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 L. Gleicher

PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENOR-DEFENDANTS' 7/25/2022 MOTION TO STAY FURTHER PROCEEDINGS

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INTRODUCTION

Intervenor-Defendants (the "Legislature") have filed their fourth motion before this Court seeking the same objective, utilizing different pleading titles, to vacate this Court's order granting preliminary injunctive relief and remove this Court from any further jurisdiction over this case. And while the Legislature says it isn't looking to stay the preliminary injunction – at least in this filing – it seeks to stay any further action by this Court via a stay of all proceedings.

What the Legislature also seeks is to prevent this Court from ruling on the pending cross-motions for summary disposition because all of the Legislature's arguments in the Court of Appeals and in the Supreme Court depend on their argument that there was a lack of adversity between the parties when this Court issued its order granting a preliminary injunction and therefore this Court lacked jurisdiction to issue that ruling. All of these arguments, erroneous as Plaintiffs believe them to be, evaporate should this Court issue a ruling on the contested motions for summary disposition currently pending before this Court. In essence, the Legislature clings to the hope that by stopping trial-court proceedings now, it can freeze in place an imaginary state of affairs in which this Court's preliminary injunction can be challenged collaterally or on appeal, without the inconvenience of a subsequent ruling from this Court on the merits that does not fit into the "no adversity" narrative.

Aside from this transparent gamesmanship that this Court should not countenance, the Legislature completely fails to address and meet the standards for a stay under Michigan law.

ARGUMENT

THE MOTION TO STAY FURTHER PROCEEDINGS SHOULD BE DENIED

The Legislature seeks a stay on four grounds: 1) its pending application for leave to appeal the preliminary injunction, 2) a pending action for superintending control,[1] 3) Governor Whitmer's request of the Supreme Court to certify questions covering the 1931 criminal abortion ban, and 4) a possible ballot proposal regarding reproductive freedom.

None of these grounds, either individually or collectively, justify a stay of proceedings. The Legislature's motion should be denied.

I. THE COURT RULES AND CASE LAW MANDATE EXPEDITIOUS DISPOSITION OF LITIGATION.

The Legislature's motion ignores the mandate of the court rules and case law that there be expeditious disposition of this case.

The Michigan Court Rules repeatedly stress the need for "expeditious disposition" of litigation. See, e.g., MCR 1.105 (court rules to be "administered . . . by . . . the court to secure the just, speedy, and economical determination of every action"); MCR 2.401(B)(1) (purpose of status conferences are to "facilitate the fair and expeditious disposition of the action"). The Michigan courts have reiterated this mandate. See, e.g., *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006) (court has authority to manage its affairs "so as to achieve the orderly and expeditious disposition of cases"); *Masters v Highland Park*, 97 Mich App 56, 59; 294 NW2d 246 (1980) (there is a "necessity for expeditious disposition of litigation"). This Court has adhered to this mandate. See, e.g., Op & Order (May 17, 2022), p 27 ¶ 4 (ordering the parties to advise the Court within 30 days of the need to schedule a trial).

[1] Because this action has been dismissed we do not further address it here.

The Legislature asks this Court to ignore this mandate without any justification, as demonstrated below.

II. THE LEGISLATURE FAILS TO MEET THE STANDARD FOR A STAY PENDING APPEAL

The Legislature fails to cite, let alone meet, the standard for a stay pending resolution of the Application for Leave to Appeal, which is the same as that which governs preliminary injunctive relief:[2]

> The factors relevant to the decision whether to grant a stay pending appeal are as follows: (1) whether the moving party is likely to prevail on the merits; (2) whether the movant will suffer irreparable harm if the stay is denied; (3) whether the non-moving party will suffer irreparable harm if the stay is granted; and (4) whether the grant or denial of a stay would harm the public interest. *Detroit Fire Fighters Ass'n IAFF Local 344 v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008).

Mothering Justice v Nessel, unpublished order of the Court of Claims issued July 29, 2022 (Docket No. 21-000095-MM) (Shapiro, J.) (Exhibit 1).

As to irreparable harm "the mere apprehension of future injury or damage cannot be the basis for . . . relief," *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008), and "it is well settled that an injunction will not lie . . . where the threatened injury is

[2] There is also a question as to whether the Legislature is really appealing a denial of its motion for reconsideration as Intervenor-Defendants were not a party to the original order granting preliminary injunctive relief and therefore must take the case as they find it. An intervenor must pursue the application to intervene in a timely manner, and if successful, the "interven[o]r must take the case as he finds it and cannot delay the trial of the cause." *Jackson v City of Detroit*, 2019 WL 5061196, at *3 (Mich Ct App Oct 8, 2019), citing *Ferndale Sch Dist v Royal Oak Twp*, 293 Mich 1, 12; 291 NW 199 (1940); see also *Ferndale Sch Dist*, 293 Mich at 13; *Keeler Twp v Bachler*, No. 294323, 2010 WL 5175456, at *4 (Mich Ct App Dec 21, 2010) (an intervenor "cannot relitigate an issue that has already been decided, absent a change in law or a substantial change in circumstances"); *Manley v Detroit Auto Inter–Insurance Exchange*, 425 Mich 140, 159–160; 388 NW2d 216 (1986) (same). In that situation the Legislature has a heavy burden to show that this Court abused its discretion in denying reconsideration which requires a showing of palpable error.

speculative or conjectural," *id.* at 9 n 15 (quotation marks and citation omitted). All of these conditions apply to a motion for stay pending appeal.

Next, "economic injuries are not irreparable." *Acorn Bldg Components v Local Union 2194, UAW,* 164 Mich App 358, 366; 416 NW2d 442 (1987); see also *Pontiac Fire Fighters, supra*, 482 Mich at 10 (economic injuries not irreparable); *Sampson v Murray,* 415 US 61, 90; 94 S Ct 937; 39 L Ed 2d 166 (1973) ("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expanded in the absence of a stay, are not enough" to establish irreparable harm).

The Legislature's motion fails to satisfy any of the factors for a stay pending appeal.

A. The Legislature Fails To Demonstrate That It Will Likely Prevail On Appeal.

This standard is very demanding. "Likely" means "probable." *Moll v Abbott Labs*, 444 Mich 1, 22; 506 NW2d 816 (1993). Thus the Legislature must demonstrate more than that it is "possible" it will prevail on appeal but that it is "probable" that it will do so, in order to meet this element for a stay pending appeal.

As is readily apparent from Plaintiffs' Answer to the Application for Leave to Appeal, the Legislature's application seeking interlocutory review of a preliminary injunction, while dispositive motions have already been filed and briefed in this Court, has little chance of success. See Exhibit 2, Plaintiffs' Answer to Application for Leave to Appeal.

B. The Legislature Has Not And Cannot Make A Showing Of Irreparable Harm To Itself In The Absence Of A Stay.

The Legislature has not demonstrated that it will suffer any harm, let alone irreparable harm, absent a stay of the proceedings in this Court, and irreparable harm is the basic prerequisite to obtaining a stay. *Michigan State Employees Assoc v Dept of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1985).

The Legislature simply argues for judicial efficiency as a reason to stay all proceedings on the long shot that its application for leave to appeal will find traction. The Legislature cites no authority for this novel proposition, that a stay may be granted solely in the interest of judicial economy, even where the stay deprives a party of its right to speedy resolution of their case. See, e.g., *Maldonado, supra.* Simply proceeding with the case and defending litigation cannot constitute irreparable harm, otherwise there would be an automatic stay every time a defendant lost a motion, as every defendant then faces the cost of proceeding with and defending the litigation. See, e.g., *Sampson, supra.* To the contrary such a stay in the trial court upon a filing of an appeal is explicitly not automatic. MCR 7.209(A)(1).

In determining what constitutes a sufficient showing of harm to warrant a stay, courts have cautioned that the requirement is that harm be "irreparable," and that economic injuries, including expenses and energy expended in litigation, do not qualify. *Sampson, supra*. The parties in every case share the burden and costs of litigation. The time and expense of such litigation do not constitute the type of irreparable harm, for either party or the court to justify a stay of proceedings when one party or the other loses a contested motion.

Defendants' failure to demonstrate a lack of irreparable harm by proceeding with the litigation is fatal to their request for a stay.

C. The Balance Of Harms And The Public Interest Favor Denial Of A Stay Pending Appeal.

This Court found that Plaintiffs had a "strong likelihood" of prevailing on their constitutional challenge, Op & Order, p 25, and that the "inability to exercise a fundamental constitutional right inherently constitutes irreparable harm," *id.* at 26. The Legislature faces no risks to its rights nor any irreparable harm from denial of a stay. Thus the balance of harm does not favor a stay. Moreover, "it is always in the public interest to prevent the violation of a party's

constitutional rights." *G&V Lounge v Michigan Liquor Control Comm'n*, 23 F3d 1071, 1079 (CA 6, 1994). Thus the public interest disfavors a stay.

III. THE PENDENCY OF GOVERNOR WHITMER'S REQUEST BEFORE THE SUPREME COURT DOES NOT SUPPORT A STAY.

Our legal system rests on the basic assumption that plaintiffs who have brought valid claims for relief are entitled to pursue those claims to final resolution. "Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v N Am Co*, 299 US 248, 255; 57 S Ct 163; 81 L Ed 153 (1936). The Legislature, as the party seeking a stay, bears the heavy burden of showing that there is "pressing need" for a stay, and that neither the Plaintiffs nor the public will suffer harm from entry of the order. *Id*. Specifically, "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Id*.

The Legislature has not and cannot meet these standards.

Its basis for asking Plaintiffs to "stand aside" are boilerplate statements about "efficient judicial administration" and "speedy resolution" of issues, Motion, p 2, and a claim that there is a "risk" of conflict, Brief, p 7. None of those rise to the level of a "*pressing* need" for stay. *Landis*, 299 US at 255 (emphasis added). This case is moving speedily along and staying it is the opposite of "speedy resolution." In contrast, other than briefing, there has been no activity whatsoever on the Governor's request. The mere pendency of that request with no action for nearly four months does not create a "pressing need" to hold up this case.

Nor has the Legislature shown that no harm will come to Plaintiffs from a stay. The Legislature disingenuously claims that it does not seek to stay the preliminary injunction – yet – so there is no harm to Plaintiffs. Brief, pp 7-8. But it is seeking to overturn it in every way possible

– by reconsideration, appeal, and disqualification – and one of Plaintiffs' remedies for these attacks on the preliminary injunction is permanent declaratory and injunctive relief. Thus, deferring final resolution of this case will not only harm the Plaintiffs but other providers of abortion care and countless potential patients who deserve the certainty of a final decision in this case about their state constitutional rights.

IV. A POTENTIAL BALLOT QUESTION DOES NOT SUPPORT A STAY

Finally, the Legislature seeks a stay because a *potential* ballot proposal *could* moot this case. Brief, p 7. But this is pure speculation. That petition effort hasn't been certified for the ballot, hasn't been approved by the voters, and if approved won't take effect until late December. Stays are based on facts, not conjecture and speculation. See, e.g., *Pontiac Fire Fighters, supra*, 482 Mich at 9. Further, the threat of future mootness should not lead the court to stay a current, ripe case. See *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242; 701 NW2d 144 (2005) (holding that the mere possibility that a road project would not be completed did not render the current case moot, which challenged the project as an abuse of eminent domain.)

The Legislature's reliance on the constitutional avoidance doctrine is also misplaced. See Brief, p 7. That doctrine is a canon of statutory construction that says if there are multiple reasonable interpretations of a statute, one of which avoids raising a constitutional issue, the court should choose the construction which avoids the necessity of making a constitutional ruling. *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 508; 274 NW2d 373 (1979), quoting *Ashwander v Tennessee Valley Auth*, 297 US 288, 348; 56 S Ct 466; 80 L Ed 688 (1936). This doctrine does *not* mean that a case can be stayed to avoid deciding a constitutional issue that is squarely presented by the case.

The possibility of a constitutional amendment on reproductive freedom doesn't justify a

stay.

V. THE LEGISLATURE'S REQUEST FOR A STAY OF PROCEEDINGS IS AN IMPROPER EFFORT TO RETAIN THEIR APPELLATE ARGUMENT

In addition to not meeting any of the requirements for a stay, the history of the Legislature's filings in this case and on appeal demonstrates that the Legislature's motion is an improper attempt to manipulate the proceedings in this Court and on appeal.

Plaintiffs filed their verified complaint in this case on April 17, 2022 and simultaneously filed a motion for preliminary injunction. The Legislature filed its motion to intervene and a motion for reconsideration of the preliminary injunction on June 6, 2022. In its motion, the Legislature argued that this Court lacked jurisdiction to issue the preliminary injunction, based on the lack of adversity between the parties. The Legislature specifically argued that "[t]he Legislature's motion to intervene does not cure the initial lack of jurisdiction or create, ex post facto, the necessary adversity that was absent when the court entered the preliminary injunction." Motion for Reconsideration, p 13. The Legislature sought to vacate the preliminary injunction for lack of subject matter jurisdiction. *Id*., p 22.

On June 8, 2022, the Legislature filed an amicus curiae brief in the Supreme Court in response to the Governor's Executive Message and argued that it had recently filed a motion to intervene and for reconsideration in this case, and that the Supreme Court should deny the Governor's request in its entirety as the request did not meet the jurisdictional requirements of MCR 7.308(A).[3]

On June 13, 2022, the Legislature filed an amicus curiae brief in support of superintending control in the Court of Appeals, stating:

[3] See https://www.courts.michigan.gov/49cb78/siteassets/case-documents/briefs/msc/2021-2022/164256/164256_36_01_ac_brf_mi-house-senate.pdf.

> The lower court's refusal to dismiss the case despite a lack of adversity meant there would be no party to defend the case. To avoid the entry of an unlawful permanent injunction that Planned Parenthood and the Attorney General would support, the Legislature was forced to move to intervene as a Defendant and move for reconsideration of the Court's May 17, 2022 preliminary injunction order.

Amicus Brief, at p 2. The Legislature continued:

> Even if the lower court were to grant the Legislature's pending intervention motion it does not cure the lack of jurisdiction to grant a preliminary injunction or ex post facto create the adversity that was absent when the court entered the PI order. There was no true Defendant at the time the court entered the PI order and that alone is sufficient to require vacatur of that order for lack of jurisdiction.

Id., p 11.

On July 6, 2022, the Legislature filed its application for leave to appeal the denial of their motion for reconsideration and argued that there was no actual controversy between the parties when the preliminary injunction was entered and "[t]hus 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." Exhibit 2, p 14. Additionally, on July 12, 2022 the Legislature filed a motion for summary disposition (which it now seeks to hold in abeyance by staying all further proceedings) arguing that this Court lacked jurisdiction over Plaintiffs' claims as there is no actual controversy because there was no adversity between the parties when the preliminary injunction was issued, which predated the Legislature's intervention.

What all of these pleadings, which seek to vacate the preliminary injunction order issued by this Court on May 17, 2022, have in common is that they rest on the argument that the court lacked *jurisdiction* to enter the preliminary injunction because the parties lacked adversity at that time. While the Legislature argues its intervention can't cure this *"ex post facto,"* this argument

becomes moot with the pending requests for permanent injunctive relief and a declaratory judgment sought by Plaintiffs in their motion for summary disposition, filed *after* the intervention of the Legislature. Thus the only option for the Legislature to preserve their central argument on appeal is to *prevent* this Court from ruling on the pending motions. That is the real goal of the Legislature's motion to stay proceedings.

So despite having filed two motions for summary disposition of their own, and a motion for disqualification, the Legislature seeks to stay all further actions by this Court in order to continue to argue the issues of jurisdiction and failure to recuse in the appellate courts. There is no judicial efficiency in staying proceedings in this Court, where a ruling on these matters will in fact moot the issues on appeal and create a final judgment for review. Both because judicial efficiency, even if it existed, is not a basis for delaying and staying proceedings, and because the Legislature's request for a stay is disingenuous at best, the motion should be denied.[4]

CONCLUSION AND RELIEF SOUGHT

For all these reasons Intervenor-Defendants' motion to stay further proceedings should be denied.

[4] The Legislature, to support its assertion that this Court "frequently" grants motions for stay pending a decision on an application for appeal, cites *one* case from this court and three other orders over the last 17 years. There have been hundreds of applications for stay with applications for leave to appeal, and such stay requests are routinely denied, as should this one be.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

Dated: August 2, 2022

Proof of Service

The undersigned certifies that on August 2, 2022, the foregoing instrument(s) electronically filed the foregoing papers with the Clerk of the Court using the Electronic Filing System which will send notification of such filing to all attorneys of record.

/s/ Elizabeth M. Rhodes
Elizabeth M. Rhodes