STATE OF MICHIGAN
IN THE SUPREME COURT

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

Supreme Court No. 164256

Oakland Circuit Court
No. 22-193498-CZ

Hon. EDWARD SOSNICK

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.
/

SUPPLEMENTAL BRIEF
IN SUPPORT OF GOVERNOR'S EXECUTIVE MESSAGE

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   The Governor's answer: No.

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

   The Governor's answer: No, and yes.

3. What is required under MCR 7.308(A) and specifically, are these questions of "such public moment as to require an early determination"?

   The Governor's answer: Yes.

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

   The Governor's answer: No.

5. Should the questions posed be answered before the U.S. Supreme Court issues its decision in *Dobbs v Jackson Women's Health Organization*, and would a decision in that case serve as binding or persuasive authority to the questions raised here?

   The Governor's answer: Yes, and no.

ARGUMENT

I. The preliminary injunction in *Planned Parenthood v Attorney General* does not remove the need for this Court to certify the questions in this case for immediate determination.

In its May 20, 2022 Order, this Court first asks "whether the Court of Claims' grant of a preliminary injunction in *Planned Parenthood v Attorney General*, 22-000044-MM, resolves any need for this Court to direct the Oakland Circuit Court to certify the questions posed for immediate determination." It does not. While the Court of Claims properly determined that MCL 750.14 is likely unconstitutional under the Michigan Constitution, the injunction is by its nature preliminary and remains subject to legal challenge—indeed, it has already been challenged. Given the paramount importance of clarifying the right to abortion under state law as Michigan women and their healthcare providers plan for the U.S. Supreme Court's forthcoming decision in *Dobbs*, a single trial court order is insufficient to dispense with the need for this Court's conclusive determination as to the scope of the right, and as to the validity of the criminal abortion statute, under the Michigan Constitution.

Of most immediate relevance, it is unclear whether or for how long that preliminary order will remain the sole relevant order in place. Just last week, Jerard M. Jarzynka, the Prosecuting Attorney for Jackson County, Christopher R. Becker, the Prosecuting Attorney for Kent County, Right to Life of Michigan, and the Michigan Catholic Conference filed a complaint in the Michigan Court of Appeals requesting an order of superintending control in *Planned Parenthood*.

(Ex A, Compl for Superintending Control.) They also moved for immediate consideration in the Court of Appeals. (Ex B, Mot for Immediate Consideration.) The complaint requests that the Court of Appeals issue an order of superintending control over Judge Gleicher, issue an order vacating Judge Gleicher's injunctive order, and dismiss the case for lack of jurisdiction. (Ex A, ¶¶ 80, 129.) The Court of Appeals has ordered further briefing on the complaint and expressed a desire to "effectuate an expedited decision," including submission for decision on the briefs without oral argument. (Ex C, 5/25/22 Order.) The uncertainty about whether, when, and how the Court of Appeals might intervene undermines the durability of the preliminary injunction's protections—of the status quo, of the public interest, and of the rights of Michiganders—and underscores the ongoing need for this Court's prompt and conclusive resolution of the constitutional questions at issue.

Even apart from challenges in the Court of Appeals, the Court of Claims is one of more than one hundred trial courts in the State. Trial court opinions are not binding on other Michigan trial courts; "it is only opinions issued by the Supreme Court and published opinions of the Court of Appeals that have precedential effect under the rule of stare decisis." *City of Detroit v Qualls*, 434 Mich 340, 360 n 35 (1990), citing MCR 7.215(C)(2). Therefore, the grant of a preliminary injunction does not in itself prevent any other trial court from ruling differently should it be presented with questions about the constitutionality of MCL 750.14. Those other trial courts—including the Oakland Circuit Court, where this action is pending—

may not find the Court of Claims' order persuasive. If other courts were to issue contradictory orders, confusion could arise about which order is binding and where.

In addition, the Court of Claims' order enjoins the Attorney General and "anyone acting under [her] control and supervision" from enforcing MCL 750.14, and orders the Attorney General to give "immediate notice" of its order to "all state and local officials acting under [her] supervision that they are enjoined and restrained from enforcing MCL 750.14." See *Planned Parenthood v Attorney General*, No. 22-000044-MM, 27 (attached as Ex D). MCL 14.30 clearly authorizes the Attorney General to "supervise the work of, consult and advise" prosecuting attorneys "in all matters pertaining to the duties of their offices." But there is some dispute over whether the statute should be read to confer on her the authority to instruct county prosecutors whether and when to charge crimes or forbear from doing so (see, e.g., Ex A ¶¶ 57–58),[1] supplying another potential source of conflict over the effect of the preliminary injunction.

This Court is the only forum with the power to conclusively settle the important constitutional issues presented in this case. It is inevitable that this

[1] Compare, e.g., *Fieger v Cox*, 247 Mich App 449, 466 (2007) ("Pursuant to MCL 59.153, prosecuting attorneys in Michigan possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings.") with *Platinum Sports Ltd v Snyder*, 715 F3d 615, 619 (CA 6, 2013) (noting that "any effort by a prosecutor at this point to enforce the statutes [at issue] . . . would be *ultra vires*" given that the Governor and Attorney General had stipulated to an order deeming them facially unconstitutional and permanently enjoining their enforcement, and that the Attorney General "is obligated to 'supervise the work of . . . prosecuting attorneys' " under MCL 14.30).

Court will be called upon to address the enforceability of MCL 750.14 under state law. The issues are live and squarely presented in this case, and there is no reason for the Court to delay its consideration of these issues of vital state importance. The Court of Claims' injunction is plainly correct, but it does not settle the issues in this State or dispel the uncertainty that motivated the Governor to exercise her extraordinary authority to invoke this Court's jurisdiction. The preliminary injunction is just that—preliminary. Michiganders require a definitive pronouncement of their constitutional rights that they can rely on in the coming weeks and months.

II. MCR 7.308 contains no "actual case and controversy requirement," but even if it did, that requirement has been met here.

This Court's second question asks "whether there is an actual case and controversy requirement and, if so, whether it is met here." There is no such requirement under the plain language of the executive message provision. See MCR 7.308. Even if there were, it is met here.

There is no "actual case and controversy requirement" under the plain language of the executive message provision. MCR 7.308(A)(1) requires only that there be a "pending" "action or proceeding" "involving a controlling question of public law, and the question is of such public moment as to require an early determination according to executive message of the governor addressed to the Supreme Court . . . ." It nowhere mentions a "case and controversy." Determining whether there is a "pending" "action or proceeding" does not require determining

whether that action or proceeding involves a case and controversy. Because Governor Whitmer's complaint was properly filed and has not been dismissed or otherwise resolved, her action is pending.

The history of this provision confirms the point. The "Certified Questions" provisions of both the 1963 and 1984 versions of the Michigan Court Rules explicitly require a "pending case or controversy." GCR § 797 (1963) required that a judge have "pending before him . . . any controlling question or questions of public law involved in a pending case or controversy . . . ."; GCR § 797 (1984) similarly required that a judge have "pending before him . . . any controlling question or questions of public law involved in a pending case or controversy . . . ." The substitution of "action or proceeding" for "case or controversy" in the current version of the certified questions provision reflects the intent of this Court—which has ultimate authority to adopt amendment to Michigan's Court Rules—to omit an actual case and controversy requirement. Indeed, "the rules governing the construction of statutes apply with equal force to the interpretation of court rules," *McAuley v Gen Motors Corp*, 457 Mich 513, 518 (1998), and "a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute," *Bush v Shabahang*, 484 Mich 156, 166–168 (2009).

Even if MCR 7.308 contained a case and controversy requirement, that requirement would be met here. Michigan's declaratory judgment rule requires an "actual controversy," and Michigan courts have a broader power to decide

controversies than do federal courts under the "case or controversy" limitations of Article III. See MCR 2.605(A)(1); *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 364–365 (2010) (*LSEA*). Governor Whitmer satisfies the requirements for standing, ripeness, and mootness. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012) ("MCR 2.605 . . . incorporates the doctrines of standing, ripeness, and mootness.").

First, the Governor has standing to bring this dispute. "The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.' " *LSEA*, 487 Mich at 355, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633 (1995). "Thus, the standing inquiry focuses on whether a litigant 'is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable.' " *Id.*, quoting *Allstate Ins Co v Hayes*, 442 Mich 56, 68 (1993). In 2010, this Court clarified that standing in the Michigan courts is "a limited, prudential doctrine." *Id.* at 372. At that time, this Court described several ways a litigant could satisfy Michigan's "limited, prudential" standing requirement. Notably, this Court explained that "a litigant has standing whenever there is a legal cause of action." *Id.* In addition, a litigant has standing "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer

standing on the litigant." *Id.* Here, the Governor satisfies the standing requirements under either test.[2]

The Governor has standing to bring her claims because "there is a legal cause of action" explicitly provided to her to bring them. *Id.* at 372. The Michigan Constitution specifically provides that the Governor can sue in the name of the State "to enforce compliance with any constitutional . . . mandate or to restrain violations of any constitutional . . . right." Const 1963, art 5, § 8. And as this Court has recognized, "[i]f the Legislature unambiguously expresses an intent to confer standing through a statute's text, then it would certainly be sufficient to confer standing." *LSEA*, 487 Mich at 374 n 23. If anything, the fact that the Governor is conferred standing under the State Constitution, rather than by statute, counsels even more strongly in favor of her lawsuit being appropriate. See *People v Tanner*, 496 Mich 199, 221–222 (2014) (noting that the Michigan Constitution "is the enduring expression of the will of 'we, the people' of this state").

Even absent the plain language of the Michigan Constitution that explicitly provides the Governor standing to bring her claims, the Governor "has a special injury or right, or substantial interest" that makes her the best litigant to bring this case. See *LSEA*, 487 Mich at 372. The Michigan Constitution requires that the Governor "shall take care that the laws be faithfully executed." Const 1963, art 5,

[2] Furthermore, even if the Governor's suit were deemed not to satisfy Michigan's traditional justiciability requirements, that would not itself preclude the case from moving forward. See *LSEA*, 487 Mich at 356–357 (noting that standing under Michigan law "remained a prudential limit that could, within the Court's discretion, be ignored").

§ 8. And it also requires that she, as a precondition to assuming that power and responsibility, "solemnly swear" to "support the Constitution of the United States and the constitution of this state." Const 1963, art 11, § 1. The Governor thus "has no less a solemn obligation . . . than does the judiciary to consider the constitutionality of [her] every action." *Lucas v Bd of Cty Rd Comm'rs of Wayne Cty*, 131 Mich App 642, 663 (1984). As such, the Governor has a right and a substantial interest in ensuring that the constitutional rights of Michigan citizens are not violated. Because the Constitution is the supreme law of the State, the Governor would abdicate her duty to take care that the laws be faithfully executed if she countenanced the enforcement of an unconstitutional statute.[3]

Second, the Governor's claim is ripe for adjudication. "[R]ipeness focuses on the *timing* of the action." *Mich Chiropractic Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363, 379 (2006), overruled on other grounds by *LSEA*, 487 Mich 349. "A claim lacks ripeness, and there is no justiciable controversy, where 'the harm asserted has [not] matured sufficiently to warrant judicial intervention . . . .' "

[3] And indeed, standing here is further confirmed by the fact that the relief sought in this suit on behalf of the State would serve to protect not only Michiganders' constitutional rights, but also the State's "quasi-sovereign interests" in the "health, comfort and welfare of [its] people." *Coldsprings Twp v Kalkaska Cty Zoning Bd of Appeals*, 279 Mich App 25, 29 (2008) (quotation marks omitted). As explained in the Complaint, abortion is a healthcare issue, and its availability to Michiganders is absolutely a matter of their health and welfare. Complications from abortion are rare, and much less frequent than complications arising during childbirth. (Ex E, Oakland Co Compl, ¶¶ 63, 64.) Some women choose to have abortions because continuing with a pregnancy could pose a significant risk to their health. (*Id.*, ¶ 67.) And when women are denied an abortion, they face comparatively greater risks to their health from continued pregnancy and childbirth. (*Id.*, ¶ 68.)

Id. at 381. Even so, "the purpose of a declaratory judgment . . . is 'to enable the parties to obtain adjudication of rights *before an actual injury occurs*.' " *UAW*, 295 Mich App at 496; see also *Adair v State*, 486 Mich 468, 490 (2010) ("We have also consistently held that 'a court is not precluded from reaching issues before actual injuries or losses have occurred.' "). Indeed, "Michigan courts have consistently upheld the right to seek declaratory relief where interested parties have sought the guidance of courts prior to there being an actual violation of a statute." *Kalamazoo Police Supervisor's Ass'n v City of Kalamazoo*, 130 Mich App 513, 518 (1983) (collecting cases). Instead, a plaintiff bringing a declaratory judgment action need only "demonstrate an 'adverse interest necessitating the sharpening of the issues raised.' " *UAW*, 295 Mich App at 495.

Governor Whitmer has done so. She has demonstrated that thousands of Michigan women depend on abortion care each year throughout the state, and that healthcare providers and their potential patients now face grave uncertainty about the enforceability of MCL 750.14. (See Ex E, ¶¶ 62–78.) This uncertainty will only intensify once the *Dobbs* decision is released if this Court has not determined whether the Michigan Constitution protects a woman's right to abortion or otherwise precludes enforcement of MCL 750.14.

The potential for criminal liability only heightens the need for this Court's intervention. Uncertainty as to the scope of a criminal statute itself implicates due process concerns. This Court has consistently held for more than a century "that '[a] criminal statute ought to be so plain and unambiguous that 'he who runs' may

read, and understand whether his conduct is in violation of its provisions.' " *People v Pinkney*, 501 Mich 259, 268 (2018), quoting *People v Ellis*, 204 Mich 157, 161 (1918). And 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. *Associated Builders & Contractors v Dir of Consumer & Indus Servs Dir*, 472 Mich 117, 127 (2005), overruled on other grounds by *LSEA*, 487 Mich 349. In light of the shifting sands of *Roe*'s federal progeny, as well as silence from this Court since *Bricker*, Michigan women and healthcare providers cannot be certain whether the criminal abortion statute will be enforceable against them. This Court need not wait until "threat of imminent prosecution," *id.*; the actions of healthcare providers and patients are already being shaped by the threat of liability under the criminal abortion statute. This Court's guidance is needed so that every Michigander knows their rights.

Third, this dispute is not moot. "A case is moot if the court's ruling cannot have any practical legal effect upon a then existing controversy." *Paquin v City of St Ignace*, 504 Mich 124, 131 n 4 (2019) (quotation marks omitted). "[T]he burden of demonstrating mootness is a 'heavy one.' " *MGM Grand Detroit, LLC v Community Coalition for Empowerment Inc*, 465 Mich 303, 359 (2001), quoting *Los Angeles v Davis*, 440 US 625, 631 (1979). The outcome of this case will have immediate "practical legal effect" for Michiganders across the State. See *Paquin*, 504 Mich at 131 n 4. Should the Governor prevail in her case, women across the State will be able to order their lives knowing that abortion will be available in Michigan this

summer and beyond, and healthcare providers will know that they can provide abortions without fear of criminal penalty. Disputes relating to pregnancy are also the quintessential example of those "likely to recur, yet evade judicial review" such that they are not moot. *Federated Publications v City of Lansing*, 467 Mich 98, 112 (2002); see also *Roe v Wade*, 410 US 113, 125 (1973) ("Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness.").

III. The Governor's certification request fits comfortably within the wide range of cases in which this Court has granted certification through the executive message process.

This Court's third question asks:

> [G]iven 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"[?]

By its plain language, the Michigan Court Rule governing certified questions from Michigan courts, MCR 7.308(A)(1), requires (1) that there 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," (2) that this action or proceeding involve "a controlling question of public law," and (3) that "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."[4]

[4] Upon such a showing, this 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

These requirements are all met here. As already discussed, the Governor's suit in Oakland Circuit Court constitutes the "pending . . . action or proceeding." At the center of that "action or proceeding" are "controlling question[s] of public law": whether the right to abortion is protected under the Michigan Constitution, and whether the criminal abortion ban violates that right and/or the right to equal protection under that same Constitution. This Court has never opined on these questions, and "according to" the Governor's Executive Message to this Court, they are "of such public moment as to require an early determination": the right of millions of Michigan women to access abortion care in our State—already uncertain and facing imminent upheaval—hangs in the balance.

The phrase "such public moment as to require an early determination" is not amenable to crisp definition, and this Court has not attempted to provide one. Yet one thing is clear: whether the Michigan Constitution protects the right to an abortion and whether MCL 750.14 is unconstitutional are of vastly more public significance that nearly all other cases that this Court has heard by executive message. If it was proper for this Court to hear cases about the propriety of a bond issuance to fund a stadium in Detroit, the jurisdiction of the Civil Rights Commission over fair housing claims, and the constitutionality of an act directed at reducing health-care costs, it is proper for this Court to rule on the constitutionality of a woman's right to abortion in the State of Michigan.

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application of the question." MCR 7.308(A)(1)(a). "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).

The first case involving use of an executive message is *City of Gaylord v Beckett*, in which Governor Romney requested this Court's review. 378 Mich 273, 287 (1966); see also *id.* at 325 n 1 (SOURIS, J., dissenting) (describing it as "first instance in which the Court has been asked for its advisory opinion pending trial of questions of public law" under the prior court rule).[5] The Gaylord city council had approved the issuance of a bond to finance the building of an industrial plant pursuant to the recently enacted "industrial development revenue bond act of 1963." *Id.* at 286–287. The plant was to be built under contract with United States Plywood Corporation; the private company could lease the plant for 25 years and then purchase the facility from the city for $1, yielding a substantial tax advantage. *Id.* at 287; see also *id.* ("[T]he net result of this transaction is that the city of Gaylord lends its tax-free status to the corporation so that the interest on what would otherwise be a private bond issue becomes tax-free."). The plant was built, but the city clerk (Beckett) refused to complete the transaction. *Id.* The case was "certified directly to this Court . . . at the request of Governor." *Id.* Ultimately, this Court issued a writ of mandamus compelling the city clerk to perform her duties. *Id.* at 308.

Two years later, in *Beech Grove Investment Co v Civil Rights Commission*, the Court again "accept[ed] certification of one controlling question" by request of

[5] The eight questions that this Court addressed were "certified to us by the circuit judge," but the Court noted that the parties did not submit or brief the questions (a practice this Court "disapprove[d]"). *Id.* at 288 n 1. Thus, the Court confirmed an uncontroversial aspect of the executive-message process—the parties should participate in briefing the merits of the certified questions.

Governor Romney: "Is the Civil Rights Commission possessed of jurisdiction, absent enabling legislation, to entertain complaints of discrimination, because of religion, race, color or national origin, in the purchase and sale of private housing?" 380 Mich 405, 417 (1968). The Court's answer: Yes. *Id.* at 419 ("The manner may be prescribed by law but the authority to act lies with the commission whether the manner is or is not so prescribed."). The Court's answer depended not only on the Michigan Constitution, but also on the common law and "its capacity to reflect the public policy of a given era." *Id.* at 428–429.

In 1972, Governor Milliken filed an executive message in *Alan v Wayne County*, submitting three questions relating to the issuance of bonds to finance a baseball stadium for the Detroit Tigers. 388 Mich 210, 242 (1972). Less than a month later, the Court issued a unanimous order affirming the trial court's determination that the bond issuance was invalid, and subsequently issued a lengthy opinion describing more fully its analysis. *Id.* at 244.

The same year, the Court addressed "the constitutionality of the Michigan public school financing system" under the Michigan Constitution, finding that, as constituted at the time of the suit was brought, it violated Michigan's equal protection clause. *Milliken v Green*, 389 Mich 1, 10, 37–38 (1972); Const 1963, art 8, § 2. On rehearing, without explanation, the Court vacated the opinions.[6] *Milliken v Green*, 390 Mich 389, 389 (1973).

[6] In the interim, the U.S. Supreme Court issued *San Antonio Independent School District v Rodriguez*, finding Texas's funding scheme did not violate the federal constitution's equal protection clause under rational basis review. 411 US 1 (1973).

Finally, in the 1980s, the Court considered questions of first impression "regarding the constitutionality and construction of the Nonprofit Health Care Corporation Reform Act," which was "an effort of the Legislature aimed at curbing the rise on health care costs by a unique statutory scheme which combines both free-market and government regulatory methods of control." *Blue Cross & Blue Shield of Mich v Governor*, 422 Mich 1, 9, 18 (1985) (*BCBSM*). The Court issued an opinion answering nine separate questions of constitutional law, with 32 issues addressed, striking down several aspects of the act. *BCBSM*, 422 Mich at 11–13. BCBSM lodged challenges to 46 sections of the act on "several constitutional grounds, *i.e.,* as an impairment of BCBSM's public and private contractual rights, as a taking without due process of law, as violative of equal protection, as an unconstitutional delegation of legislative authority, as a denial of procedural due process, as unconstitutionally vague, and as a violation of the First Amendment." *Id.* at 13.[7]

Texas's funding scheme was apparently similar to Michigan's at the time. See *Milliken v Green*, 390 Mich 389, 393–393 (1973) (Kavanagh and Levin, JJ, concurring in order vacating case as improvidently granted).

[7] In addition, the Court has declined to exercise its authority upon executive message of the Governor on at least two occasions, though these decisions did not identify the reasons for doing so. In another case involving bond issuance, this Court declined to grant the Governor's request for an early determination of the issue "whether the City of Detroit's published notice of intent to issue bonds for stadium development meets the requirements set by statute." *Kratchman v City of Detroit*, 400 Mich 158, 162–163 (1977). After the trial court granted summary disposition against the City, enjoining its ability to issue bonds, the Court granted the City's bypass application, see MCR 7.305(B)(4), and reversed. *Id.* at 168. And in *W.A. Foote Memorial Hospital, Inc v Kelley*, the Court reviewed, among other things, the constitutionality of the Hospital Finance Authority Act, 1969 PA 38, a statutory scheme that permitted the creation of local hospital authorities to

Through such certification, the Court has opined on the validity of a bond issuance to finance the construction of a stadium for a sports team. *Alan*, 388 Mich at 242. It has passed on the constitutionality of a revenue bond act and its application to a municipal bond maneuver in funding a plywood plant. *Beckett*, 378 Mich at 287. And it has opined on the jurisdiction of the Civil Rights Commission to adjudicate housing discrimination complaints, *Beech Grove Inv Co*, 380 Mich at 417, the constitutional validity of Michigan's school financing scheme, *Green*, 389 Mich at 1, and an industry-specific insurance regulatory scheme, see *BCBSM*, 422 Mich at 9.

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. That gubernatorial determination is entitled to respect, both under the text of the court rule and basic principles of interbranch comity. Beyond that, the cases reflect a general practice of this Court to hear cases governing the constitutionality of state statutes that have at least regional, if not statewide impact. And while the court rule speaks of the necessity of a "public moment" requiring "an early determination," this Court has not treated this as a strictly temporal limitation. Compare *Alan*, 388 Mich at 243–

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construct, improve, and lease non-profit hospital facilities. 390 Mich 193 (1973). This Court declined certification of an issue "without prejudice to recertification to this Court by the Governor after the trial court had decided the central issue of the constitutionality of the Act," *id.* at 207, and later granted cross-appeals from the circuit court's order nullifying the City of Jackson's use of the act for a public hospital. *Id.* at 208.

244 (just over a month from executive message to order affirming the decision below), with *Beech Grove Inv Co*, 380 Mich at 417 (almost 18 months from complaint to executive message, and more than seven months from executive message to this Court's order).

Even if there was some demonstrated exigency requirement, this case readily satisfies it. As discussed, it is at this very moment unclear to what extent Michigan's criminal abortion statute is enforceable, given the erosion of *Roe*'s federal protections since *Bricker*. Any day now, that uncertainty will only deepen with the issuance of a decision in *Dobbs*, which will dictate—and very likely upend—the federal constitutional rights of millions of Michigan women and their access to medical care. And abortion is an extremely time-sensitive procedure. A delay of mere weeks can mean that a woman must obtain a surgical rather than a medical abortion, or preclude her from obtaining an abortion altogether. In all respects, time is of the essence here; this Court's determination of Michigan's constitutional right to abortion and the validity of Michigan's criminal abortion statute will have immediate and statewide impact. The urgency and import of these circumstances easily match, and quickly outstrip, those that this Court has previously deemed worthy of certification from its own courts.

IV. Neither the executive message process nor any other court rule, law, or constitutional provision prevents the Governor from seeking, under article 5, § 8 of the Michigan Constitution, to enjoin the violation of constitutional rights, including constitutional rights that have not yet been recognized.

The fourth question this Court has asked is "whether the Executive Message process limits the Governor's power to defending statutes, rather than calling them into question." It does not.

The relevant language of MCR 7.308(A)(1)(a) provides:

> 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.

Nothing in the language of this rule suggests that the executive message is limited to defending a statute. The text of the rule plainly applies to any "controlling question of public law" that is "of such public moment as to require an early determination" by this Court. As discussed, the questions presented in the Executive Message in this case fit both requirements.

Beyond that, no limits, conditions, or restrictions appear in the text of the rule. An executive message could ask this Court to hold that a statute is constitutional or that a statute is unconstitutional, that an apparent conflict between two statutes should be resolved in favor of one statute or the other, that a rule or regulation is valid or invalid, or any other question of public law.

The questions presented in the pending lawsuit in Oakland Circuit Court—whether the Michigan Constitution protects a right to abortion and whether MCL 750.14 violates that right or the right to equal protection—are questions of public law that control the outcome of that lawsuit. And, as discussed above, the uncertainty as to the enforceability of MCL 750.14 under the Michigan Constitution and the impending Supreme Court decision in *Dobbs* render this question of such public moment as to require an early determination.

Indeed, the executive message power is not limited to advocacy at all. For example, in *Alan*, the Governor sent an executive message to this Court asking it to answer three questions despite not being a party to the case below. 388 Mich at 243 n 29. And one of these questions asked this Court to consider whether a Michigan statute violated the federal or Michigan Constitution. *Id.*

Defendants Jarzynka and Becker, in opposing certification, have not suggested that the executive message process limits the Governor's power to defending statutes. They have, however, argued that the Governor lacks the power under article 5, § 8 to argue that a statute violates a constitutional provision. They are mistaken. Article 5, § 8 speaks in broad terms and grants the Governor the authority to sue "to restrain violations of *any* constitutional . . . right . . . ." (emphasis added). The only limitation in the constitutional text is that the Governor may not use this power to sue the Legislature, which she has not done.

Jarzynka and Becker argue that this Court should engraft additional limiting language into article 5, § 8, limiting this power to restraining a *previously*

recognized constitutional violation. But the People did not choose to place that limitation into the Constitution, and this Court should not amend the Constitution to add this language. These defendants argue that "what is conspicuously absent from this provision is any authority for the Governor to . . . make any requests that a court find a statute to be unconstitutional."[8] But the opposite is true: what is actually absent from article 5, § 8 is any restriction barring the Governor from asking a court to recognize a constitutional right in the course of seeking to enforce that right.

There is nothing unusual about a litigant asking for a previously unrecognized constitutional right to be recognized and enforced in the same action. Indeed, that is how constitutional rights first get recognized. Article 5, § 8 does not grant the Governor a lesser power to sue to restrain constitutional violations than other litigants have. What it grants the Governor is the *standing* to bring such lawsuits without the showing that would be required of a private litigant.

Jarzynka and Becker also claim that this power should be limited such that the Governor "cannot bring a lawsuit to enforce compliance or restrain violations of laws or constitutional rights that do not exist." (Ex F, p 5.) The Governor agrees. But while Jarzynka and Becker suggest that the constitutional right to abortion

[8] These defendants also point out other "conspicuous absences" from article 5, § 8: "to change a law, amend a law, nullify a law, repeal a law" (Ex F, Defs' Jarzynka and Becker's Br in Opp to Req for Certification, p 5.) The Governor's lawsuit does not attempt to do any of these things.

does not exist in Michigan, the Governor asserts that it *does*. And it is this "controlling question of public law" that the Governor asks this Court to decide.

V. This Court should answer the questions presented before the release of *Dobbs*, which will not bind this Court and will likely have limited to no persuasive value on the questions presented here.

This Court's fifth and final question asks "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." The answer is clear: *Dobbs* will not bind this Court in resolving questions of state constitutional law; its reasoning is unlikely to have much persuasive value; and this Court ought not wait for *Dobbs* while the potential enforceability of MCL 750.14 threatens the constitutional rights of Michiganders.

First, this Court should not wait for *Dobbs* because the questions posed here are of state constitutional law. As to those questions, *Dobbs* will not bind this Court. The U.S. Supreme Court has repeatedly stated that state courts may "interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v Evans*, 514 US 1, 8 (1995). Michigan courts have acknowledged this authority and have previously extended greater protections under the Michigan Constitution than those offered by parallel provisions of the federal constitution. See *Sitz v Dep't of State Police*, 443 Mich 744, 776 (1993) (holding that in the context of automobile seizures, "the Michigan Constitution offers more protection than the United States

Supreme Court's interpretation of the Fourth Amendment."). As the Court of Claims pointed out in *Planned Parenthood*, the Michigan Supreme Court has explicitly noted, in particular, "that the Michigan Constitution's due process clause need not be interpreted in lockstep with the Fourth Amendment's due process clause." *Planned Parenthood*, unpub op at 14–15, citing *AFT Mich v Michigan*, 497 Mich 197, 245 (2015) ("Although these provisions are often interpreted coextensively, Const 1963, art 1, § 17 may, in particular circumstances, afford protections greater than or distinct from those offered by U.S. Const Am XIV, § 1.").

Second, *Dobbs* should not delay this Court's consideration of the questions posed because whatever persuasive value the opinion might offer is, at best, highly limited. Beyond not addressing Michigan's Constitution—the basis of the questions posed here—it is unlikely that the *Dobbs* opinion will address either the right to bodily integrity or equal protection. The parties' briefs in *Dobbs* did not address those rights, and neither is included in the question presented. Governor Whitmer, however, has asked this Court to address whether MCL 750.14 violates the right to bodily autonomy protected by Michigan's Due Process Clause and whether it violates Michigan's Equal Protection Clause. (See Ex G, Executive Message, p 2.) Thus, even if this Court were to treat a decision in *Dobbs* as persuasive, it would not resolve this case.

Third, the questions posed should be answered before the U.S. Supreme Court issues its decision in *Dobbs* because the uncertainty regarding the scope of the right to abortion and the enforceability of Michigan's criminal abortion ban

under the Michigan Constitution does not depend on *Dobbs*. MCL 750.14, on its face, makes each of the thousands of abortions performed by doctors in Michigan each year a felony unless necessary to preserve the life of the pregnant woman. Application of that law has been limited to some degree since 1973, when this Court construed the statute to allow those abortions protected under the U.S. Constitution, as then articulated in *Roe*. But federal abortion jurisprudence has shifted dramatically since *Roe* was decided nearly five decades ago. (Ex E, ¶¶ 53–59.) This Court has not opined any further on the scope of abortions that must be exempted from criminal prosecution because of the right to abortion under the U.S. Constitution, and it has never opined on how the protections for abortions available under the Michigan Constitution independently, and further, limit the permissible applications of the criminal abortion statute. As a result, the extent to which Michigan's criminal abortion statute is currently enforceable is unclear. There is no way for Michiganders, today, to know whether or to what extent the statute has expanded to fill the void left by a retreating *Roe*. Whatever the U.S. Supreme Court does or does not do in *Dobbs*, Michiganders deserve to know their rights and the scope of those rights, especially when criminal liability is at issue.

CONCLUSION AND RELIEF REQUESTED

The Governor respectfully requests that this Court direct the Oakland Circuit Court to certify the controlling questions of law presented here.

Respectfully submitted,

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