STATE OF MICHIGAN
IN THE SUPREME COURT

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, DAVID S. LEYTON, Prosecuting Attorney of Genesee County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants.

Supreme Court Case No. 164256

PROPOSED INTERVENORS' SUPPLEMENTAL BRIEF IN OPPOSITION TO GOVERNOR WHITMER'S REQUEST FOR CERTIFICATION UNDER MCR 7.308

This case involves a claim that state governmental action is invalid

Oakland Circuit Court No. 22-193498-CZ

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Introduction

Right to Life of Michigan and the Michigan Catholic Conference moved to intervene in this matter on April 22, 2022. Almost a month later, this Court ordered Governor Whitmer to file a brief providing "a further and better statement of the questions and the facts" justifying certification, specifically directing the Governor to answer five questions. 5/20/22 Order at 1 (citing MCR 7.308(A)(1)(b)). The Court's order stipulates that the motion to intervene remains pending and invites amici and "[o]ther persons or groups interested in the determination of the issues presented in this case" to respond to the Governor's brief within 14 days. *Id.* at 1–2. Governor Whitmer filed her supplemental brief on May 25, 2022. Proposed Intervenors Right to Life of Michigan and the Michigan Catholic Conference file this response to the Court's questions and Governor Whitmer's supplemental brief.

In short, there is no merit to the Governor's request for certification. This Court does not decide abstract questions, only actual controversies. And it is difficult to imagine a proposed case more abstract than this one. The Governor's lawsuit involves no concrete facts but instead asks the Court to declare an alleged right that has no basis in the language of Michigan's Constitution while providing no parameters for making such a decision. Would the Governor's request negate laws that require parental consent for minors to obtain an abortion? What about laws that protect the health and safety of those seeking abortions? Or laws prohibiting partial-birth abortions, or the use of Medicaid funds for abortion procedures? Such unanswered – and on this record, unanswerable – questions demonstrate that the Governor's request is improper. Certification should be denied.

Argument

I. The preliminary injunction in *Planned Parenthood v Attorney General* does not resolve this case.

The Court of Claims' preliminary injunction in *Planned Parenthood of Michigan v Attorney General*, 22-000044-MM, does not resolve this case—but for different reasons than Governor Whitmer suggests. 5/25/22 Gov's Suppl Br at 1–4. Proposed Intervenors are seeking to dissolve that injunction via a complaint for superintending control, and the jurisdictional defects there echo those here.

Planned Parenthood filed suit against Attorney General Nessel—the sole defendant—in the Court of Claims, seeking (1) a declaration that MCL 750.14 violates the Michigan Constitution, (2) preliminary and permanent injunctive relief enjoining the Attorney General and anyone she "supervises" from enforcing MCL 750.14 and other abortion regulations, and (3) attorney fees and costs.[1] 4/7/22 Verified Compl at 34–35, *Planned Parenthood v Attorney General*, 22-000044-MM.

But Attorney General Nessel *agrees* that MCL 750.14 is unconstitutional and has pledged *for years* not to enforce the statute regardless of a court's ruling on its constitutionality. So there is no adversity, and the Court of Claims lacked jurisdiction to act.

Nonetheless, the Court of Claims ignored binding Court of Appeals precedent and held that the Michigan Constitution likely creates a right to abortion, and it granted Planned Parenthood's requested injunction, enjoining not just the Attorney

[1] Planned Parenthood also alleged that MCL 750.14 violates the Elliott-Larsen Civil Rights Act. But the Court of Claims did not address that claim.

General but all county prosecuting attorneys too. The Court of Claims issued that sweeping injunction even though:

- Right to Life of Michigan and the Michigan Catholic Conference filed an amicus brief explaining that the court lacked jurisdiction and the appearance-of-impropriety standard required Judge Gleicher to recuse.
- The Attorney General *admitted* that there was no adversity between the parties and the court lacked jurisdiction.
- The court received and considered no adversarial briefing on the merits, just Planned Parenthood's pro-abortion advocacy.
- Instead of holding a public hearing at which amici could potentially have made opposing arguments, as promised by the court's April 20th scheduling order, the court allowed the non-adverse parties to *waive* the hearing requirement—apparently at a private status conference from which the court excluded Proposed Intervenors' counsel by ejecting him and everyone else who disagrees with Planned from the Zoom hearing.
- Nonparties were deprived of notice, as well as the ability to file an earlier complaint for order of superintending control.
- And the court lacked authority to enjoin nonparty prosecuting attorneys who make charging decisions independent of the Attorney General (the sole defendant),[2] *People v Birmingham*, 13 Mich App 402, 406–07; 164 NW2d 561 (1968), and who are not working "in active concert or participation" with her, MCR 3.310(C)(4).[3]

The Court of Claims litigation is part of the problem, not the solution. It is a one-sided affair in which basic jurisdictional requirements and due-process protections are absent. This Court should put no stock in the Court of Claims' order, which the Court of Appeals is likely to vacate.

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[2] As the Attorney General has admitted, local prosecutors make charging decisions independent of her office. *E.g.*, Rick Pluta, *Nessel says she can't stop abortion prosecutions if Roe is reversed*, WMUK (May 3, 2022), https://bit.ly/3Q6apbD.

[3] Because the Attorney General refuses to enforce MCL 750.14, any prosecuting attorney working "in active concert or participation" with her poses no threat to Planned Parenthood's interests. MCR 3.310(C)(4).

Instead, this Court should enforce the rule of law and disregard the Court of Claims' preliminary injunction for six reasons:

- First, the Court of Claims lacked jurisdiction because there is no adversity between Planned Parenthood and the Attorney General who both agree on the merits. The court issued a preliminary injunction without any form of adversarial briefing, argument, or hearing on the critical question of whether the Michigan Constitution creates a right to abortion. The Court of Claims litigation is nothing but "a friendly scrimmage brought to obtain a binding result that both sides desire," as the Attorney General admitted time and again. *League of Women Voters of Mich v Secretary of State*, 506 Mich 905; 948 NW2d 70 (2020) (*League of Women Voters I)* (VIVIANO, J., concurring).

- Second, Planned Parenthood lacks standing because MCR 2.605(A)(1) requires an "actual controversy" and there is none. Planned Parenthood is not being threatened with prosecution. In fact, the Attorney General is a Planned Parenthood ally and will not prosecute *anyone* under MCL 750.14, regardless of what a court says. So a "declaratory judgment is not needed to guide [plaintiff's] future conduct." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020) (*League of Women Voters II*).

- Third, the Court of Claims action is not ripe because Planned Parenthood's claims rest on a chain of "hypothetical future events." *Oakland Co v Michigan*, 325 Mich App 247, 265 n 2; 926 NW2d 11 (2018). For any real-world harm even to *potentially* occur, the Supreme Court of the United States would have to overrule *Roe v Wade*, 410 US 113; 93 S Ct 705 (1973), a prosecutor would have to seek to enforce MCL 750.14, and Michigan courts would have to decline to address the constitutional issue.

- Fourth, the case is "'moot'" because Planned Parenthood seeks "'a judgment on a pretended controversy,'" as explained above, and the Court of Claims's injunction against the Attorney General will have no "'practical legal effect upon a then existing controversy.'" *League of Women Voters II*, 506 Mich at 580 (quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920)).

- Fifth, the Court of Claims violated *stare decisis* principles by refusing to follow the Court of Appeals' published, post-November-1990 opinion in *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104 (1997), which held—in no uncertain terms—"that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." *Id*. at 339.

- Last, Judge Gleicher violated the objective appearance-of-impropriety standard by declining to recuse even though she (1) litigated *Mahaffey* as an ACLU attorney on behalf of Planned Parenthood, the identical plaintiff's counsel and plaintiff in the Court of Claims, (2) asked Michigan courts to create the state constitutional right to abortion that *Mahaffey* rejected but which her own injunction order now creates out of whole cloth, (3) regularly donates to Planned Parenthood, indirectly funding the litigation before her, and (4) has received a Planned Parenthood award.

II. There is an actual controversy requirement, and it is not met.

A. An actual controversy is required for this (or any other) Court to render a declaratory judgment.

The Court's order asks "whether there is an actual case and controversy requirement and, if so, whether it is met here." 5/20/22 Order at 1. But the Governor's brief answers a *different* question: whether there is an "'actual case and controversy requirement' under . . . the executive message provision." 5/25/22 Gov's Suppl Br at 4. Ask the wrong question, get the wrong answer.

MCR 7.308(A)(1) creates a *procedure* for certification by executive message, not a substantive cause of action.[4] That procedure applies to certain "action[s] or proceeding[s]" pending in lower courts "from which an appeal may be taken to the Court of Appeals or to the Supreme Court." MCR 7.308(A)(1). The executive-message rule does not authorize the Governor to file an original action in the Supreme Court. It merely grants this Court discretion to "authorize [a lower state]

[4] Nor does Const 1963, art 5, § 8, help the Governor's case. Certification under MCR 7.308(A)(1) is not restricted to actions the Governor initiates in the name of the state to enforce Michigan constitutional or statutory law. It extends to any "action or proceeding involving a controlling question of public law" that "is of such public moment as to require an early determination according to executive message of the governor addressed to the Supreme Court." MCR 7.308(A)(1). That action or proceeding could be brought by private parties just as well as by the Governor herself.

court or tribunal to *certify*" a specific "controlling question of public law" at issue in *an existing case*, along with "a statement of the facts [at issue in that case] sufficient to make clear the application of the question." *Id.* (emphasis added)

Here, the existing case is the Governor's suit in Oakland County Circuit Court, which asks the trial court to declare that the Michigan Constitution creates a right to abortion and enjoin certain county prosecutors from enforcing MCL 750.14. 4/7/22 Compl at 26–27, *Whitmer v Linderman*, No. 22-193498-CZ. But Michigan courts have the power to enter declaratory judgments only "[i]n a case of *actual controversy* within [their] jurisdiction." MCR 2.605(A)(1) (emphasis added). Only when there is an "*actual controversy*" and "jurisdiction" otherwise exists may Michigan courts "declare the rights and other legal relations of an interested party seeking a declaratory judgment." *Id.* (emphasis added).

The Court of Appeals has confirmed this straightforward reading of MCR 2.605(A)(1)'s text: the rule's "essential requirement . . . is an 'actual controversy,'" a "condition precedent," *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 2*, 309 Mich App 611, 624; 873 NW2d 783 (2015), or "prerequisite to declaratory relief," *Welfare Employees Union v Mich Civil Serv Comm*, 28 Mich App 343, 350; 184 NW2d 247 (1970).

Indeed, because "MCR 2.605 incorporates the doctrine of standing, as well as ripeness and mootness," *League of Women Voters II*, 506 Mich at 583 n 31, Michigan courts lack jurisdiction to consider Governor Whitmer's claims unless she establishes the actual controversy the declaratory-judgment rule demands.

The Governor's argument that no actual controversy is necessary turns basic jurisdictional rules on their head. 5/25/22 Gov's Suppl Br at 4–5. If there is no actual controversy, and the trial court lacks jurisdiction to consider Governor Whitmer's claims, there is no valid "action or proceeding" and no "controlling question of public law" for this Court "to certify." MCL 7.308(A)(1). After all, a legal question cannot be "controlling" when it is raised in a nonjusticiable action that Michigan courts lack the power to resolve.

It defies logic to argue that, although the lower court lacks jurisdiction under MCR 2.605(A)(1) because there is no "actual controversy," MCL 7.308(A)(1) somehow allows this Court to certify and resolve a question raised in a nonjusticiable, lower court action. 5/25/22 Gov's Suppl Br at 4–5. This Court's answer to such a question would be utterly meaningless and control nothing. No valid action or proceeding exists. What's more, MCR 2.605(A)(1)'s jurisdictional requirements apply equally to this Court. MCR 1.103. Certification under MCR 7.308(A)(1) does not make the Governor's executive message a "trump card" that exempts this Court from basic jurisdictional rules that apply to Michigan's entire judiciary.

What the Governor wants is a freestanding power to seek advisory opinions from this Court, untethered to any "actual controversy" or corresponding "facts sufficient to make clear the application of the question." MCR 7.308(A)(1). That is contrary to MCR 7.308(A)'s plain text and this Court's established practice. E.g., *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 12; 367 NW2d 1 (1985) (refusing to answer questions where "there is no actual controversy presented").

If such an unfettered, free-standing, advisory-opinion power existed, this Court would have drafted MCR 7.308(A) to read much like MCR 7.308(B), which allows the Governor to seek an advisory opinion on enacted legislation that has not yet taken effect—in keeping with Const 1963, art 3, § 8. But this Court worded MCR 7.308's subsections *differently* because the Governor lacks authority to seek an advisory opinion after a statute takes effect. In MCL 750.14's case, the deadline to seek an advisory opinion passed more than 90 years ago.

MCR 7.308(A)(1)'s text further illustrates the problem. The rule requires not just an "executive message of the governor address to the Supreme Court," but also "a statement of the facts sufficient to make clear the application of the question." The absence of an actual controversy means *there are no facts* to clarify the answer to the Governor's legal question – which doubtless is why this Court's request for "a further and better statement of the questions and the facts," 5/20/22 Order at 1, has gone unanswered. As a result, the Governor cannot fulfill MCR 7.308(A)(1)'s basic requirements, and this Court must reject her certification request, which is really a demand for an untimely advisory opinion.

B. Governor Whitmer lacks standing because an actual controversy is absent here.

Alternatively, the Governor argues that an actual controversy exists, and she has standing. 5/25/22 Gov's Suppl Br at 5–6. The Governor is wrong.

In declaratory judgment actions like this one, standing depends on a plaintiff meeting the requirements of MCR 2.605. *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 373; 792 NW2d 686 (2010). And, as explained above, MCR

2.605(A)(1) requires an "actual controversy." For an actual controversy to exist, (1) there "must be a present legal controversy, not one that is merely hypothetical or anticipated in the future," and (2) a declaratory judgment must be "*needed* to guide a party's future conduct in order to preserve that party's legal rights." *League of Women Voters II*, 506 Mich at 586 (emphasis added and quotation marks and citation omitted).

Here, the lack of a present legal controversy is obvious because "[t]here is no specific circumstance that [Governor Whitmer] claim[s] should be different" *right now*. *Id*. at 588. No prosecuting attorney is threatening to enforce MCL 750.14 at present, let alone contrary to *In re Vickers*, 371 Mich 114; 123 NW2d 253 (1963), *People v Bricker*, 389 Mich 524; 208 NW2d 172 (1973), or *People v Higuera*, 244 Mich App 429; 625 NW2d 444 (2001), in a manner that might hinder abortionists or women seeking them out.

Quite the opposite, seven of the prosecuting attorneys named as defendants have already declared their belief that MCL 750.14 is unconstitutional and refused to defend (or enforce) the law regardless of how a court rules. *Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose*, news release issued April 7, 2022, available at <https://www.waynecounty.com/documents/prosecutor/article-statment_from_7_elected_prosecutors_4.7.22_aw.pdf> (accessed June 6, 2022). Two more have declared that they "have never prosecuted anyone under MCL 750.14, they are not aware of any investigations in their jurisdictions related to this situation." 4/26/22 Defs Jarzynka & Becker's Br in Opp at 7. In addition, the fact

that a county prosecutor *might* bring a charge under MCL 750.14, *someday*, under a particular set of *unknown* facts, does not create an actual controversy now unless one makes the unwarranted assumption that the Michigan courts will decline to consider a constitutional claim when an actual controversy exists.

Because there is no present legal controversy, no declaratory judgment is needed to guide the Governor's future conduct or preserve her (or anyone else's) legal rights. In fact, the Governor has already done everything possible to promote abortion. E.g., Executive Directive No. 2022-5, *Reproductive Rights in Michigan*, (May 25, 2022), available at <https://content.govdelivery.com/attachments/MIEOG/2022/05/25/file_attachments/2168036/ED%202022-05%20Reproductive%20Rights%20in%20Michigan%20%28with%20signature%29.pdf> (accessed June 6, 2022). A court's ruling on MCL 750.14's constitutionality will not change her present or future conduct one jot.

All Governor Whitmer presents are fears and prognostications about the future. Specifically, she speculates that if the U.S. Supreme Court "restricts the federal right to abortion," no Michigan court will "opine[ ] on the scope of Michigan rights" when an actual controversy exists, and an abortionist "may feel the need to restrict access to abortion." 4/7/22 Br. in Support of Gov's Executive Message at 11. That is indeed a poor view of the Michigan judiciary and is the classic definition of a dispute "that is merely hypothetical or anticipated in the future." *League of Women Voters II*, 506 Mich at 586.

When plaintiffs move "for a declaratory judgment because it *perhaps may be needed* in the future," this Court routinely turns them down because they "do not meet the requirements of MCR 2.605." *Id.* And that is all the Governor offers here. Just as in *League of Women Voters II*, Governor Whitmer "only want[s] instruction going forward [to avoid speculative future harm]. And nothing in the relevant caselaw gives [the Governor] standing to challenge any [abortion]-related laws at any time." 506 Mich at 588.

Consider *Int'l Union v Central Mich Univ Trustees*, 295 Mich App 486, 491; 815 NW2d 132 (2012), where a union challenged draft guidelines implementing a political-candidacy policy for university employees. Because the guidelines "were still in draft form and the University had not yet implemented them," leaving their "future implications . . . speculative and hypothetical," the Court of Appeals held there was no actual controversy or standing. 295 Mich App at 496. The same is true here. At best, Governor Whitmer may provide a preliminary draft of the U.S. Supreme Court's *Dobbs* opinion. But as Planned Parenthood and the ACLU noted in response, "This is a draft opinion. . . . but it is not final," @PPFA, Twitter (May 2, 2022, 9:16 pm), <https://bit.ly/3yaRPbV> (accessed June 6, 2022), or "an official decision. . . . Roe is still the law of the land." @ACLU, Twitter (May 2, 2022, 10:13 pm), <https://bit.ly/3P4Z37s> (accessed June 6, 2022). Neither draft guidelines nor draft opinions yield the "actual controversy" that MCR 2.605(A) requires.

Or take *Pontiac Police*, where the board of trustees overseeing a police and fire benefits trust challenged city orders that altered collective bargaining agreements with police and fire unions. 309 Mich App at 615. The board's suit failed because none of the city's orders "affect[ed] [its] legal rights . . . or the trust itself." *Id.* at 625. Because none of the "board's legal rights [were] jeopardized by any changes in the retirees' benefits," there was "no 'actual controversy" and the board lacked "standing under MCR 2.605." *Id.* Just so here, there has been no "modification of the pertinent" abortion laws in decades and no change in Michiganders' legal rights. *Id.* So no actual controversy exists and the Governor lacks standing.

What's more, women who procure an abortion are not subject to MCL 750.14. *In re Vickers*, 371 Mich at 117–18. And Governor Whitmer has no special interest in representing abortionists who are. For third-party standing, this Court formerly required a close relationship with the party possessing the right and a hindrance to third parties' ability to protect their interests. *Mich Chiropractic Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363, 377–78; 716 NW2d 561 (2006), overruled by *Lansing Schs Ed Ass'n*, 487 Mich at 371 n 18. The requirements for third-party standing are now unclear. But Governor Whitmer lacks any close relationship with abortionists, and there is no hindrance to abortionists' ability to protect their own interests—as shown conclusively by Planned Parenthood's independent lawsuit.

Governor Whitmer's asserted constitutional right to abortion also puts her directly at odds with those of religious health-care entities and licensed medical providers who *object* to taking innocent human life but may be *forced* to do so (and

become abortionists) if the Governor prevails. Where such a conflict of interest exists, third-party standing is inappropriate, especially for someone who was elected to represent the interests of all Michiganders, not just certain special interests. E.g., *Elk Grove Unified Sch Dist v Newdow*, 542 US 1, 15–17; 134 S Ct 1377 (2004), abrogated on other grounds by *Lexmark Int'l, Inc v Static Control Components, Inc*, 572 US 118, 127; 134 S Ct 1377 (2014).

In addition, where an injury is "merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 55, 620 NW2d 546 (2000). And speculative harm is all that Governor Whitmer alleges. E.g., 4/7/22 Br. in Support of Gov's Executive Message at 11.

Finally, there is nothing to the Governor's argument that she has standing because the Michigan Constitution provides her a "legal cause of action." 5/25/22 Gov's Suppl Br at 7 (quotation omitted). Const 1963, art 5, § 8 provides the Governor with no substantive cause of action: it simply provides a procedural mechanism to "initiate court proceedings in the name of the state to enforce" constitutional or statutory mandates, rights, or duties. Any court proceedings the Governor initiates, seeking a form of substantive relief authorized by Michigan law, must follow normal jurisdictional rules.

Accepting Governor Whitmer's arguments would give future Governors—and future Justices—the unfettered ability to change Michigan law via an advisory opinion generated by an executive message. And it is not just Michigan's abortion laws that may fall. A conservative Governor sending an executive message to a

conservative Supreme Court could undo minimum-wage laws, outlaw public-employee unions, squash any form of gun control, and trammel the Elliott-Larsen Act. What's more, nothing would stop federal courts, other states' appellate courts, or tribal courts from inundating this Court with certification requests under MCR 7.308(A)(2), even where there is no actual controversy. Governor Whitmer offers this Court a Pandora's Box. The Court should decline to open it.

C. This suit is not ripe.

Because "MCR 2.605 incorporates . . . ripeness and mootness," *League of Women Voters II*, 506 Mich at 583 n 31, the Governor's brief also addresses those issues, 5/25/22 Gov's Suppl Br at 8–11. Proposed Intervenors Right to Life of Michigan and the Michigan Catholic Conference offer the following response.

When considering ripeness, courts ask whether a plaintiff's asserted harm "has matured sufficiently to warrant judicial intervention." *People v Carp*, 496 Mich 440, 527; 852 NW2d 801 (2014) (quotation marks and citation omitted), vacated on other grounds by *Carp v Michigan*, 577 US 1186; 136 S Ct 1355 (2016). Ripeness doctrine "is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Shaw v City of Dearborn*, 329 Mich App 640, 657; 944 NW2d 153 (2019) (quotation marks and citation omitted).

Governor Whitmer's claims here are both hypothetical and contingent. She argues that harm *might* occur if a highly specific chain of future events takes place, including (1) a final *Dobbs* opinion limiting *Roe*, (2) Michigan courts failing to "opine[ ] on the scope of Michigan rights" when a ripe controversy exists, and (3) an

abortionist "feel[ing] the need to restrict access to abortion." 4/7/22 Br. in Support of Gov's Executive Message at 11.

There are more contingencies to add to the Governor's list. For any real-world harm to occur, (4) a pregnant woman must also choose to seek out an abortionist for assistance with ending her child's life, (5) in one of the defendant county prosecutors' jurisdictions, (6) in violation of MCL 750.14, (7) outside any safe harbor *Vickers*, *Bricker*, *Higuera*, or the final *Dobbs* opinion may provide, (8) one of the defendant county prosecutors must threaten to press charges against the abortionist, a course seven have already ruled out, (9) the Michigan courts must refuse to hear any constitutional claims brought as a result of that threatened prosecution, and (10) the abortionist decides to turn the woman away. As a result, Governor Whitmer's claims "rest[ ] upon contingent future events that may not occur as anticipated, or may not occur at all." *Oakland Co*, 325 Mich App at 265 n 2. She merely alleges that if all the stars align just right, something bad might happen. That isn't enough to satisfy the ripeness requirement.

Because the Governor's challenge is "premised on [a sequence of] hypothetical future events," it is "not ripe for judicial review." *Id.*; accord *Shaw*, 329 Mich App at 657 ("[P]laintiff's claim is not ripe because it rests on speculation about possible future events."); *King v Mich State Police Dep't*, 303 Mich App 162, 188; 841 NW2d 914 (2013) ("A claim that rests on contingent future events is not ripe."). Though Michigan plaintiffs cannot "premise an action on a hypothetical controversy," *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017),

that is precisely what Governor Whitmer seeks to do here. And the Governor is entitled to no special exception from the ripeness principles merged into MCR 2.605. This Court should reject her efforts to evade them.

It is no answer for the Governor to claim that a declaratory judgment's purpose is to adjudicate rights before an actual injury occurs. 5/25/22 Gov's Suppl Br at 9. There must still be "a *present legal controversy*, not one that is merely hypothetical or anticipated in the future." *League of Women Voters II*, 506 Mich at 586 (emphasis added).

Contrary to Governor Whitmer's assertions, she has demonstrated no "adverse interest" between the parties and no facts "necessitating the sharpening of the issues raised." 5/25/22 Gov's Suppl Br at 9 (quotation marks and citation omitted). No defendant is enforcing MCL 750.14 now, and it borders on the preposterous to claim, as the Governor does, that Michigan courts would fail to "opine[ ] on the scope of Michigan rights" when a ripe controversy exists. 4/7/22 Br. in Support of Gov's Executive Message at 11.

Significantly, the Governor's claim that "every Michigander [must] know[ ] their rights" would apply equally to all manner of rights that individual residents may believe are embedded in the Michigan Constitution. 5/25/22 Gov's Suppl Br at 10. One Governor may think there's a state constitutional right to taxpayer-funded abortion on demand. Another Governor may think that houses of worship have their own legitimate claim on the public purse. That does not mean this Court should issue roving advisory opinions absent an actual, ripe, justiciable controversy.

D. This case is moot.

A case is " 'moot' " in at least three circumstances: (1) when a party "'seeks to get a judgment on a pretended controversy, when in reality there is none;'" (2) when a party pursues "'a decision in advance about a right before it has been actually asserted and contested;'" and (3) when a party requests "'a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.'" *League of Women Voters II*, 506 Mich at 580 (quoting *Anway*, 211 Mich at 610). The Governor's action fails in all three respects.

First, the controversy here is "'pretend.'" *Id.* (citation omitted). None of the defendant county prosecutors have enforced or threatened to enforce MCL 750.14 against anyone. All agree on the current state of Michigan's abortion laws. Governor Whitmer merely seeks an advisory opinion based on contingent fears that things *might* change, a real controversy *might* develop in the future, and, most important, a Michigan court *might* refuse to address any actual controversy.

Second, because *Roe* is still the law of the land, no one has actually asserted or contested a state constitutional right to abortion in a real case with real facts. There's no current need for an abortionist or woman to do so. The Governor merely seeks "a decision in advance about [that asserted] right" based on fears regarding what *might* happen in *Dobbs*. *League of Women Voters II*, 506 Mich at 580 (quotation marks and citation omitted).

Third, the declaratory judgment and injunction the Governor seeks would have no "practical legal effect upon an . . . existing controversy." *Id.* (quotation marks and citation omitted). Again, there is no existing controversy, just a hypothetical future one. And the *current* practical effect of a court ruling that the Michigan Constitution creates a right to abortion is nil.

Even if the U.S. Supreme Court changes federal abortion jurisprudence, there is no instantaneous controversy because the precise nature of that alteration is unknown, as is Defendants' response. None of the county prosecutors are enforcing MCL 750.14 with *Roe*, and seven have pledged *not* to enforce MCL 750.14 without *Roe*. Unless *Roe* evaporates and the remaining defendants choose to enforce MCL 750.14 under case-specific facts, a court ruling will make no difference.

This Court should reject the Governor's certification request "because reviewing a moot question would be a purposeless proceeding" and Michigan courts "refuse to hear cases that they do not have the power to decide, including cases that are moot." *People v Richmond*, 486 Mich 29, 35, 782 NW2d 187 (2010) (quotation marks and citations omitted).

Notably, Governor Whitmer cannot evade mootness by pointing to "potential for criminal liability" in the *future* for abortions performed *now*. 5/25/22 Gov's Suppl Br. at 9; accord *id.* at 9–11. The Michigan Constitution rejects such ex post facto applications of criminal laws. Const. 1963, Art. I, § 10; accord *People v Harvey*, 174 Mich App 58, 60–61; 435 NW2d 456 (1989); *People v Moon*, 125 Mich App 773, 777; 337 NW2d 293 (1983).

In sum, this case is not justiciable. An actual controversy is required for any Michigan court to act, and this case fails to present one. The case is not ripe because it relies on numerous future contingencies, including that the courts will fail to opine if a real controversy develops. And the case is already moot in three ways. The Court should deny certification and direct the trial court to dismiss the case.

III. Governor Whitmer's suit does not meet MCR 7.308(A)(1)'s requirements.

A. MCR 7.308(A)(1) contains four prerequisites.

This Court has discretion to "respond to a certified question" under MCR 7.303(b)(4). For the Governor to certify a question via executive message, four preconditions must be met under MCR 7.308(A)(1)(a)

- There must be "an action or proceeding" pending in "a trial court or tribunal from which an appeal may be taken to the Court of Appeals or to the Supreme Court."
- The pending action must "involv[e] a controlling question of public law."
- The controlling legal question must be "of such public moment as to require an early determination."
- And "the [controlling legal] question" must be capable of certification along "with a statement of the facts sufficient to make clear the application of the question."

"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." MCR 7.308(A)(1)(b). But the Court may not grant certification if either a "properly stated" question or "sufficient facts" are lacking. *Id.* The Governor bypasses the last requirement, which is explicit in MCR 7.308(A)(1)(a) and (b)'s plain text. 5/25/22 Gov's Suppl Br at 11.

B. This lawsuit fails all four certification requirements.

For the reasons explained earlier in Part II, there is no valid lower court declaratory-judgment action or proceeding pending in a Michigan trial court because (1) an actual controversy is absent and Governor Whitmer lacks standing, (2) the Governor's claims are not ripe, and (3) the Governor's lawsuit is moot. And, as a result, the Oakland County Circuit Court lacks jurisdiction to consider Governor Whitmer's action. So the first factor is absent.

The legal questions Governor Whitmer asks this Court to certify control nothing because there is no actual, ripe controversy for Michigan courts to decide. Courts simply lack jurisdiction, so the second requirement is not met either.

The "public moment" requirement speaks to a legal issue's exceptional importance to the general public and the need for this Court to provide a speedy answer because of the issue's significant real-world impact. Where there is no valid lower-court action and no controlling legal question at stake, this third prerequisite does not even come into play here. This is especially true because the sort of abstract answers to theoretical questions that Governor Whitmer asks this Court to provide without regard to any facts giving rise to an actual controversy will have no real-world impact whatsoever.

Finally—but most importantly—because there is no actual controversy, it is impossible for the Governor or trial court to provide a statement of facts "sufficient to make clear the application of the question." MCR 7.308(A)(1)(a). *All* the facts are missing here because there is no present legal dispute, just a hypothetical one. The

Governor seeks an advisory opinion that has *no* application now but *might* apply if a precise series of contingent events occurs in the future. So the fourth component is missing too.

The fundamental problem is that any right to abortion that the Court might recognize under the Michigan Constitution, at Governor Whitmer's request, would not be limited to MCL 750.14's broadscale (and inchoate) constitutionality; rather, unbound by any specific factual controversy, she effectively asks this Court to declare an unlimited right to abortion.

Governor Whitmer's lawsuit is based on the notion that abortion is healthcare. 5/25/22 Gov's Suppl Br at 8 n 3. Does the Michigan Constitution also require faith-based hospitals and healthcare providers to violate their religious beliefs and take innocent human life on demand? What facts would "make clear the application of" this and other questions? MCR 7.308(A)(1)(a). The Governor doesn't say. What about Michigan's other abortion laws, including the partial-birth abortion ban (MCL 750.90h & 333.1081 to MCL 333.1085), the Parental Rights Restoration Act (MCL 722.901 to MCL 722.908), the informed consent law (MCL 333.17015), laws regulating the teaching of or referring for abortion in public schools (MCL 380.1507 & 388.1766), the law forbidding public funding of abortion (MCL 400.109a), the Abortion Insurance Opt-Out Act (MCL 550.541 to MCL 550.551), or laws protecting infants intended to be aborted but born alive (Born Alive Infant Protection Act, MCL 333.1071 to MCL 333.1073)? (Proposed Intervenors helped shepherd these pro-life provisions into law, demonstrating why their intervention is

appropriate). What facts clarify the Michigan Constitution's application to these laws? Again, the Governor does not and cannot say. 5/25/22 Gov's Suppl Br at 11–12, 17.

This Court should be extraordinarily reluctant to decide so many questions in the abstract, without any actual controversy or statement of facts sufficient to make clear the application of those questions. Doing so would cause the public to rightly wonder if this is a court of law or a court of public policy. Because MCR 7.308(A)(1)'s essential requirements are not satisfied, the Court must deny certification.

IV. The Governor's use of an executive message to overturn a 91-year statute—rather than to uphold a validly enacted law—is unprecedented and confirms that this Court should deny certification.

Though the Governor's supplemental brief implies the opposite, see 5/25/22 Gov Suppl Br at 13–17, this Court regularly denies Governors' certification requests via executive message. E.g., *In re Executive Message (Brown v Snyder)*, 493 Mich 905; 823 NW2d 274 (2012); *In re Executive Message*, 755 NW2d 153 (2008); *In re Executive Message (DPG York v Michigan)*, 474 Mich 1017; 708 NW2d 375 (2006); *In re Executive Message*, 467 Mich 1208; 651 NW2d 747 (2002); *Marlinga* v *Kevorkian*, 456 Mich 1223; 575 NW2d 550 (1998); *In re Executive Message*, 444 Mich 1214; 514 NW2d 465 (1994); *Int'l Union, United Auto Aerospace & Agricultural Implement Workers of America v. Michigan*, 487 NW2d 766 (1992) (*UAW*); *In re Executive Message (Neff v Secretary of State)*, 478 NW2d 436 (1991).

In fact, denying certification requests under MCR 7.308(A)(1) has been the Court's established norm for at least 30 years. E.g., *UAW*, 487 NW2d at 766 (denying certification after concluding "that under the circumstances it would be an inappropriate exercise of [the Court's] discretion to grant the request"). This Court treats certification via executive message as a last resort and allows that extra-ordinary procedure—which bypasses lower tribunals and deprives this Court of a considered opinion to review—only when there is no effective alternative. E.g., *In re Executive Message (DPG York v Michigan)*, 474 Mich at 1017; ("granting reconsideration and denying the application for leave to appeal in Docket No. 128656," rather than granting certification); *In re Executive Message*, 467 Mich 1208 (ordering "the Court of Appeals to further expedite its consideration of the case" instead of granting certification); *In re Executive Message*, 478 NW2d at 437 (declining to grant certification and directing "the dismissal of this case in the Iosco Circuit Court" and making the provisional appointment of "a special panel of judges to submit a reapportionment plan"); *Kratchman v Detroit*, 400 Mich 158, 163–64; 254 NW2d 23 (1977) (denying certification but granting immediate consideration of the trial court's ruling and bypassing the Court of Appeals).

None of the Governor's examples of certification from 37 to 56 years ago, 5/25/22 Gov's Suppl Br at 13–16, are remotely like the request here:

- In *City of Gaylord v Beckett*, 378 Mich 273; 144 NW2d 460 (1966), this Court *upheld* the Industrial Development Revenue Bond Act of 1963's constitutionality at Governor Romney's request. *Id*. at 287, 308.
- Again at Governor Romney's request, in *Beech Grove Investment Co v Civil Rights Comm*, 380 Mich 405; 157 NW2d 213 (1968), this Court *upheld* the Civil Rights Commission's jurisdiction—absent enabling

legislation—to entertain and resolve complaints of discrimination in the purchase and sale of private housing. *Id*. at 416, 435–36.

- Governor Milliken wanted this Court to *uphold* a stadium bond scheme in *Alan v Wayne County*, 388 Mich 210; 200 NW2d 628 (1972), but to his dismay, the Court struck it down. *Id*. at 238–44, 356–63.

- And in *Blue Cross & Blue Shield*, Governor Milliken sought to have this Court *uphold* the Nonprofit Health Care Corporation Reform Act. 422 Mich at 9–10. This Court granted certification but did not consider any legal questions until the trial court had conducted "[e]videntiary hearings . . . over a two-month period" and generated "562 findings" of fact." *Id*. at 10–11. Ultimately, the Court upheld parts of the act, struck down a few, and refused to address "[o]ther sections . . . because there [was] no actual controversy presented." *Id*. at 12.

In stark contrast, Governor Whitmer requests certification not to defend and uphold a recently passed statute, constitutional provision, or bond scheme, but to strike down a statute that has been on the books for the last three generations notwithstanding changeover between Democrat and Republican administrations and legislative majorities, and the shift from the 1908 to the 1963 Michigan Constitution.

What's more, *all* prior cases in which this Court granted certification involved the Governor intervening on behalf of the State because *the State itself* would be harmed absent this Court's immediate review. Governor Whitmer does not—and cannot—allege any similar harm to the State of Michigan. She merely alleges that MCL 750.14 *might* harm third-party abortionists who share her views.

The Governor boldly admits the breadth of her request. She responds to this Court's quite modest framing of its fourth question by claiming a right to ask the Court not only to strike down a statute, but to enjoin violation of "*constitutional rights that have not yet been recognized*," 5/25/22 Gov's Supp. Br at 18, point

heading IV (Governor's emphasis), *id* at 19-21. This is a breathtaking assertion of authority that would result in a judicial declaration allowing the Governor to sidestep the Legislature completely and repeal MCL 750.14, contrary to the enactment and presentment clauses of Const 1963, art 4, §§ 1, 26, 33, and thus also the separation of powers. Const 1963, art 3, § 2.

The enactment and presentment clauses and the role they guarantee the Legislature "are integral parts of the constitutional design for the separation of powers." *Blank v Dep't of Corrections*, 222 Mich App 385, 398; 564 NW2d 130 (1997), *aff'd in relevant part*, 462 Mich 103; 611 NW2d 530 (2000) (quoting *INS v Chadha*, 462 US 919, 946 (1983)). "The powers of government should be so divided and balanced among several bodies…that no one could transcend their legal limits, without being effectually checked and retained by the others." *Id* (cleaned up) (quoting *General Assembly v Byrne*, 90 NJ 376, 381; 448 A2d 438 (1982) and Thomas Jefferson, *Notes on the State of Virginia*, 120 (W Peden ed, 1955)). But the Governor via the Executive Message mechanism is trying to enlist this Court in an end-run around the Legislature, effectively investing her with the authority of all three branches. That is an invitation this Court should respectfully decline. *In re Certified Questions from US Dist Ct, W Dist of Mich, S Div*, 506 Mich 332, 357; 958 NW2d 1 (2020) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny") (cleaned up) (quoting *46th Circuit Trial Court v Crawfor Co*, 476 Mich

131, 141; 719 NW2d 553 (2006) and The Federal No. 47 (Madison) at 301 (Rossiter ed, 1961)).

To summarize, this appears to be the first case where a Michigan Governor seeks to certify questions to this Court for the purpose of striking down an enacted Michigan statute. This appears to be the first case where a Michigan Governor seeking certification invokes the rights of third parties rather than the interests of the State. It is not seriously contestable that this would be the first case this Court has certified in the absence of any actual controversy presented or the satisfaction of *any* of MCL 750.14's provisions or applications, as explained earlier in Part II. This Court should follow its settled precedents and reject certification here. E.g., *Blue Cross & Blue Shield*, 422 Mich at 13 (refusing to address "sections of the act . . . because there is no actual controversy presented").

V. This Court cannot (and should not) answer the questions posed here before the U.S. Supreme Court issues a decision in *Dobbs*.

Governor Whitmer's entire case hinges on many contingencies, including her prediction that the U.S. Supreme Court's decision in *Dobbs v Jackson Women's Health Organization* might contract or overrule the holding of *Roe v Wade*. Indeed, that is precisely what Governor Whitmer argued in her executive message. 4/7/22 Gov's Executive Message at 2 (positing that "*Dobbs* [could] overrule *Roe*, or significantly limit its reach" and access to abortion could be "restrict[ed]"). It is also what the Governor said in her brief supporting certification. 4/7/22 Br. in Support of Gov's Executive Message at 11–12 (expressing concern that "a ruling in *Dobbs* [might] restrict[ ] the federal right to abortion in some way"). Governor Whitmer's

reply brief echoes that concern. 5/16/22 Gov's Reply in Supp of Certification at 5 (theorizing that "should *Dobbs* overrule *Roe*, or significantly limit its reach, healthcare providers may feel constrained to restrict access to abortion services"). And her supplemental brief reiterates the same fear. 5/25/22 Gov's Suppl Br at 17 (arguing that "the issuance of a decision in *Dobbs*[ ] will dictate—and very likely upend—the federal constitutional right[ ]" to abortion).

Without a potential ruling in *Dobbs* limiting or discarding *Roe*, even the Governor admits that certification would be inappropriate. E.g., *id.* at 19 ("[T]he impending Supreme Court decision in *Dobbs* render this question of such public moment as to require an early determination."). In other words, *Dobbs* is the Governor's real complaint. And it makes no sense for this Court to rule on the abstract legal questions the Governor has raised in advance of that decision, especially when nobody knows what the final version will say.

Unless the U.S. Supreme Court *actually* changes federal law in some way, there is not even a *potential* actual controversy here. And even if *Dobbs* does change federal law, the two defending county prosecutors have not said whether they will enforce MCL 750.14 and in what circumstances, and Michigan courts stand ready to address any constitutional issues if they arise. No one faces an imminent adverse action here.

This Court's established rule is to "not unnecessarily decide constitutional issues." *J &J Constr Co v Bricklayers & Allied Craftsmen*, 468 Mich 722, 734; 664 NW2d 728, 735 (2003). Yet Governor Whitmer asks this Court to decide key

constitutional issues based on mere guesswork that such a ruling might be necessary when the *need* for a constitutional ruling is far from clear. This Court should not abandon its well-established guardrails to address one of the Governor's pet political issues, especially as "[a] decision on constitutional grounds . . . places limitations on the Legislature's power and should not be done unless necessary to the case." *People v Arnold*, 508 Mich 1, 25 n 52; 873 NW2d 36 (2021). If the Court allows the Governor's blatantly political move, it will seriously damage Michigan courts' credibility and open the floodgates for future Governors to seek unnecessary constitutional rulings on hot-button issues to generate campaign fundraising, bolster reelection efforts, and legislate by judicial fiat.

Just as Democrat Governors push abortion rights in the abstract, Republican Governors could, for example, seek to further gun rights under Const 1963, art 1, § 6, or free-exercise rights under Const 1963, art 1, § 4. Regardless of the outcome of these efforts, this Court would become a political football, and its legitimacy as a legal arbiter and bulwark of the rule of law would be damaged beyond repair.

Equally important, even if the Governor is right about what the Supreme Court is going to do in *Dobbs*, the *Dobbs* opinion may provide valuable, persuasive authority, explaining why courts should not recognize constitutional rights that have no grounding in a constitution's text or history, as well as the dangers of courts functioning as partisans seeking to advance their political likings, rather than neutral adjudicators of the law. Contrary to the Governor's assertions, what Michiganders "deserve" is a Republican form of government, including a judicial

system that refuses to locate rights in the state constitution that have no grounding in its text or history. 5/25/22 Gov's Suppl Br at 23; accord US Const, art IV, § 4.

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Proposed Intervenors Right to Life of Michigan and the Michigan Catholic Conference's "motion to intervene[ ] . . . remain[s] pending." 5/20/22 Order at 2. That motion should be granted regardless of whether this Court grants certification.

The Oakland County Circuit Court has frozen the trial court proceedings and refuses to hear oral argument on Right to Life of Michigan and the Michigan Catholic Conference's intervention motion below. 5/24/22 Order re Mot to Intervene at 1, *Whitmer v Linderman*, No. 22-193498-CZ. It awaits "further direction" from this Court. *Id.* at 2. If Proposed Intervenors are to defend their interests on the merits, they must do so in this Court and in this proceeding.

"Given the gravity of the issues presented in this case," the Court "should strive to open the courtroom doors to as many voices as possible." 5/20/22 Order at 2 (BERNSTEIN, J., concurring). Accordingly, if the Court decides to overlook the plethora of jurisdictional deficiencies and grant certification to decide hypothetical questions outside the context of any actual dispute or even facts, then the Court should also direct the trial court to grant Right to Life of Michigan and the Michigan Catholic Conference's intervention motion and certify two additional questions for this Court to review:

- Whether any right to abortion recognized under the Michigan Constitution is superseded by the protection of human life from the moment of conception embodied in the U.S. Constitution's Fourteenth Amendment.

- Whether a state court's recognition of a right to abortion that has no basis in the Michigan Constitution's text, history, or tradition deprives Michiganders of the Republican form of government guaranteed by article IV, section 4 of the U.S. Constitution.

Allowing Proposed Intervenors an opportunity to participate and raise pressing questions of federal constitutional law is the only way for this Court to ensure that all voices are being heard and practically resolve the legal questions presented. Otherwise, the public will have reason to doubt that this is a legal proceeding, rather than a political one.

Conclusion

For the above-stated reasons, this Court should (1) grant Proposed Intervenors Right to Life of Michigan and the Michigan Catholic Conference's motion to intervene, (2) deny the Governor's certification request, and (3) direct the trial court to dismiss this action for lack of jurisdiction.

Alternatively, if this Court grants certification despite the lack of justiciability, then it should also (a) direct the trial court to grant Right to Life of Michigan and the Michigan Catholic Conference's motion to intervene, and (b) order the trial court to certify proposed intervenors' federal affirmative defenses, giving advocates from both sides of the abortion debate an equal opportunity to ask this Court to resolve hypothetical questions in a case with no controversy and no facts.

Respectfully submitted,

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