the Legislature readily meets the requirements for permissive intervention.

II. This Court Should Grant the Legislature's Motion for Reconsideration.

For reconsideration of a trial court's decision, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). The rule "allows the court considerable discretion in granting reconsideration to correct mistakes." *Kokx v Bylenga*, 241 Mich App 655, 659 (2000).

Reconsideration is required here because in its decision to enjoin the enforcement of MCL 750.14, the Court made a palpable error in concluding, first and foremost, that it had jurisdiction and, alternatively, that the preliminary injunction factors weighed in favor of enjoining the law.

A. The Court Lacks Jurisdiction.

Plaintiffs cannot surmount the threshold questions of jurisdiction and justiciability in this case for several independent reasons. As an initial matter, the Michigan Constitution provides that "the judiciary is to exercise the 'judicial power.'" *Nat'l Wildlife Fedn v Cleveland Cliffs Iron Co*, 471 Mich 608, 613 (2004), citing Const 1963, art 6, § 1, overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010) (hereinafter "*Lansing*"). The "judicial power" of a court pertains to "the right to determine actual controversies arising between adverse litigants." *Anway v Grand Rapids R Co*, 211 Mich 592, 616 (1920). Put differently, "the doctrines of justiciability" affect "judicial power, the absence of which renders the judiciary constitutionally powerless to adjudicate the claim." *Michigan Chiropractic Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363, 372 (2006), overruled on other grounds by *Lansing*.

Further, because Plaintiffs seek a declaratory judgment, they must satisfy the requirements of MCR 2.605(A)(1), which states that "a Michigan court of record may declare the rights and other legal relations" of parties only "[i]n a case of actual controversy within its jurisdiction." This rule incorporates "the traditional restrictions on justiciability such as standing, ripeness, and mootness." *Associated Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 125 (2005), overruled on other grounds by *Lansing*. The rule "does not limit or expand the subject-matter jurisdiction of the courts." See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) (per curiam).

In sum, declaratory relief is not an end run around jurisdiction. And thus, any one of the jurisdictional deficiencies in this case—the lack of a controversy, the unripe claims, and Plaintiffs' lack of standing—requires reconsideration.

1. The court lacks subject matter jurisdiction because there is no controversy here.

To find an "actual controversy" that warrants declaratory relief, "the court must examine the facts of each case and make a determination as to whether a real, immediate, and substantial controversy exists between persons with adverse legal interests." 3 Longhofer, Michigan Court Rules Practice, Text (7th ed), § 2605.3. Thus, the "actual controversy" requirement contains two elements: (1) there must be true adversity about the merits and (2) a real (not hypothetical) dispute. If these elements are not met, "the circuit court lacks subject matter jurisdiction to enter a declaratory judgment." *Fieger v Comm'r of Ins*, 174 Mich App 467, 470 (1988).

Here, the Court decided there was a controversy by (1) relying on *Lansing* to hold that the broad purposes of declaratory relief, and not the controversy requirement, govern; (2) finding sufficient adversity based on the Attorney General's refusal to agree to the requested relief; and (3) citing *INS v Chada*, 462 US 919 (1983) and *United States v Windsor*, 570 US 744 (2013) as "somewhat similar case[s] procedurally." PI Order at 9–13. These reasons are flawed.

First, *Lansing* did not alter the "actual controversy" rule. The *Lansing* case concerned only the doctrine of standing. And regarding declaratory judgments, the Supreme Court stated that "whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing*, 487 Mich at 372.[5] Thus, "the requirements of MCR 2.605"—requiring adversity on the merits and a present (not future) controversy—remain the rule.

Second, the Attorney General's unwillingness to consent to an injunction does not create adversity. The "actual controversy" rule requires adversity on the merits. See *id.* at 372 n 20 ("[T]he essential requirement of the term 'actual controversy'" is "an adverse interest necessitating the sharpening of the issues raised."). Here, it is undisputed that the existing parties agree on the merits of Plaintiffs' challenge to MCL 750.14. Their only disagreement is whether this Court has jurisdiction to hear the case, which the Attorney General offered to remedy by allowing the Plaintiffs "to add an appropriate party to ensure adversity exists." Def's Response at 1. Using a disagreement about jurisdiction to justify jurisdiction has no basis or support in caselaw.

Third, *Chadha* and *Windsor* are nothing like this case. In both of those cases, third parties intervened to vigorously defend the challenged statute. *Chadha*, 462 US at 939; *Windsor*, 570 US at 754. Indeed, the intervenors' "sharp adversarial presentation of the issues" in those cases "satisfie[d] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree." *Windsor*, 570 US at 761. These cases highlight

[5] In fact, the sources this Court relied upon actually undermine the notion that *Lansing* allows the Court to ignore the requirements for an "actual controversy." In *Lansing* itself, the Supreme Court emphasized that the "the term 'actual controversy' under the rule is that plaintiffs 'plead and prove facts which indicate an *adverse* interest.'" 487 Mich at 372 n 20 (emphasis added). Further, the Longhofer text, which the Court cited extensively, states that MCR 2.605 requires "a disagreement or adverse position as between the parties respecting their status or rights and duties with reference to the subject of the action." 3 Longhofer, Michigan Court Rules Practice, Text (7th ed), § 2605.3. The text goes on to emphasize that the court must determine whether there is a "real, immediate, and substantial controversy." *Id.*

that adversity is not about disagreement on a threshold issue of jurisdiction arising from the parties' very agreement on the merits. Rather, adversity requires the presence of an opposing party to ensure "sharp adversarial presentation of the issues" at all stages in the litigation. *Id.* But when the Court issued the preliminary injunction, there was no party defending the case and thus no justiciable controversy over which to exercise the judicial power. This Court's order was therefore entered without jurisdiction and is void. See *Bowie v Arder*, 441 Mich 23, 56 (1992) ("When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void."). The Legislature's motion to intervene does not cure that initial lack of jurisdiction or create, ex post facto, the necessary adversity that was absent when the court entered the preliminary injunction.[6] Thus, this case is distinguishable from *Chadha* and *Windsor*.

2. Plaintiffs' claims are not ripe and thus the court lacks constitutional jurisdiction.

The "requirement of an 'actual controversy' prevents a court from deciding hypothetical issues." *Shavers v Kelley*, 402 Mich 554, 589 (1978). Without a "real, immediate, and substantial controversy," a court lacks subject matter jurisdiction over declaratory-judgment actions. 3 Longhofer, Michigan Court Rules Practice, Text (7th ed), § 2605.3. The related principle of ripeness deprives the court of a different type of jurisdiction—constitutional jurisdiction. *Michigan Chiropractic Council*, 475 Mich at 378–379. Because the two requirements are nearly identical and result in the same outcome—no jurisdiction—they are analyzed together.

The ripeness doctrine ensures that the "harm asserted has matured sufficiently to warrant judicial intervention." *Warth v Seldin*, 422 US 490, 499 n 10 (1975). "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at

[6] One of the Legislature's interests in intervening is, first and foremost, to ensure that the Court does not preliminarily enjoin a duly enacted statute where it lacks subject matter jurisdiction, thereby gravely undermining the separation of powers.

all." *Mich Chiropractic Council*, 475 Mich at 371 n 14 (cleaned up).

When it comes to pre-enforcement harm, the plaintiff must show "a real and immediate threat to protected constitutional rights." *Dep't of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 410 (1990) (CAVANAGH, J., concurring). The threat of injury cannot be mere speculation. *Id.*; see also *League of Women Voters*, 506 Mich at 585–587. For example, in *Emmanuel Baptist Preschool*, the Michigan Supreme Court refused to decide whether a statute regarding financial disclosures violated the defendants' First Amendment rights because "the state ha[d] not exercised its statutory authority to compel financial disclosure, making these issues unripe for review." 434 Mich at 389.

Neither has the state done so here. This case is premised purely on speculative and remote events. The statute does not subject a pregnant woman to prosecution. And Plaintiffs do not allege that any woman has been denied an abortion based on MCL 750.14 or that any doctor has refused to perform an abortion due to a supposed threat of prosecution. Moreover, there are no pending prosecutions or threatened prosecutions of any person under MCL 750.14.

In fact, the available information strongly suggests that prosecutors will *not* enforce the law. The Attorney General has repeatedly made clear that "[a]s this state's top law enforcement officer, … I will not prosecute women or their doctors."[7] A few weeks later, she "reiterated her refusal to prosecute" anyone under the statute.[8] The Attorney General also claimed that enforcement "falls principally on the elected prosecutors," Def's Response at 3 n 3, and she

[7] Press Release, Dana Nessel, Mich Attorney General, AG Nessel's Statement on Efforts to Preserve Abortion Rights in Michigan, https://tinyurl.com/2jftwjbh (April 7, 2022) (accessed June 5, 2022).

[8] LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence*, THE DETROIT NEWS, https://tinyurl.com/53wh3u9n (May 3, 2022) (accessed June 1, 2022).

admitted that there would be no controversy unless the prosecutors created one "down the road should *Roe* be overturned."[9] Many of those prosecutors are defendants in Governor Whitmer's related lawsuit and have stated that they will not enforce the law.[10]

Given these realities, Plaintiffs are forced to rely only on conjecture, arguing that "overzealous prosecutors" may capitalize on the "uncertainty" surrounding federal abortion law and may "attempt[] to enforce the Criminal Abortion Ban" after *Dobbs* is decided. PI Motion at 7. They further theorize that:

> some PPMI staff *may* be afraid to continue working at PPMI *if* the Criminal Abortion Ban were enforced . . . . [E]ven *if* PPMI and its staff complied with the Ban, a prosecutor *might* accuse staff of violating it. . . . Some staff *might* prefer to leave PPMI given this risk. . . . Other staff *might* simply be unable to bear turning patients away. [*Id.* at 13 (emphasis added).]

The Court's decision does not account for Plaintiffs' conjecture. Indeed, the Court acknowledges that "[a]s of the date this opinion is issued, it is unknown whether the United States Supreme Court will overrule *Roe v Wade*." PI Order at 13. This type of speculation is insufficient to establish an "actual controversy" or ripeness. See *League of Women Voters*, 506 Mich at 579–580; *Delaware Women's Health Org, Inc v Wier*, 441 F Supp 497, 501 (D Del, 1977) (dismissing plaintiffs' application for declaratory relief because the parties agreed on the merits regarding the constitutionality of the abortion statutes and there was no threat of prosecution under those statutes). It follows, then, that this Court lacks jurisdiction to decide Plaintiffs' claims.

3. Plaintiffs lack standing.

In *Lansing*, the Court stated that "whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." 487 Mich at 372. The

[9] *Id.*

[10] News Release, Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose, Joint Statement, https://tinyurl.com/ya7r5am9 (April 7, 2022) (accessed June 1, 2022).

inverse is also true: If "plaintiffs do not meet the requirements of MCR 2.605, they do not have standing." *League of Women Voters*, 506 Mich at 585–587.

As discussed in detail above, Plaintiffs' preliminary injunction motion did not meet the requirements of MCR 2.605 because at the stage the motion was made and decided, this case lacked both genuine adversity and a present controversy. Even if the Legislature is permitted to intervene, Plaintiffs will still lack standing due to the absence of an actual controversy. See *id.*

Plaintiffs also lack standing to challenge MCL 750.14 on behalf of their patients. On its face, the statute does not apply to pregnant women. See *People v Nixon*, 50 Mich App 38, 39–40 (1973). Even if it did, "plaintiffs must assert their own legal rights and cannot rest their claims to relief on the rights or interests of third parties." *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 622 (2015). Thus, Plaintiffs cannot bring claims to vindicate their patients' alleged right to an abortion under our Constitution, nor can they rely on those claims to establish standing.

For the myriad reasons addressed above, this Court lacks jurisdiction to decide this case. The Court should therefore grant the Legislature's motion for reconsideration to correct that error and preserve the bounds of the judicial power.

B. Plaintiffs Are Not Entitled to a Preliminary Injunction.

If this Court declines to reconsider its jurisdictional ruling, the Legislature moves to intervene to oppose Plaintiffs' claims and for reconsideration of the Court's decision that Plaintiffs satisfied the requirements for a preliminary injunction. "An injunction represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 613–614 (2012). There are four preliminary injunction factors:

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Id.* at 613.]

None of these factors weigh in Plaintiffs' favor.

1. Plaintiffs are unlikely to prevail on the merits.

In *Mahaffey v Attorney General*, 222 Mich App 325, 336 (1997) (per curiam), the Court of Appeals squarely held "that there is no right to abortion under the Michigan Constitution." Further, the Supreme Court has made clear that "[i]t is the public policy of the state to proscribe abortion." *People v Bricker*, 389 Mich 524, 529 (1973). These binding precedents leave no room for doubt about whether our Constitution provides a right to abortion—it does not.

To avoid these precedents, however, the Court held that *Mahaffey* was about a *different* set of abortion statutes and a generalized right to privacy. PI Order at 15. Recognizing the Court of Appeals' decision in *Mahaffey* foreclosed any constitutional argument premised on the right to privacy, the Court turned to Plaintiffs' argument that MCL 750.14 "unconstitutionally infringes on the right to bodily integrity," to ensure the claims' survival. *Id.* The Court further found that because the right to bodily integrity encompassed the right to *refuse* medical treatment, there was a corresponding "liberty interest in *seeking* medical treatment" protected by the Due Process Clause. *Id.* at 22. Based on this alleged liberty interest to seek medical treatment, the Court held that Plaintiffs were likely to succeed on their claim that MCL 750.14 violates Michigan's Due Process Clause. *Id.* at 24–25. Every premise leading to this conclusion is flawed.

First, *Mahaffey* was not about a distinct right separate from the right to bodily integrity, but instead involved the "generalized right of privacy." 222 Mich App at 334. And the right to bodily integrity stems from that general right to privacy. Borgmann, *The Constitutionality of*

Government-imposed Bodily Intrusions, 2014 U Ill L Rev 1059, 1066 (2014). Saying *Mahaffey*'s right-to-privacy holding does not apply to a bodily-integrity claim is like saying the prohibition on driving while intoxicated does not apply to those who drink wine. Of course it does. Just like wine is a type of intoxicant, bodily-integrity claims are merely a kind of right-to-privacy claim. The Court acknowledges this point: "[E]very medical procedure implicates a person's liberty interests in personal privacy and bodily integrity." PI Order at 22. The *Mahaffey* court's sweeping statement that "there is no right to abortion under the Michigan Constitution," 222 Mich App at 336, does not leave room for a lower court to create such a right—whether rooted in the broad right to privacy or any of privacy's subsidiary rights. *Mahaffey* therefore controls.

Further, the Court's conclusion ignores *Mahaffey*'s robust reasoning. The *Mahaffey* court held there is no right to abortion under the Michigan Constitution because "[w]hen the 1963 constitution was adopted, abortion was a criminal offense." 222 Mich App at 335. "The drafters of a constitutional provision are presumed to have known the existing laws and to have drafted the provision accordingly." *Id.* The court also noted that "less than ten years after the adoption of the constitution, essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute." *Id.* at 336. Finally, the court pointed to two Michigan Supreme Court cases dealing with *Roe v Wade*, both of which "suggest that in Michigan[,] a woman's right to abortion is derived solely from the federal constitution." *Id.* at 338. The Court's PI Order did not confront any of this reasoning.

Second, the right to refuse medical treatment does not necessarily provide for a right to obtain medical treatment. To reach the opposite conclusion, the Court relied on *Rochin v California*, 342 US 165 (1952) and *Cruzan v Director, Mo Dep't of Health*, 497 US 261 (1990). But these cases bear no similarity to the issue of abortion. In *Rochin*, the U.S. Supreme Court

found three deputy sheriffs' actions unconstitutional because their involuntary pumping of the plaintiff's stomach to obtain evidence "shock[ed] the conscience." 342 US at 172. In *Cruzan*, the Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." 497 US at 279.

Both *Rochin* and *Cruzan* involved nonconsensual intrusion into the plaintiffs' bodies by medical professionals. Here, no such "intrusion" is involved. In fact, the statute at issue guards against an intrusion into the life of the unborn, which the State has a profound interest in protecting. *O'Neill v Morse*, 385 Mich 130, 137 (1971) ("The fact of life is not to be denied. Neither is the wisdom of the public policy which regards unborn persons as being entitled to the protection of the law."); *Planned Parenthood of Se Pa v Case*y, 505 US 833, 870 (1992) ("[T]he State has a legitimate interest in promoting the life or potential life of the unborn.").

Thus, nothing in *Rochin* or *Cruzan* supports a right to obtain medical treatment. The heart of the due process question in those cases was whether the individual had the right to *exclude* an outsider from forcing a procedure on his or her body. See *Cruzan*, 497 US at 279 ("forced administration of life-sustaining medical treatment"); *Rochin*, 342 US at 172 ("[i]llegally breaking into the privacy of the petitioner"). The right to exclude does not by any logic or doctrine include the contrary right to *obtain*. The Supreme Court recognized this critical distinction in *Washington v Glucksberg*, 521 US 702 (1997), in holding there is no right to obtain a physician-assisted death.

Finally, rooting the newly created right to abortion in the right to "bodily integrity" is at odds with the State's competing interest in "promoting the life or potential life of the unborn." *O'Neill*, 385 Mich at 137; *Case*y, 505 US at 870. The Court's "bodily integrity" theory leaves no room for protecting that interest.

In sum, there is no case that supports a right to obtain an abortion as a corollary to the right

to refuse medical treatment. Nor does the Court cite any such case—the only support the Court could scrounge up for such a right came from Justice Blackmun's concurring opinion in *Casey*. PI Order at 22. Considering the binding Michigan authority holding there is no right to abortion under the Michigan Constitution, and the fact that the current Michigan Constitution was adopted over 100 years *after* MCL 750.14's enactment, there is simply no basis for the Court's holding that Plaintiffs will likely prevail on their claims.

2. Plaintiffs will suffer no harm without an injunction.

Irreparable harm is "an indispensable requirement to obtain a preliminary injunction. The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8–9 (2008) (citation omitted). Plaintiffs must show they face "real and imminent danger" from the conduct they want enjoined. *Id.* A court thus errs "in granting any preliminary injunction without a showing of concrete irreparable harm." *Michigan Coalition of State Employee Unions v Michigan Civil Serv Comm*, 465 Mich 212, 225–226 (2001).

Here, Plaintiffs have proven no harm, much less a "particularized showing of irreparable harm." *Id.* at 213. As discussed above, Plaintiffs' alleged harm depends on multiple, hypothetical events: the overturning of *Roe*, the creation of a right to abortion under the Michigan Constitution, and the enforcement (or threat of enforcement) of MCL 750.14. Even if the first two events occur, the Attorney General has vowed not to enforce the law. Further, no pregnant woman has ever been prosecuted under the law, and there is zero indication such a prosecution is a "real and imminent" danger. Nor do Plaintiffs point to any indication that doctors will be prosecuted under the law. Plaintiffs will suffer no harm in the absence of a preliminary injunction, and the Court therefore erred in granting the injunction without a showing of concrete irreparable harm.

3. The balance of harms and public interest weigh against a preliminary injunction.

Plaintiffs will suffer no harm without a preliminary injunction, but the harm of enjoining an unenforced statute is immense. The justiciability doctrines exist to constrain the "judicial power." *Michigan Chiropractic Council*, 475 Mich at 373–374. "The judiciary arrogates to itself the powers of the executive and legislative branches whenever it acts outside the constitutional confines of 'judicial power.' Fidelity to our constitutional structure compels this Court to be 'vigilant in preventing the judiciary from usurping the powers of the political branches.'" *Id.* By enjoining an unenforced statute solely based on a chain of hypothetical future events, this Court steps outside its "judicial power" and does grave harm to the separation of powers. See *Maryland v King*, 567 US 1301, 1303 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

This overreach will be just as concerning if the U.S. Supreme Court overturns *Roe*. If that does happen, the Legislature will have the opportunity to revisit MCL 750.14 and other abortion-related laws. The democratic process will then allow for debate and compromise among the public and its elected representatives. By contrast, a judicial opinion that overreaches to settle this issue usurps the power of the Legislature, exacerbates polarization, and smothers the potential for a democratic solution and public buy-in.

Indeed, this is one of the chief criticisms of the *Roe* decision. Even the late Justice Ginsburg stated the U.S. Supreme Court should not have issued such a sweeping ruling.[11] She instead thought the abortion issue should have stabilized through the democratic process.[12] Justice Ginsburg was right. The public is best served by letting the democratic process play out, and it is

[11] Frommer, *Justice Ginsburg thought Roe was the wrong case to settle abortion issue*, Washington Post (May 6, 2022), https://tinyurl.com/32z64we2.

[12] *Id.*

harmed when the judiciary seizes the issue from the people constitutionally empowered—and, practically, best poised—to resolve it.

In sum, none of the preliminary injunction factors weigh in Plaintiffs' favor. Moreover, the tremendous harm in this case stems from the issuance of a preliminary injunction—not the absence of it. The Court erred by holding otherwise and should reconsider its decision.

CONCLUSION AND RELIEF REQUESTED

The Legislature's motion to intervene should be granted. Upon intervention, the Court should grant the Legislature's motion for reconsideration to (i) vacate the preliminary injunction order and deny Plaintiffs' preliminary injunction motion for lack of subject matter jurisdiction, or (ii) in the alternative, vacate the order and deny Plaintiffs' motion on the ground that Plaintiffs have failed to establish their entitlement to preliminary relief.

Dated this 6th day of June, 2022

Respectfully submitted,

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**Pro hac vice applications forthcoming*