STATE OF MICHIGAN
IN THE COURT OF CLAIMS

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

Plaintiffs,

v

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

Defendant,

and

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Intervenor-Defendants.

/

Case No. 22-000044-MM

Hon. Elizabeth Gleicher

JULY 25, 2022 INTERVENOR-DEFENDANTS' MOTION TO STAY FURTHER PROCEEDINGS

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

_____ /

Pursuant to this Court's inherent authority to manage the proceedings before it, Intervenor-Defendants Michigan House of Representatives and Michigan Senate (the Legislature) move for entry of an order staying further proceedings in the above-captioned matter.

The Legislature has filed an Application for Leave to Appeal in the Court of Appeals. That application is currently pending, and if granted, the subsequent decision could moot or have significant impact on further proceedings in this case. And proceedings brought by others could have that same impact: Governor Whitmer is seeking certification to the Michigan Supreme Court

of questions that would control the outcome in this case, and there is a pending Complaint for an Order of Superintending Control asking the Court of Appeals to require this Court to dismiss the case for lack of jurisdiction. Staying further proceedings in this case pending the outcomes in the proceedings before the Michigan Supreme Court and Court of Appeals would serve the public's interest in efficient judicial administration and allow for speedy resolution of the significant state constitutional issues in this case.

Furthermore, Michigan voters may soon render this case moot: there is a pending petition to put a constitutional amendment on the ballot that would prevent the law challenged in this case from going into effect. This Court should consider principles of constitutional avoidance and stay further proceedings in this case pending the outcome of the ballot initiative to preserve the separation of powers.

WHEREFORE, the Legislature respectfully requests that this Court stay further proceedings in this matter pending the outcome of proceedings before the Michigan Supreme Court and the Court of Appeals and the outcome of the ballot initiative.

BRIEF IN SUPPORT OF JULY 25, 2022 INTERVENOR-DEFENDANTS' MOTION TO STAY FURTHER PROCEEDINGS

This Court should stay further proceedings in this matter pending disposition of the related proceedings in the Michigan Supreme Court and the Court of Appeals and the outcome of the Reproductive Freedom for All ballot initiative, each of which could moot this case or have a significant impact on the issues presented. The Court has inherent authority to manage these proceedings efficiently, and the Court of Claims has previously exercised that authority by granting a stay of further proceedings while applications for leave to appeal are pending before the Court of Appeals. Staying this case is consistent with both the public's interest in the wise administration of judicial resources and the principle of separation of powers. And in this case, a stay of further proceedings would pose no harm to Plaintiffs or the public because the preliminary injunction would remain in effect. Accordingly, the Legislature respectfully requests this Court stay the case pending the disposition of the proceedings before the Supreme Court and the Court of Appeals and the outcome of the Reproductive Freedom for All ballot initiative

BACKGROUND

Plaintiffs filed the Verified Complaint on April 7, 2022, seeking a declaration that MCL 750.14 violates the Michigan Constitution and the Elliott-Larsen Civil Rights Act and requested a permanent injunction barring its enforcement. Plaintiffs also moved for a preliminary injunction to enjoin enforcement of MCL 750.14.

And on that same day, Governor Whitmer filed a lawsuit against thirteen Michigan County Prosecuting Attorneys in the Oakland County Circuit Court, Case No. 22-193498-CZ, also alleging that MCL 750.14 is unconstitutional. And again on the same day, Governor Whitmer submitted an Executive Message to the Michigan Supreme Court under MCR 7.308 and filed a Motion for Immediate Consideration, which remains pending. *In re Executive Message of the Governor*

Requesting the Authorization of a Certified Question, Supreme Ct No. 164256.

On May 17, 2022, this Court granted Plaintiffs' motion for preliminary injunction, enjoining the Attorney General, and those under her control and supervision, from enforcing MCL 750.14 during the pendency of the action. PI Order at 27.

On May 27, 2022, two of the Prosecuting Attorneys sued by Governor Whitmer, along with Right to Life of Michigan and the Michigan Catholic Conference, filed a Complaint for Order of Superintending Control, asking the Court of Appeals to require this Court to dismiss the case for lack of jurisdiction. That Complaint remains pending. See Complaint for Order of Superintending Control, *In re Jarzynka,* Court of Appeals Case No. 361470.

On June 6, 2022, the Legislature filed a motion to intervene in this case and for reconsideration of the Court's PI Order. The Court granted the motion in part, allowing the Legislature to intervene, but denied the motion regarding reconsideration. June 15, 2022 Order.

On July 6, 2022, the Legislature filed an Application for Leave to Appeal before the Court of Appeals. See Appl for Leave to Appeal (attached as Exhibit A), *Planned Parenthood of Michigan v Attorney General*, Court of Appeals Case No. 362078. That application challenges the preliminary injunction both because of jurisdictional deficiencies and because of Plaintiffs' failure to establish any of the factors necessary for a preliminary injunction. *Id.* That application is currently pending.

On July 11, 2022, a petition was filed to put the Reproductive Freedom for All amendment on the ballot in November 2022. The amendment would create state constitutional protections for a right to abortion and keep MCL 750.14 from going into effect. That petition was supported by more than 750,000 signatures—some 325,000 more than required for the amendment to qualify for the ballot. See Ollstein, *Michigan activists submit signatures to put abortion rights on the*

ballot in November, Politico (July 11, 2022), https://tinyurl.com/Ollstein (accessed July 22, 2022).

ARGUMENT

The Michigan Supreme Court established long ago that the courts of this State have "the inherent right to function, and to function efficiently." *People v Brown*, 238 Mich 298, 300 (1927). This Court thus has "inherent power … to control the movement of cases on its docket." *Banta v Serban*, 370 Mich 367, 368 (1963). See *Maldonado v Ford Motor Co,* 476 Mich 372, 376 (2006) ("[T]rial courts possess the inherent authority ... to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); *Baynesan v Wayne State Univ*, 316 Mich App 643, 651 (2016) ("In this case, the Court of Claims was acting as a trial court. A trial court has the inherent authority to control its own docket.").

Michigan courts, including this Court, frequently exercise that power by granting motions for stay of further proceedings pending a decision on an application for leave to appeal. See, e.g., *Milanov v Univ of Mich*, unpublished order of the Court of Claims, issued January 13, 2021 (Docket No. 20-000056-MK), 2021 WL 8820955; *Gorman Golf Products, Inc v FPC, LLC*, unpublished opinion of the Oakland County Circuit Court, issued April 2, 2009 (Docket No. 06074150CH), 2009 WL 9390669, at *1 (noting that the court had previously held matter in abeyance pending ruling from Court of Appeals on application for leave to appeal); *Salt v Gillespie*, unpublished order of the Ingham County Circuit Court, issued May 10, 2006 (Docket Nos. 05-60-NS, et al.), 2006 WL 6335442; *Provider Creditors Comm v United Am Health Care Corp*, unpublished order of the Ingham County Circuit Court, issued April 21, 2005 (Docket No. 05127-CK), 2005 WL 6340512. Such stays ensure that a lower court's rulings are not upset by pending proceedings before a higher court.

The Court should exercise its authority to stay further proceedings to serve the public's

interest in judicial efficiency. "[P]ublic policy demands[] conservation of judicial resources and the efficient administration of justice." *Hanley v Mazda Motor Corp*, 239 Mich App 596, 602 (2000) (citing *People v Carpentier*, 446 Mich 19, 58 (1994) (RILEY, J, concurring)) (cleaned up). A stay of further proceedings would clearly conserve judicial resources: If the Court of Appeals grants the Legislature's application for leave to appeal, it will decide the central issues in this case, which will necessarily go to the heart of any further proceedings before this Court. If this Court nonetheless continues further proceedings until the Court of Appeals rules on the Legislature's application and the Complaint for Order of Superintending Control, or until the Michigan Supreme Court acts on Governor's Whitmer's request for certification, it runs the risk that its decisions will be overruled or narrowed by those proceedings. Such an overruling would come at the expense of this Court's and the litigants' time and resources.

The petition to put a constitutional amendment that would moot the key issue in this case on the ballot also counsels in favor of a stay. For over a century, the Michigan Supreme Court has recognized that "[i]t is a cardinal principle with courts not to pass upon the constitutionality of acts of the Legislature, unless where necessary to a determination of the case." *Powell v Eldred*, 39 Mich 552, 553 (1878). And the same principle behind the doctrine of constitutional avoidance—protecting the separation of powers—is at issue here. See *In re Certified Questions From United States Dist Ct*, *Western Dist of Mich*, 506 Mich 332, 409 n 18 (2020) (VIVIANO, J., concurring in part and dissenting in part). This Court should not invalidate a legislative statute unnecessarily. And it need not do so while a ballot initiative that could render the issue moot remains pending.

The Legislature asks only that this Court stay further proceedings, not that it stay the preliminary injunction itself. Plaintiffs' legal interests thus "remain intact" and, if the Court of Appeals does not grant the Legislature's application, "can be litigated in full later." *Atain Ins Co*

v Warren Hospitality Suites Inc, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2022 (Docket No. 355928), p 4, 2022 WL 1714612, at *3. A stay of further proceedings thus poses no potential harm to Plaintiffs or third parties.

CONCLUSION

For the foregoing reasons, the Legislature respectfully requests this Court stay further proceedings pending the disposition of the related proceedings before the Michigan Supreme Court and the Court of Appeals and the outcome of the Reproductive Freedom for All ballot initiative.

Dated this 25th day of July, 2022

Respectfully submitted,

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

EXHIBIT A

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellees,

v

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

Defendant-Appellee,

and

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Intervenor-Defendants-Appellants.

Case No. _____

Court of Claims
Case No. 22-000044-MM

APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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Dated: July 6, 2022

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STATEMENT OF JURISDICTION

This Court has jurisdiction to consider a timely application for leave to appeal from non-final orders. MCR 7.203(B)(1). An application for leave to appeal a non-final order is timely if it is filed within 21 days of an order deciding a motion for reconsideration. MCR 7.205(A)(1)(b). By order dated May 17, 2022, the Court of Claims granted Plaintiffs' motion for a preliminary injunction. May 17, 2022 Order, App'x A1.[1] On June 6, 2022, Intervenor-Defendants filed a Motion for Reconsideration of the May 17, 2022 Order. App'x A254. On June 15, 2022, the Court of Claims denied Intervenor-Defendants' Motion for Reconsideration. June 15, 2022 Order, App'x A28. This application is filed within 21 days of the June 15, 2022 Order. This Court therefore has jurisdiction to grant Intervenor-Defendants' application for leave to appeal the Court of Claims' May 17, 2022 Order granting Plaintiffs' motion for a preliminary injunction.

[1] This order was entered without a hearing and therefore there is no record to be transcribed that is relevant to this appeal. See MCR 7.205(B)(4)(g).

STATEMENT OF THE QUESTIONS INVOLVED

1. Does a Michigan court lack jurisdiction in a declaratory-judgment action to enjoin a criminal statute as unconstitutional where (i) the statute is not being enforced; (ii) the defendant, the Attorney General of Michigan, has announced that she will not enforce the statute; and (iii) there is otherwise no threat of future enforcement?

Intervenor-Defendants' answer: Yes

The Court of Claims answered: No

2. Does a plaintiff lack standing to bring claims on behalf of third parties when the plaintiff's interests potentially conflict with the third parties' interests?

Intervenor-Defendants' answer: Yes

The Court of Claims answered: Did not answer.

3. Does the Michigan Constitution contain a right to abortion despite (i) *Mahaffey v Attorney General*, 222 Mich App 325, 336 (1997) (per curiam) ("there is no right to abortion under the Michigan Constitution"); (ii) the Constitution's silence on abortion; and (iii) the historical fact that Michigan law made abortion a crime for more than a century before the now-overturned *Roe v Wade* decision?

Plaintiffs' answer: Yes

Intervenor-Defendants' answer: No

The Court of Claims answered: Yes

INTRODUCTION

This is a case about judicial overreach, indeed, *extreme* judicial overreach. Without adequately addressing significant jurisdictional concerns, the Court of Claims recognized a brand new right to abortion under the Michigan Constitution—a right this Court previously and explicitly held does *not* exist. And then, on the basis of that newly minted right, the Court of Claims preliminarily enjoined one of Michigan's abortion-related statutes (MCL 750.14).

The Court of Claims' many errors stem from its failure to make any real effort to confine itself to the proper judicial role.[2] It lacked jurisdiction to grant preliminary relief for several reasons: *First*, when it entered the injunction, there was no "actual controversy" because no adversity existed between Plaintiffs and the Attorney General, who agrees with Plaintiffs on the merits and abdicated her duty to defend against this lawsuit. *Second*, Plaintiffs' claims are unripe because the absence of any enforcement or even threat of enforcement of MCL 750.14 and the Attorney General's vow to never enforce the law leave Plaintiffs with only hypothetical and speculative future injuries. And, *third*, Plaintiffs lack standing because they are not the real parties in interest as to the claims they have brought on behalf of their future

[2] This stepping outside of the confines of the judicial role is especially concerning considering that the lower court sent a letter to the original parties stating that she "makes yearly contributions to Planned Parenthood of Michigan," and "she represented Planned Parenthood" in *Mahaffey v Attorney General*, 222 Mich App 325 (1997). Letter, Clerk of Court of Claims to Counsel (April 14, 2022), App'x A150. Despite her past and present legal and financial contributions to Planned Parenthood, the lower court vowed to judge the case "with requisite impartiality and objectivity." *Id.*

patients. The court blew past these serious jurisdictional issues, however, either by summarily disposing of or completely ignoring them.

On the merits, the Court of Claims defied the binding precedent of this Court, which holds that the Michigan Constitution contains no right to abortion. See *Mahaffey v Attorney General*, 222 Mich App 325, 336 (1997) (per curiam) (holding that "there is no right to abortion under the Michigan Constitution"). After brushing aside this controlling authority, the Court of Claims held that there is a Michigan constitutional right to abortion—the exact opposite of *Mahaffey*'s holding.

The Court of Claims declared that (1) the right of substantive due process in the Michigan Constitution includes a right to bodily integrity, (2) which includes a subsidiary right to *refuse* medical treatment, (3) which in turn includes a corollary right to *obtain* medical treatment, (4) which includes a right to obtain an abortion. While the first two steps in the court's analysis may be defensible, the crucial third and fourth jumps in the court's hopscotch surely are not. No constitutional text, history, or precedent supports the existence of a constitutional right to obtain medical treatment—let alone a right to a medical procedure that, unique among all such procedures, is *intended* to terminate unborn life.

The court's recognition of a brand new constitutional right (est. May 17, 2022) of uncertain scope—to obtain an abortion as part of a substantive due process/bodily integrity right to refuse/obtain medical treatments—not only nullifies MCL 750.14, but threatens to upend many eminently reasonable and sensible statutes enacted by the Legislature. This includes the prohibition on partial-birth abortions; the

requirement of parental consent before the performance of abortions on minors; the statutory right of hospitals and doctors to refuse to perform abortion; the 24-hour waiting period; and the statutory duty of a doctor to refuse to perform abortions on patients who have been coerced to abort.

The court below improperly arrogated to itself the power to decide a contentious social issue that the Michigan Constitution, properly understood, allows the people of Michigan and their chosen representatives to decide. The jurisdictional and constitutional errors of the Court of Claims constitute an egregious abuse of judicial power. And that abuse of power has caused the Legislature, which undoubtedly has a significant interest "in defending its own work," *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 578 (2020), substantial harm. See also *Maryland v King*, 567 US 1301, 1303 (2012) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (ROBERTS, CJ, in chambers) (cleaned up). Leave to appeal should therefore be granted to Intervenor-Defendants, the Michigan House of Representatives and the Michigan Senate ("the Legislature").

STATEMENT OF FACTS

The laws of Michigan have regulated abortion for close to two centuries. "[T]he Michigan Legislature in 1846 enacted three provisions relating to the well-being of a pregnant woman and her unborn child." *People v Nixon*, 42 Mich App 332, 335 (1972). One of those provisions was "the precursor to the statute" at issue here, MCL 750.14. The current version of MCL 750.14 was adopted in 1931. It remained the law of this

State until the U.S. Supreme Court decided *Roe v Wade* in 1973. The statute was not repealed in the wake of *Roe*. And the Michigan Supreme Court held that *Roe* did not invalidate the statute; it simply added "other exceptions" to it. *People v. Bricker*, 389 Mich 524, 529 (1973).

Just one year before *Roe*, in 1972, Michiganders voted on a ballot measure that would have legalized abortions performed by doctors in hospitals up to 20 weeks' gestation. The measure was resoundingly defeated, with nearly 1.96 million voters (60.65%) voting against it and just over 1.27 million voters (39.35%) voting for it. Mich Bureau of Elections, *Initiatives and Referendums Under the Constitution of the State of Michigan of 1963* at 9, Mich Secretary of State, https://tinyurl.com/4pbkjpb2 (January 2019) (accessed July 4, 2022).

On April 7, 2022, Plaintiffs Planned Parenthood of Michigan ("PPMI") and PPMI doctor Sarah Wallett sued the Attorney General in the Court of Claims seeking a declaration that MCL 750.14, on its face, violates the Michigan Constitution and the Elliott-Larsen Civil Rights Act, and requesting a permanent injunction barring the statute's enforcement. App'x A36. The same day, Plaintiffs moved for a preliminary injunction to enjoin enforcement of MCL 750.14. App'x A74.

Still on the same day, the Attorney General declared in no uncertain terms that neither she nor anyone from her office would defend or enforce the statute: "Let me be very clear, I will not use the resources of my office to defend Michigan's 1931 statute criminalizing abortion. . . . As this state's top law enforcement officer, I have never wavered in my stance on this issue, and I will not prosecute women or their

doctors for a personal medical decision." Press Release, Mich Dep't of Attorney General, AG Nessel's Statement on Efforts to Preserve Abortion Rights in Michigan, https://tinyurl.com/2jftwjbh (April 7, 2022) (accessed July 4, 2022).

A few weeks later, on May 2, 2022, the draft opinion of the U.S. Supreme Court in *Dobbs v Jackson Women's Health Organization*, No. 19-1392, leaked to a news organization and was published. After the leak, the Supreme Court confirmed the draft was "authentic." Press Release, Supreme Court of the US, https://tinyurl.com/3z34bc59 (May 3, 2022) (accessed July 4, 2022).

Also on May 3, the Attorney General reiterated her position and stated that she "believes the lawsuit brought by Planned Parenthood of Michigan should be dismissed for a lack of jurisdiction because there is no case or controversy—or active prosecution—that could serve as a basis for the suit, nor will there ever be while she's in office." LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence*, The Detroit News, https://tinyurl.com/yc46nmvs (May 3, 2022).

The Attorney General articulated this same position on May 5, 2022, before the Court of Claims in response to Plaintiffs' motion for a preliminary injunction, agreeing that the statute is unconstitutional and declaring that she would not defend it. Def's PI Response at 4, App'x A178. She correctly argued there was a "lack of adversity" and thus no "actual, live controversy before the Court" to support jurisdiction. *Id.* at 7–8, App'x 181–182. For that reason, the Attorney General further suggested that the lower court take it upon itself to dismiss this case *sua sponte*. *Id.*

But she stated that she "will not move to dismiss the action." *Id.* at 10, App'x A184.

Two days later, the Attorney General issued a press release in which she "renew[ed] [her] pledge" not to defend MCL 750.14 and added: "There is no adversity here. I stand with Planned Parenthood . . . ." Press Release, Dana Nessel, Attorney General, AG Nessel Statement Reaffirming Commitment to Abortion Rights, https://tinyurl.com/4txayj6p (May 7, 2022) (accessed July 4, 2022).

Two *amici* (Right to Life of Michigan and the Michigan Catholic Conference) filed a brief asking the court to dismiss Plaintiffs' claims because of the absence of adversity, the lack of an actual controversy, and the unripe claims. App'x A151. *Amici* also requested the judge recuse herself given her annual donations to Plaintiffs and her previous representation of Plaintiffs in *Mahaffey,* where this Court rejected her argument and held that our Constitution does not contain a right to an abortion.

On May 17, 2022, the court granted Plaintiffs' motion for a preliminary injunction. App'x A1 ("PI Order"). The court first held there were no jurisdictional deficiencies because the Attorney General's personal views of the case were "irrelevant." PI Order at 8, App'x A8. The court did not address the ripeness or recusal concerns raised by *Amici*. The court then held that, despite *Mahaffey*'s holding that there is no constitutional right to abortion, the Constitution contains a right to bodily integrity, including the right to refuse medical treatment, which contains a subsidiary right to obtain medical treatment, including abortion. PI Order at 24, App'x A24. The court enjoined the Attorney General, and those under her

control and supervision, from enforcing MCL 750.14 during the pendency of the action. PI Order at 27, App'x A27.

On June 6, 2022, in light of the Attorney General's refusal to defend against Plaintiffs' lawsuit, the Legislature moved to intervene, as the parties' agreement on the merits made the injunction and any further proceedings immune from appeal. App'x A254. The Legislature also moved for reconsideration of the court's preliminary injunction order. *Id.* The court granted the motion in part, allowing the Legislature to intervene, App'x A323, but denied the motion regarding reconsideration. June 15, 2022 Order, App'x A28. The court held that the Legislature proffered no new arguments, even though no party or *amici* had raised several of the Legislature's arguments, such as Plaintiffs' lack of standing and the absence of a right to abortion in the Constitution.

On June 24, 2022, the U.S. Supreme Court decided *Dobbs*. See *Dobbs*, No. 19-1392, 2022 WL 2276808 (US, June 24, 2022). The Court overruled both *Roe v Wade*, 410 US 113 (1973), and *Planned Parenthood of Se Pa v Casey*, 505 US 833 (1992) ("*Casey*").

The Michigan Legislature now files this timely application for leave to appeal.

LEGAL STANDARDS

Rule 7.203 gives this Court broad discretionary power to grant an interlocutory appeal by leave from non-final orders. See MCR 7.203(B)(1). This Court frequently exercises that discretion to grant interlocutory appeals following a lower court's issuance of a preliminary injunction. See, e.g., *Slis v State*, 332 Mich App 312, 335, app den 506 Mich 912 (2020).

This Court "review[s] for an abuse of discretion a trial court's ruling on a request for a preliminary injunction." *Id.* "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id.* The trial court's factual findings made "in the process of deciding whether to grant a preliminary injunction are reviewed for clear error." *Id.* Statutory and constitutional issues, as well as other questions of law, are reviewed *de novo*. *Id.; Mich Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 252 (2020).

"A party challenging the facial constitutionality of [a statute] faces an extremely rigorous standard." *Bonner v City of Brighton*, 495 Mich 209, 223 (2014) (cleaned up). "To prevail, plaintiffs must establish that no set of circumstances exists under which the [statute] would be valid and the fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid." *Id.*

ARGUMENT

I. The Court of Claims erred by disregarding the several jurisdictional deficiencies that require dismissal of this case.

The Michigan Constitution states that "the judiciary is to exercise the 'judicial power.'" *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608, 613 (2004) (citing Const 1963, art 6, § 1), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010) ("*Lansing*"). And a court's "judicial power" is "the right to determine *actual controversies* arising between *adverse litigants*." *Anway v Grand Rapids R Co*, 211 Mich 592, 616 (1920) (emphases added). Put another way, "the doctrines of justiciability" affect "judicial power, the absence of

which renders the judiciary constitutionally powerless to adjudicate the claim." *Mich Chiropractic Council v Comm'r of Office of Fin & Ins Servs*, 475 Mich 363, 372 (2006), overruled on other grounds by *Lansing*.

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

A Michigan plaintiff thus may not circumvent jurisdictional requirements by seeking declaratory relief. And there are three impediments to jurisdiction in this case. *First*, there is no "actual controversy" here because MCL 750.14 is not being enforced, and the defendant in this case, the Attorney General, has vowed that she will never enforce it. Additionally, at the time the court below issued its injunction, there was no adversity between the parties in the case; Plaintiffs and the Attorney General agreed (and still agree) that the statute is unconstitutional. Even though there is adversity now, the Legislature's intervention does not retroactively cure the lack of jurisdiction at the time the Court of Claims granted preliminary relief to Plaintiffs. *Second*, Plaintiffs' claims are unripe, as they are based on conjecture and

hypothetical future harms. *Third*, Plaintiffs lack standing, both because they cannot meet the "actual controversy" requirement and because they are not the real parties in interest with respect to the claims they have brought. Any one of these jurisdictional deficiencies requires vacatur of the preliminary injunction.

A. There was no "actual controversy" between the parties when the court below granted preliminary relief and thus the court lacked the requisite jurisdiction to grant an injunction.

To find an "actual controversy" making declaratory relief possible, "the court must examine the facts of each case and make a determination as to whether a real, immediate, and substantial controversy exists between persons with adverse legal interests." 3 Longhofer, Michigan Court Rules Practice Text (7th ed), § 2605.3. Thus, the "actual controversy" requirement contains two elements: there must be (1) true adversity about the merits; and (2) a real (not hypothetical) dispute. If these elements are not met, "no case of actual controversy exists" and the court "lacks subject matter jurisdiction to enter a declaratory judgment." *Fieger v Comm'r of Ins*, 174 Mich App 467, 470 (1988).

As an initial matter, the Court of Claims did not apply the correct rule. The court relied on *Lansing* to hold that the broad purposes of declaratory relief, and not the actual controversy requirement, govern. But *Lansing* did not alter the "actual controversy" rule. *Lansing* concerned only the doctrine of standing. And regarding declaratory judgments, the Supreme Court stated that "whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *Lansing*, 487 Mich at 372. Because this Court had not considered whether the Plaintiffs met MCR 2.605's requirements, the Supreme Court

remanded the case so that this Court could decide the question in the first instance. *Id.* at 373. On remand, this Court found that "an actual controversy [wa]s lacking." *Lansing Sch Ed Ass'n v Lansing Bd of Ed (On Remand)*, 293 Mich App 506, 516 (2011). Thus, nothing about *Lansing* or its subsequent developments indicates a departure from the "actual controversy" requirement of MCR 2.605.

Here, neither of the "actual controversy" requirements is met. As to adversity, it is undisputed that, when the Court of Claims granted preliminary relief to the Plaintiffs, the parties in the case at that time (PPMI, Dr. Wallett, and the Attorney General) all *agreed* on the merits of Plaintiffs' challenge to MCL 750.14. Plaintiffs and the Attorney General both told the court the statute was unconstitutional. The parties' only disagreement at the time was whether the court had jurisdiction. And even that disagreement was half-hearted at best. The Attorney General did not move to dismiss for lack of jurisdiction, as she should have. Instead, she suggested that Plaintiffs could and should ensure jurisdiction by "add[ing] an appropriate party to ensure adversity exists." Def's PI Response at 1, App'x A175.

Despite the Attorney General's concession, the Court of Claims found sufficient adversity based on the Attorney General's refusal to agree to the requested relief. But this unwillingness to consent to an injunction did not create adversity. The "actual controversy" rule requires adversity with respect to the parties' advocacy *on the merits*. See *Lansing,* 487 Mich at 372 n 20 ("[T]he essential requirement of the term 'actual controversy'" is "an adverse interest necessitating the sharpening of the issues raised."). Indeed, the federal cases the court below relied on, *INS v Chada*,

462 US 919 (1983), and *United States v Windsor*, 570 US 744 (2013), confirm this point. In each of those cases, third parties intervened to defend vigorously the challenged statutes. *Chadha*, 462 US at 939; *Windsor*, 570 US at 754. It was the intervenors' "sharp adversarial presentation of the issues" in those cases that "satisfie[d] the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree." *Windsor*, 570 US at 761.

The lower court ignored the requirement for adversity on the merits and improperly seized on the parties' semi-disagreement about jurisdiction to justify jurisdiction. That circular logic is, by itself, grounds for vacating the injunction because "[w]hen a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void." *Bowie v Arder*, 441 Mich 23, 56 (1992). Thus, the Legislature's recent, post-injunction intervention does not cure the initial lack of jurisdiction or supply, after the fact, the necessary adversity that was absent when the court granted preliminary relief to Plaintiffs.

In short, the Court of Claims had no jurisdiction to issue a preliminary injunction because there was no adversity between the parties at that time. And as discussed next, Plaintiffs' claims are based on hypothetical possibilities, not present realities. Thus, this case satisfies neither element of the "actual controversy" requirement.

B. Plaintiffs' claims are unripe and their claimed future harms are hypothetical and speculative.

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

"Ripeness prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Mich Chiropractic Council*, 475 Mich at 371 n 14. "A claim lacks ripeness, and there is no justiciable controversy, where the harm asserted has not matured sufficiently to warrant judicial intervention." *Id.* at 381 (cleaned up). "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 371 n 14 (cleaned up).

Where, as here, a plaintiff brings a pre-enforcement challenge to a statute, the plaintiff must show "a real and immediate threat to protected constitutional rights." *Dep't of Social Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 410 (1990) (CAVANAGH, J, concurring). The threat of injury from future enforcement cannot be mere speculation. *Id.*; see also *League of Women Voters*, 506 Mich at 585–587. For example, in *Emmanuel Baptist Preschool*, our Supreme Court refused to decide whether a statute regarding financial disclosures violated the plaintiffs' First

Amendment rights because "the state ha[d] not exercised its statutory authority to compel financial disclosure, making these issues unripe for review." 434 Mich at 389.

Here, Plaintiffs have not shown, and cannot show, a real and immediate threat of enforcement of MCL 750.14. To begin, the statute cannot be enforced against any woman for seeking or receiving an abortion—the law simply does not impose any liability on such persons. And Plaintiffs did not allege that any woman has been denied an abortion based on MCL 750.14 or that any doctor has refused to perform an abortion due to a supposed threat of prosecution under MCL 750.14. There are no pending prosecutions or threatened prosecutions of any physician under MCL 750.14, and the only defendant in this case who has any enforcement authority, Michigan's Attorney General, has announced in no uncertain terms that she will not enforce the statute. Given these facts, Plaintiffs are left to resort to mere conjecture. Indeed, more than a dozen times, they acknowledge that their arguments are contingent on a chain of hypothetical events. See Compl. ¶¶ 4, 6, 28, 42, 48, 71, 96, 97, 102, 107, 111, 114, 115, App'x A38, A39, A46, A48, A49, A53, A57, A58, A59, A60, A61–A62.

The theory undergirding Plaintiffs' entire complaint is that, in a post-*Roe* world, abortion providers "*may* no longer" be protected from prosecution. Compl. ¶ 4 (emphasis added), App'x A38. Plaintiffs speculate that "overzealous prosecutors" may capitalize on the "uncertainty" surrounding federal abortion law and may "attempt[] to enforce" MCL 750.14 post-*Dobbs*. Pltfs' PI Motion at 7, App'x A82. And stacking a series of hypothetical future events on top of each other, Plaintiffs theorize that

> some PPMI staff *may* be afraid to continue working at PPMI *if* the [MCL 750.14] were enforced . . . . [E]ven *if* PPMI and its staff complied with the [statute], a prosecutor *might* accuse staff of violating it. . . . Some staff *might* prefer to leave PPMI given this risk. . . . Other staff *might* simply be unable to bear turning patients away. [*Id.* at 13, App'x A88 (emphases added).]

The affidavit of Plaintiff Wallett confirms that Plaintiffs' predictions of future harm are speculative. For example, she speculates: "*If* [MCL 750.14] were enforced as written in Michigan, my colleagues at PPMI and I *would be* forced to stop providing abortion under virtually any circumstance." Wallett Aff. ¶ 75 (emphases added), App'x A141. She also admits that "[a]bsent enforcement of [MCL 750.14], PPMI will continue to provide both medication and procedural abortion in Michigan." *Id.* ¶ 88, App'x 146. Notably, Dr. Wallett has not alleged that she or any PPMI doctor has refused to perform any abortions because of MCL 750.14.

In short, even though the U.S. Supreme Court has overruled *Roe*, Plaintiffs have not shown that MCL 750.14 has been or will be enforced by the Attorney General against any doctor who performs abortions in Michigan. Thus, Plaintiffs' challenge to the statute "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Mich Chiropractic Council*, 475 Mich at 371 n 14. Such speculation is insufficient to establish an "actual controversy" or ripeness required for declaratory relief. See *League of Women Voters*, 506 Mich at 579–580; *Delaware Women's Health Org, Inc v Wier*, 441 F Supp 497, 501 (D Del 1977) (dismissing plaintiffs' request for declaratory relief regarding the constitutionality of state abortion statutes when there was no threat of prosecution under those statutes).

The Court of Claims ignored the fact that Plaintiffs' claimed future injuries are hypothetical and speculative. Rather than address the ripeness issue, the court simply proclaimed that "plaintiff's complaint describes an on-going controversy regarding the constitutionality of MCL 750.[14] and a need for a declaration to guide the future conduct of Planned Parenthood's physicians and patients." PI Order at 13, App'x A13 (misciting to "750.41"). This conclusory holding was reversible error.

C. Plaintiffs PPMI and Dr. Wallett lack standing.

While the lower court summarily dismissed the ripeness issue, it did not even engage with the standing arguments the Legislature raised. But "a court at all times is required to question," even *sua sponte*, "its own jurisdiction." *Straus v Governor*, 459 Mich 526, 532 (1999). Here, aside from the issues already discussed, there is also a lack of jurisdiction because Plaintiffs lack standing.

First, in *Lansing*, the Supreme Court stated that "whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." 487 Mich at 372. And the converse is also true: If "plaintiffs do not meet the requirements of MCR 2.605, they do not have standing." *League of Women Voters*, 506 Mich at 585–587. As discussed above, Plaintiffs cannot meet MCR 2.605's requirement that their claims involve an actual, *i.e.*, a real and immediate, controversy. Plaintiffs thus lack standing to bring all of their claims.

Second, Plaintiffs lack standing to challenge MCL 750.14 on behalf of unnamed and unknown persons in Michigan who may sometime in the future become pregnant,

decide to seek abortion, and then decide to become Plaintiffs' patients.[3] On its face, the statute does not apply to pregnant women. "It does not provide that the woman herself shall be guilty of an offense." *In re Vickers*, 371 Mich 114, 117–118 (1963).

In any event, all "plaintiffs must assert their own legal rights and cannot rest their claims to relief on the rights or interests of third parties." *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 622 (2015) ("*Pontiac Police*"). This is especially true in the declaratory-judgment context, as MCR 2.605 permits a court to "declare the rights . . . of *an interested party*" only. (emphasis added).

MCR 2.201(B) similarly requires that "[a]n action must be prosecuted in the name of the real party in interest." This rule requires the plaintiff to be a "party who by the substantive law in question owns the claim asserted." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 356 (2013). When a third party "owns the claim asserted," the plaintiff bringing the claim is not the real party in interest. *Id.* An exception to this rule exists for an organization that advocates "for the interests of its members" when those "members themselves have a sufficient interest." *Pontiac Police*, 309 Mich App at 625.

Plaintiffs are not the real parties in interest for almost all of their claims. Plaintiffs assert a violation of their *patients'* "right to bodily integrity," a violation of

[3] Those persons for whom Plaintiffs have performed abortions in the past are no longer Plaintiffs' patients. And persons who may become pregnant in the future and seek out an abortion from Plaintiffs are not yet considered patients. Thus, it is misleading for Plaintiffs to assert (as they do in the caption of their Complaint) that they are asserting claims "on behalf of" their patients.

their *patients'* equal protection rights, a violation of their *patients'* liberty and privacy rights under the Retained Rights Clause, a violation of their *patients'* liberty and privacy rights under the Due Process Clause, and sex discrimination against their *patients*. Compl. ¶¶ 126 (Count II), 134 (Count III), 148–149 (Count IV), 157 (Count V), 166 (Count VI), App'x A63, A64, A66, A67, A69. Plaintiffs only assert one claim on their own behalf. See Compl. ¶ 119 (Count I) (alleging that MCL 750.14 is unconstitutionally vague), App'x A62. But even this claim is brought on behalf of "Plaintiffs and Plaintiffs' patients." *Id.* So aside from one part of one claim, none of the alleged rights at stake belong to Plaintiffs themselves. Plaintiffs therefore do not "own[] the claims" asserting violations of those rights. See *In re Beatrice Rottenberg Living Tr*, 300 Mich App at 356.

Further, Plaintiffs cannot benefit from the exception for organizations representing their members' interests. The class of persons who in the future may become pregnant and may decide to seek an abortion from Plaintiffs PPMI and Dr. Wallett are not "members" of the PPMI organization. PPMI therefore has no organizational standing here.

Plus, even if predicted future patients were "members" of PPMI, Plaintiffs concede that they provide care to patients for non-abortion services and that "[t]here is no typical abortion patient." Compl. ¶ 81, App'x A54. In other words, Plaintiffs purport to represent all of their patients—not just those seeking abortion. And as Plaintiffs concede, even pregnant patients are not a monolithic group with common interests capable of mass representation. The lack of a common interest precludes

standing. See *Pontiac Police*, 309 Mich App at 625–626 (holding that board did not have standing on behalf of its individual members because its members did not "shar[e] a common interest" or "assert through their group association a common injury.").

What is more, rather than share the same interests with all of their patients, Plaintiffs have significant interests, mainly financial, that are potentially in conflict with their patients' interests. See Compl. ¶ 113 ("The Criminal Abortion Ban would directly harm PPMI's mission to provide comprehensive sexual and reproductive health care . . . Some PPMI staff might leave the organization."), App'x A61. It takes little imagination to see how PPMI's financial interest in performing abortions and retaining employees is at odds with patients' interests in "design[ing] their own future." Compl. ¶ 92, App'x A56.

In short, Plaintiffs lack standing to bring any of their claims because they cannot meet MCR 2.605's "actual controversy" requirement. Plaintiffs also lack standing because they are not the real parties in interest and cannot vindicate their patients' rights. The court below had no jurisdiction over Plaintiffs' claims and therefore, the claims should be dismissed. The Court of Claims erred in ignoring this threshold issue.

II. Plaintiffs cannot meet any of the preliminary injunction factors.

The Court of Claims' errors did not stop at the threshold question of jurisdiction. The court also erred on the merits in finding that a preliminary injunction was warranted.

"An injunction represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 613–614 (2012). A court considers four factors in determining whether to grant a preliminary injunction:

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

Applying these factors, the Court of Claims held that Plaintiffs were entitled to a preliminary injunction because, in its view, (1) the Michigan Constitution contains a substantive due process right to bodily integrity, which includes a subsidiary right to refuse medical treatment, which in turn includes a corollary right to obtain medical treatment, including a right to obtain an abortion; (2) if *Roe* were overturned, pregnant women (who are not parties to this case) could not exercise that right and Plaintiffs would be frustrated in carrying out their organizational goals; (3) enjoining the law would not harm the Attorney General, who agrees the law is unconstitutional and says she will not enforce the law; and (4) it is in the public interest to prevent the violation of constitutional rights. Each of these holdings is deeply flawed, and together amounts to an egregious abuse of discretion.

A. The Michigan Constitution does not contain a right to abortion and thus Plaintiffs are not likely to prevail on the merits.

Constitutional interpretation is a question of law "reviewed de novo on appeal."

Mahaffey, 222 Mich App at 334. This Court has explained that "[t]he guiding framework for an examination of the constitutionality of a statute begins with the presumption that statutes are constitutional, and 'courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent.'" *Mich Alliance for Retired Americans*, 334 Mich App at 255 (quoting *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6 (2003)).

Moreover, when "interpreting a provision of the Michigan Constitution, words of that provision 'must be given their ordinary meanings.'" *Co Road Ass'n of Mich v Governor*, 260 Mich App 299, 306 (2004), aff'd in part, app den in part 474 Mich 11 (2005). The primary source a court should use to ascertain the ordinary meaning is the Constitution's "plain language as understood by its ratifiers when it was adopted." *Id.* at 307 (quoting *Traverse City Sch Dist v Attorney General,* 384 Mich 390, 405 (1971)).

1. This Court, the Michigan Supreme Court, and the U.S. Supreme Court all agree that the right of due process does not include a right to abortion.

Mahaffey squarely controls the merits question in this case. This Court held, unequivocally, "that there is no right to abortion under the Michigan Constitution." *Mahaffey*, 222 Mich App at 336; see also *id*. at 339 ("We . . . hold that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right."). To reach this conclusion, this Court noted that the text of the Constitution says nothing about abortion. See *id.* at 335–336 ("[T]he 1963 constitution itself and the debates of the Constitutional Convention preceding the adoption of the constitution are silent regarding the question of abortion").

Furthermore, "[w]hen the 1963 constitution was adopted, abortion was a criminal offense." *Id.* at 335 (citing, *inter alia*, MCL 750.14). Because "[t]he drafters of a constitutional provision are presumed to have known the existing laws," this Court had to "presume that the drafters of the 1963 constitution were aware of the statutory prohibition against abortion." *Id.*

Adding a "fundamental right to abortion to the constitution would have been such a marked change in the law as to elicit major debate among the delegates" to the Convention. *Id.* at 336 (quotation marks omitted). Yet abortion was not mentioned in the debates of the Constitutional Convention, which "indicates that there was no intention of altering the existing law." *Id.* at 336. Equally important, "less than ten years after the adoption of the constitution, essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute."[4] *Id.* The text and history thus show that there is no reason to "conclude that the intent of the people that adopted the 1963 constitution was to establish a constitutional right to abortion." *Id.*

To create the novel right to abortion under our Constitution, the lower court first attempted to distinguish *Mahaffey* by reasoning that the case was about a different set of abortion statutes and a generalized right to privacy. PI Order at 15, App'x A15. The court then honed in on Plaintiffs' "alternative" constitutional theory that MCL 750.14 "unconstitutionally infringes on the right to bodily integrity." *Id.* The court held that because the right to bodily integrity encompassed the right to

[4] Notably, only one county in the entire state voted in favor of the ballot proposal.

refuse medical treatment, there was a corresponding "liberty interest in *seeking* medical treatment" protected by the Due Process Clause. *Id.* at 22, App'x A22. Based on this alleged liberty interest to seek medical treatment, the court held that Plaintiffs were likely to succeed on their claim that MCL 750.14 violates Michigan's Due Process Clause. *Id.* at 24–25, App'x A24–A25.

The court's reasoning fails at the first step, as *Mahaffey* is indistinguishable and controlling here. The case was not about a distinct right separate from the right to bodily integrity, but instead involved the "generalized right of privacy." 222 Mich App at 334. The right to bodily integrity stems from that general right to privacy. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U Ill L Rev 1059, 1066 (2014).[5] Saying *Mahaffey*'s right-to-privacy holding does not apply to a bodily integrity claim is like saying the prohibition on driving while intoxicated does not apply to those who drink wine. Of course it does. Just like wine is a type of intoxicant, bodily integrity claims are merely a kind of right-to-privacy claim. The Court of Claims even acknowledges this point: "[E]very medical procedure implicates a person's liberty interests in *personal privacy* and bodily integrity." PI Order at 22 (emphasis added), App'x A22. Thus, the *Mahaffey* court's sweeping statement that "there is no right to abortion under the Michigan Constitution," 222 Mich App at 336, does not leave room for a lower court to create such a right—whether

[5] Even the dissent in *Dobbs* explained that the right *Roe* "recognized does not stand alone." *Dobbs*, 2022 WL 2276808, at *72 (BREYER, SOTOMAYOR, AND KAGAN, JJ, dissenting). Rather, it is "part of the same constitutional fabric" as bodily integrity, "protecting autonomous decisionmaking over the most personal of life decisions." *Id.*

rooted in the broad right to privacy or any of privacy's subsidiary rights. *Mahaffey* therefore controls.

Caselaw decided by the Michigan Supreme Court and U.S. Supreme Court confirm *Mahaffey*'s holding. The Michigan Supreme Court has made clear that "[i]t is the public policy of the state to proscribe abortion." *Bricker*, 389 Mich at 529. In *Bricker*, the Supreme Court went to great lengths to explain that this public policy had to "be subordinated to federal constitutional requirements" under *Roe*. *Id.* at 529. Thus, as this Court pointed out, *Bricker* suggests "that in Michigan a woman's right to abortion is derived solely from the federal constitution." *Mahaffey*, 222 Mich App at 338. The U.S. Supreme Court has now overturned *Roe* and *Casey****Error! Bookmark not defined.***, holding that the U.S. Constitution does not provide a right to abortion. The Michigan public policy of proscribing abortion, therefore, is no longer subordinated to a federal constitutional right to abortion.

What *Dobbs* said of the federal Constitution may be said with equal force of its Michigan counterpart: "The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including . . . the Due Process Clause." *Dobbs*, 2022 WL 2276808, at *7. Although the due process clause may protect certain rights "deeply rooted in [our] history and tradition and implicit in the concept of ordered liberty," "[t]he right to abortion does not fall within this category." *Id.*[6] "Until the latter part of the 20th century, such a right was entirely

[6] See also *Lansing Ass'n of Sch Adm'rs v Lansing Sch Dist Bd of Ed*, 216 Mich App 79, 91 (1996) (cleaned up) ("The rights not readily identifiable in the Constitution's text are characterized as those fundamental liberties deeply rooted in our nation's

unknown in American law," *id.*, including here in Michigan. Importantly, *Dobbs* observed that "[o]ur Nation's historical understanding of ordered liberty does not prevent the people's representatives from deciding how abortion should be regulated." *Id.* at *20. Abortion is "a question of profound moral and social importance that the Constitution unequivocally leaves for the people" and their representatives. *Id.* at *26. The Michigan Constitution does the same.[7]

2. The court below improperly engaged in the "unprincipled creation" of a state constitutional right exceeding its federal counterpart.

*Dobbs***Error! Bookmark not defined.**'s holding that there is no federal constitutional right to abortion has important implications for Michigan law. It is, of course, true that "[w]e are obligated to interpret our own organic instrument of government," but that is not an invitation for "unprincipled creation of state constitutional rights that exceed their federal counterparts." *Sitz v Dep't of State Police*, 443 Mich 744, 763 (1993). This is especially true in the context of substantive due process:

> The underlying purpose of substantive due process is to secure the individual from the arbitrary exercise of governmental power. . . . Absent definitive differences in the text of the state and federal provision, common-law history that dictates different treatment, or

history and tradition, i.e., neither liberty nor justice would exist if they were sacrificed."), aff'd in part, remanded in part on other grounds sub nom *Bradley v Saranac Cmty Sch Bd of Ed*, 455 Mich 285 (1997).

[7] Below, the court said "[t]he common law proscribed abortions only after a mother first felt fetal movement, referred to as 'quickening.'" PI Order at 1, App'x A1. But the U.S. Supreme Court explained that "the common law did not condone even prequickening abortions." *Dobbs v Jackson Women's Health Org*, No. 19-1392, 2022 WL 2276808, at *13 (US, June 24, 2022). "Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*." *Id.*

> other matters of particular state or local interest, courts should reject the "unprincipled creation of state constitutional rights that exceed their federal counterparts." [*People v Sierb*, 456 Mich 519, 523–524 (1998) (quoting *Sitz*, 443 Mich at 763).[8]]

Here, there are no "definitive" textual or meaningful historical differences between the two clauses, nor is there *any* principled basis for holding that the Michigan right of substantive due process exceeds its federal counterpart with respect to abortion.

Indeed, while much of the *Dobbs***Error! Bookmark not defined.** opinion applies here, the most critical part is where the Court pointed out that "[u]ntil the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right." *Dobbs*, 2022 WL 2276808, at *12. Until just a few weeks ago, this statement was still true about Michigan's Constitution. After *Dobbs*, it is utterly unprincipled for the Court of Claims to have found a right to abortion in Const 1963, art 1, § 17, when there is no such right in the substantive component of the federal Due Process Clause.

3. The Court of Claims' analysis and vast expansion of the right to bodily integrity are unsupported and incorrect.

Even without *Mahaffey*, the Court of Claims' analysis and vast expansion of the right to bodily integrity was error on several levels. In order to reach the conclusion that there is a state constitutional right to abortion, the Court of Claims

[8] This Court has similarly stated, in the specific context of a substantive due process claim, that "[t]he Due Process Clause of the Michigan Constitution . . . is nearly identical to the Due Process Clause of the United States Constitution, and the due process guarantee of the Michigan Constitution is coextensive with its federal counterpart." *Mays v Snyder*, 323 Mich App 1, 73 (2018) (cleaned up), aff'd by an equally divided court sub nom *Mays v Governor of Mich*, 506 Mich 157 (2020).

had to build a legal daisy chain: that the right of substantive due process (itself a controversial doctrine) includes a right to bodily integrity; that the right to bodily integrity includes the right to refuse unwanted medical treatment; that the right to *refuse* medical treatment includes a corollary right to *obtain* medical treatment; and that the general right to refuse or obtain medical treatment included the specific right to obtain abortion. Each step in this chain is unsupported.

First, the right to bodily integrity is new to Michigan law. Before *Mays v Snyder*, 323 Mich App 1 (2018), aff'd by an equally divided court sub nom *Mays v Governor of Mich*, 506 Mich 157 (2020), the Supreme Court "ha[d] not previously recognized a right to bodily integrity." 506 Mich at 212 (BERNSTEIN, J, concurring).

In *Mays,* which arose from the Flint water crisis, this Court held that the plaintiffs had alleged facts that, if proven to be true, would be a violation of the substantive due process right to bodily integrity. 323 Mich App at 56. But *Mays* does not help Plaintiffs. The *Mays* plaintiffs brought an as-applied challenge to executive branch action. Here, Plaintiffs bring only a facial challenge to MCL 750.14; they have not pleaded any facts. See *infra* at Section II.A.5.

Further, *Mays* involved the alleged "nonconsensual entry of toxic water into plaintiffs' bodies," *Mays*, 506 Mich at 193, which this Court described as a "[v]iolation of the right to bodily integrity involv[ing] an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective," *Mays*, 323 Mich App at 60 (quotation marks omitted); accord *Mays*, 506 Mich at 192. But MCL 750.14 does not involve a "nonconsensual entry into the body," let alone "an

egregious" one. In addition, MCL 750.14 advances entirely legitimate governmental objectives. See *Mahaffey*, 222 Mich App at 345 (protecting "the life of the fetus" is a "legitimate legislative objective[ ]"); see also *Dobbs*, 2022 WL 2276808, at *42 ("These legitimate interests include respect for and preservation of prenatal life at all stages of development" and other interests). In *Mays*, the Supreme Court stated that "[t]here is obviously no legitimate governmental objective in poisoning citizens." *Mays*, 506 Mich at 193. No reasonable person would equate every pregnancy with being poisoned.

Mays also teaches that "to survive dismissal, the alleged violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Mays*, 323 Mich App at 60; accord *Mays*, 506 Mich at 192. Here, it cannot fairly be said that the Legislature's commitment to the preservation of unborn life is egregious, outrageous, or conscience shocking. It was certainly none of those things in 1963, and it still is not today. Thus, the bodily integrity claim here cannot "survive dismissal." *Mays*, 323 Mich App at 60.

Second, the Court of Claims erroneously found that the right to bodily integrity includes the right to refuse unwanted medical treatment. Support for the existence of such a right, under *federal* law, may be found in the U.S. Supreme Court's decision in *Cruzan* and *Rochin*, and in the decision of three Justices of the Michigan Supreme Court in *Kevorkian*. See *Cruzan v Director, Mo Dep't of Health*, 497 US 261, 278 (1990); *Rochin v California*, 342 US 165 (1952); *People v Kevorkian*, 447 Mich 436,

465 & n 29, 480 n 59 (1994). The Court of Claims appears to be the first court to recognize a Michigan constitutional right to refuse medical treatment.

For similar reasons that *Mays* is unhelpful, the lower court's reliance on *Rochin* and *Cruzan* was misplaced. In *Rochin*, the U.S. Supreme Court found the actions of three deputy sheriffs unconstitutional because their involuntary pumping of the plaintiff's stomach to obtain evidence "shock[ed] the conscience." 342 US at 172. In *Cruzan*, the Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." 497 US at 279.

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

As the U.S. Supreme Court explained in *Dobbs*, after citing *Rochin*:

> What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe****Error! Bookmark not defined.*** and *Casey****Error! Bookmark not defined.*** rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." [*Dobbs*, 2022 WL 2276808, at *20.]

As a result of this key difference, cases like *Rochin* are "inapposite." *Id.* They do not "involve[] the critical moral question posed by abortion" and thus do not "support the right to obtain an abortion." *Id.*

Third, even if *Rochin* and *Cruzan* were relevant, the right to *refuse* medical treatment does not necessarily provide for a right to *obtain* medical treatment. The heart of the due process question in those cases was whether the individual had the right to *exclude* an outsider from forcing a procedure on his or her body. See *Cruzan*, 497 US at 279 ("forced administration of life-sustaining medical treatment"); *Rochin*, 342 US at 172 ("[i]llegally breaking into the privacy of the petitioner"). The right to exclude does not by any logic or doctrine include the contrary right to *obtain*.

This very theory has been rejected by the Michigan Supreme Court, the U.S. Supreme Court, and the U.S. Court of Appeals for the D.C. Circuit. *People v Kevorkian*, 447 Mich 436 (1994), cited in passing by the court below, see PI Order at 20, App'x A20, cuts sharply against the claimed constitutional right to obtain medical treatment. In that case, the Supreme Court held that the Legislature may impose criminal penalties on a physician who assists someone in committing suicide. "[A]t least four justices" concurred in that holding. 447 Mich at 446. The principal opinion recognized that "the notion of bodily integrity" includes "[t]he right to refuse medical treatment," *id.* at 480 n 59, but held that there is no due process right to obtain the assistance of a physician to commit suicide. *Id.* at 482 (CAVANAGH, CJ, joined by BRICKLEY and GRIFFIN, JJ). The Chief Justice's opinion explained that a right to physician-assisted suicide was "neither implicit in the concept of ordered liberty nor

deeply rooted in the nation's history and tradition." *Id.* at 481.

Similarly, the U.S. Supreme Court has held that there is no right to obtain a physician-assisted death. *Washington v Glucksberg*, 521 US 702 (1997). The Court distinguished *Cruzan* and *Casey*, noting that they did not create a general right to personal autonomy. *Id.* at 726–728. And the Court rejected the Court of Appeals' argument that even though the state had an interest in preserving life, that interest was outweighed by the dire medical condition and wishes of the person who desired to obtain a medical procedure that would cause death. *Id.* at 729.

In *Abigail Alliance for Better Access to Developmental Drugs v von Eschenbach*, 495 F3d 695, 711 (DC Cir 2007), the D.C. Circuit held that there was no fundamental right to obtain experimental drugs, even if those drugs could save a patient's life because such a right was not "deeply rooted in our Nation's history and tradition." *Id.* The court also rejected a right of medical self-defense and a more general right to medical autonomy. *Id.*

Before discussing the court's final step—recognition of a right to obtain abortion—we should pause here to consider the implications of the broader right to obtain medical treatment recognized by the court. Not every medically unnecessary procedure desired by a patient should be fulfilled by a physician; doctors are not, and judges should not make them become, vending machines. For example, Michigan law makes it a crime for doctors to perform genital circumcision on a woman under the age of 18. See MCL 750.136(1). It is not a defense that the woman wants the medical procedure because she believes it to be required by her culture's custom or ritual. See

MCL 750.136(5). Does the new constitutional right to obtain medical treatment recognized by the Court of Claims render this statute unconstitutional? Take another example: Some people genuinely desire to amputate healthy arms or legs. See Johnston & Elliott, *Healthy limb amputation: ethical and legal aspects*, 2 Clinical Med 431 (2002). If the Legislature were to ban medically unnecessary amputation of limbs, would that violate the Michigan Constitution? It would, under the lower court's invented right to obtain medical treatment. The court's invented right knows no bounds.

Finally, the Court of Claims held that the general right to refuse or obtain medical treatment included the specific right to obtain abortion. The court asserted that a woman's right "to terminate a pregnancy" is "indistinguishable from the right of a patient to refuse treatment." PI Order at 24, App'x A24. Not so. First, that assertion is facially nonsensical; the right to refuse something is undoubtedly distinguishable from the right to get something. Imagine applying that framework to any other right. It would mean, for example, that because someone can refuse police entry without a warrant, they could also demand the police warrantlessly enter their home whenever they want. Similarly absurd examples are endless. Further, even if there were a general state constitutional right to obtain medical treatment (and there is not), that right cannot include a right to obtain an abortion, unless the general right is utterly absolute in a way that few, if any, rights are.

Abortion is a unique medical procedure. Alone among all procedures, it has the purpose and effect of terminating unborn life. "As even the *Casey* plurality

recognized, '[a]bortion is a unique act' because it terminates 'life or potential life.'" *Dobbs*, 2022 WL 2276808, at *37 (quoting *Casey*, 505 US at 852). Assuming *arguendo* that there is a state constitutional right to obtain medical treatment, that right cannot include the right to obtain a medically unnecessary procedure that has the purpose and effect of terminating a developing human life. (To be clear, Intervenors agree that abortion is permissible when necessary to save the life of the pregnant woman. See MCL 750.14.)

The Court of Claims, however, seems to regard the right to obtain medical treatment as a right to obtain any medical treatment that a person wants, including an elective, non-medically necessary abortion—a procedure that, if successful, always ends the life of another. The court below could not see the difference between "the right of a patient to refuse treatment" and a right "to terminate a pregnancy," see PI Order at 24 (calling the two "indistinguishable"), App'x A24. But there *is* a difference, it is vast, and it requires reversal here.

4. The court below failed to carefully describe the new substantive due process rights it created, leaving many important questions unanswered.

The lower court's bodily integrity analysis was flawed for the reasons explained above. But it is not just the creation of this right that is problematic. The questions this new right raises and the uncertainty of the limits of the court's ruling are causing the Legislature and Michigan citizens substantial harm, reinforcing the need for immediate interlocutory review.

The Michigan Supreme Court has explained that "[s]ubstantive due process analysis must begin with a careful description of the asserted right." *Bonner*, 495

Mich at 226–227 (cleaned up). That is because "there has always been reluctance to expand the concept of substantive due process given that the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Id.*; see also *Kevorkian*, 447 Mich at 476 n 47 ("[I]t is important to the analysis of substantive due process that the asserted right be framed in a precise and neutral manner.").

The Court of Claims did not, however, heed these admonitions to describe carefully and precisely any new substantive due process right. Indeed, there are many crucial but unanswered questions about the court's late-breaking recognition of a fundamental but unenumerated substantive due process right to bodily integrity, including the right to refuse medical treatment, including the right to obtain medical treatment, including abortion. Among such questions are:

- Is this right absolute? If not, what are the contours of this right? What are its limits? In what circumstances, if any, may abortion be proscribed?
- The Court of Claims suggested that abortion may be regulated. See PI Order at 27 ("Other laws in effect *regulating* abortion in this State shall remain in full effect") (emphasis in original), App'x A27.[9] But what constitutes "regulation" of abortion for purposes of the Michigan right to

[9] It is not clear whether the court made the statement quoted above because it believes that the new Michigan right to abortion is subject to regulation, or simply because Plaintiffs failed to challenge or seek an injunction with respect to any statute other than MCL 750.14.

abortion? And what standard of review applies to government regulation of this right?

- Is the Michigan right to abortion exactly the same as the pre-*Dobbs* federal abortion right that existed on June 23, 2022, under the now-overruled *Roe* and *Casey* decisions? Or is it broader? May the right be exercised after the point of fetal viability? May a pregnant patient abort a fetus during the third trimester or even the ninth month of pregnancy?
- Michigan law provides that a hospital or physician may refuse to perform abortions. See MCL 333.20181. Does the constitutional right to obtain medical treatment including abortions trump this statute, such that a government-run hospital or a state-employed doctor *must* perform an abortion when a patient demands it?
- Does the Michigan right to obtain an abortion include the right to obtain a partial-birth abortion? But see MCL 333.17516.
- Does the Michigan right to obtain an abortion attach when the patient requests an abortion but the physician finds she has been coerced to abort? But see MCL 333.17015(1); MCL 750.213a.
- May limits be placed on the right to abortion based on the compelling new scientific evidence that, between 12 and 18 weeks of development, a fetus can and does experience pain? See Brief of Maureen L. Condic, Ph.D. and

the Charlotte Lozier Institute as *Amici Curiae* Supporting Petitioners at 4, *Dobbs,* No. 19-1392 (US, June 24, 2022), https://tinyurl.com/4nckrf4r.[10]

As noted above, Michigan courts must "exercise the utmost care" when they "break new ground" in the field of substantive due process and "must begin with a careful description of the asserted right." *Bonner*, 495 Mich at 226–227. The court below failed to do so. It vastly expanded the Michigan constitutional right to bodily integrity (itself a right of very recent vintage), to include a new Michigan right to refuse medical treatment, a new Michigan right to obtain medical treatment, and a new Michigan right to abortion. And now, a host of thorny questions arise from the court's hasty right-making. The proper course would have been to leave the field unbroken, at least on a motion for preliminary injunction.

5. The Court of Claims failed to apply the "extremely rigorous" standard of review applicable to facial challenges to statutes.

The Court of Claims' constitutional analysis fails for yet another reason—the court ignored that Plaintiffs brought a facial, not as-applied, challenge to MCL 750.14. This case is clearly a "*facial* challenge to" MCL 750.14 because "plaintiffs do

[10] Dr. Condic's and CLI's *amici* brief explains (at 4):

> [A] mountain of recent scientific evidence shows that, through neural structures developing between 12 and 18 weeks, the fetus can and does experience conscious pain *in utero*. Faced with multiple, new, independent lines of evidence, even past naysayers have now admitted that the fetus is capable of conscious suffering without the later-developing brain structures that experts once considered essential to a conscious apprehension of pain. Perhaps most compellingly, 4D ultrasonography confirms that, even before viability, fetuses react to painful surgical procedures by grimacing and making other facial gestures recognized by science as a universal language of conscious pain experience.

not challenge the [statute's] application in a particular instance." *Bonner*, 495 Mich at 223 (emphasis in original). Yet the court failed to apply the test that properly applies to such challenges.

"A party challenging the facial constitutionality of [a statute] faces an extremely rigorous standard." *Bonner,* 495 Mich at 223 (cleaned up). "To prevail, plaintiffs must establish that *no set of circumstances exists under which the [statute] would be valid* and the fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid." *Id*. (cleaned up; emphasis added).

Plaintiffs' facial challenge fails this "extremely rigorous" test because there are circumstances—in fact, there are many circumstances—in which MCL 750.14 is valid. For example, the Legislature may prohibit, and has prohibited, the performance of partial-birth abortions except to save the mother's life. See MCL 333.17516. The Legislature may also prohibit, and has prohibited, physicians from performing abortions without informed written consent. See MCL 333.17015. And the Legislature may prohibit, and has prohibited, the performance of abortions on minors without parental consent or a court waiver. See MCL 722.903. Plaintiffs have not challenged any of these statues, and so they remain in effect. These statutes prove that "circumstances exists under which the [MCL 750.14] would be valid." *Bonner*, 495 Mich at 223.

Further, the Supreme Court has previously rejected a facial challenge to MCL 750.14, even after *Roe* was decided. See *Bricker*, 389 Mich at 531. In *Bricker*, decided

the same year as *Roe*, the Supreme Court constrained the application of MCL 750.14. *Id.* The Court held, however, that *Roe* "require[d] other exceptions" to the statute; *Roe* did not invalidate the entire law. *Id.* at 529. If MCL 750.14 had constitutional applications even under *Roe*, surely it has constitutional applications after *Roe*. Plaintiffs' facial attack on MCL 750.14 therefore cannot pass the "extremely rigorous standard" governing such attacks.

* * *

In sum, the lower court's merits analysis suffers from numerous, reversible flaws. There is simply no state or federal case that supports the lower court's creation of a right to abortion under our Constitution. To the contrary, the bedrock principles of constitutional interpretation, the existence of MCL 750.14 (and other similar abortion-related laws) at the time the 1963 Constitution was ratified, the State's public policy prohibiting abortion, Michiganders' resounding rejection in 1972 of a ballot proposal adding abortion as a constitutional right, this Court's precedent, and federal caselaw all foreclose the Court of Claims' novel theory. The lower court's constitutional theory is nothing more than "a policy goal in desperate search of a constitutional justification." *Dobbs*, 2022 WL 2276808, at *59 (THOMAS, J, concurring). To make matters worse, the lower court ignored the facial nature of Plaintiffs' claims and the burden that comes with proving such a claim.

Because there is no right to abortion under our Constitution, and Plaintiffs cannot surmount the rigorous standard for facial challenges, the court erred in finding that Plaintiffs are likely to succeed on the merits of their claims.

B. Plaintiffs will suffer no harm, much less irreparable harm, without an injunction.

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

The lower court found irreparable harm to the Plaintiffs' patients (who are not parties to this case) because the future enforcement of MCL 750.14 would infringe on their fundamental right to abortion. PI Order at 26, App'x A26. The court also found harm to Plaintiffs because the uncertainty surrounding abortion law was "frustrating the ability of plaintiffs to carry out their organizational goals." *Id.* These findings are both incorrect.

First, as explained in the previous section, our Constitution does not contain a right to abortion and thus there is no infringement of this alleged right.

Second, Plaintiffs' frustrated desire to perform abortions is a far cry from "*concrete* irreparable harm." The case the lower court relied on to decide otherwise is inapposite. The Court of Claims pointed to a federal case from the Northern District of California, where the court found irreparable harm to an organization who had evidence of "lost opportunities and income." *Santa Cruz Lesbian & Gay Cmty Ctr v*

Trump, 508 F Supp 3d 521, 545 (ND Cal 2020). Even if this case were applicable, there is no such concrete evidence here. Plaintiffs' asserted harm is that MCL 750.14 may be enforced and then "[s]ome patients *might* misunderstand why PPMI is no longer providing abortion and think that it is because its providers no longer want to help them." Pltfs' PI Motion at 12–13 (emphasis added), App'x A87–A88.

Plaintiffs also argue that "some PPMI staff *may* be afraid to continue working at PPMI," and Dr. Wallett *may* not be able to continue providing abortions in Michigan. *Id.* (emphasis added). Even after *Dobbs* overturned *Roe*, Plaintiffs have only averred that they "*could be* at risk by continuing to provide abortions" and that "a future attorney general *could* seek to prosecute a Michigan abortion provider." Pls' Mot for Summary Disposition at 41, 42 (emphases added), App'x A372–A373. These theoretical harms are insufficient, and thus the court below erred in granting the injunction without a showing of concrete irreparable harm.

C. The final two factors, balance of harms and public interest, also weigh against an injunction.

The Court of Claims found that the balance of harms weighed in Plaintiffs' favor because the Attorney General, who forcefully vocalized her *agreement* with Plaintiffs' claims, would not be harmed by an injunction. PI Order at 26, App'x A26. The court also held that the public interest would be served by an injunction because the injunction protected constitutional rights. *Id.* As with its analysis of the first two injunction factors, the court's analysis of these last two factors is erroneous.

First, at the time the court entered the injunction, it lacked jurisdiction over the case. Indeed, the court's reasoning that the Attorney General would not be

harmed (because she agreed with Plaintiffs) demonstrates why adversity is necessary before a court decides a case. While the Legislature's intervention did not retroactively cure the lack of jurisdiction, it did change the analysis of this factor. The Legislature has an interest "in defending its own work," *League of Women Voters*, 506 Mich at 578, and is harmed when statutes are enjoined, see *King*, 567 US at 1303 ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (ROBERTS, CJ, in chambers) (cleaned up).

Second, the lower court's lack of jurisdiction, due to the previous lack of adversity as well as Plaintiffs' premature claims and lack of standing, causes immense harm to the public. The justiciability doctrines exist to constrain the "judicial power." *Mich Chiropractic Council*, 475 Mich at 373–374. "The judiciary arrogates to itself the powers of the executive and legislative branches whenever it acts outside the constitutional confines of 'judicial power.'" *Id.* As a result, "[f]idelity to our constitutional structure compels this Court to be 'vigilant in preventing the judiciary from usurping the powers of the political branches.'" *Id.* By enjoining an unenforced statute solely based on hypothetical future events, the lower court stepped outside its "judicial power" and did grave harm to the separation of powers.

This overreach is even more concerning after *Dobbs**Error! Bookmark not defined.***. Post-*Roe*, the Legislature will have the opportunity to revisit abortion laws. The democratic process will allow for debate and compromise among the public and its elected representatives. By contrast, a judicial opinion that overreaches to settle

this issue usurps the power of the Legislature, exacerbates polarization, and smothers the potential for a democratic solution and public buy-in. As stated in the principal opinion in *Kevorkian*, judges may not "under the guise of constitutional interpretation" decide a question that "clearly is a policy one that is appropriately left to the citizenry for resolution, either through its elected representatives or through a ballot initiative under Const. 1963, art. 2, § 9." 447 Mich at 481–482 (opinion of CAVANAGH, CJ, joined by BRICKLEY and GRIFFIN, JJ).

This was one of the chief criticisms of *Roe*. Even Justice Ginsburg criticized *Roe* for having "halted a political process that was moving in a reform direction and thereby . . . prolonged divisiveness and deferred stable settlement of the issue." Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L Rev 1185, 1208 (1992). Justice Ginsburg was right. And the U.S. Supreme Court echoed her concerns in *Dobbs*: "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. That is what the Constitution and the rule of law demand." *Dobbs*, 2022 WL 2276808, at *7 (quotation marks omitted). The public is best served by letting the democratic process play out and is harmed when the judiciary seizes the issue from the people constitutionally empowered—and, practically, best poised—to resolve it.

None of the preliminary injunction factors weigh in Plaintiffs' favor. And the tremendous harm in this case stems from the issuance of a preliminary injunction—not the absence of it. The Court of Claims abused its discretion by holding otherwise.

D. The lower court granted improper relief.

Not only did the Court of Claims err on the jurisdictional and merits questions, it also failed to provide appropriate relief. The lower court purported to enjoin the Attorney General "and anyone acting under" her "control and supervision." PI Order at 27, App'x A27. The court also ordered the Attorney General to "give immediate notice of th[e] preliminary injunction to all state and local officials" because those officials were "enjoined and restrained from enforcing MCL 750.14." *Id.* To support this broad relief, the court cited MCL 14.30. But that statute does not give the Attorney General "control" over anyone. Rather, it provides that "[t]he attorney general shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices." MCL 14.30. Supervising, consulting, and advising are vastly different from controlling. Further, the prosecuting attorneys and other local officials are not parties to this litigation. Nor could they ever become parties because the "jurisdiction of the Court of Claims does not extend to local officials." *Mays,* 323 Mich App at 47. Thus, the lower court's relief, based on an incorrect reading of MCL 14.30, purported to bind non-parties—over whom the court has no jurisdiction—who could not appeal the decision and were forced to file a complaint for superintending control before this Court. See *In re Jerard M. Jarzynka* et al., Case No. 361470. The lower court's improper relief is yet another error this Court should correct.

CONCLUSION AND RELIEF REQUESTED

Because of the myriad errors the Court of Claims made below, the Legislature asks this Court to grant its application for leave to appeal the lower court's issuance of a preliminary injunction.

Respectfully submitted,

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**Pro hac vice* application forthcoming

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