No. _____

In the Supreme Court of the United States

GLENN BOWLES, ET AL.,

Petitioners,

v.

GRETCHEN WHITMER, GOVERNOR OF MICHIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit Court of Appeals erroneously held that Petitioners, who sought a declaratory judgment under the Declaratory Judgment Act that Michigan's Court of Claims Act was unconstitutional, lacked standing to sue because in naming the Governor of Michigan, and the Attorney General of Michigan, as defendants, they failed to name appropriate defendants under the Supreme Court's decision in *Ex parte Young,* 209 U.S. 123 (1908).

PARTIES TO THE PROCEEDINGS

Petitioners

- Glenn Bowles
- Kenneth Franks
- Robert Gardner

There are no corporate petitioners

Respondents

- Gretchen Whitmer, Governor of Michigan
- Dana Nessel, Attorney General of Michigan

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit

No. 24-1013

Glenn Bowles; Kenneth Franks; Robert Gardner, *Plaintiffs-Appellants*, v. Gretchen Whitmer; Dana Nessel, *Defendants-Appellees*.

Date of Final Opinion: November 7, 2024

Date of Rehearing Denial: December 10, 2024

U.S. District Court for the Eastern District of Michigan Southern Division

No. 22-11311

Glen Bowles, et al., *Plaintiffs*, v. Governor Gretchen Whitmer, In Her Official Capacity, et al., *Defendants*.

Date of Final Order: March 30, 2023

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CONSTITUTIONAL PROVISIONS

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The decision of the Court of Appeals affirming the district court's dismissal of the lawsuit is included below at App.1a. *Reh'g denied* (6th Cir. December 10. 2024) is included below at App.30a. The decisions of the U.S. District Court for the Eastern District of Michigan, (E.D. Mich. March 30, 2023) dismissing the lawsuit is included at App.15a.

JURISDICTION

The Court of Appeals entered Judgment on November 7, 2024 (6th Cir. 2024) (App.1a), *reh'g denied,* December 10, 2024 (6th Cir. (App.30a). By Order entered on March 5, 2025, Justice Kavanaugh granted the Petitioners' application to extend the due date for their petition for *certiorari* to May 9, 2025. (No. 24A849). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All the related provisions are reported at Appendix.

- U.S. Const. amend. XIV, § 1 (App.32a.)
- 28 U.S.C. § 2201 (App.32a.)
- MCL 600.6404 (App.33a.)

- MCL 600.6413 (App.35a.)
- MCL 600.6443 (App.35a.)

INTRODUCTION

Under the Supreme Court decision in *Ex parte Young,* 209 U.S. 123 (1908), a citizen of a State who believes conduct by the State pursuant to a state statute is unconstitutional, but who is barred by the 11th Amendment and the decision in *Hans v. Louisiana,* 134 U.S. 1 (1890), from suing the State in federal court, has only one available option — to sue a state officer responsible for enforcing or implementing the statute, seeking a declaratory judgment pursuant to the Declaratory Judgment Act and the Fourteenth Amendment for a judgment that the statute is unconstitutional. The lawsuit against the state officer for equitable relief is deemed not to be a lawsuit against the State itself, and is accordingly not barred by the 11th Amendment.

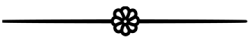
Here, Petitioners' lawsuits against arms of the State of Michigan had been assigned to the Michigan Court of Claims pursuant to a state statute, and had been dismissed. The dismissals were then affirmed on appeal to the Michigan Court of Appeals. While the cases were pending in the Michigan Court of Claims and the Michigan Court of Appeals, the Petitioners sued the governor of the State of Michigan and its Attorney General in federal court seeking a declaratory judgment that the Michigan Court of Claims Act violates the Due Process Clause and the Equal Protection Clause in several respects: (1) it violated the Due

Process and Equal Protection Clauses by requiring that such lawsuits be litigated in the Court of Claims, whose judges are assigned from the Michigan Court of Appeals, at the same time that any appeal from the trial court must be taken to the Michigan Court of Appeals, and consequently be subject to appellate review by contemporaneous colleagues of the trial court judge; (2) it violated the Equal Protection Clause because jury trials were precluded in the Court of Claims, unlike in other trial courts of general jurisdiction, dividing litigants into two classes — those suing the State or an arm of the State, denied a jury trial, and those not suing the State or an arm of the State, and entitled to jury trials, with no rational relationship between the two different classes of litigants justifying the disparity.

The Sixth Circuit Court of Appeals did not address the merits of either constitutional claim. Instead, it held that the Petitioners did not have standing to sue because neither of the Respondents identified as defendants was the appropriate defendant under the decision in *Ex parte Young*. There were no other officers of the State who could qualify as defendants, and the Court did not identify any alternative defendants. Under the Court's published decision, no Michigan citizen could have standing in federal court to contest the constitutionality of the Court of Claims Act, Likewise, citizens in Kentucky, Oho and Tennessee would not have standing to contest the constitutionality of statutes enacted by their states.

The Court of Appeals' decision was contrary to numerous Supreme Court decisions identifying state governors and other state officers as appropriate defendants under *Ex parte Young,* and turned the law

of standing in the context of the 11th Amendment on its head. The decision essentially eliminates the right of citizens to challenge the constitutionality of a state statute in federal court, because no officers of the State will qualify as appropriate defendants under *Ex parte Young*.



STATEMENT OF THE CASE

The instant lawsuit involves a challenge to the constitutionality of the Michigan Court of Claims Act ("MCOCA") MCL 600.6401, *et seq.,* which applies to any lawsuit which is filed against the State of Michigan, or any of its agencies or sub-divisions. The Petitioners contend the statute is unconstitutional in two respects: (1) it violates the procedural Due Process Clause of the 14th Amendment in that it provides that trials are conducted in the Court of Claims by judges who simultaneously sit as appellate judges on the Michigan Court of Appeals, to which a party who has not prevailed in the Court of Claims must appeal in order to obtain relief from the decision rendered by the Court of Claims judge, a procedure which the Petitioners maintain inherently, and unavoidably, raises the appearance of impropriety and bias against the appellant; (2) the statute violates the Equal Protection Clause by virtue of precluding some classes of plaintiffs from having a jury, while allowing other classes to have a jury, where the distinctions do not satisfy either the strict scrutiny or rational relationship test.

Each of the Petitioners filed a lawsuit in state court naming a branch of the State of Michigan as a

defendant. In the case of Glenn Bowles and Kenneth Franks, the branch of the State of Michigan was the Michigan Commission On Law Enforcement Standards ("MCOLES"), a State Commission which was created and operates pursuant to MCL 28.603, *et seq.* MCOLES is responsible for preparing and publishing mandatory minimum selection and training standards for entry-level law enforcement officers.

Robert Gardner filed a lawsuit against Michigan State University ("MSU") which included claims of discrimination in violation of the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101, *et seq.,* over which Circuit Courts have concurrent jurisdiction with the Court of Claims under the MCOCA, and claims of promissory estoppel and tortious interference with a prospective business relationship, over which the Court of Claims has exclusive jurisdiction.

Under the MCOCA, the claims which were pled against the State were required to be adjudicated in the Michigan Court of Claims. Lawsuits filed in the Michigan Court of Claims are distinguished from all other lawsuits in Michigan which are not required to be filed in the Court of Claims, but may be filed in either a Circuit Court or a District Court, in the following respects: (1) plaintiffs who sue in the Court of Claims are not entitled to a jury trial; (2) all lawsuits filed in the Court of Claims are presided over by a judge who simultaneously sits as an appellate judge on the Michigan Court of Appeals, and then, in the event the plaintiff does not prevail and appeals, the appeal must be filed in the Michigan Court of Appeals, to be adjudicated by colleagues of the judge who presided over the Court of Claims lawsuit.

Petitioners maintain that these provisions of the MCOCA violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They filed suit against Gov. Gretchen Whitmer and Attorney General Dana Nessel in accordance with *Ex parte Young,* 209 U.S. 123 (1908), in the United States District Court, Eastern District of Michigan, claiming that the MCOCA violated the First and Fourteenth Amendments, requesting that the court issue a declaratory judgment pursuant to 28 U.S.C. § 2201 declaring the MCOCA unconstitutional.

All three Petitioners had their lawsuits dismissed by the Michigan Court of Claims, the Chief Judge of the Michigan Court of Appeals presiding. They each filed appeals in the Michigan Court of Appeals. Petitioners submit that, human nature being what it is, any three-judge panel of Michigan Court of Appeals judges could not avoid the appearance of potential bias, regardless of whether or not they had any actual bias towards any of the Petitioners, thereby violating their right to Due Process under the 14th Amendment. This was especially true given the facts of this case, where the Court of Appeals panel was called upon to review two decisions by their own Chief Judge, making it highly unlikely that they would reverse either of those decisions by ruling that their own Chief Judge had made a clearly erroneous error of fact, or had misinterpreted the applicable law. "Even a judge may not put aside the propensities of human nature as easily as he does his robe." *Schmidt v. United States,* 115 F.2d 394, 398 (6th Cir. 1940).

The relevant provisions of the MCOCA were set forth in ¶ s 9-16 of the Complaint (R.1). Under these provisions, all of the judges assigned to the Michigan

Court of Claims are also judges currently serving on the Michigan Court of Appeals.[1] If a plaintiff suing an arm of the State of Michigan loses a lawsuit filed in the Court of Claims, the only avenue for appellate review is to the Michigan Court of Appeals, from which all of the judges on the Court of Claims are drawn. Petitioners maintain this arrangement (which has no comparable arrangement in any other state for lawsuits filed against that state) violates the Due Process Clause. In addition, a plaintiff suing in the Court of Claims is not entitled to have a jury trial. The only exceptions are those cases over which the Court of Claims has concurrent jurisdiction with the circuit courts, *e.g.*, the ELCRA. Petitioners maintain this disparity in the right to a jury trial violates the Equal Protection Clause of the 14th Amendment.

Petitioners filed their Complaint seeking a declaratory judgment in the United States District Court, Eastern District of Michigan, on June 14, 2022. At the time they filed the Complaint, Bowles' and Franks' lawsuit against MCOLES was still pending in the Michigan Court of Claims, since the Michigan Court of Claims did not dismiss their lawsuit until August 3, 2022. They thereafter filed an appeal in the Michigan Court of Appeals, which continued to be pending while the lawsuit in the federal court was still pending.

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[1] This arrangement, whereby the trial judges of the Court of Claims simultaneously serve as appellate judges on the Michigan Court of Appeals, resulted from an amendment of the Court of Claims Act by the Michigan legislature in 2013. Prior to 2013, the Court of Claims was located in the Ingham County Circuit Court, and all judges of the Court of Claims were Circuit Court judges, none of whom simultaneously served as appellate judges on the Court of Appeals.

Likewise, Gardner's lawsuit against MSU in the Michigan Court of Claims was still pending in the Michigan Court of Appeals, since the Michigan Court of Appeals did not affirm the dismissal of his lawsuit by the Court of Claims until December 29, 2022.

The Complaint filed in the federal court pled four counts alleging violations of the Due Process Clause, the Equal Protection Clause, and access to the courts under the right to petition the government under the First Amendment. The prayer for relief for each count requested entry of a declaratory judgment asserting that the Court of Claims Act is unconstitutional, and entry of a permanent injunction enjoining its future enforcement. The District Court dismissed the lawsuit on jurisdictional grounds (lack of standing) and failure to state a claim.

The Sixth Circuit Court of Appeals affirmed solely on the basis of standing, ruling that the defendants whom the Petitioners named could not redress the injuries they claimed were caused by the constitutional defects in the MCOCA. *Bowles v. Whitmer,* 120 F.4th 1304 (6th Cir. 2024).[2] The Court asserted that the Petitioners were seeking to redress past injuries committed by the arms of the State of Michigan they sued in the Court of Claims, rather than potential future injuries attributable to the MCOCA. This assertion was

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[2] The Court of Appeals noted in its decision, 120 F.4th at 1307, "Michigan's legislature has waived the State's sovereign immunity by creating a specialized court, the Court of Claims, in which the plaintiffs may sue." However, a State's waiver of immunity in its state courts does not entail waiver of the State's sovereign immunity in federal court under the 11th Amendment. *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 54 (1944); *Murray v. Wilson Distilling Co.,* 213 U.S 151, 172 (1909).

erroneous, because on the date that the Petitioners filed their federal lawsuit, the Bowles/Franks lawsuit in the Michigan Court of Claims had not yet been dismissed, and was subject to appeal thereafter in the Michigan Court of Appeals; and Gardner's appeal from the dismissal of his lawsuit by the Michigan Court of Claims was still pending in the Michigan Court of Appeals. Consequently, their constitutional injuries caused by the MCOCA were still subject to future redress. The named defendants, Governor Whitmer and Attorney General Nessel, were the appropriate defendants under *Ex part Young* to implement the MCOCA, and therefore were the appropriate defendants to remedy the constitutional deficiencies of the MCOCA.

SUMMARY OF ARGUMENT

Since the Petitioners' lawsuits were still pending either in the Michigan Court of Claims, or on appeal in the Michigan Court of Appeals from a decision by the Michigan Court of Claims, at the time they filed their lawsuit in federal court, the injuries they claimed were caused by unconstitutional aspects of the MCOCA were subject to future redress by the officers of the State of Michigan they named as defendants. The assertion by the Sixth Circuit Court of Appeals that Petitioners' injuries were not attributable to the MCOCA, but to other third parties, was clearly erroneous and contrary to the facts. The Court's assertion that the Petitioners' injuries did not relate to future events redressable under the Declaratory Judgment Act was factually erroneous and contrary to

law. The Court's assertion that the defendants named by the Petitioners were not appropriate state officers responsible for implementing and enforcing the MCOCA under the decision in *Ex parte Young* was contrary to the holdings of numerous Supreme Court decisions.

ARGUMENT

I. The Court of Appeals' Decision Is Contrary to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Supreme Court's Decision in *Ex Parte Young*.

A. The Court of Appeals' Decision that the Officers of the State of Michigan Named As Defendants Were Not Appropriate Defendants Is Contrary to *Ex Parte Young* and Numerous Supreme Court Decisions.

28 U.S.C. § 2201 states, in relevant part:

> (a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 1343(a)(3) states that federal district courts have original jurisdiction to "redress the deprivation, under color of any State law . . . of any

right, privilege or immunity secured by the Constitution of the United States . . . ."

In the case of a citizen of a state seeking a declaratory judgment that a statute enacted by the state is unconstitutional, the 11th Amendment precludes the citizen from suing the state in federal court. *Hans v. Louisiana,* 134 U.S. 1 (1890). In *Ex parte Young,* 209 U.S. 123 (1908), the Supreme Court held that under such circumstances, a litigant who wishes to challenge the constitutionality of a state statute may name an officer of the state who has direct or indirect responsibility for enforcing the statute in question as a defendant, thereby avoiding the proscription of the 11th Amendment.

In subsequent years, numerous Supreme Court decisions have affirmed the validity of lawsuits in federal court in which citizens of a state have sued officers of the state contesting the constitutionality of a state law, and requesting equitable relief in the form of an injunction and/or a declaratory judgment. *See, e.g., Baker v. Carr,* 369 U.S. 186 (1962) (sustaining the validity of a lawsuit in federal court by citizens of Tennessee against the Secretary of State of Tennessee challenging the constitutionality of the state's statute apportioning members of the General Assembly among the state's counties and requesting declaratory judgment and injunctive relief under the 14th Amendment and 42 U.S.C. § 1983)[3]; *Dombrowski v. Pfister,* 380

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[3] The plaintiffs' reliance on 42 U.S.C. § 1983 was later nullified by the Supreme Court in *Quern v. Jordan,* 440 U.S. 332 (1979), and *Will v. Michigan Dept. of State Police,* 491 U.S. 197 (1988). *Baker* is nonetheless relevant to the instant case, since the plaintiffs also relied on the 14th Amendment, as do the Petitioners here.

U.S. 479 (1965) (sustaining the validity of a lawsuit in federal court by Louisiana citizens against the governor, police and the Chairman of the Legislative Joint Committee on Un-American Activities in Louisiana seeking declaratory relief and an injunction under the 14th Amendment against enforcement of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law); *Moore v. Oglivie,* 394 U.S. 814 (1969) (sustaining the validity of a lawsuit by residents of Illinois against members of the Illinois Electoral Board seeking declaratory relief and an injunction under the Equal Protection Clause against the operation of an Illinois statute designating the number of voter signatures required for an individual to qualify as an independent candidate); *Jenkins v. McKeithen,* 395 U.S. 411 (1969) (sustaining the validity of a lawsuit in federal court by a citizen of Louisiana against the Governor of Louisiana, and Commission members, contesting the constitutionality of Act 2, which created a Commission tasked with investigating alleged violations in the field of labor management relations, and seeking injunctive and declaratory judgment relief under the 14th Amendment); *Larson v. Valente,* 456 U.S. 228 (1982) (sustaining the validity of a lawsuit in federal court by citizens of Minnesota against the Attorney General and Commissioner of Securities of Minnesota challenging the constitutionality of the Minnesota charitable solicitations Act under the Establishment Clause and requesting equitable relief); *Anderson v. Celebrezze,* 460 U.S. 780 (1983) (sustaining the validity of a lawsuit in federal court by citizens of Ohio against the Ohio Secretary of State challenging the constitutionality of the state's election law under the First Amendment and Equal Protection Clause and requesting equitable

relief); *Wallace v. Jaffree,* 472 U.S. 38 (1985) (sustaining the validity of a lawsuit in federal court by citizens of Alabama against the Governor of Alabama and various state officials challenging the constitutionality under the Establishment Clause of several Alabama statutes requiring one minute of silence in all public schools for meditation or voluntary prayer and permitting teacher led prayer, requesting equitable relief); *Ams. for Prosperity Found. v. Bonta,* 141 S.Ct. 2373 (2021) (sustaining the validity of a lawsuit in federal court against the Attorney General of California by tax exempt charities challenging the constitutionality under the First Amendment of an administrative regulation requiring that the charities disclose the names and addresses of donors); *Obergefell v. Hodges,* 576 U.S. 644 (2015) (sustaining the validity of a lawsuit in federal court by citizens of Michigan, Tennessee and Kentucky against the respective governors of these states contesting the constitutionality under 14th Amendment substantive due process of the respective state marital laws precluding marriage between same-gender couples and requesting equitable relief against the continued enforcement of these laws). In none of these cases did the Supreme Court hold that the respective plaintiffs did not have standing to sue because they had failed to name the appropriate defendant. Indeed, in *Baker, supra,* 369 U.S. at 206, and in *Jenkins, supra,* 395 U.S. at 425, the Court expressly stated the plaintiffs had standing to sue.

Accordingly, Petitioners filed the instant lawsuit in the United States District Court for the Eastern District of Michigan pursuant to the First and Fourteenth Amendments challenging the constitutionality of the MCOCA, and named Gov. Whitmer and Attor-

ney General Nessel as defendants. The Court of Appeals stated, however, 120 F.4th at 1310, "Plaintiffs . . . lack standing to sue a defendant if their injury arose 'from the independent action of some third party not before the court.'" The Court stated further, *id.,* at 1311, "[H]ow are the injuries 'fairly traceable' to any actions of the defendants that they sued: Michigan's Governor and Attorney General?" This statement ignored the fact that when Petitioners filed the federal lawsuit, their lawsuits in state court under the MCOCA were still pending.

The Court's objection is refuted by several of the decisions cited above. In *Dombrowki, supra,* the Governor of Louisiana was deemed a proper defendant, although the governor played no direct role in enforcing the Louisiana statute intended to combat subversive activities and Communism. In *Jenkins, supra,* the Governor of Louisiana played no role in the operation of the Commission the constitutionality of which was challenged in the lawsuit. In *Wallace, supra,* the Governor of Alabama played no direct role in enforcing the requirement that public schools provide for a minute of silence and meditation. In *Obergefell, supra,* none of the governors of Michigan, Tennessee or Kentucky played any direct role in enforcing the state' matrimony laws or prohibiting the marriage of same-sex couples. Yet, in none of these decisions did the Supreme Court hold that the indirect role played by the respective defendants deprived the plaintiffs of standing to challenge the constitutionality of the respective state statute. The Court acknowledged at 120 F.4th at 1311, moreover, that the Petitioners' injuries were "sufficiently 'forward-looking' to leave open the possibility for some prospective relief."

B. The Cases Relied on by the Court of Appeals Are Distinguishable.

The Court of Appeals' reliance on the decisions it cited for support of its objections was misplaced. In *Murthy v. Missouri,* 144 S.Ct. 1972 (2024), there were two categories of plaintiffs — two States and individual social-media users. They claimed that pressure placed on social media platforms to censor the content of information on the platforms violated the First Amendment. The states did not have standing because they were not users of the social media platforms in question and therefore the causation requirement was not satisfied. *Id.,* at 1989. Here, Petitioners were all affected directly by the MCOCA because their lawsuits were required to be adjudicated in the Court of Claims. With respect to the individual social media plaintiffs in *Murthy,* they were seeking exclusively *injunctive* relief regarding the past effects of the Executive's policy they objected to. The Court held that injunctive relief was not available to redress past constitutional wrongs. *Id.*, at 1989. Here, Petitioners were requesting both injunctive and *declarator judgment* relief regarding the future enforcement of the MCOCA. The decision in *Murthy* does not disqualify their standing to seek declaratory judgment relief.

In *Whole Woman's Health v. Jackson,* 595 U.S. 30 (2021), the plaintiffs were seeking a pre-enforcement injunction against a recently enacted Texas statute prohibiting abortions. The Supreme Court held that the plaintiffs did not have standing because they failed to name a defendant who had enforcement authority as to whom an *injunction* could apply. This ruling does not apply to an action seeking a *declaratory judgment* that a state statute is unconstitutional. In such an

action, the plaintiff does not have to name a defendant who has direct enforcement authority. In *Dombrowski,* for example, the plaintiffs sought. and the Supreme Court granted, a declaratory judgment that the state statute was unconstitutional, even though one of the named defendants, the Governor of Louisiana, had no enforcement authority regarding the statute. Similarly, in *Obergefell,* the Court held, 576 U.S. at 675, that the respective statutes of Michigan, Tennessee and Kentucky were unconstitutional, and therefore invalid, despite the fact that the only named defendants were the respective governors of these states, who had no enforcement role regarding the states' matrimony laws.

In *Clapper v. Amnesty Int'l USA,* 568 U.S. 398 (2013), the plaintiffs were attorneys who claimed the FISA Amendments Act of 2008 threatened to obstruct their ability to represent their foreign clients, because "there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted" under the Act. *Id.*, at 400. The Supreme Court held that the "objectively reasonable" standard was too speculative to afford the plaintiffs standing, holding that the "threatened injury must be certainly impending to constitute injury in fact." Here, the Petitioners' injury is not speculative, but real, certain and unavoidable. Under the MCOCA, Petitioners, and any resident of Michigan filing a lawsuit against the State or any of its subdivisions, are required to have their claim adjudicated in the Court of Claims, with certain limited exceptions. Petitioners' claims did not fall within the exceptions, as with numerous other Michigan citizens' claims against the State of Michigan, or any of its sub-divisions, *e.g.*, medical malpractice claims against hospitals operated and administered by the State.

California v. Texas, 141 S.Ct. 2104 (2021), was likewise inapposite. Texas, 17 other states, and two individuals, sued federal officials contending that elimination of the penalty originally imposed under the Patient Protection and Affordable Care Act, requiring that individuals have minimal essential health insurance coverage, rendered the legislation unconstitutional. However, the legislation lacked any means of enforcement against individuals who did not purchase minimum essential health insurance coverage. Consequently, the Supreme Court held that none of the plaintiffs had standing, because absent an enforcement mechanism in the statute, none of the plaintiffs suffered a redressable injury. This criticism does not apply to Petitioners — at the time they filed the lawsuit, they were suffering a concrete injury by virtue of the requirement under the MCOCA that their lawsuit be adjudicated in the Michigan Court of Claims, pursuant to which, appellate review in the Michigan Court of Appeals of an adverse decision necessarily involved the unavoidable bias in favor of affirmance of the decision by the Court of Claims, all of whose judges simultaneously sat on the Michigan Court of Appeals. This was not a speculative injury; it was real, inevitable, and immediate.

The Court of Appeals stated, 126 F.4th at 1311 that the Petitioners' injuries were attributable to actions taken by parties other than the defendants — in the case of Bowles and Franks, personnel actions taken against them by Macomb Community College ("MCC"); in Gardner's case, the denial of employment opportunities by MSU. It is obviously true that neither Governor Whitmer nor Attorney General Nessel played any role in the decisions made by MCC or by MSU.

This argument, however, misstates the injury for which Petitioners were seeking redress. Their injury derived from the operation of the MCOCA on the lawsuits they filed in order *to remedy* the injuries caused by MCC and MSU, which in turn caused them injury by virtue of how the MCOCA operated. This injury *is redressable* via a lawsuit in federal court seeking a declaratory judgment stating that the manner in which the MCOCA operates is unconstitutional because it violates Due Process and Equal Protection under the 14th Amendment.

The Court of Appeals proceeded to state, 120 F.4th at 1311, that Petitioners did not have standing because they failed to satisfy the redressability element, since they had not sought, and were barred by the 11th Amendment from seeking, damages against the defendants sued in their official capacities. This ignored the fact, however, that in each of the counts pled by the Petitioners, they requested both injunctive and declaratory judgment relief. That they were barred from obtaining injunctive relief for past conduct, did not preclude them from obtaining a declaratory judgment against these defendants that the MCOCA is unconstitutional, per the decisions in *Dombroski, Jenkins* and *Obergefell, supra,* which granted declaratory judgments against the governors of the respective states, precluding continued future enforcement of the statutes in question.

The Court of Appeals recognized, 120 F.4th at 1312, that the alleged due process and equal protection violations attributable to the MCOCA constituted "'intangible' procedural and equal-protection harms [that] may well qualify as sufficiently 'concrete'" to warrant protection." The Court proceeded to state,

however, that these injuries were not caused by the named defendants, citing *California*, *supra.* But this constituted a misapplication of the Declaratory Judgment Act and was contrary to the holdings in *Dombroski, Jenkins* and *Obergefell, supra.* A state statute may be declared unconstitutional under the Declaratory Judgment Act regardless what state officers are entrusted with its enforcement. *See Allied Picture Corp. v. Rhodes,* 679 F.2d 656, 665, note 5 (6th Cir. 1982), wherein the Court of Appeals stated:

> [*Ex parte*] *Young* requires that the state officers sued have "some connection" with the enforcement of the allegedly unconstitutional Act. Even in the absence of specific state enforcement provisions, the substantial public interest in enforcing the trade practices legislation involved here places a significant obligation upon the Governor to use his general authority to see that the state laws are enforced. *see* Ohio Const. Art. III, § 6[.] . . . We thus find that the Governor has sufficient connection with the enforcement of the Act that he falls outside the scope of eleventh amendment protection and may be sued for the declaratory and injunctive relief requested here. Were this action unavailable to the plaintiffs, they would be unable to vindicate the alleged infringement of their constitutional rights without first violating an Ohio statute requiring a significant change in their business conduct. Such a result is clearly what the doctrine in *Ex Parte Young* was in part designed to avoid.

See Taxpayers Against Casinos v. Michigan, 471 Mich. 306. 355-56 (Mich. 2004) (Justice Weaver concurring in part) ("Michigan's Constitution separates the powers of government: . . . The executive power, is first and foremost, the power to enforce the laws or to put the laws enacted by the Legislature into effect." Citations omitted.)

Here, there are no state officers other than the Governor and the Attorney General of Michigan who could be named as defendants in a declaratory judgment action. Petitioners could not name the judges of the Court of Claims or the Court of Appeals as defendants, since they were not challenging the merits of their decisions, but the statutory structure which the judges were required by the State's legislation to follow. Nor could they sue the Michigan legislators, all of whom enjoyed legislative immunity. *Tenney v. Brandhove,* 341 U.S. 367 (1951). Precluding Petitioners from suing either the Governor or the Attorney General would leave Petitioners, as well as all of the citizens of Michigan, without any means to challenge the constitutionality of the MCOCA in federal court. The lack of a federal juridical forum in order to challenge the constitutionality of a state statute is anathema to the Constitution. As stated in *Mitchum v. Foster,* 407 U.S. 225, 242 (1972), the purpose of the 14th Amendment is "to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' *Ex parte Virginia,* 100 U.S. [339] at 346 [1879]."

CONCLUSION

Based on the above argument, the decision that Petitioners did not have standing to seek a declaratory judgment that the MCOCA was unconstitutional should be vacated. The Court of Appeals' recommendation that its decision be published would leave many of the citizens of Michigan, Ohio, Tennessee and Kentucky without a means to contest the constitutionality of state statutes via a declaratory judgment. The decision is contrary to the Declaratory Judgment Act, contrary to the Supreme Court decision in *Ex parte Young,* and contrary to the numerous Supreme Court decisions cited above which have granted standing to state citizens to contest the constitutionality of a state statute. Petitioners' claims should be remanded to the Sixth Circuit Court of Appeals, to be evaluated on the merits of their arguments that the MCOCA violates both the Due Process and the Equal Protection Clauses of the Fourteenth Amendment for a determination of whether their Complaint stated a cognizable claim not subject to dismissal under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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