STATE OF MICHIGAN
IN THE SUPREME COURT

GRETCHEN WHITMER, on behalf of the State of Michigan,

Plaintiff,

v

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

Defendants.

RESPONDENTS PROSECUTING ATTORNEYS SAVIT, LEYTON, SIEMON, GETTING, WIESE, MCDONALD, AND WORTHY'S BRIEF IN SUPPORT OF GOVERNOR WHITMER'S REQUEST FOR CERTIFICATION UNDER MCR 7.308

This case involves a claim that state governmental action is invalid

Supreme Court Case No. 164256

Oakland Circuit Court No. 22-193498-CZ
HON. EDWARD SOSNICK

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I. INTRODUCTION

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992). Thirty years after the United States Supreme Court decided *Casey*, we find ourselves on the precipice of an extraordinary change to reproductive rights jurisprudence. Pending before the U.S. Supreme Court is *Dobbs v. Jackson Women's Health Organization* (No. 19-1392), a case in which that Court is reconsidering the viability standard announced in *Roe v. Wade*, 410 U.S. 113 (1973), and upheld in *Casey*. It is widely expected that the U.S. Supreme Court will affirm Mississippi's 15-week abortion ban, which squarely conflicts with the viability standard, and therefore will either expressly or impliedly overrule these landmark decisions. At a minimum, the U.S. Supreme Court is expected, within the next 60 days, to dramatically change what the right to an abortion means (if anything at all) under the U.S. Constitution.[1]

Recognizing the uncertainty that the impending *Dobbs* decision creates for Michiganders, and the dire consequences of inaction, Governor Whitmer filed the instant case to solidify the right to an abortion under the Michigan Constitution. Respondents Prosecuting Attorneys, who are named as defendants in their official capacities in this action because of their role in enforcing the state's criminal laws, join the Governor in her request for the Michigan Supreme Court's review. The case presents an actual controversy, and the costs of delay are too great to forego consideration. If ever there was a case for the executive message, this is it. At any moment, Michigan's criminal abortion law may spring back into life (in whole or in greater part), making

[1] On Monday, a draft majority opinion authored by Justice Alito was disseminated publicly by *Politico*. According to the reporting, there are five votes on the U.S. Supreme Court to overturn *Roe* and *Casey*. The 98-page draft includes the following: "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak and the decision has had damaging consequences." Josh Gerstein and Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows* Politico, (May 2, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

it a felony to provide an abortion in this state. Even if no prosecutor intended to enforce the criminal statute, the law remains a threat to health care providers and, as a result, access to abortion in this state. This Court should not countenance the potential degradation of health care options if criminal liability for most abortion care attaches in Michigan. The Governor's request should therefore be granted.[2]

II. STATEMENT OF FACTS

A. The Imminent and Near Certain Change to Abortion Rights

Currently pending before the U.S. Supreme Court is *Dobbs*, a case in which that Court granted *certiorari* on the question of "[w]hether all pre-viability prohibitions on elective abortions are unconstitutional." *Dobbs v. Jackson Women's Health Org.*, Pet. for Cert. at i; Order List May 17, 2021. The U.S. Supreme Court heard arguments on December 1, 2021, and a decision is expected by late June. The case concerns Mississippi House Bill 1510, which restricts access to abortion to the first 15 weeks of pregnancy. Under existing U.S. Supreme Court jurisprudence, the 15-week ban is patently unconstitutional—as the lower courts in *Dobbs* concluded. *Dobbs v. Jackson Women's Health Org.*, 945 F.3d 265 (5th Cir. 2019). But the U.S. Supreme Court decided to review that decision—a highly likely indication of a desire to reverse the decision below. Experts and commentators agree with this assessment.[3]

There are several other indications that the U.S. Supreme Court will uphold Mississippi's law and, at a minimum, substantially undercut the precedential value of *Roe* and *Casey*. Earlier in the Term, the U.S. Supreme Court refused to intervene and allowed Texas's S.B. 8 to go into effect.

[2] In filing this brief with the Michigan Supreme Court, Respondents Prosecuting Attorneys preserve all rights with respect to proceedings in the Circuit Court, including any claims or defenses they might assert in an initial responsive pleading.

[3] Adam Liptak, *The Supreme Court seems poised to uphold Mississippi's abortion law*, NY Times, (Dec. 1, 2021), https://www.nytimes.com/live/2021/12/01/us/abortion-mississippi-supreme-court.

Whole Woman's Health v. Jackson, 21A24 (Sept. 1, 2021). That law authorizes private civil enforcement against any abortion performed after a so-called fetal heartbeat is detected (which usually first occurs at about six weeks into pregnancy). *See* Tex. Health & Safety Code § 171.208. S.B. 8 has effectively ended access to abortion in Texas and has forced most pregnant people to seek care in neighboring states (and locations even farther away).[4] Later in fall 2021, the U.S. Supreme Court affirmed the vacatur of a district court injunction of S.B. 8 and effectively ended challenges brought both by Texas-based providers and the U.S. Department of Justice. *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021).

State legislatures already have seized upon the very likely shift in jurisprudence by enacting dozens of abortion restrictions and bans that would otherwise be unlawful under *Roe*. From January to mid-April 2022, nine states enacted 33 different restrictive measures and seven states enacted abortion bans (including three laws banning abortion after 15 weeks, two that impose a "Texas-style" civil-enforcement scheme after six weeks, and one "trigger ban" that will go into effect should *Roe* be overturned).[5]

[4] Karen Brooks Harper, et al., *Fewer patients, smaller staff, an uncertain future: abortion providers await court decision on Texas law*, Tex. Trib., (Nov. 23, 2021), https://www.texastribune.org/2021/11/23/texas-abortion-providers-supreme-court/.

[5] Elizabeth Nash et al., *2022 State Legislative Sessions: Abortion Bans and Restrictions on Medication Abortion Dominate*, Guttmacher Inst. (updated Apr. 15, 2022), https://www.guttmacher.org/article/2022/03/2022-state-legislative-sessions-abortion-bans-and-restrictions-medication-abortion; Caroline Kitchener, *Okla. legislature approves bill banning abortions after 6 weeks of pregnancy*, Wash. Post, (Apr. 28, 2022), https://www.washingtonpost.com/politics/2022/04/28/abortion-oklahoma-republicans/. These numbers include some laws that have been temporarily enjoined, but these injunctions would likely be lifted if *Roe* is overturned or restrained. These recent enactments are on top of existing trigger laws: as of December 1, 2021, thirteen states had trigger bans. More broadly, "nearly 22 states have laws or constitutional amendments already in place that would make them certain to attempt to ban abortion as quickly as possible." Elizabeth Nash & Lauren Cross, *26 States Are Certain or Likely to Ban Abortion Without Roe: Here's Which Ones and Why*, Guttmacher Inst., (updated Apr. 19, 2022), https://www.guttmacher.org/article/2021/10/26-states-are-certain-or-likely-ban-abortion-without-roe-heres-which-ones-and-why; Caroline Kitchener, *Okla. legislature approves bill banning abortions after 6 weeks of pregnancy*, Washington Post, (Apr. 28, 2022), https://www.washingtonpost.com/politics/2022/04/28/abortion-oklahoma-republicans/.

B. Michigan's Law on Abortion

Michigan law has never squarely recognized a right to an abortion, separate from the requirements of the U.S. Constitution. Michigan instead maintains a criminal abortion statute, which makes it a felony for "[a]ny person" to provide an abortion, except where "necessary to preserve the life of [the pregnant] woman." MCL 750.14. In 1973, shortly after *Roe* was decided, this Court reviewed the conviction of an unlicensed individual under the state's abortion statute. There, the Michigan Supreme Court sought to "save what [it could] of the Michigan statutes" by making clear that some portions of the law remained operative: "We hold that, except as to those cases defined and exempted under *Roe v. Wade* and *Doe v. Bolton*, *supra*, criminal responsibility attaches." *People v. Bricker*, 389 Mich. 524, 529 (1973). In a companion case on the same day, this Court also concluded that the state's criminal manslaughter by abortion law could only be applied after viability. *Larkin v. Cahalan*, 389 Mich. 533, 541 (1973) ("Our duty is to read the Michigan act to be consistent with the Federal Constitution, if such interpretation can be made without doing violence to the language used by the Legislature.").

This Court has never opined on whether the state constitution independently protects the right to an abortion. In *Mahaffey v. Attorney General*, however, the Michigan Court of Appeals held that "there is no right to abortion under the Michigan Constitution." 222 Mich. App. 325, 336 (1997). This decision remains binding precedent on the lower courts of Michigan and offers further reason for this Court to immediately take up the questions presented.

C. Governor Whitmer's Lawsuit

In light of the current state of Michigan law, the imminent change to federal constitutional law, and the substantial reliance interests of individuals and providers on legal access to abortion

in Michigan, the Governor filed the instant case in Oakland County Circuit Court. The Governor contends that MCL 750.14 violates both the due process and equal protection clauses of the Michigan Constitution. *Whitmer v. Linderman*, Compl. ¶¶ 79–95. The case was filed pursuant to the Governor's authority under Article 5, § 8 of the Michigan Constitution, and the Governor has sought review of the questions presented by this Court under MCR 7.308. Respondents Prosecuting Attorneys join the Governor in that request given the significant public interest at stake.

The Governor's lawsuit named thirteen county prosecutors—all of the prosecutors in counties where abortion providers operate—as defendants in this case.[6] All Respondents Prosecuting Attorneys have made clear their agreement that the Michigan Constitution protects the right to an abortion at least concurrently with *Roe* (if not extending further).[7] Yet despite Respondents Prosecuting Attorneys' agreement with the Governor's legal position, the residents that they serve face imminent and significant harm from MCL 750.14.

Of course, the decision to pursue felony criminal charges vests exclusively with county prosecutors (or the Attorney General, if she seeks to bring a case). But even in counties where prosecutors are not inclined to prosecute abortion, "criminal" abortion cases could still be investigated by law enforcement if MCL 750.14 springs back into effect. Worse, people could still be *arrested* for abortion—even in counties where prosecutors would generally decline such cases. *See* MCL 750.14 (making abortion "a felony"); MCL 764.15 (allowing "[a] peace officer, without a warrant, [to] arrest a person" if (1) "[t]he person has committed a felony although not in the

[6] Respondents Prosecuting Attorneys are required to "appear for the state or county, and prosecute or defend in all courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested." MCL 49.153.

[7] Press Release, Karen McDonald et al., *Seven Michigan Prosecutors Pledge to Protect a Woman's Right to Choose Joint Statement* (Apr. 7, 2022) https://tinyurl.com/nhen4c9s.

peace officer's presence"; or (2) "[a] felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it"). The threat of criminal investigation and arrest alone infringe upon the constitutional rights of residents of Respondents' counties and are of significant concern.

* * *

Put bluntly: A storm is gathering. A cloud of uncertainty and criminality looms over the exercise of a right that has been expressly protected by the U.S. Constitution for a half-century. The residents of Michigan—including those in Respondents Prosecuting Attorneys' counties—deserve clarity as to the existence and scope of core constitutional rights. And they deserve it now, *before* anyone is faced with the prospect of criminal liability for exercising their rights. The Governor's request for certification under MCR 7.308 should therefore be granted.

III. ARGUMENT

THE HONORABLE COURT SHOULD GRANT THE GOVERNOR'S REQUEST FOR CERTIFICATION UNDER MCR 7.308

A. The Governor's Case Presents a Justiciable Controversy Regarding the Constitutionality of MCL 750.14

Given the rapidly shifting jurisprudence regarding the federal constitutional right to abortion, this Court should grant the Governor's request to certify the questions presented of whether the Michigan Constitution protects the right to abortion and the extent to which MCL 750.14 is constitutional. The case presents an actual controversy which the Governor, asserting the State's sovereign and quasi-sovereign interests, has standing to pursue.

1. This Case Presents a Justiciable Controversy

This Court has never determined whether the Michigan Constitution provides an independent right to abortion. Instead, this Court solely has incorporated federal jurisprudence

related to abortion into state law. *See, e.g.*, *Bricker*, 389 Mich. 524; *Larkin*, 389 Mich. 533. This incorporation, however, does not resolve the question of whether the Michigan Constitution independently and separately provides a right to abortion "because [the U.S. Constitution and the Michigan Constitution] were written at different times by different people, the protections afforded may be greater, lesser, or the same." *Sitz v. Dep't of State Police*, 443 Mich. 744, 762 (1993). Moreover, at this moment, a binding Court of Appeals decision precludes lower courts from reaching such an outcome. *See Mahaffey*, 222 Mich. App. 325 (1997). With the federal constitutional right expected to be significantly curtailed in *Dobbs*, Michiganders, health care providers, and the entire legal system face mounting uncertainty regarding the right of abortion in Michigan. This imminent and highly likely change in the law creates a ripe controversy for this Court to adjudicate. The Governor should not have to wait until after *Dobbs* is decided to initiate this process.

The Governor's request to certify the questions is urgent and, accordingly, timely. As this Court recently explained: "[A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none . . . or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *League of Women Voters of Michigan v. Sec'y of State*, 506 Mich. 561, 580 (2020) (citations omitted). This is not a pretend controversy, as constitutional rights are in flux. The fact that no one in Michigan has yet been impacted by *Dobbs* does not preclude adjudication now. "[A]n actual controversy is deemed to exist in circumstances where declaratory relief is necessary in order to guide or direct future conduct. In such situations, courts are not precluded from reaching issues before actual injuries or losses have occurred." *City of Huntington Woods v. City of Detroit*, 279 Mich. App. 603, 615-16 (2008).

Here, clarity in the form of declaratory and other relief is appropriate. MCL 750.14 remains on the books and operative to the extent that it does not violate *Roe* and *Casey*. Once *Roe* is eliminated or substantially eroded, MCL 750.14 will spring back to life. Combined with a Court of Appeals opinion that unjustifiably ruled that the Michigan Constitution provides no right to abortion, *see Mahaffey*, 222 Mich. App. 325, every Michigan resident faces constitution-infringing confusion requiring intervention by this Court. This uncertainty has real-world implications for Michiganders seeking to exercise fundamental rights and for their providers. For example, a private citizen could initiate a complaint with law-enforcement under MCL 750.14. Even if a county prosecutor ultimately refuses to pursue the case, a respondent may be subject to arrest and/or detention pending charges from the prosecutor's office. At a minimum, that will have a chilling effect on those acting within the potential purview of MCL 750.14.

In addition, questions of abortion have long been granted special timeliness considerations given both their public importance and the unique circumstances of pregnancy. A pregnancy does not wait for the courts. Current pregnancies and current decisions about whether to get pregnant will be affected by *Dobbs*. Those who would seek an abortion in the aftermath of *Dobbs* cannot wait for litigation to commence and wind its way through the courts. They urgently need to know whether, and under what circumstances, they can exercise their reproductive rights. Indeed, *Roe* itself—in an aspect of the case that is *not* subject to being overruled in *Dobbs*—explains that "[p]regnancy provides a classic justification for a conclusion of nonmootness. It truly could be capable of repetition, yet evading review." *Roe*, 410 U.S. at 125 (citation omitted); *Honig v. Doe*, 484 U.S. 305, 335–36, (1988) (Scalia, J., dissenting) ("*Roe* [and other abortion cases] differ from the body of our mootness jurisprudence . . . [by focusing] upon the great likelihood that the issue

will recur *between the defendant and the other members of the public at large* without ever reaching us") (emphasis in original). The same rationale merits the Court's intervention now.

2. The Governor Has Standing

The Governor likewise has standing to pursue this case. This Court has emphasized that standing requirements under Michigan law are heavily reliant on the discretion of courts themselves, based on an analysis of whether a litigant has a "special injury or right, or substantial interest" to seek redress on a particular question. *Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 372 (2010). The Governor—who is expressly acting "in the name of the state," Const. 1963, art. 5, § 8—has at least two "special injuries or rights" that have long been recognized by courts as providing standing to a State or its representatives.

First, the Governor filed this lawsuit in the name of the State to "enforce compliance with [a] constitutional . . . mandate." *Id.* That is precisely the type of "sovereign interest" that courts regularly allow a state to sue to vindicate. As the U.S. Supreme Court has held, states have inherent "sovereign interests" in exercising, thorough the laws the state has adopted, "sovereign power over individuals and entities within the relevant jurisdiction." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). The state constitution, of course, is the supreme source of state law, and the ultimate manifestation of state sovereignty. Accordingly, the Governor may "easily" sue to enforce compliance with the Michigan Constitution. *Id.* Indeed, this exercise of sovereign power is "regularly at issue in constitutional litigation." *Id.* Thus, Michigan's sovereign interests are more than sufficient to give the Governor standing here.

Second, and independent of the state's sovereign interests, the Governor has standing to sue under the *parens patriae* doctrine. A state may sue as *parens patriae* when it asserts "an injury to what has been characterized as a 'quasi-sovereign' interest." *Id.* A "quasi-sovereign interest" is

an "alleged injury to the health and welfare of [a State's] citizens"—which "suffices to give the State standing to sue as *parens patriae*." *Id.* at 607. Courts have "not attempted to draw any definitive limits" on what can constitute a quasi-sovereign interest. *Id.* But the U.S. Supreme Court has made clear that states maintain a "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents." *Id.*

Both the physical and economic health and well-being of Michigan residents are squarely at issue here. The physical-health analysis is straightforward, and straightforwardly disturbing. Prior to *Roe,* the criminalization of abortion pushed people and providers into the shadows, where they engaged in risky and unsafe abortion procedures. Thousands upon thousands of people died from abortion in the pre-*Roe* era.[8] Medical advances since *Roe* have dramatically changed the landscape but forcing people to carry a pregnancy to term carries great health risks for the pregnant person and the child. As the U.S. Supreme Court has recognized, childbirth is more dangerous than abortion. *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016). According to one study, carrying a pregnancy to term is fourteen times risker than having an abortion.[9] The risks of pregnancy and childbirth are greater for people of color and of lower socioeconomic status (*i.e.*, those most likely to be denied abortions).[10] In addition to the significant physical health risks of pregnancy, childbirth, and the post-partum period, forced pregnancies pose immediate and long-term mental health risks.[11]

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[8] Rachel Benson Gold, *Lessons from Before Roe: Will Past be Prologue?,* 6 Guttmacher Report on Public Policy at 8 (Mar. 2003).

[9] *Black Women Over Three Times More Likely to Die in Pregnancy, Postpartum Than White Women, New Research Finds*, Population Reference Bureau, (Dec. 6, 2021), https://www.prb.org/resources/black-women-over-three-times-more-likely-to-die-in-pregnancy-postpartum-than-white-women-new-research-finds/.

[10] *Id.* (noting that "the maternal mortality rate among non-Hispanic Black women was 3.5 times that of non-Hispanic white women").

[11] Pamela Herd et al., *The Implications of Unintended Pregnancies for Mental Health in Later Life*, Am. J. Pub. Health, (Feb. 17, 2016), https://ajph.aphapublications.org/doi/10.2105/AJPH.2015.302973#_i6

From an economic standpoint, the pre-*Roe* criminalization of abortion in some states forced many residents to travel long distances to access reproductive care. That travel, of course, imposed exorbitant monetary costs on those seeking a safe, legal abortion. The option to travel "was really only available to the small proportion of women who were able to pay for the procedure plus the expense of travel and lodging."[12] If MCL 750.14 springs back to life, it will recreate a caste system in which out-of-state abortion is available (albeit at significant economic cost) for some wealthier Michiganders, whereas many poorer Michiganders are forced to carry their pregnancies to term.

For those unable to afford out-of-state travel to secure an abortion, the "economic" consequences will be dire indeed. *See Snapp*, 458 U.S. at 607. Many Michiganders, forced by the State to give birth, will "bear[ ] nurture and support burdens alone, when fathers deny paternity or otherwise refuse to provide care or financial support for unwanted offspring." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985). The economic costs of an unplanned pregnancy, which are disproportionately imposed on those who are already of lower socioeconomic status, are significant. "In the balance is a woman's autonomous charge of her full life's course—her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen." *Id.* (cleaned up).

These two "special injuries and rights"—the State's sovereign authority to ensure enforcement of its constitution, and its quasi-sovereign interest in ensuring the health and welfare of its citizens—are more than sufficient to give the Governor standing. *Lansing Sch. Educ. Ass'n*, 487 Mich. at 372; *Snapp,* 458 U.S. at 601, 607. That is true even under the restrictive federal

("Experiencing unwanted pregnancies . . . appears to be strongly associated with poor mental health effects for women later in life."); Sarah Fielding, *Adoption is No Substitute for Abortion: Forced Pregnancy Impacts Mental Health*, Verywell Mind, (updated Jan. 14, 2022), https://www.verywellmind.com/mental-health-implications-of-forced-pregnancy-5212669.

[12] Benson Gold, *supra* note 8 at 11.

standing test. *See Snapp,* 458 U.S. at 601, 607; *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 520 (2007) (granting "special solicitude in . . . standing analysis" to state leadership to protect the interests of their constituents). It is *a fortiori* true under Michigan's more "limited, prudential doctrine*.*" *Lansing Sch. Educ. Ass'n*, 487 Mich. at 372.[13] Again, Article V, Section 8 of the Michigan Constitution provides that "the governor may initiate court proceedings in the name of the state to enforce compliance with any constitutional . . . mandate, or to restrain violations of any constitutional . . . power, duty or right by any officer, department or agency of the state or any of its political subdivisions." Const. 1963, art. 5, § 8. That provision plainly authorizes the Governor to exercise the State's authority to ensure that significant constitutional rights are protected.

There is also adversity in the case, which means the Governor's claims are redressable. Defendants Jarzynka and Becker, who are also county prosecutors, have filed a joint brief opposing the Governor's request and seeking dismissal of the complaint. *See, e.g.*, *Anway v. Grand Rapids Ry. Co.*, 211 Mich. 592, 616 (1920) (noting that the "judicial power . . . is the right to determine actual controversies arising between adverse litigants"). The Governor is thus correct to rely on the standing granted to her under the Michigan law to bring the instant case.

B. There Is Good Cause for the Michigan Supreme Court to Take up this Case

The circumstances of this case amount to "such public moment as to require an early determination." MCR 7.308. As discussed above, a shift in federal constitutional interpretation is imminent. This shift will leave access to abortion care in Michigan in grave peril absent intervention by this Court. Doing so, however, would not require this Court to take every case involving constitutional uncertainty.

[13] As this Court has explained, the federal case-or-controversy standing requirement—derived from the text of Article III of the United States Constitution—"does not reflect the broader power held by state courts" to adjudicate cases. *Lansing Sch. Educ. Ass'n*, 487 Mich. at 362.

In evaluating the "public moment," at least three considerations are paramount. *First,* this Court should consider the hugely impactful effect of reproductive choice for the economic and social opportunity of people who can become pregnant in Michigan and across the country. *See, e.g.*, *Casey*, 505 U.S. at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."). *Second*, irrespective of *Roe*'s vitality, people will continue to seek out and have abortions. But that exercise of reproductive freedom will not be without consequences. A dramatic shift in the law will make abortion care more costly (by, among other things, requiring out-of-state travel),[14] riskier (by, among other things, delaying care), and less equitable (by becoming less available to people of less financial means and people of color in general).[15] *Third*, significant legal restrictions can cause abortion providers to stop providing care. *See, e.g.*, *Hellerstedt*, 579 U.S. at 612 (following the passage of Texas's HB 2, "the number of facilities providing abortions dropped in half, from about 40 to about 20"). Even when those legal restrictions are ultimately eliminated, they can have far-reaching and lasting effects from which a state network of clinics may not recover.[16]

While the Governor's request is unusual, this Court's decision to take up the case would not open a Pandora's box. There may be other situations in which a governor may seek this Court's

[14] For example, if abortion were prohibited in Michigan, the average resident would need to travel 260 miles for an abortion as opposed to only 13 as of November 2021. Jenn Schanz, *What a challenge to Roe v. Wade could mean for Michigan*, WXYZ, (Nov. 12, 2021), https://www.wxyz.com/news/what-a-challenge-to-roe-v-wade-could-mean-for-michigan.

[15] In addition to the risk of negative health consequences, pregnant women who are denied access to abortion care are substantially more likely to face economic hardships. *See, e.g.*, Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion*, Nat'l Bureau of Econ. Rsch., p. 3 (Jan. 2020), https://www.nber.org/system/files/working_papers/w26662/w26662.pdf.

[16] *See, e.g.*, Alexa Ura et al., *Here Are the Texas Abortion Clinics That Have Closed Since 2013*, Tex. Trib., (June 28, 2016), https://www.texastribune.org/2016/06/28/texas-abortion-clinics-have-closed-hb2-passed-2013/.

intervention, but they are very likely to be distinguishable, given the unusual nature of this constitutional moment. At oral argument in *Dobbs*, justices of the U.S. Supreme Court questioned both counsel for respondent, Julie Rikelman, and the U.S. Solicitor General, Elizabeth Prelogar, about other situations—such as *Brown v. Board of Education*—in which that court had overturned precedent. Solicitor General Prelogar aptly explained why those cases were different than what the U.S. Supreme Court contemplates in *Dobbs*:

> [In those other cases the] Court was actually taking the issue away from the people and saying that it had been wrong before not to recognize a right . . . Here, the Court would be doing the opposite. It would be telling the women of America that it was wrong, that, actually, the ability to control their bodies and perhaps the most important decision they can make about whether to bring a child into this world is not part of their protected liberty.

Dobbs v. Jackson Women's Health Org., Oral Arg. Tr. at 89 (Dec. 1, 2021).

The same logic holds here. This Court is not being asked to intervene to define a new right never before protected by either the U.S. Constitution or the Michigan Constitution. Rather, this Court is being asked to respond to an unprecedented occurrence in American jurisprudence—the elimination (or significant weakening) of settled law which takes away a clearly established and fundamental right from the people. It is a right that is both fundamental and critical to the personal autonomy and equality of all Michiganders. Such a moment demands this Court's intervention.

IV. CONCLUSION

For the foregoing reasons, the Governor's request should be granted and the Michigan Supreme Court should authorize the circuit court to certify the questions presented in the case.

Respectfully submitted,

DATED: May 3, 2022

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DATED: May 3, 2022

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PROOF OF SERVICE

I, Eli Savit, hereby affirm that on the date stated below I delivered a copy of Respondents Savit, Leyton, Siemon, Getting, Wiese, McDonald and Worthy's Brief in Support of Governor Whitmer's Request for Certification Under MCR 7.308, upon opposing counsel stated above, via the Court's MiFile system. I hereby declare that this statement is true to the best of my information, knowledge, and belief.

DATED: May 3, 2022

/s/ Eli Savit
Eli Savit
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