STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN SENATE AND MICHIGAN HOUSE OF REPRESENTATIVES,

Appellants/Plaintiffs,

v

JOCELYN BENSON,

Appellee/Defendant.

Supreme Court No. 160908

Court of Appeals No. 351073

Court of Claims No. 19-000092-MZ

Consolidated with:

LEAGUE OF WOMEN VOTERS OF MICHIGAN, MICHIGANDERS FOR FAIR AND TRANSPARENT ELECTIONS, HENRY MAYERS, VALERIYA EPSHTEYN, AND BARRY RUBIN,

Appellants/Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State,

Appellee/Defendant.

Supreme Court No. 160907

Court of Appeals No. 350938

Court of Claims No. 19-000084-MM

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

BURSCH LAW PLLC
John J. Bursch (P57679)
9339 Cherry Valley Ave. SE, #78
Caledonia, MI 48316
(616) 450-4235
jbursch@burschlaw.com
Attorneys for Michigan Senate and Michigan House of Representatives

DICKINSON WRIGHT PLLC
Charles R. Spies (P83260)
Ariana D. Pellegrino (P79104)
500 Woodward Avenue, Suite 4000
Detroit, MI 48226-3425
(313) 223-3500
cspies@dickinsonwright.com
apellegrino@dickinsonwright.com
Co-counsel for Michigan Senate and Michigan House of Representatives

THE MICHIGAN SENATE AND HOUSE'S MOTION TO INTERVENE IN CASE NO. 160907

The Michigan Senate and Michigan House of Representatives, pursuant to MCR 2.209 and MCR 7.311, move this Court to intervene in the action pending before this Court as Docket No. 160907, and to grant the pending application for leave to appeal that the Senate and House filed in Docket No. 160908. In support of their motion, the Senate and House state as follows:

1. This case involves the enforcement of Public Act 608 of 2018 ("PA 608"), which concerns the process for circulating petitions to initiate legislation or to amend the Michigan Constitution. PA 608 took effect on December 31, 2018; on May 22, 2019, Attorney General Dana Nessel issued a formal opinion, OAG No. 7310, opining that certain provisions of PA 608 are unconstitutional.

2. On May 23, 2019, the League of Women Voters of Michigan ("LWV") filed a Verified Complaint for Declaratory and Injunctive Relief in the Court of Claims, Case No. 19-000084-MM (the "LWV Action"), seeking a determination that certain provisions of PA 608 are unconstitutional.

3. On June 5, 2019, the Senate and House filed in the Court of Claims a Complaint for Declaratory and Injunctive Relief, Case No. 19-000092-MZ (the "Legislature's Action," and, together with the LWV Action, the "Court of Claims Actions"), seeking to uphold PA 608 as enacted.

4. On July 3, 2019, the Court of Claims consolidated the Court of Claims Actions.

5. On September 27, 2019, the Court of Claims issued an Opinion and Order on the dispositive motions in the Court of Claims' Actions (the "Court of Claims Order"), declaring certain provisions of PA 608 constitutional and others unconstitutional. Ex B to 2/3/2020 Michigan Senate and House Application for Leave to Appeal.

6. On October 7, 2019, LWV filed a Claim of Appeal in the Court of Appeals, Case No. 350938.

7. On October 14, 2019, the Senate and House filed a Claim of Appeal in the Court of Appeals, Case No. 351073 (together with the LWV Claim of Appeal, the "Appeals").

8. On November 5, 2019, LWV filed in this Court an Application for Leave to Appeal before Decision by the Court of Appeals (the "LWV Bypass Application") pursuant to MCR 7.305(B)(4), Case No. 160492 (the "LWV Supreme Court Action"), identifying in the caption both Appeals.

9. On November 8, 2019, the Court of Appeals consolidated the Appeals.

10. Within 28 days of the filing of the LWV Bypass Application, on December 3, 2019, the Senate and House filed an Answer Concurring in the LWV Bypass Application and Cross-Emergency Bypass Application.

11. On December 4, 2019, this Court advised the Senate and House to instead file a motion to intervene in this Court's Case No. 160492. The Senate and House promptly filed that motion, and on December 18, 2019, this Court denied denied the bypass application, denied the motion to intervene, and directed the Court of Appeals to issue an abbreviated briefing schedule and to issue a decision no later than Moday, January 27, 2020.

12. On January 27, 2020, the Court of Appeals issued its 2-1 published decision. Ex A to 2/3/2020 Michigan Senate and House Application for Leave to Appeal. Two panel members held that the Legislature lacked standing to defend PA 608 even though the Attorney General neither defended nor assigned anyone to defend the legislation. Judge Boonstra disagreed and would have held that the Legislature had standing in this unique circumstance. Two panel members also held that PA 608's paid-circulator-disclosure requirement was invalid. Judge Boonstra disagreed and would have upheld the requirement. All three panel members held that PA 608's geographic-distribution and paid-circulator-affidavit requirements were invalid. The standing ruling conflicts with numerous federal-court decisions that—despite the more

rigorous Article III standing requirement—allowed Congress to defend a law when the federal Executive Branch declined to do so. *E.g.*, *United States v Windsor*, 570 US 744 (2013). The geographic-distribution holding conflicts with *Utah Safe to Learn-Safe to Worship Coalition, Inc v State of Utah*, 94 P3d 217 (Utah, 2004), which upheld a substantively identical requirement. And the paid-circulator-disclosure holding conflicts with *Charge v Gale*, 810 F Supp 2d 916 (D Neb, 2011), which upheld a substantively identical requirement.

13. Following this Court's directive in its December 18, 2019 Order, the Michigan Senate and House timely filed their application for leave to appeal the Court of Appeals' erroneous published decision by 5:00 p.m. on Monday, February 3, 2020. This Court promptly advised the Senate and House to also file a motion to intervene in the LWV case.

14. Accordingly, the Senate and House now bring the instant Motion to Intervene in the LWV Supreme Court Action, No. 160907, pursuant to MCR 2.209 and MCR 7.311.

15. Under MCR 2.209(A)(3), on timely application, an applicant has a right to intervene in an action "when the applicant claims an interest relating to the . . . transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

16. Similarly, under MCR 2.209(B)(2), on timely application, an applicant may intervene "when an applicant's claim or defense and the main action have a question of law or fact in common."

17. The rule for intervention "should be liberally construed to allow intervention where the applicant's interests may be inadequately represented." *Neal v Neal*, 219 Mich App 490, 492-493; 557 NW2d 133 (1996).

18. "[T]here need be no positive showing that the existing representation is in fact inadequate. All that is required is that the representation by existing parties may be inadequate." *Mullinix v City of Pontiac*, 16 Mich App 110, 115; 167 NW2d 856 (1969) (emphasis added).

19. Finally, "common question[s] of law and fact alleged should be the basis for granting the motion for leave to intervene unless the court in [its] discretion determines that the intervention would unduly delay or prejudice the adjudication of the rights of the original parties." *Burg v B & B Enters, Inc*, 2 Mich App 496, 499; 140 NW2d 788 (1966).

20. First, this Motion is timely. Because the Appeals were consolidated, litigated together, and decided together, all parties are on notice of the other parties' interests and legal arguments.

21. Second, as set forth in the Legislature's 2/3/2020 Application for Leave, as the legislative body of this State, the Senate and House have a strong interest in the enforcement of validly-enacted legislation. The Senate and House's interests are not just *inadequately* represented absent intervention; they are not represented at all. Both LWV and Secretary Benson advocate that PA 608's geographic-distribution, paid-circulator-disclosure, and paid-circulator-affidavit requirements should be struck down. Only the Legislature seeks to uphold PA 608 in its entirety.

22. Moreover, there is no dispute that Senate and House's claims and/or defenses share commons questions of law and fact with the LWV Action. That is why both the Court of Claims and the Court of Appeals consolidated the two cases, and why both issued a single opinion that disposed of both cases. The issues presented in the cases are identical.

23. Secretary Benson and LWV have acknowledged the close relationship between the Court of Claims Actions and Appeals. See Secy's 6/28/19 Motion to Hold Cause in Abeyance, ¶¶ 9, 13-14 ("The [Court of Claims Actions] raise the same legal question—the

constitutionality of [PA 608]."); LWV Motion to Consolidate Appeals, ¶ 10 ("This appeal should be consolidated with the Senate and House of Representatives Appeal . . . [because they] involve common facts and legal issues concerning the validity of PA 608, [and] of course they arise from the same Court of Claims ruling.").

24. Finally, pursuant to MCR 2.209(C)(1) and (2), the Senate and House have (1) filed this Motion stating the grounds for intervention, and (2) filed their 2/3/2020 Application for Leave, which states with more specificity the claims and/or defenses for which intervention is sought.

25. Although the phenomenon of the Attorney General choosing to attack the validity of a Michigan law rather than assigning an assistant attorney general to defend is new to this administration, this unique situation has occurred several times at the federal level, where Congress has been forced to seek intervention where the Executive Branch declined to defend an enacted federal law.

26. For example, when the Department of Justice declined to defend the constitutionality of the Defense of Marriage Act, the House of the 112th Congress intervened in more than a dozen cases to defend the law, including cases that were already on appeal. Yet no court denied the House full party status as intervenor. *E.g.*, *United States v Windsor*, 570 US 744 (2013); *McLaughlin v Hagel*, 767 F3d 113 (CA 1, 2014); *Bishop v Smith*, 760 F3d 1070 (CA 10, 2014); *Golinski v US Office of Pers Mgmt*, 824 F Supp 2d 968 (ND Cal, 2012); *Revelis v Napolitano*, 844 F Supp 2d 915 (ND Ill, 2012); and *Pederson v Office of Pers Mgmt*, 881 F Supp 2d 294 (D Conn, 2012), among others.

27. That is why the U.S. Supreme Court and lower federal courts routinely grant motions to intervene filed by the House of Representatives. *E.g.*, *Chadha*, 462 US at 930 n5; *Adolph Coors Co v Brady*, 944 F2d 1543, 1546 (CA 10, 1991) ("The Treasury admitted in its

answer that [certain challenged statutory provisions] are unconstitutional under the First Amendment . . . The House, however, moved to intervene in order to defend the constitutionality of the statute."); *Lear Sigler, Inc v Lehman*, 893 F2d 205, 206-07 (CA 9, 1989) (explaining that Senate and House of Representatives were allowed to intervene to defend constitutionality of statute that "the Navy originally had treated as unconstitutional"); *Synar v United States*, 626 F Supp 1374, 1378-1379 (DDC, 1986), aff'd, *Bowsher v Synar*, 478 U.S. 714 (1986) (allowing the U.S. Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives to intervene "in support of the constitutionality of" a statute that, in the executive branch's view, "violate[d] the principle of separation-of-powers"); *Ameron, Inc v US Army Corp of Eng'rs*, 607 F Supp 962, 963 (DNJ, 1985), *aff'd as modified on reh'g*, 809 F2d 979 (CA 3, 1986); *Barnes v Carmen*, 582 F Supp 163, 164 (DDC, 1984), *rev'd sub nom Barnes v Kline*, 759 F2d 21, 22 (CA DC, 1984), *rev'd on mootness grounds sub nom Burke v Barnes*, 479 US 361, 362 (1987); and *In re Production Steel, Inc*, 48 BR 841, 842 (Bankr MD Teen, 1985), among many others.

28. Any other result gives the Attorney General alone the power to "nullify [the Legislature's] enactment solely on [her] own initiative," posing "grave challenges to the separation of powers." *Windsor*, 570 US at 762.

Accordingly, the Senate and House respectfully request that the Court (1) grant the instant Motion and enter an order allowing the Senate and House to intervene in Case No. 160907, (2) grant the Senate and House's pending Application for Leave to Appeal, (3) direct the parties to appear for oral argument, (4) hold that the Senate and House have standing to defend a Michigan law's validity when the Attorney General declines to defend it or to appoint an assistant attorney general to do so, and (5) uphold PA 608 in its entirety.

Respectfully submitted,

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BURSCH LAW PLLC

By */s/ John J. Bursch*

John J. Bursch (P57679)
9339 Cherry Valley Ave his SE, #78
Caledonia, Michigan 49316
(616) 450-4235
jbursch@burschlaw.com

Charles R. Spies (P83260)
Ariana D. Pellegrino (P79104)
DICKINSON WRIGHT PLLC
500 Woodward Avenue, Suite 4000
Detroit, Michigan 48226-3425
(313) 223-3500
cspies@dickinsonwright.com
apellegrino@dickinsonwright.com

Counsel for the Senate and House