STATE OF MICHIGAN
COURT OF CLAIMS

MOTHERING JUSTICE, MICHIGAN ONE FAIR WAGE, MICHIGAN TIME TO CARE, RESTAURANT OPPORTUNITIES CENTER OF MICHIGAN, JAMES HAWK, and TIA MARIE SANDERS,

Plaintiffs,

v

DANA NESSEL, in her official capacity as Attorney General and head of the Department of Attorney General,

Defendant.

No. 21-000095-MM

HON. CYNTHIA D. STEPHENS

BRIEF IN SUPPORT OF DEFENDANT ATTORNEY GENERAL DANA NESSEL'S 06/07/2021 (C)(8) MOTION FOR SUMMARY DISPOSITION IN CASE NO. 21-000095-MM

Goodman Acker, P.C.
Mark Brewer (P35661)
Attorneys for Plaintiffs
17000 W. Ten Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Ann M. Sherman (P67762)
Deputy Solicitor General
Linus Banghart-Linn (P73230)
Assistant Solicitor General
Attorneys for Defendant Nessel
Michigan Dep't of Attorney General
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
Banghart-LinnL@michigan.gov

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6/7/2021 BRIEF IN SUPPORT OF DEFENDANT ATTORNEY GENERAL DANA NESSEL'S 6/7/2021 (C)(8) MOTION FOR SUMMARY DISPOSITION IN CASE NO. 21-000095-MM

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INTRODUCTION

The Attorney General agrees with the *policy* arguments set forth in the Complaint. The Plaintiffs are correct to point out that the Legislature performed an unconstitutional end-run around the initiative process in its lame-duck "adopt and amend" gambit. Nevertheless, the Attorney General seeks summary disposition under MCR 2.116(C)(8) because, based on the allegations in the Complaint, she is not the proper party against whom to bring any of the Complaint's three Counts. Her presence in the case does not create an actual controversy, she has not injured the Plaintiffs, and there is no relief that can be granted through her. Curiously, the Attorney General is the only party Plaintiffs chose to sue, a decision that is likewise fatal to the viability of the Complaint as drafted.

To begin, Plaintiffs fundamentally misunderstand the relationship between the Attorney General, an elected member of the executive branch of government, and the Legislature, part of the legislative branch of government. Plaintiffs erroneously assume that merely by issuing an opinion or not rescinding the opinion of a prior attorney general, the Attorney General permits laws to be enacted. Plaintiffs also erroneously assert that by issuing an opinion opining that a duly enacted law is constitutional, or by not rescinding prior Attorney General opinion issued by a predecessor Attorney General, the current Attorney General holding office "enforces" state law. Relatedly, this Court cannot fashion either the declaratory or injunctive relief requested here: the Attorney General has caused no injury to the Plaintiffs; she is not a necessary party to a declaration that Attorney General Opinion 7306 is incorrect, null and void; and declaring 7306 null and void

would not affect the declaratory or injunctive relief requested as to Counts II and III. Finally, Counts II and III and the relief associated with them, do not even pertain to the Attorney General.

This lawsuit is wholly inappropriate. If allowed to go forward, it would set several dangerous precedents. First, it will tell the bar: if you want to challenge a law, no need to expend resources litigating against the State agency or official who is engaged in enforcement, or any entity who has caused you any injury. Instead, find an Attorney General opinion on point, sue the Attorney General based on that opinion, and let her carry the water (or if there is no opinion on point, sue her for *not* issuing one). Second, and better yet, try to bully her into rescinding an opinion of her predecessor and issuing a superseding opinion in the hopes of avoiding what would now be the inevitable lawsuit against her and her alone.

Third, if you are feeling litigious, you need only to comb through the thousands of Attorney General opinions issued by a sitting Attorney General's predecessors to find something that is not aligned with the current Attorney General's political views, and sue her for not rescinding the opinion—with little risk, knowing she will support your substantive position. That would be the worst precedent at all, because it would politicize the Attorney General opinion process, transforming it from a disinterested and cogent analysis of law into a weathervane that changes direction every time the office of the Attorney General passes to a different political party. This Court should reject the invitation to create such inappropriate precedents.

STATEMENT OF FACTS

History of relevant legislation and AG Opinions at issue

The following facts, laying out the history of the relevant legislation and AG opinions at issue here, are drawn from Justice Clement's concurrence to the Supreme Court's denial of leave to appeal in *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369* (hereafter "*In re PA 368 & 369*"):

> Groups known as "Michigan One Fair Wage" and "MI Time to Care" sponsored, respectively, proposals known as the "Improved Workforce Opportunity Wage Act" and the "Earned Sick Time Act." Pursuant to MCL 168.473, they filed those petitions with the Secretary of State in the summer of 2018. The Secretary of State then notified the Board of State Canvassers, MCL 168.475(1), which canvassed the petitions to determine whether an adequate number of signatures was submitted, MCL 168.476(1). The Board ultimately certified both petitions as sufficient, MCL 168.477(1), and, pursuant to Const. 1963, art. 2, § 9, the proposals were submitted to the Legislature. This constitutional provision required that the proposals were to "be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition [was] received by the legislature," with enactment not "subject to the veto power of the governor." The Legislature ultimately adopted both "without change or amendment" on September 5, 2018. 2018 PAs 337 and 338. Enacting them meant that they were not "submit[ted] . . . to the people for approval or rejection at the next general election." Const. 1963, art. 2, § 9. Had they been submitted to the people and adopted, they would only have been amendable with a three-fourths majority in the Legislature. *Id.*
>
> After the 2018 elections, the Legislature turned its attention to these policy areas once again. Although Attorney General Frank Kelley had, several decades ago, opined that "the legislature enacting an initiative petition proposal cannot amend the law so enacted at the same legislative session," OAG, 1963–1964, No. 4,303, p. 309, at 311 (March 6, 1964), a member of the Michigan Senate asked for an opinion on that issue and Attorney General Bill Schuette issued a new opinion which superseded the prior opinion and concluded that the Legislature *could* enact amendments to an initiated law during the

same session at which the initiated law was itself enacted. See OAG, 2017–2018, No. 7,306, p.[85] (December 3, 2018). The Legislature thereafter did adopt certain amendments to these proposals with a simple majority, which—as ordinary legislation—the Governor signed into law. See 2018 PA 368 and 369. Because neither law contained a more specific effective date, both took effect on the 91st day after the 99th Legislature adjourned *sine die*. Const. 1963, art. 4, § 27; *Frey v. Dep't of Mgt. & Budget*, 429 Mich. 315, 340, 414 N.W.2d 873 (1987). The Legislature adjourned on December 28, 2018, see 2018 HCR 29, so the effective date of 2018 PA 368 and 369 was March 29, 2019.

On February 13, 2019—about a month after the convening of the 100th Legislature, see Const. 1963, art. 4, § 13—a member of the Michigan Senate wrote to newly elected Attorney General Dana Nessel seeking another opinion on whether 2018 PA 368 and 369 had unconstitutionally subverted the constitutional protections for initiated legislation, and a week later, both chambers of the Legislature adopted resolutions asking for this Court to issue an opinion under Const. 1963, art. 3, § 8. See 2019 HR 25; 2019 SR 16. On April 3, 2019, we ordered argument on whether to issue an advisory opinion. *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 503 Mich. 1003, 929 N.W.2d 381 (2019). We subsequently ordered additional briefing on the question of whether this Court has jurisdiction to issue an advisory opinion after the effective date of the legislation being scrutinized. *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 504 Mich. 918 (2019). [*In re PA 368 & 369*, 936 NW2d 241, 241–243 (2019) (footnotes omitted).]

Information on Attorney General Opinions

The origin and history of the office of Attorney General as legal advisor to the sovereign has been described as "ancient." *Mundy v McDonald*, 216 Mich 444, 450 (1921). The Attorney General's statutory duty to provide opinions to the Governor, the Legislature, and other state officers was first established in the Revised Statutes of 1846, chapter 12, section 32, MCL 14.32. That law has continued to provide in relevant part: "It shall be the duty of the attorney general, when required, to give his opinion upon all questions of law submitted to him by the

legislature, or by either branch thereof, or by the governor, auditor general, treasurer or any other state officer[.]" MCL 14.32.

Attorney General opinions serve as an important means by which state officers and agencies may seek objective, expeditious, and inexpensive guidance regarding the laws they must follow and enforce. These opinions are rendered on a broad range of issues that face public servants on a day-to-day basis. The greatest number of opinion requests, as reported in the Attorney General's Biennial Report[1] are submitted by individual legislators.

Because courts are bound to follow only published decisions of the Court of Appeals and of the Supreme Court, an opinion of the Attorney General is not binding on the judicial branch in accordance with separation of powers principles. The courts nevertheless accord Attorney General opinions respectful consideration and frequently rely on them as persuasive authority. See, e.g., *Cheboygan Sportsman Club v Cheboygan Co Prosecuting Attorney*, 307 Mich App 71, 83 (2014); *Williams v Rochester Hills*, 243 Mich App 539, 557 (2000), citing *Frey v Dep't of Management and Budget*, 429 Mich 315, 338 (1987), and *Indenbaum v Michigan Bd of Medicine*, 213 Mich App 263, 274 (1995).

Similarly, opinions of the Attorney General are not binding upon local units of government, which are generally guided in their legal affairs by local counsel, although a local unit's failure to follow an opinion of the Attorney General has been

[1] MCL 14.30 requires the attorney general to "make and submit to the legislature, at the commencement of its session, a report of all official business" done by him or her during the two years preceding.

held by the courts to be relevant to a determination of whether it acted in good faith. See, e.g., *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300 (1985); *Bond v Ann Arbor School Dist*, 383 Mich 693, 703 (1970).

But within the executive branch Attorney General opinions continue to command the allegiance of state agencies in accordance with a long line of cases consistently so holding. See, e.g., *Traverse City School Dist v Attorney General*, 384 Mich 390, 410, n 2 (1971); *Campbell v Patterson*, 724 F2d 41, 43 (CA 6, 1983), cert den 465 US 1107 (1984). Compare *East Grand Rapids Sch Dist v Kent Co,* 415 Mich 381, 394 (1982) (in a case brought be a local school district, appearing to distinguish "governmental agencies" from state agencies); *Danse Corp v City of Madison Heights*, 466 Mich 175, 182, n 6 (2002) (referring to a local agency as a "governmental agency"). Notably, attorney general opinions do not operate as a legislative veto and do not declare law without redress. See *Beer & Wine Wholesalers*, 142 Mich App at 301–302.

The Attorney General's formal opinions are published biennially and appear in over 80 bound volumes dating back to 1867. Since 1961, more than 7,000 formal opinions have issued, of which an overwhelming majority have been upheld by the Michigan appellate courts when challenged. See, e.g., *McPhail v Attorney General*, unpublished opinion of the Court of Appeals, decided November 9, 2004 (Docket No. 248126) (upholding AG Opinion No 7125).

LEGAL STANDARD

"A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted," and such a motion "tests the legal sufficiency of the complaint solely on the basis of the pleadings." *Nyman v Thomson Reuters Holdings, Inc*, 329 Mich App 539 (2019) (quotations omitted). On a (C)(8) motion, a court must accept all well-pleaded factual allegations as true and construe them in the light most favorable to the nonmoving party. *Id.*

"Summary disposition on the basis of subrule (C)(8) should be granted . . . when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Id.* (quotations omitted).

ARGUMENT

I. The Attorney General is not the proper party and all claims against her must be dismissed.

At bottom, this lawsuit challenges the constitutionality of Public Acts 368 and 369. Plaintiffs seek to do so by suing only the current Attorney General, Dana Nessel, rather than the state entities that have enforced these allegedly unconstitutional laws. For a number of reasons, the Attorney General is not a proper party to this lawsuit, and certainly not as the *only* party to this lawsuit.

A. The fact that the Attorney General is the only Defendant does not present an actual controversy.

A court's jurisdiction "is limited to determining rights of persons or property, which are actually controverted in a case before it." *Amway v Grand Rapids*, 211 Mich 592, 615 (1920). Indeed, a controversy must be real and not *pro forma* even where a *pro forma* case presents "real questions." *Id*. at 612. Without such a limitation, "the most difficult and complicated issues of law . . . might be settled by a court on such *pro forma* proceedings when no real controversy or adverse interests exist." *Id*.

Here, there are no relevant adverse interests so as to form an actual controversy. The Attorney General agrees with Plaintiffs' position on the merits of PA 368 and 369. If she is not dismissed as a party, her arguments as to the constitutionality of those statutes will essentially be in lockstep with Plaintiffs'. See *League of Women Voters v Secretary of State*, 506 Mich 905 (2020) (Viviano, J., concurring) ("[T]his lawsuit appears to be a friendly scrimmage brought to obtain a binding result that both sides desire.") She would argue, consistent with Plaintiffs' argument, that the Legislature performed an unconstitutional end-run around the initiative process in its lame-duck "adopt and amend" gambit. And her policies with respect to workers and working families are consonant with Plaintiffs' substantive arguments.[2]

[2] The Department of Attorney General has already had a conflict wall in place on the adopt-and-amend issue, since, in the wake of the Michigan Supreme Court's decision not to issue an advisory opinion, it has been waiting for an *appropriately postured* lawsuit to be filed challenging the Legislature's adopt-and-amend

The only issues on which the Attorney General disagrees with the Plaintiffs are embodied in this motion. They go to a proper understanding of the Attorney General's role and the Attorney General opinion process, the way the Attorney General interfaces with the Legislature in its legislative sphere, and the wholesale impropriety of how this lawsuit is postured.

Additionally, among the varied relief they request, Plaintiffs request declaratory judgment as to Counts I and II. (Complaint, Prayer for Relief "A" and "B".) But even where declaratory relief is sought, a case must present adverse interests that form an actual controversy. *Assoc Builders & Contractors v Dir of Consumer and Industrial Servs*, 472 Mich 117, 126 (2005), overruled on other grounds by *Lansing Sch Educ Assn v Lansing Bd of Educ*, 487 Mich 349, 372 n 20 (2010). An actual controversy exists when a declaratory judgment is needed to guide a party's future conduct in order to preserve that party's legal rights. *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 495 (2012). The Michigan Supreme Court has explained that the actual controversy requirement of MCR 2.605(A)(1) "subsumes the limitation on litigants' access to the courts" imposed by the Michigan Supreme Court's standing doctrines. *Id*.

Here, because the viability of PA 368 and 369 does not depend on the existence or absence of an Attorney General opinion, and because Plaintiffs have

maneuver. The Attorney General herself is on the side of the conflict wall that is aligned with Plaintiffs' substantive arguments.

already requested that the challenged statutes be struck down and PA 337 and PA 338 be given effect in their place, "a declaratory judgment [as to Attorney General opinions] is not *needed* to guide plaintiffs' future conduct." *League of Women Voters,* 506 Mich at 586 (emphasis in original).

B. The Attorney General has not caused any injury.

The injury that Plaintiffs allege is that the Attorney General injured them by "permit[ting]" and "enforc[ing] PA 368 and 369." She did neither, and thus, did not injure Plaintiffs.

1. The Attorney General did not "permit" or cause legislative action, as Plaintiffs allege.

Plaintiffs' complaint has a predominant theme: a Michigan Attorney General can give the Michigan Legislature "permission"—in other words, can "allow" it—to pass laws. In that vein, Plaintiffs allege that 2018 PA 338 was gutted by 2018 PA 369 PA 369 "*with the permission* of the then-Attorney General." (Complaint, ¶ 5, emphasis added).) They also allege that the Department of Attorney General "has *allowed* unconstitutional 2018 PA's 368 and 369 to be enacted . . . by issuing and refusing to rescind Opinion of the Attorney General No. 7306 (2018)." (*Id*. ¶ 9, emphasis added.) And they further allege that "[w]ith the *permission* of then-attorney general secured . . . the Legislature passed and the Governor signed 2018 PA 368 . . . ." (*Id*., ¶ 18, emphasis added.)

These pointed allegations reflect a fundamental misunderstanding of the independent roles of the Attorney General and the Legislature, and an ignorance of

the separation-of-powers doctrine. The Legislature does not need the Attorney General's "permission" to pass legislation. Such a requirement would upset the balance among the branches of government, rendering it unconstitutional.

Three points are crucial here. First, the Legislature never "needs" or "requires" an Attorney General opinion. Although one of the missions of a state attorney general is the "duty to give legal advice, including advice concerning the constitutionality of state statutes, to members of the legislature," *Sch Dist of City of E Grand Rapids, Kent Cty v Kent Cty Tax Allocation Bd,* 415 Mich 381, 394 (1982), an Attorney General's decision as to whether to render an opinion is nevertheless discretionary. She is under no legal obligation to do so, and in fact, there are many varied reasons why AG Opinions are rendered, declined, or allowed to remain despite requests that they be superseded. Just as the Michigan Supreme Court's denial of leave to appeal does not necessarily indicate an agreement with the lower court's decision, see *Frishett v State Farm Mut Auto Ins Co*, 378 Mich 733 (1966), and just as the Legislature's decision not to pass a bill does not necessarily mean that its individual members are opposed to the policy advanced by that bill, see *Donajkowski v Alpena Power Co*, 460 Mich 243, 258–261 (1999) (discussing weaknesses of arguments based on "legislative acquiescence"), the Attorney General's decision to decline to issue or decline to rescind an opinion can be based on any number of considerations.

Second, to the extent the Legislature desired an Attorney General opinion prior to enacting PA 337 and 338, one was already in existence, as the timeline set

forth above, drawn from Justice Clement's concurrence in *In re PA 368 & 369*, demonstrates. And since Attorney General opinions are not binding on the Legislature, in enacting PA 337 and 338, the Legislature could have chosen to follow the conclusion of AG Opinion No. 7306 *or* of the previous AG Opinion, No. 4303.

Third, and most importantly, the Attorney General does not "allow" the Legislature to make law. Under article 3, § 2 of the Michigan Constitution, it is well-established that "the powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." As our state Supreme Court has recognized, "the principal function of the separation of powers . . . is to . . . protect individual liberty[.]" *In re Certified Questions From United States Dist Ct, W Dist of Michigan, S Div*, 506 Mich 332, 358–359 (2020), citing *Clinton v City of New York*, 524 US 417, 482 (1998) (Breyer, J., dissenting). " 'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." *Id.*, quoting Baron de Montesquieu, *The Spirit of the Laws* (London: J. Nourse and P. Vaillant, 1758), Book XI, ch 6, p 216.

Article 4, § 1 of the Michigan Constitution provides that "the legislative power of the State of Michigan is vested in a senate and a house of representatives."

In re Certified Questions From United States Dist Ct, W Dist of Michigan, 506 Mich at 357. "The legislative power has been defined as the power 'to regulate public concerns, and to make law for the benefit and welfare of the state." *Id*. at 357–358 (cleaned up). "The Legislative can have no power to transfer their Authority of making Laws, and place it in other hands." *Id*. (citation omitted).

It is true that Michigan allows for some overlap among the branches. *Soap & Detergent Ass'n v Nat Res Comm'n*, 415 Mich 728, 752 (1982). But even where legislative power has been expressly delegated to the executive branch, that power must be clearly limited and specific. *Id.*

Here, to the extent an Attorney General can be said to exercise any legislative authority through Attorney General opinions, it is limited to circumstances where the opinion is supporting or proscribing state-entity behavior on which a lawmaking or rulemaking body has not spoken. Even with respect to state agencies, an Attorney General opinion certainly does not supplant the Legislature's independent ability and constitutional duty to make laws. Nor, as our Courts have made clear, do attorney general opinions operate as a legislative veto or declare law without redress. See *Beer & Wine Wholesalers*, 142 Mich App 294, 301–302 (1985). And allowing the Attorney General to "give permission" to the Legislature to make laws would be a clear incursion into the legislative sphere and would not be constitutionally tolerated.

League of Women Voters of Michigan v Sec'y of State, 506 Mich 5 (2020), underscores the Legislature's independence with respect to Attorney General

opinions. In the context of a case in which the question was whether an executive officer's actual or threatened nondefense of legislation in a private lawsuit allows the Legislature to satisfy the standing requirement, the Court said it did not. *Id.* at 597. Instead, it concluded that Legislature had no standing to pursue its case challenging on the basis of a formal Attorney General opinion that had earlier concluded the statute was unconstitutional). *Id.*

In short, the Attorney General cannot have caused the injury of "permitting" the Legislature to enact law, as alleged in the Complaint.

2. The Attorney General has not "enforced" 337 and 338-- either by issuing Attorney General Opinion 7306 or by not rescinding it—as Plaintiffs allege.

Neither can the Attorney General have caused the alleged injury of enforcing PA 337 and 338, as the Complaint also alleges. Plaintiffs allege that the Department of Attorney General "has *allowed* unconstitutional 2018 PA's 368 and 369 to be . . . enforced by issuing and refusing to rescind Opinion of the Attorney General No. 7306 (2018)." (*Id.* ¶ 9, emphasis added.) Similarly, they allege that "Opinion No. 7306 remains in effect and the State of Michigan is enforcing 2018 PA's 368 and 369 pursuant to that Opinion." (Complaint, ¶ 24.) In fact, Plaintiffs trace all the alleged ills to the AG Opinion. (*Id.* at ¶¶ 25, 26.) They allege that "as a result of [AG] Nessel's refusal to supersede or withdraw Opinion No. 7306, hundreds of thousands of Michigan workers have been denied millions, if not tens of millions, of dollars in wages they would have otherwise received under 2018 PA 337." (Complaint, ¶ 25.) They likewise state that "as a result of [AG] Nessel's

refusal to supersede or withdraw Opinion No. 7306, every Michigan worker has been denied the right to earned paid sick time they would otherwise have received under 2018 PA 338." (Complaint, ¶ 26.) And they allege that AG Nessel has injured those who set forth the proposals, as well as Plaintiff Hawk. (Complaint, ¶¶ 25, 26.) Not so.

In dicta in *Traverse City School District v Attorney General*, the Michigan Supreme Court said that "the opinions of the Attorney General are binding on state agencies *for limited purposes* only until the courts make a pronouncement on the issue." *People v Waterman*, 137 Mich App 429, 439 (1984) (emphasis added), citing *Traverse City School Dist v Attorney General,* 384 Mich 390 (1971). While it is well-established that AG opinions are binding on state agencies, where the AG opinion has opined that a legislatively enacted law is constitutional, the relevant state entities are simply continuing to follow state law to which they are bound. Any injuries that result are not a direct result of the AG opinion.

In short, the attorney general does not "enforce" a law by opining on its constitutionality, especially prior to enactment or amendment.

3. This Court cannot redress the alleged injuries through the Attorney General.

Based on the above analysis, even if the Attorney General somehow caused the injuries alleged in the Complaint, this Court cannot redress the alleged injury through the Attorney General.

Plaintiffs request declaratory relief for Count I. (Complaint, Prayer for Relief, "A".) But the Attorney General's participation as a party is not required in order for a court to declare that the AG opinion is null and void.[3] And here is it not even necessary to declare AG Opinion 7306 invalid. The challenged AG Opinion was rendered *prior to* the passage of PA 368 and 369 and Plaintiffs also request that the statutes themselves be declared invalid and struck down. Opinions of the Attorney General are not binding on courts as precedent. *Frey v Dep't of Management & Budget,* 429 Mich 315, 338 (1987). And once a court invalidates a statute, an Attorney General opinion opining that the statute is valid and constitutional is of little moment, will not be followed, and need not be stricken down. Thus, the requirements of MCR 2.605 are not met because a declaratory judgment as to the AG Opinion is not needed to guide Plaintiffs' future conduct in order to preserve their legal rights. See *League of Women Voters*, 506 Mich at 585–586.

In short, this Court could, in an appropriate suit brought by a proper plaintiff against a proper defendant, strike down PAs 368 and 369 as unconstitutional,

[3] The Attorney General does not concede that it is ever possible to raise a judicial challenge to an Attorney General opinion, although she concedes that the Michigan Supreme Court has suggested in dicta that such an action is possible. See *League of Women Voters,* 506 Mich at 597–598. But assuming an action may be filed to test the validity of an AG Opinion, the entity or entities that have taken action or refused to take action based on that AG Opinion must be joined. See, e.g., *In re Proposal C*, 384 Mich 390, 403 (1971) (in a case brought by the Traverse City School District against the Attorney General to test the validity of Attorney General Opinion 4715, which construed proposal C, the Supreme Court specifically noted that the suit was "joined by all the appropriate parties in interest."

whether AG Opinion 7306 stands or falls. This Court could conceivably declare that AG Opinion 7306 was incorrect in its reasoning and conclusion, but doing so would be no different than striking down PAs 368 and 369 as unconstitutional. The only possible remedy that would justify joining the Attorney General as Defendant to this suit (especially as the *sole* Defendant to this suit) would be for this Court to order the Attorney General to withdraw AG Opinion 7306. But even if this Court were to take that extraordinary and unwarranted action, the withdrawal of AG Opinion 7306, on its own, would have absolutely no effect on the validity of PAs 368 or 369, or of PAs 337 and 338. In other words, it would not have the slightest effect on the legal rights or responsibilities of any of the Plaintiffs.

Further, the requested relief based on Count II of declaring PA 368 and PA 369 invalid and enjoining their enforcement (Complaint Prayer for Relief, "B" and "C") cannot be accomplished by any action with respect to either the existence or absence of an Attorney General opinion or by ordering the Attorney General to do anything. And he same is true for the relief requested as to Count III.

In sum, the only way a court could actually give the relief Plaintiffs seek would have nothing to do with the Attorney General—and conversely, the only things this Court could conceivably order the Attorney General to do would not grant the Plaintiffs any relief. Recall that the core injury Plaintiffs allege is that the Attorney General's predecessor gave the Legislature "permission" to pass PA 368 and 369. Even if there were a scintilla of merit to that argument, the ship has sailed; the bills have passed. The remedy is for the Legislature to repeal them or for

a court, *in an appropriate lawsuit brought against an appropriate defendant*, to strike PA 368 and 369 down as unconstitutional. This lawsuit is not that vehicle.

4. Counts II and III do not pertain to the Attorney General.

There is an additional reason why the Attorney General is not a proper party to Counts II and III: those counts do not pertain to her. Count II alleges that PA 368 and 369 are unconstitutional because they violate Article 2, § 9 of the Michigan Constitution. Count III alleges that, as a result of PA 368 and 369 being unconstitutional, PA 338 and 339 are in full force and effect. As set forth above, neither of those counts pertains to the Attorney General and her Office's role with respect to Attorney General opinions.

C. The precedent created by allowing this suit to proceed would politicize and corrupt the Attorney General opinion process.

What makes this lawsuit even more outrageous is that it does not even restrict itself to challenging the correctness of AG Opinion 7306. If that were all it did, it would be akin to the lawsuit discussed in *In re Proposal C*, 384 Mich 390 (1971). Again, while the Attorney General does not concede that such a lawsuit against an Attorney General is appropriate, it would certainly be closer than this one. What makes this suit worse is that it challenges the Attorney General's decision *not* to rescind Opinion 7306 or issue a superseding opinion.

In exercising her duty to issue opinions, the Attorney General must be free to give the most deliberate, sober, and candid view of the legally correct answer to the question asked. And in doing so, the Attorney General is well aware that the

correctness of her opinions might be tested in lawsuits. Indeed, the Attorney General is prepared for the correctness of Opinion 7306 to be challenged in an appropriate lawsuit. But there is a difference between saying that Opinion 7306 is incorrect and that PA 368 and 369 are causing an injury (a valid argument), and saying that Opinion 7306 is *itself* causing an injury (an invalid argument), and to take it a step further, to say that the refusal to *rescind* Opinion 7306 is also causing an injury.

For a court to dignify this argument would mean that the Attorney General in issuing opinions must consider not only that the correctness of the opinion could be tested in court, but also that she could be sued for issuing an opinion at all, or presumably for not issuing an opinion, for failing to rescind any one of the more than 7,000 opinions already in place, or presumably for choosing to rescind one. This will create natural pressures to make decisions in the opinion arena based on inappropriate considerations.

Not only that, but it will taint the process with political considerations as well. Future attorneys general will be expected to rescind the opinions of their opposite-party predecessors in order to avoid lawsuits—and for every opinion not rescinded, the floodgates are open for such suits, each one "a friendly scrimmage." *League of Women Voters*, 948 NW2d at 70 (Viviano, J., concurring).

Though it is far from the largest problem with the complaint, paragraph A of the prayer for relief (Complaint, p 8) is symptomatic of the misunderstanding of law that infects the complaint. That paragraph asks this Court to declare that "OAG

No. 7306 is incorrect, null, and void." There is nothing wrong with asking a court to declare Opinion 7306 incorrect (in an appropriate lawsuit, which this is not). But there is no reason to declare it "null and void." This is akin to moving to strike a brief because one disagrees with the arguments in it. If a court disagrees with an argument in a party's (or amicus's) brief, that does not mean the brief is improper, or will be struck or declared null and void. The brief still stands, even if the court disagrees with the position it takes. It is no different with Attorney General opinions. The fact that Plaintiffs believe that the incorrectness of Opinion 7306 is a basis to render it null and void is right in line with their misunderstanding of the role Attorney General opinions play in general and their mistaken belief that Attorneys General may cause a cognizable and redressable injury merely by opining on the constitutionality of a statute.

CONCLUSION AND RELIEF REQUESTED

Attorney General Dana Nessel is not a proper party to this litigation. As a matter of law and policy, she is aligned with the Plaintiffs on the substantive issues; any injury to Plaintiffs cannot be traced to a specific enforcement action by her; and the alleged injuries are not redressable through her.

For the reasons requested in this motion and supporting brief, Plaintiff requests summary disposition under MCR 2.116(C)(8) because the claims against her are unenforceable as a matter of law.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa A. Hammoud (P74185)
Solicitor General

/s/ Ann M. Sherman
Ann M. Sherman (P67762)
Deputy Solicitor General

Linus Banghart-Linn (P73230)
Assistant Solicitor General

Attorneys for Defendant Nessel
Michigan Dep't of Attorney General
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628
ShermanA@michigan.gov
Banghart-LinnL@michigan.gov

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