STATE OF MICHIGAN
IN THE COURT OF APPEALS

IN RE JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County; CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County; RIGHT TO LIFE OF MICHIGAN; and THE MICHIGAN CATHOLIC CONFERENCE,

Plaintiffs.

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Case No.

COMPLAINT FOR ORDER OF SUPERINTENDING CONTROL

***Planned Parenthood of Michigan v Attorney General*, Court of Claims Case No. 22-000044-MM**

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COMPLAINT FOR ORDER OF SUPERINTENDING CONTROL

Pursuant to MCR 7.206(B) and MCR 3.302, Jerard M. Jarzynka, the Prosecuting Attorney for Jackson County, Christopher R. Becker, the Prosecuting Attorney for Kent County, Right to Life of Michigan, and the Michigan Catholic Conference ("Plaintiffs"), respectfully ask this Court to issue an order of superintending control over the Hon. Elizabeth L. Gleicher of the Court of Claims in *Planned Parenthood of Michigan v Attorney General*, Court of Claims Case No. 22-000044-MM.

The ACLU, Planned Parenthood of Michigan, and one of its employees sued Attorney General Nessel in the Court of Claims based on fears that the U.S. Supreme Court *might* overrule *Roe v Wade*, 410 US 113 (1973). They seek a declaration that the Michigan Constitution creates a right to abortion and an injunction barring the Attorney General from enforcing the State's abortion laws, including MCL 750.14, a statute that bars performing elective abortions. Yet the Attorney General is a supporter of abortion rights who pledged not to defend or enforce MCL 750.14 years before this litigation. The Attorney General has repeatedly asserted in the Court of Claims action that she is not adverse to the ACLU and Planned Parenthood, the Court of Claims accordingly lacks jurisdiction, and the Court of Claims action should therefore be dismissed.

Even though the Attorney General admits that there is no adversity between the parties or actual controversy here, the Court of Claims refused to dismiss the case for lack of jurisdiction and granted Planned Parenthood a preliminary injunction that addresses one of the most controversial issues of our time without

any party filing a merits brief or presenting oral argument against that relief. In her order, Judge Gleicher held that the Michigan Constitution likely creates a right to abortion and preliminarily enjoined the Attorney General—and all prosecuting attorneys in the State, even though they are not parties to the action—from enforcing MCL 750.14. The Attorney General, who already declined to file a motion to dismiss or file a brief opposing the requested preliminary injunction on the merits, now cheers her own defeat and the Court of Claims's purported injunction. Not surprisingly, she now refuses to appeal. In short, this Court of Claims action has become a runaway train and only this Court can apply the brakes.

This Court must intervene and do so immediately. Michigan courts lack jurisdiction over manufactured disputes where there is no adversity, no actual controversy, and the plaintiff's claims are hypothetical, moot, and not ripe. Plaintiffs respectfully ask this Court to issue an order vacating the preliminary injunction and directing the Court of Claims to dismiss the case for lack of jurisdiction. At a bare minimum, Plaintiffs respectfully ask this Court to vacate the Court of Claims's preliminary injunction (issued May 17, 2022) and order Judge Gleicher to adhere to the objective appearance-of-impropriety standard and recuse herself.

Time is of the essence, as the Court of Claim's injunctive order will become unappealable after June 7th, the 21st day following the order's issuance. It is up to this Court to restore the rule of law in Michigan. And it must do so now, before the

Court of Claims litigation erodes the public's perception of a fair and impartial judiciary any further.

LEGAL BACKGROUND

I. MCL 750.14 and its construction by Michigan courts

1. MCL 750.14 is a 91-year-old statute that bans performing an abortion unless necessary to save the life of the mother. The law does not regulate or target women, only medical professionals or others who seek to take innocent, unborn life. For nearly 60 years it has existed peaceably side-by-side with the Constitution that Michiganders ratified in 1963, without altering any of the State's abortion laws. Those who ratified the Michigan Constitution in 1963 were fully aware of MCL 750.14 and its limits on abortion: it has been the law-of-the-land for 32 years.

2. The Michigan Supreme Court has already held that no woman in Michigan can be charged under MCL 750.14 for having an abortion or assisting with her own abortion. *In re Vickers*, 371 Mich 114, 117-118; 123 NW2d 253, 254 (1963).

3. In 1973, the Michigan Supreme Court in *People v Bricker* construed MCL 750.14 to comport with the U.S. Supreme Court's recent holding in *Roe*, narrowing MCL 750.14 as follows:

> [W]e construe § 14 of the penal code to mean that the prohibition of this section shall not apply to 'miscarriages' authorized by a pregnant

> woman's attending physician in the exercise of his medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in his medical judgment to preserve the life or health of the mother. [*People v Bricker*, 389 Mich 524, 529–30; 208 NW2d 172, 175 (1973)]

4. In 2001, this Court in *People v Higuera* recognized that courts "are obliged to read [MCL 750.14] in light of . . . *Bricker*" and narrowed the statute still further based on *Bricker*'s "deference to the subjective good-faith medical judgment of the physician," holding that a prosecuting attorney

> must allege, and, to convict, the prosecution must prove, that the fetus was twenty-eight weeks old and viable, that defendant himself subjectively believed that the fetus was twenty-eight weeks old and viable, and that defendant, in his own mind, did not hold the subjective belief or medical judgment that the procedure was necessary to preserve the life or health of the mother. [244 Mich App 429, 449, 625 NW2d 444, 455–56 (2001)]

5. Now, 21 years later, the law is the same. MCL 750.14 remains in effect, but its scope is limited by *Vickers*, *Bricker,* and *Higuera*. And charges (let alone convictions) under Michigan's abortion statute are exceptionally rare.

II. In a published decision issued after 1990, this Court rejected a right to abortion under the Michigan Constitution in a case where Planned Parenthood was represented by the presiding judge in the action at issue here.

6. In 1994, the president of the Detroit City Council and several abortion doctors asked a state court to declare that the Michigan Constitution protects a right to abortion. *Mahaffey v Attorney General*, 222 Mich App 325, 332; 564 NW2d 104, 108 (1997). The right they asserted would forbid not just major abortion bans but minor preconditions to an abortion, such as providing women information about

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their unborn children and mandating a 24-hour waiting period for women to review this information. 222 Mich App at 329–30, 564 NW2d at 107. The *Mahaffey* plaintiffs were represented by a group of ACLU attorneys that included Judge Gleicher, who is now presiding over the present suit in the Court of Claims.

7. Abortion advocates won in the trial court, which held that the Michigan Constitution includes a right to abortion that subjects *any law* (ban or regulation) to strict scrutiny. 222 Mich App at 333, 564 NW2d at 109. This Court reversed in a published decision, unambiguously holding "that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." 222 Mich App at 339, 564 NW2d at 111. *Mahaffey* established that nothing in the Michigan Constitution subjects abortion laws (of whatever type) to anything more than rational-basis review. For a quarter century all agreed that "[t]his Court has held that the Michigan Constitution does not provide a right to end a pregnancy." *Taylor v Kurapati*, 236 Mich App 315, 347; 600 NW2d 670, 687 (1999) (citing *Mahaffey*, 222 Mich App at 334–39). Indeed, *Mahaffey*'s clarity on this issue extends beyond Michigan's borders. *Planned Parenthood of the Heartland v Reynolds ex rel State*, 915 NW2d 206, 254 n.10 (Iowa 2018) (Mansfield, J., dissenting) ("Michigan state courts have found no right to an abortion at all in their state constitution.") (citing *Mahaffey*).

8. Under MCR 7.215(C)(2), "[a] published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*," which means that *Mahaffey* controls in the Court of Claims. Similarly, under MCR 7.215(J)(1), *Mahaffey*'s

holding remains binding on subsequent panels of this Court because it was issued after November 1, 1990.

III. The multi-front attack on *Mahaffey*

9. The Governor, Attorney General, and Planned Parenthood have now concocted an extraordinary, three-pronged attack on *Mahaffey* of which this case represents one part. All three initiatives are premised on a hypothetical future event: that the U.S. Supreme Court in *Dobbs v Jackson Women's Health Org*, No 19-1392, *might* overrule *Roe*. For her part, Governor Whitmer sued prosecuting attorneys in the Oakland County Circuit Court, requesting a declaration that MCL 750.14 violates the state constitution and an injunction against its enforcement "because of the U.S. Supreme Court's imminent decision in *Dobbs*," which "has created *uncertainty* about . . . the federal right to abortion." Compl in *Whitmer v Linderman,* Oakland County Circuit Court Case No. 22-193498-CZ, ¶¶ 59, 61 (emphasis added).

10. But the Governor has admitted, quite candidly, that "both the circuit court and the Court of Appeals are bound to decide, in light of *Mahaffey*, that there is no state constitutional right to abortion." 4/7/22 Br in Support of Governor's Exec Message in *Whitmer v Linderman,* Supreme Court Case No. 164256, p 11. Accordingly, the Governor filed an executive message in the Michigan Supreme Court, seeking an order directing the trial court to certify the legal question of whether the Michigan Constitution mandates a right to abortion. *Id.* at 6.

11. Planned Parenthood took a parallel path. It sued Attorney General Dana Nessel in the Court of Claims, requesting a declaration that MCL 750.14 violates the Michigan Constitution and an injunction against its enforcement. Planned Parenthood did so fully aware that the Attorney General is an avid proponent of abortion who would refuse to defend MCL 750.14. What's more, Planned Parenthood argued that the Court of Claims should either ignore or end-run *Mahaffey*, rather than adhere to this Court's controlling precedent. 4/7/22 Br in Supp of Pls.' Mot for Prelim Inj in *Planned Parenthood of Mich v Att'y Gen*, Court of Claims No. 22-000044-MM, at 22 n.10, 34–35.

12. The floodgates are already opening to friendly lawsuits tailor-made to nullify duly enacted statutes. Another case on an abortion issue was just filed against Attorney General Nessel on May 18, 2022. *Elizabeth Cady Stanton Trust v Nessel,* Court of Claims No. 22-000066-MM. This Court must put an immediate stop to this underhanded practice. The judiciary is for the resolution of actual disputes, not a forum for state-wide policy changes sought by non-adverse litigants.

LOWER COURT PROCEEDINGS

I. The ACLU files suit on Planned Parenthood's behalf

13. On April 7, 2022, the ACLU filed suit on behalf of Planned Parenthood and its chief medical officer against Attorney General Dana Nessel, as the sole defendant, in the Court of Claims. The ACLU and Planned Parenthood argued that, notwithstanding *Mahaffey*, the Court of Claims should (1) declare that the Michigan Constitution includes a right to abortion, and (2) enjoin the Attorney General and

all prosecuting attorneys from enforcing MCL 750.14 and other abortion regulations. 4/7/22 Planned Parenthood Verified Compl ¶¶ 34–35, attached as **Exhibit 1**.

14. The ACLU and Planned Parenthood's suit is based explicitly on the future possibility that the U.S. Supreme Court could "modify" *Roe* and *Casey* in *Dobbs*. *Id.* ¶ 96. If a change in federal abortion law occurs, the ACLU and Planned Parenthood fear *Bricker*'s construction of MCL 750.14 "may no longer protect Michigan abortion providers." *Id.* ¶ 96. They sued to prevent "uncertainty" in light of this "potential[ ] revising," even though almost 50 years of post-*Roe* modifications had not altered *Bricker* up till now. *Id.* ¶ 121.

15. Right after filing the complaint, the ACLU and Planned Parenthood also filed a motion for preliminary injunction in the Court of Claims. They sought an order enjoining the enforcement of "MCL 750.14 *and any other Michigan statute or regulation* to the extent that it prohibits abortions authorized by a licensed physician before viability, or after viability when necessary in the physician's judgment to preserve the life or health of the pregnant person." 4/7/22 Br in Supp of Pls' Mot for Prelim Inj at 39 (emphasis added), attached as **Exhibit 2**.

16. The lawsuit was immediately assigned to Judge Gleicher.

II. The Attorney General refuses to defend Michigan law while recognizing there is no adversity and the Court of Claims lacks jurisdiction.

17. Just hours after the plaintiffs filed their lawsuit and motion for preliminary injunction in the Court of Claims, Attorney General Dana Nessel—the

sole defendant—issued a press release declaring that she would not defend MCL 750.14 and would support the ACLU and Planned Parenthood's legal position. 4/7/22 Atty Gen Press Release, attached as **Exhibit 3**.

18. On April 20, 2022, Judge Gleicher set a briefing schedule for Plaintiffs' motion for preliminary injunction. The Attorney General's response was due on May 5, 2022, and Plaintiffs' reply was due on May 10, 2022. The Court indicated that it would schedule oral argument on the motion approximately 14 days after Plaintiffs filed their reply. 4/20/22 Briefing Schedule Order, attached as **Exhibit 4.**

19. Before the Attorney General's response to the ACLU and Planned Parenthood's motion for preliminary injunction was due on May 5, 2022, the parties stipulated to a status conference, which Judge Gleicher held on May 2, 2022.

20. At this point, Right to Life of Michigan and the Michigan Catholic Conference had already filed an amici brief with the Court of Claims explaining that the Court lacked jurisdiction because, among other things, there was no jurisdiction because the matter lacked adversity and the case was not ripe because the Attorney General did not intend to enforce or defend Michigan law. Amici's counsel, John Bursch, received an invitation to the status conference, which was convened over Zoom. But Judge Gleicher excluded him and everyone else from the status conference other than attorneys from the Attorney General's Office, the ACLU, and Planned Parenthood—all of whom support a state constitutional right to abortion and agree that MCL 750.14 should be enjoined.

21. On information and belief, at this status conference, the Attorney General's Office took the position that the Court of Claims lacked jurisdiction because there was no adversity between the parties. Despite the obvious lack of adversity between the Attorney General's Office, the ACLU, and Planned Parenthood, the parties apparently waived a hearing on the motion for preliminary injunction. 5/17/22 Op & Order at 25, attached as **Exhibit 5.** But this waiver was not made public. The Court of Claims's April 20, 2022 scheduling order still indicated that "[t]he Court will set a date for oral argument, which will be conducted approximately 14 days after the plaintiffs' reply brief is filed."

22. On May 5, 2022, the Attorney General filed her response to Plaintiffs' motion for preliminary injunction. 5/5/22 Def's Resp to Pls' Mot for Prelim Inj, attached as **Exhibit 6.** This brief confirmed that the Attorney General agreed with the ACLU and Planned Parenthood's legal theories, shared their desired outcome, and refused to defend MCL 750.14 and related laws. As a result, the Attorney General recognized that the Court of Claims lacked jurisdiction, just as Right to Life of Michigan and the Michigan Catholic Conference had explained:

- "As a candidate, the Attorney General made clear she would not enforce Michigan's criminal abortion statute, MCL 750.14, and shortly after taking office in January 2019, she reconfirmed that commitment *at a conference held by Plaintiff* Planned Parenthood of Michigan." *Id.* at 1 (emphasis added).

- "Plaintiffs' complaint powerfully and persuasively alleges that Michigan's criminal abortion statute, MCL 750.14, violates several provisions of the Michigan Constitution, including the Due Process Clause, art 1, § 17, and the Equal Protection Clause, art 1, § 2. The Attorney General agrees that the statute is unconstitutional under the theories alleged by Plaintiffs. And because she agrees, the Attorney General will not exercise her discretion to defend the statute, a point she made clear the day the lawsuit was filed." *Id.* at 4.
- "Given the Attorney General's exercise of discretion not to defend MCL 750.14, there is at present a lack of adversity. Before the Court can order any declaratory or injunctive relief, there must first be an actual, live controversy before the Court. And for there to be a controversy, there needs to be adversity between the parties, which does not presently exist in this case." *Id.* at 8 (citations omitted).
- "Because the parties' interests are aligned, the Court is now confronted with the question of its jurisdiction to hear this matter. For jurisdiction to exist, there must be a live, actual controversy between adverse litigants. Given the Attorney General's decision not to defend the statute, there is presently a lack of adversity sufficient to support jurisdiction." *Id.* at 1.

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23. Despite admitting that the Court of Claims lacked jurisdiction, the Attorney General refused to "move to dismiss the action" because she agreed with the ACLU and Planned Parenthood that "[t]he legal issues in this case are important." *Id.* at 10.

24. Rather than creating the necessary adversity by erecting a conflict firewall that might allow other members of the Attorney General's Office to defend MCL 750.14, *id.* at 9–10, the Attorney General offered multiple suggestions to the ACLU, Planned Parenthood, and Judge Gleicher regarding how the Court might allow the lawsuit to proceed and "ensure a defensible result." *Id.* at 10.

25. This would require bringing "an additional party . . . into this lawsuit to create the necessary adversity and stave off claims that the suit is nothing more than a 'friendly scrimmage brought to obtain a binding result that both sides desire.'" *Id.* at 8-9 (quoting *League of Women Voters v Secretary of State*, 506 Mich 905; 948 NW2d 70 (2020) (Viviano, J., concurring).

26. First, the Attorney General confessed that:

> [w]hen a court lacks jurisdiction, it loses its power to hear the case. But that need not happen here. Plaintiffs can amend their lawsuit to add an appropriate party to ensure adversity exists. The Attorney General has offered to stipulate to such an amendment. Plaintiffs may then continue to press, and this Court can resolve, the substantial legal questions presented by this case and so important to the women of Michigan.

Id. at 1.

27. Second, the Attorney General suggested that "various joinder rules also permit the addition of parties to litigation," but recognized that "[i]t is unclear,

however, whether these rules may be used to remedy a jurisdictional defect." *Id.* at 9.

28. Under Michigan law, however, the possibility of joinder only arises when jurisdiction already exists. Joinder cannot vest a court with jurisdiction. *Bowes v Int'l Pharmakon Labs, Inc*, 111 Mich App 410, 415; 314 NW2d 642, 644 (1981).

29. It was inappropriate for the Attorney General to refuse to defend MCL 750.14 and related laws, decline to erect a firewall in the Attorney General's Office to enable a defense, admit that the Court of Claims lacked jurisdiction, and yet suggest ways for the ACLU and Planned Parenthood to remedy the jurisdictional defect to obtain a mutually-desired result, instead of filing a motion to dismiss. The Attorney General's unusual conduct simply underscores the improper nature of the Court of Claims action.

III. The ACLU and Planned Parenthood refuse to create adversity and double down on their preliminary-injunction request.

30. The ACLU and Planned Parenthood had no interest in taking the Attorney General up on any of her suggestions as to creating adversity and producing a "defensible result." Def's Resp to Pls' Mot for Prelim Inj at 10. They created a lack of adversity by suing only the Attorney General—an ally and well-known abortion supporter—in the Court of Claims. And they did nothing to remedy that glaring jurisdictional defect.

31. Instead, the ACLU and Planned Parenthood doubled down on their preliminary-injunction request, arguing that "so long as an official-capacity

defendant is an agent of the State and a plaintiff is challenging the validity of a law of the State, the parties are adverse and there is an 'actual controversy' for the Court to resolve." 5/6/22 Pl's Reply to Def's Resp to Pls' Mot for Prelim Inj at 3, attached as **Exhibit 7**. "[T]he Attorney General's overall agreement with Plaintiffs' legal arguments," in their view, made no difference. *Id.* The ACLU and Planned Parenthood failed to note that, absent a threat that the Attorney General would enforce the challenge, the case was not ripe in any event.

32. The ACLU and Planned Parenthood recognized that the Court of Claims lacked an "adversarial briefing process where legal arguments on both sides of a constitutional issue are presented." *Id.* at 9. But they urged "the Court to move expeditiously to rule on their motion for preliminary injunction" anyway. *Id.* at 12.

IV. The Attorney General again declares that the Court of Claims lacks jurisdiction, while refusing to file a motion to dismiss.

33. The Attorney General sought permission to file a sur-reply, arguing again that "[a]bsent a live controversy between litigants who disagree, this Court lacks jurisdiction to rule on the constitutionality of MCL 750.14." Def's 5/12/22 Sur-reply Br to Pl's 5/6/22 Reply at 1, attached as **Exhibit 8**.

34. The Attorney General's sur-reply acknowledged that "[m]erely suing another party does not create the necessary actual controversy" for a court to issue declaratory relief. *Id.* at 2. It is "adversity between the parties [that] creates the controversy" and "it cannot be said that there is a genuine, live controversy between

Plaintiffs and the Attorney General where the Attorney General has admitted the unconstitutionality of MCL 750.14 and that she will not enforce the statute." *Id.*

35. The Attorney General recognized that a key element of adversarial litigation was "[m]issing" from the ACLU and Planned Parenthood's suit. *Id.* at 3. Specifically, "parties who support the constitutionality of MCL 750.14," as their "interests and rights . . . will necessarily be affected by the declaration of unconstitutionality sought by Plaintiffs." *Id.*

36. Because the Court of Claims lacked jurisdiction, the Attorney General argued that it could not issue declaratory or injunctive relief. *Id.*

37. Yet the Attorney General refused to file a motion to dismiss, even though she acknowledged there was a lack of adversity. She also refused to create a firewall in her office, *id.* at 3–6, or "take a substantive position with respect to the merits of Plaintiffs' motion for preliminary injunction." *Id.* at 6.

38. Instead, the Attorney General (again) urged the ACLU and Planned Parenthood to remedy the jurisdictional "defect by amending the complaint to add an appropriate [adverse] party." *Id.* at 3.

V. The Court of Claims preliminarily enjoins the Attorney General—and anyone operating under her supervision—from enforcing MCL 750.14.

39. Without adversarial briefing or argument, without a public hearing, and without jurisdiction or even a ripe controversy, the Court of Claims nonetheless

issued an opinion and order on May 17, 2022, that preliminarily enjoins the Attorney General and anyone operating under her supervision from enforcing MCL 750.14. 5/17/22 Op & Order at 27.

40. The Court of Claims did so because "*Dobbs* presents an opportunity for the United States Supreme Court to overrule *Roe*" and "[a] draft opinion in *Dobbs* purporting to overrule *Roe* was leaked to the press on May 2, 2022," even though the U.S. Supreme Court has not issued a final decision and there has been no change in federal or state law. *Id.* at 6.

41. Without considering or addressing *Vickers*, *Bricker,* and *Higuera*'s narrowing constructions of MCL 750.14, the Court of Claims accepted the ACLU and Planned Parenthood's assertion "that if the United States Supreme Court overrules *Roe v Wade*, abortion will again become illegal in Michigan except when 'necessary to preserve the life of [the] woman.'" *Id.* (quoting MCL 750.14).

42. The Court of Claims admitted that "Defendant Attorney General concurs with plaintiffs' argument that MCL 750.14 is unconstitutional," *id.* at 7, but held the case was "a justiciable declaratory judgment action" regardless. *Id.* at 9.

43. In so doing, the Court of Claims disrespected not only the law but Justice Viviano, whose well-reasoned *League of Women Voters* concurrence the Court of Claims judge wrongly disparaged as a "cut-and-pasted" job that "mischaracterized the meaning and contextual applicability" of an opinion by then-Judge Scalia. *Id.* at 7 n 6.

44. The Court of Claims instead relied on a nonbinding treatise that suggests Michigan courts should not apply "an unduly restrictive construction of the actual controversy requirement." *Id.* at 11 (quotation omitted).

45. As further support for its justiciability holding, the Court of Claims cited *United States v Windsor*, 570 US 744; 133 S Ct 2675 (2013), where jurisdiction turned on the federal government's refusal to refund the plaintiff estate taxes that she allegedly should not have been required to pay and thus created an actual controversy. *Id.* at 12.

46. The plaintiff in *Windsor* had a justiciable case because the United States refused to provide her requested relief, *i.e.*, a refund of the estate taxes that she otherwise would not have paid. *Id.* at 759 ("the refusal of the Executive to provide the relief sought suffices to preserve a justiciable dispute"). But this case is entirely different. The Attorney General acceded to the ACLU and Planned Parenthood's requested relief, *i.e.*, non-enforcement of MCL 750.14, as a candidate for office *years before* the ACLU and Planned Parenthood filed suit. 5/5/22 Def.'s Resp. to Pls.' Mot. for Prelim. Inj. At 2. What's more, the Attorney General has "never waivered from her commitment to" abortion rights. *Id.* So Planned Parenthood faces no danger of enforcement from the Attorney General.

47. The Court of Claims replaced disagreement on the plaintiff's requested relief, which the Attorney General had already granted, with a mere procedural disagreement on whether the Attorney General should consent to the entry of a preliminary injunction—in a case where adversity, an actual controversy, and

jurisdiction were lacking. But the Attorney General's refusal to take a substantive position on the ACLU and Planned Parenthood's motion for preliminary injunction cannot gin up a justiciable controversy. No preliminary injunction was even necessary because the Attorney General acceded—long ago—to the ACLU and Planned Parenthood's requested relief.

48. Far from "refusing to give [her legal position in regard to MCL 750.14] effect," *id.* at 12 (quoting *Windsor*, 570 US at 756), the Attorney General has promised (repeatedly) not to enforce the law. Planned Parenthood suffered no injury—monetary or otherwise—as there has been no change in abortion law, just hypothetical and anticipatory fears. The ACLU and Planned Parenthood do not claim that anything should be different now. Their suit is simply a ploy to create a right to abortion in the Michigan Constitution free and clear of any opposition.

49. As the Court of Claims recognized, "[a]s of the date this opinion is issued, it is unknown whether the United States Supreme Court will overrule *Roe v Wade*." *Id.* at 13. The court's holding on whether the Michigan Constitution protects a right to abortion (without adversarial briefing or argument) is based on the *possibility* that event may occur and cause *speculative* harm in the future.

50. To rule on this hypothetical dispute and enjoin MCL 750.14's enforcement, the Court of Claims had to end-run this Court's binding decision in *Mahaffey*—the very case which the presiding Court of Claims judge had herself litigated and lost. The Court of Claims attempted to do so by (1) arguing that MCL 750.14 was not specifically at issue in *Mahaffey*, and (2) claiming to locate a right to

abortion in the "right to bodily integrity," a substantive due process concept just like the *Mahaffey* plaintiffs' asserted right to privacy. *Id.* at 15; *accord id.* at 4, 15–16, 19–20.

51. The Court of Claims—citing predominately federal cases like *Rochin v California*, 342 US 165, 72 S Ct 205 (1952), *Cruzan v Director, Missouri Department of Health*, 497 US 261, 110 S Ct 2841 (1990), and *Casey*, *id.* at 22–24—derived from "[a] general liberty interest in *refusing* medical treatment . . . a general liberty interest in *seeking* medical treatment." *Id.* at 22 (emphasis in original).

52. Without any relevant analysis or explanation, the Court of Claims declared that "the right to obtain safe medical treatment is indistinguishable from the right of a patient to refuse treatment. *Id.* at 24.

53. Yet there are obvious differences. Generally, the right to refuse medical treatment physically impacts no one but the patient. But abortion intentionally ends another innocent human life. And, in comparable circumstances where a parent rejects life-saving medical treatment for a minor child, the law often rejects that parent's decision and commands the opposite result. *E.g.*, *In re AMB*, 248 Mich App 144, 183–85; 640 NW2d 262, 284–85 (2001).

54. Because the Court of Claims viewed abortion as medical treatment, rather than the intentional taking of innocent human life, it held that the Michigan Constitution's Due Process Clause likely protects a right to abortion that renders MCL 750.14 invalid, *id.* at 24—25, even though *Mahaffey* rejected that very result and was binding on the Court of Claims.

55. The Court of Claims issued a preliminary injunction that purports to enjoin not only the Attorney General from enforcing MCL 750.14 but also "all state and local officials acting under [her] supervision," including all prosecuting attorneys in the State, even though they are not parties to the action. *Id.* at 27

56. MCR 3.310(C)(4) allows courts to enter injunctions against parties, their officers, agents, servants, employees, attorneys and other persons in active concert or participation with them. But prosecuting attorneys are *not* the Attorney General's agents, servants, or employees, and no one argues that the Attorney General is acting in concert or participation with them.

57. As the Attorney General maintained in her response to the ACLU's and Planned Parenthood's motion for preliminary injunction, "[w]hile the Attorney General generally 'supervise[s] the work of, consult[s] and advise[s] the prosecuting attorneys,' MCL 14.30, county prosecutors have broad discretion with respect to charging determinations. See, e.g., *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683 (1972)." Def's Resp to Pls' Mot for Prelim Inj at 3 n 3.

58. Indeed, Attorney General Nessel stated: "I don't believe that I as attorney general of this state have the authority to tell duly elected prosecutors what they can and what they cannot charge . . . . If that were the case, I don't even know why we would elect our county prosecutors in the first place, if they're not allowed to make their own decisions." Beth LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence*, The Detroit News (May 3, 2022), https://bit.ly/3LrKaZJ, attached as **Exhibit 9**.

VI. The Attorney General refuses to appeal the Court of Claim's ruling

59. Even though the Attorney General consistently argued that the Court of Claims lacked jurisdiction, she immediately touted her loss as a victory, praising the court's rejection of her jurisdictional arguments and issuance of an overly broad preliminary injunction.

60. Attorney General Nessel issued a public statement that reads:

> This injunction is a victory for the millions of Michigan women fighting for their rights. The judge acted quickly in the interest of bodily integrity and personal freedom to preserve this important right and found a likelihood of success in the state law being found unconstitutional. I have no plans to appeal and will comply with the order to provide notice to all state and local officials under my supervision. [5/18/22 Mich Dep't of Att'y Gen, AG Nessel Statement on Court of Claims Order, attached as **Exhibit 10**., https://bit.ly/3wnRnpu]

61. Despite admitting that adversity and an actual controversy are missing, the Attorney General refused to file a motion to dismiss or appeal the Court of Claim's preliminarily injunction order.

62. The Attorney General's actions ensure that no higher court will disturb the Court of Claims's order enjoining enforcement of MCL 750.14, thus locking in the ACLU, Planned Parenthood, and the Attorney General's mutually-desired result unless another State entity seeks to intervene as defendant—an action that would create adversity and the jurisdiction that the Court of Claims lacks. This is an untenable Catch-22 for any State entity considering intervention.

63. Within hours of the issuance of Judge Gleicher's opinion and order, the Attorney General e-mailed all 83 county prosecutors a copy of the opinion and order stating that all Michigan county prosecutors are now enjoined from enforcing MCL 750.14, attached as **Exhibit 11.** This includes Plaintiffs Jarzynka and Becker.

64. But, as the Attorney General admitted, she has no authority to dictate to county prosecutors how they exercise their prosecutorial discretion. 5/5/22 Def.'s Resp. to Pls.' Mot. for Prelim. Inj. at 3 n.3. None of Michigan's 83 county prosecutors are parties to the ACLU and Planned Parenthood's action. They cannot appeal the Court of Claims's unlawful order. What's more, none of Michigan's county prosecutors had an opportunity to be heard, file briefs, attend hearings, or otherwise participate in the litigation.

65. The due process violations inherent in the Court of Claims's preliminary injunction order are striking, as is the court's flouting of MCR 3.310(C)(4). Judge Gleicher designed her injunction order specifically to cover county prosecutors who are not parties to the case and who are not working in concert with the Attorney General—the sole defendant, and did all this in an action lacking adverse parties or even a live controversy.

LEGAL STANDARD

66. This Court may, in its discretion and on terms it deems just, enter any judgment or order and grant any relief that a case may require. MCR 7.216(A)(7); *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273;

761 NW2d 210 (2008), *mandamus gtd* 280 Mich App 801 (2008), *aff'd as to result* 482 Mich 960; 755 NW2d 157 (2008).

67. Complaints for orders of superintending control are "an original civil action designed to order a lower court to perform a legal duty." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 346–47; 675 NW2d 271, 289 (2003). Issuing such an order is appropriate when "a lower court exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, or [otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*, 273 Mich App 594, 598; 733 NW2d 65, 68 (2007). The "plaintiff seeking an order of superintending control bears the burden of establishing the grounds for issuing the order." *In re Gosnell*, 234 Mich App 326, 342; 594 NW2d 90, 98 (1999).

68. To obtain an order of superintending control, the plaintiff must show (1) that a lower court "has failed to perform a clear legal duty" and (2) "the plaintiff is otherwise without an adequate legal remedy." *Id.* A plaintiff is without an adequate legal remedy when it lacks the ability to appeal. *Fort v City of Detroit*, 146 Mich App 499, 503; 381 NW2d 754, 756 (1985).

ARGUMENT

I. The Court of Claims violated a clear legal duty to dismiss the case for lack of jurisdiction and failed to proceed according to law in entering a preliminary injunction that directly contradicted this Court's binding decision in *Mahaffey*.

A. Without adversity between the parties, the Court of Claims lacks jurisdiction to issue declaratory or injunctive relief.

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69. As the Michigan Supreme Court held almost 90 years ago, "it is the duty of the court to raise the question of jurisdiction on its own motion." *Halkes v Douglas & Lomason Co*, 267 Mich 600, 602; 255 NW 343, 344 (1934).

70. But, in this case, the Court of Claims was not required to address jurisdiction on its own because the sole defendant, Attorney General Nessel, argued clearly and consistently that a lack of adversity between the parties deprived the court of jurisdiction to issue declaratory or injunctive relief. This should have ended the analysis.

71. Nonetheless, the Court of Claims refused to dismiss the action and issued a preliminary injunction without the benefit of any adversarial briefing, argument, or hearing on the merits of the ACLU and Planned Parenthood's claims, and it did so in contravention of a binding Court of Appeals decision.

72. In so doing, the Court of Claims "exceeded its jurisdiction, acted in a manner inconsistent with its jurisdiction, [and otherwise] failed to proceed according to law." *In re Credit Acceptance Corp*, 273 Mich App at 598; 733 NW2d at 68.

73. Michigan courts only have jurisdiction over actual controversies arising between adverse litigants. *In re House of Representatives Request for Advisory Op Regarding Constitutionality of 2018 PA 368 & 369*, 505 Mich 884; 936 NW2d 241, 243 (2019) (Clement, J, concurring) (quoting *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), itself quoting *Anway v Grand Rapids Ry Co*, 211 Mich 592, 616; 179 NW 350 (1920)).

74. A “controversy must be real and not *pro forma*,” even when a *pro forma* case presents “real questions.” *Anway*, 211 Mich at 612; 179 NW 350, 357 (cleaned up).

75. Absent adversity, a lawsuit like the ACLU and Planned Parenthood’s suit against the Attorney General is nothing more than “a friendly scrimmage brought to obtain a binding result that both sides desire.” *League of Women Voters*, 948 NW2d at 70 (2020) (Viviano, J, concurring).

76. “Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding.” *Fox v Board of Regents*, 375 Mich 238, 242 (1965) (citation omitted).

77. “When a court is without jurisdiction of the subject matter, any action with respect to such a cause . . . is absolutely void.” *Id.*

78. Because there is no adversity between the parties, the Court of Claims issued a preliminary injunction order without any form of adversarial briefing, argument, or hearing on the critical question of whether the Michigan Constitution protects a right to abortion. There are a multitude of answers to the ACLU and Planned Parenthood’s merits arguments. But none of them were ever made by a party before the Court of Claims ruled that the Michigan Constitution likely contains a right to abortion and enjoined a valid Michigan law.

79. What's more, the Court of Claims's invalid preliminary injunction purports to cover non-parties who are neither the Attorney General's agents nor acting in concert with her, in direct contravention of MCR 3.310(C)(4).

80. The Court of Claims exceeded its jurisdiction in multiple respects. This Court should declare the preliminary injunction order null and void, vacate the preliminary injunction, and direct the Court of Claims to dismiss the case.

B. There is no standing; there must be an "actual controversy," not just a hypothetical or anticipatory one.

81. The Court of Claims held "that this matter is a justiciable declaratory judgment action." Op & Order at 9. But that ruling is plainly wrong.

82. In a declaratory judgment action, like this one, a plaintiff has standing "if the requirements in MCR 2.605 are met." *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 373; 792 NW2d 686, 700 (2010).

83. MCR 2.605(A)(1) provides that "[i]n a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment . . . ." (emphasis added).

84. The statute's "essential requirement . . . is an '*actual controversy*,'" which serves as a "condition precedent," *Pontiac Police & Fire Retiree Prefunded Grp Health & Ins Trust Bd of Trustees v City of Pontiac No 2*, 309 Mich App 611, 624; 873 NW2d 783, 791 (2015) (emphasis added), or "prerequisite to declaratory

relief." *Welfare Emps Union v Mich Civil Serv Comm'n*, 28 Mich App 343, 350; 184 NW2d 247, 251 (1970).

85. "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." *League of Women Voters*, 506 Mich 561, 586; 957 NW2d 731, 586 (2020) (emphasis added). Michigan courts may rule before injuries occur but "a present legal controversy, not one that is merely hypothetical or anticipated in the future," is needed for a plaintiff to have standing under MCR 2.605. *League of Women Voters,* 506 Mich at 586; 957 NW2d at 744 (quotation omitted).

86. There is no "actual controversy" here. The ACLU and Planned Parenthood's complaint focuses on a theoretical dispute regarding illusory harm that *might possibly* emerge in the future under a certain set of facts that has not occurred and may not occur as they expect. The ACLU and Planned Parenthood "cannot show a present legal controversy rather than a hypothetical or anticipated one." *League of Women Voters,* 506 Mich at 586, 957 NW2d at 744.

87. Even if *Roe* and *Casey* are overturned, in whole or in part, there is still no actual controversy between Planned Parenthood and Defendant Attorney General Nessel.

88. Planned Parenthood is not currently being prosecuted, or even threatened with prosecution, by the Attorney General for an alleged violation of MCL 750.14. To the contrary, the Attorney General has repeatedly proclaimed that she will never prosecute anyone under MCL 750.14.

89. Just as in *League of Women Voters*, where a voting rights group and individual voters lacked standing to challenge a statute governing petition drives when there was no petition drive in process, "[a] declaratory judgment is not *needed* to guide [anyone's] future conduct" here. 506 Mich at 586, 957 NW2d at 744 (emphasis in original). Like those plaintiffs, the ACLU and Planned Parenthood ask "for a declaratory judgment because it *perhaps may be needed* in the future" should a particular chain of events occur. *Id.* (emphasis added).

90. As the Court of Claims recognized, "it is unknown whether the United States Supreme Court will overrule *Roe v Wade*." Op & Order at 13. The ACLU and Planned Parenthood's argument is that *if* the *Dobbs* Court chooses to "modify" *Roe* and *Casey*, *Bricker*'s construction of MCL 750.14 "*may* no longer protect Michigan abortion providers." 4/7/22 Planned Parenthood Verified Compl ¶ 96 (emphasis added). So the ACLU and Planned Parenthood have asked the Court of Claims to preempt this "*potential*[ ] revising" of *Bricker*, which they characterize as an "*uncertainty*." *Id.* at ¶121 (emphasis added).

91. Mays, ifs, and other hypothetical possibilities do not establish an "actual controversy." "There is no specific circumstance that [the ACLU and Planned Parenthood] claim[s] should be different" *right now*. *League of Women Voters*, 506 Mich at 588, 957 NW2d at 744–45. They "only want instruction going forward. And nothing in the relevant caselaw gives [a plaintiff] standing to challenge any [abortion]-related laws at any time." *Id.* This is particularly so where the only named Defendant has emphatically refused to enforce Michigan law.

92. Where an injury is "merely hypothetical, a case of actual controversy does not exist." *Citizens for Common Sense in Gov v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546, 553 (2000).

93. At best, the ACLU and Planned Parenthood can cite a draft opinion in *Dobbs* that purports to overrule *Roe*. But as Planned Parenthood and the ACLU noted in response, "This is a draft opinion. . . . but it is not final," @PPFA, Twitter (5/2/22, 9:16 pm), https://bit.ly/3yaRPbV, or "an official decision. . . . Roe is still the law of the land." @ACLU, Twitter (5/2/22, 10:13 pm), https://bit.ly/3P4Z37s (both statements are attached as **Exhibit 12**.

94. Neither draft guidelines nor draft opinions create the "actual controversy" needed for the Court of Claims to issue a declaratory judgment or a preliminary injunction because their "future implications" are too "speculative and hypothetical." *Int'l Union v Cent Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132, 138 (2012). And even if the draft opinion were issued as a final one, there would be no controversy where the only named Defendant has repeatedly promised not to enforce the law against Plaintiff Planned Parenthood or anyone else. 95. "Because there is no actual controversy, the [Court of Claims] lack[ed] jurisdiction to issue a declaratory judgment" or preliminary injunction. *Citizens for Common Sense*, 243 Mich App at 56; 620 NW2d at 553.

C. There was no dispute ripe for judicial decision.

96. Ripeness "focuses on the timing of the action." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192, 201 (2017). "The question is

whether the ACLU and Planned Parenthood's asserted harm "has matured sufficiently to warrant judicial intervention." *In re Reliability Plans of Elec Utils for 2017–2021*, 325 Mich App 207, 218; 926 NW2d 584, 592 (2018), *rev'd on other grounds*, 505 Mich 97; 949 NW2d 73 (2020) (quotation omitted).

97. The plain answer is "no." Ripeness doctrine "is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." 325 Mich App at 217, 926 NW2d at 217. The ACLU and Planned Parenthood's lawsuit is a classic example of speculative claims based on anticipatory harms that are guesswork, not fact.

98. Even if this speculated event occurs and *Roe* is overturned, this matter is still not even potentially ripe unless Attorney General Nessel alters her longstanding position and agrees to enforce MCL 750.14.

99. The ACLU and Planned Parenthood base their claims on speculation that "if the United States Supreme Court overrules *Roe v Wade*, abortion will again become illegal in Michigan except when 'necessary to preserve the life of [the] woman.'" Op & Order at 6 (quoting MCL 750.14).

100. The Court of Claims accepted that assertion in direct conflict with this Court's binding precedent, which establishes that MCL 750.14 must be read in light of *Bricker* and other narrowing constructions imposed by state courts. *Higuera*, 244 Mich App at 432, 625 NW2d at 446.

101. What's more, the ACLU and Planned Parenthood's claims rest, as they forthrightly admit, "upon contingent future events that may not occur as

anticipated, or may not occur at all." *Citizens Protecting Mich Const v Sec of State*, 280 Mich App 273, 282; 761 NW2d 210, 216 (2008).

102. For any real-world injury to occur: (1) a pregnant woman must choose to take her own child's life, (2) in one of the relevant jurisdictions, (3) in violation of MCL 750.14, (4) outside any safe harbor *Vickers*, *Bricker*, *Higuera*, or the final *Dobbs* ruling may provide, (5) an abortionist must either turn the woman away or agree to take her child's life, and, if the latter, (6) the Attorney General must choose to press charges against the doctor, something she has promised not to do.

103. Any one of these prerequisites is conjectural. When taken together, the ACLU and Planned Parenthood's alleged harms are extraordinarily unlikely, especially as the Attorney General is firmly in their corner.

104. Because the ACLU and Planned Parenthood's "challenge is premised on [a chain of] hypothetical future events" leading to equally speculative future harm, this lawsuit is "not ripe for judicial review." *Oakland Cty v State*, 325 Mich App 247, 265 n.2; 926 NW2d 11, 21 n.2 (2018).

105. "A claim that rests on contingent future events is not ripe." *King v Mich State Police Dep't*, 303 Mich App 162, 188, 841 NW2d 914, 928 (2013). And when a lawsuit is not ripe for judicial decision, the case must be dismissed. *Van Buren Charter Twp*, 319 Mich App at 556, 904 NW2d at 203.

D. This dispute is moot.

106. As the Michigan Supreme Court explained in an analogous context:

> a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance

> about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. The only way a disputed right can ever be made subject of judicial investigation is, first, to exercise it, and then, having acted, to present a justiciable controversy in such shape that the disputed right can be passed upon in a judicial tribunal, which can pronounce the right and has the power to enforce it.

League of Women Voters, 506 Mich at 580, 957 NW2d at 740 (quoting *Anway*, 211 Mich at 610; 179 NW at 357).

107. A case is moot if it falls into any of these categories. The ACLU and Planned Parenthood's suit falls into all of them: it is moot in every possible way.

108. First, this case is a "pretended controversy." Attorney General Nessel has exercised no power related to MCL 750.14. The ACLU and Planned Parenthood cannot point to a single person or entity who she has prosecuted under MCL 750.14. In fact, Attorney General Nessel has repeatedly affirmed that she will never enforce MCL 750.14. This case is not a real controversy in any sense of the word.

109. Second, Planned Parenthood seeks a "'decision in advance about a right'" to abortion before it has been actually asserted or contested by anyone. *League of Women Voters*, 506 Mich at 580, 957 NW2d at 740 (quoting *Anway*, 211 Mich at 610; 179 NW at 357). The ACLU and Planned Parenthood do not claim that Attorney General Nessel has violated any Michigander's rights, nor could they, even if the Supreme Court overrules *Roe*.

110. Third, any decision by this Court "cannot have any practical legal effect upon a then existing controversy." *Id*. The ACLU and Planned Parenthood's allegations rely upon a string of hypothetical assumptions, as outlined above, and

no one knows if they will ever occur. In addition, the Court of Claims's injunctive order has no practical effect on Attorney General Nessel in any way. The Attorney General was not enforcing MCL 750.14 prior to the ACLU and Planned Parenthood's lawsuit, and she would continue that non-enforcement today regardless of any ruling by the Court of Claims.

111. Even if the U.S. Supreme Court changes federal abortion jurisprudence, there is no instantaneous controversy because the precise nature of that alteration is unknown, as is the Attorney General response. The Attorney General declines to enforce MCL 750.14 now under *Roe*. If the Attorney General continues refusing to enforce MCL 750.14 without *Roe* (as she has pledged), the ACLU and Planned Parenthood's litigation makes no difference.

112. Fourth, a live case requires a "'disputed right.'" *Id.* (quoting *Anway*, 211 Mich at 610; 179 NW at 357). But the ACLU, Planned Parenthood, and the Attorney General dispute nothing. They all agree that MCL 750.14 violates the Michigan Constitution. Nor does Planned Parenthood claim that anyone (least of all the Attorney General) has sought to violate its rights. As a result, no party has "anything at stake in this dispute," judicial intervention is moot, and the case must be dismissed. 506 Mich at 583, 957 NW2d at 742.

113. "[B]ecause reviewing a moot question would be a purposeless proceeding, appellate courts will *sua sponte* refuse to hear cases that they do not have the power to decide, including cases that are moot." *People v Richmond*, 486 Mich 29, 35, 782 NW2d 187, 190 (2010). "Whether a case is moot is a threshold issue that a court

addresses before it reaches the substantive issues of the case itself." *Id*. But the Court of Claims ignored all these issues.

114. For instance, there are no facts. Attorney General Nessel has not exercised any power relating to MCL 750.14. The ACLU and Planned Parenthood cannot (and do not) allege that the Attorney General has violated the Michigan Constitution. What's more, it is false that Defendant Nessel's non-enforcement of MCL 750.14 presents a "real and imminent danger of irreparable injury" sufficient to warrant injunctive relief. *Davis v City of Detroit Fin Review Team*, 296 Mich App 568, 614, 821 NW2d 896, 919 (2012) (quotation omitted). The ACLU and Planned Parenthood have grounded this litigation on the "mere apprehension of future injury" because they believe that *Roe* may hypothetically be struck down. *Sandstone Creek Solar, LLC v Twp of Benton*, 335 Mich App 683,706, 967 NW2d 890, 903 (2021). But such fears "cannot be the basis for injunctive relief," which proves this case is moot and must be dismissed. *Id.*

115. The Supreme Court discerns the same infirmity in Governor Whitmer's part of the three-pronged attack on *Mahaffey*. It ordered her to file a supplemental brief by June 3, 2022, that—among other things—provides "a further and better statement of the questions and the facts." 5/20/22 Order in *In re Exec Message of the Governor*, Sup Ct No 164256, attached as **Exhibit 13**.

E. *Mahaffey* required the Court of Claims to reject the ACLU and Planned Parenthood's claims.

116. The ACLU and Planned Parenthood asked the Court of Claims to declare that various provisions of the Michigan Constitution protect a right to

abortion and enjoin MCL 750.14's enforcement on that basis. *E.g.*, Ver Compl ¶¶ 7, 26, pp. 34–35.

117. The Court of Claims accepted this invitation based on the ACLU's and Planned Parenthood's argument concerning a right to bodily privacy anchored in the Michigan Constitution's Due Process Clause. Ver Compl ¶¶ 125–27.

118. In *Mahaffey*, Michigan courts encountered a similar claim by abortion advocates that a statute requiring pregnant women to receive information about their unborn children and wait 24 hours to decide whether to review that information before obtaining an abortion—and intentionally ending an innocent human life—"violates a woman's [state constitutional] right to privacy and due process." *Mahaffey,* 222 Mich App at 332, 564 NW2d at 108.

119. The *Mahaffey* trial court ruled that "the Michigan Constitution guarantees a right to abortion, which is separate and distinct from the federal guarantee" and that "the proper test for evaluati[ng] [any] legislation related to abortion under state law," whether a broad ban or a narrow regulation, "is strict scrutiny." 222 Mich App at 333, 564 NW2d at 108–09.

120. In *Mahaffey*, this Court answered the trial court's broad ruling under the Michigan Constitution with an expansive holding of its own. It reversed the trial court's grant of summary disposition in the abortion advocates' favor and stated unambiguously "that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." 222 Mich App at 339, 564 NW2d at 111.

121. *Mahaffey*'s holding is clear-cut. This Court ruled that "neither application of traditional rules of constitutional interpretation nor examination of Supreme Court precedent supports the conclusion that there is a right to abortion under the Michigan Constitution." 222 Mich App at 334, 564 NW2d at 109.

122. A few times the *Mahaffey* Court spoke in terms of "whether the constitutional right to privacy encompasses the right to abortion." *Id.* But none of the Court's reasoning was specific to any constitutional right to privacy.

123. Instead, this Court's *Mahaffey* decision was based on four overarching factors that apply to the 1963 Constitution as a whole:

- First, the Michigan Constitution itself and the debates surrounding it "are silent regarding the question of abortion." 222 Mich App at 335–36, 564 NW2d at 110.
- Second, abortion "was a criminal offense" when the 1963 Constitution was ratified and the ratifiers demonstrated "no intention of altering the existing law." 222 Mich App at 335–36, 564 NW at 109–10. Creating a constitutional right to abortion would have "elicit[ed] major debate among the delegates to the Constitutional convention as well as the public at large." 222 Mich App at 336, 564 NW at 110 (quotation omitted). But no major debate occurred because the 1963 Constitution left Michigan's abortion laws—including MCL 750.14, which predated the constitutional convention by roughly 30 years—untouched. *Id.*

- Third, less than a decade after the constitution was adopted, "essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute." *Id.*
- Last, Michigan's public policy "does not favor abortion" either in 1963 or now. 222 Mich App at 337, 564 NW at 110.

124. MCR 7.215(C)(2) provides that "[a] published opinion of the Court of Appeals has precedential effect under the rule of *stare decisis*." As a result, *Mahaffey*'s holding that the Michigan Constitution contains no right to an abortion is controlling precedent for proceedings in the Court of Claims. In short, *Mahaffey* held that the Michigan Constitution does not include a right to abortion. Judge Gleicher ruled that it likely does. That is a violation of *stare decisis*.

125. The "filing of an application for leave to appeal to the Supreme Court," as occurred in *Mahaffey*, "does not diminish the precedential effect of a published opinion of the Court of Appeals." *Id.* What's more, the Supreme Court unanimously denied leave. *Mahaffey v Attorney General*, 456 Mich 948; 616 NW2d 168 (1998).

126. Because *Mahaffey* is "a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals," Judge Gleicher was required to apply *Mahaffey*'s holding to the ACLU and Planned Parenthood's case. MCR 7.215(J)(1). This was so even though then-attorney Gleicher was on the losing side of *Mahaffey*.

127. *Stare decisis* requires courts "to reach the same result in a case that presents the same *or substantially similar issues* as a case that another panel of this Court has decided." *Pew v Mich State Univ*, 307 Mich App 328, 334; 859 NW2d 246, 250 (2014) (emphasis added).

128. *Mahaffey*, at the least, considered substantially similar issues to those presented in the ACLU and Planned Parenthood's suit. As a result, *Mahaffey*'s holding that there is no right to abortion under the Michigan Constitution controls in the Court of Claims and here. *Mahaffey,* 222 Mich App at 334, 564 NW2d at 109.

129. The Court of Claims's refusal to (1) apply *Mahaffey* and (2) reject the ACLU and Planned Parenthood's claims under the Michigan Constitution is a failure to proceed according to law. Op & Order at 15–16. It is an especially egregious failure given that Judge Gleicher was one of the ACLU attorneys who represented the *Mahaffey* plaintiffs, and thus received this Court's unambiguous, published decision that "the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right." 222 Mich App at 339, 564 NW2d at 111. This also calls for issuance of an order of superintending control directing the Court of Claims to dissolve its preliminary injunction order, which directly contradicts *Mahaffey*.

II. Plaintiffs are without an adequate legal remedy.

130. Prosecutors Jarzynka and Becker are not parties in the Planned Parenthood case and have their own prosecutorial discretion. They are elected officials and take their own oath of office to faithfully discharge their duties. They

have no recourse or right to appeal Judge Gleicher's unlawful injunctive order and they have no other adequate remedy at law.

131. Right to Life of Michigan is a nonpartisan, nonsectarian, nonprofit organization of caring people, united to protect the precious gift of human life from fertilization to natural death. Right to Life encourages community participation in programs that foster respect and protection for human life. Right to Life gives a voice to the voiceless on life issues like abortion, infanticide, euthanasia, and physician-assisted suicide. Right to Life educates people on these issues and motivates them to action, including support for laws like MCL 750.14.

132. The Michigan Catholic Conference serves as the official voice of the Catholic Church in Michigan on matters of public policy. Its mission is to promote a social order that respects the dignity of all persons and to serve the common good in accordance with the teachings of the Catholic Church. Its board of directors includes the active bishops of Michigan's seven Catholic dioceses. The Michigan Catholic Conference has a deep, abiding interest in this matter—the dignity and sanctity of all human life. The Conference is dedicated to preserving and protecting human life at all stages, including by supporting laws like MCL 750.14.

133. On April 20, 2022, Right to Life of Michigan and the Michigan Catholic Conference filed a motion for leave to file an amicus brief in the Court of Claims, as well as a motion for immediate consideration. 4/20/22 Mot of Right to Life of Michigan and the Michigan Catholic Conference for Leave to File Amicus Curiae

Br, attached as **Exhibit 14**, and 4/20/22 Mot for Immediate Consideration, attached as **Exhibit 15**.

134. The Court of Claims granted Right to Life of Michigan and the Michigan Catholic Conference's motion to file an amicus brief and motion for immediate consideration that same day, and accepted their amicus brief for filing. 4/20/22 Order Granting Leave to File Amicus Curiae Briefing at 1, attached as **Exhibit 16**; *accord* 5/17/22 Op & Order at 7 n.5 ("The Court has had the benefit of two amicus curiae briefs filed in opposition to the relief requested, one signed by Right to Life of Michigan and the Michigan Catholic Conference . . . .").

135. Right to Life of Michigan and the Michigan Catholic Conference's amicus brief maintained that the Court of Claims was obligated to dismiss the ACLU and Planned Parenthood's case for lack of jurisdiction due to (1) a lack of adversity between the parties (because the ACLU, Planned Parenthood, and the Attorney General agree that MCL 750.14 is unconstitutional and should be enjoined), (2) the lack of any actual controversy (because there is no present injury or dispute on which a court could opine), and (3) the lack of ripeness (because the U.S. Supreme Court has not overruled *Roe*). *Id.* at 5-8.

136. Moreover, Right to Life of Michigan and the Michigan Catholic Conference have moved to intervene as defendants in Governor Whitmer's corresponding action in the Michigan Supreme Court, as well as in the Governor's related action in the Oakland County Circuit Court. 4/22/22 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Mot to Intervene, attached as

Exhibit 17; 5/4/22 Proposed Intervenors Right to Life of Mich & Mich Catholic Conference's Mot to Intervene, attached as **Exhibit 18**.

137. Adversity exists in Governor Whitmer's lawsuit because Prosecutors Jarzynka and Becker contest that MCL 750.14 violates the Michigan Constitution and should be enjoined. If Planned Parenthood wants to challenge MCL 750.14, Governor Whitmer's lawsuit is an appropriate matter in which to do so.

138. The Court of Claims's order enjoining MCL 750.14's enforcement preempts Right to Life of Michigan and the Michigan Catholic Conference's interest in the constitutionality of MCL 750.14 and other abortion laws. Right to Life of Michigan and the Michigan Catholic Conference have worked for decades to see many pro-life measures become law. And they have already moved to intervene in Governor Whitmer's adverse actions to defend MCL 750.14 in court.

139. As non-parties in the Court of Claims, Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference cannot (1) move to dismiss the ACLU and Planned Parenthood's action for lack of jurisdiction, or (2) apply for leave to file an interlocutory appeal of the court's preliminary injunction order.

140. This leaves Prosecutors Jarzynka and Becker, Right to Life of Michigan and the Michigan Catholic Conference without an adequate legal remedy. Filing a complaint for an order of superintending control is their only option.

III. At a minimum, this Court should vacate the preliminary injunction order and correct Judge Gleicher's failure to recuse.

141. Michigan has a compelling interest in maintaining public confidence in the judiciary's fairness and integrity. *Williams-Yulee v Fla Bar*, 575 US 433, 445; 135 S Ct 1656, 1666 (2015).

142. As a result, Canon 2 of the Michigan Code of Judicial Conduct requires judges to "avoid all impropriety and appearance of impropriety." Mich Code of Judicial Conduct, Canon 2, https://bit.ly/3lpRf2r.

143. The Court of Claims judge assigned to *Planned Parenthood of Michigan v Attorney General* is the Hon. Elizabeth Gleicher.

144. On April 14, 2022, the Clerk of the Court of Claims sent a letter to the parties at Judge Gleicher's direction. This letter disclosed that Judge Gleicher makes yearly donations to Planned Parenthood of Michigan—the plaintiff in this action—and that she represented Planned Parenthood as an ACLU attorney—the same firm that represents Planned Parenthood in the Court of Claims. 4/14/22 Letter of Clerk Jerome W. Zimmer, Jr. at 1, attached as **Exhibit 19**.

145. Nonetheless, the letter indicated that Judge Gleicher "is certain that she can sit on this case with requisite impartiality and objectivity." She declined to recuse, continued to preside over the ACLU and Planned Parenthood's lawsuit, and invited the non-adverse parties to file a recusal motion. *Id.*

146. Predictably, the non-adverse parties, who want to enjoin MCL 750.14 under the Michigan Constitution, did not file a MCR 2.003(D) motion.

147. Right to Life of Michigan and the Michigan Catholic Conference's amicus brief in the Court of Claims urged Judge Gleicher to recuse to avoid the

appearance of impropriety, especially given her personal advocacy of the ACLU and Planned Parenthood's legal theories in *Mahaffey*. 4/20/22 Amici Curiae Br of Right to Life of Mich & the Mich Catholic Conference at 2, 9.

148. Right to Life of Michigan and the Michigan Catholic Conference emphasized that recusal analysis is objectively focused on public perception, not a judge's own subjective beliefs. *Id*. at 9–10.

149. The question is whether a judge's conduct "would create *in reasonable minds a perception* that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired," regardless of whether a judge subjectively believes that she can act objectively. *Caperton v A T Massey Coal Co*, 556 US 868, 888; 129 S Ct 2252, 2266 (2009) (quoting ABA Model Code, Canon 2A, Commentary) (emphasis added).

150. Right to Life of Michigan and the Michigan Catholic Conference identified objective reasons why Judge Gleicher should recuse to avoid an appearance of impropriety, several of which the court's letter failed to disclose:

- Judge Gleicher served as a lawyer for the ACLU and represented Planned Parenthood, unsuccessfully arguing that the Michigan Constitution includes a right to abortion in *Mahaffey*, the controlling Court of Appeals decision that Judge Gleicher's preliminary injunction order refused to apply. 4/14/22 Letter of Clerk Jerome W. Zimmer, Jr. at 1; 5/17/22 Op & Order at 15–16.

- Judge Gleicher makes yearly donations to Planned Parenthood and ostensibly continues to do so. *Id.*
- Judge Gleicher received the "Planned Parenthood Advocate Award" from Plaintiff following her advocacy in *Mahaffey*. ICLE *Contributor Directory*, https://bit.ly/3t7WCHZ (**undisclosed**).
- Judge Gleicher served as a lawyer for the ACLU and represented Planned Parenthood in challenging a Michigan law requiring minors to obtain the consent of their parents before obtaining an abortion. UPI, *Judge strikes down parental consent law* (Aug. 5, 1992), https://bit.ly/3lnphV9 (**undisclosed**).
- Judge Gleicher served as a lawyer for the ACLU in challenging a Michigan pro-life law that prohibited the use of public funds to pay for abortion unless abortion was necessary to save the mother's life. *Doe v Dep't of Soc Servs*, 439 Mich 650; 487 NW2d 166 (1992) (**undisclosed**).
- Judge Gleicher served as a lawyer for the ACLU to sue federal officials who tried to prevent a halfway-house resident from taking her baby's life after the first trimester had expired. ACLU of Michigan, *Federal Prisoner Almost Denied Reproductive Rights*, CIVIL LIBERTIES NEWSLETTER, Winter 2001, at 7, https://bit.ly/3sLm5Xm (**undisclosed**).

151. Counsel for Right to Life of Michigan and the Michigan Catholic Conference, John Bursch, received an electronic invitation to a status conference on May 2, 2022, which the non-adverse parties jointly requested right before the Attorney General's response to the ACLU and Planned Parenthood's preliminary injunction motion was due. But Judge Gleicher barred Mr. Bursch from silently observing the status conference and had him ejected from the Zoom meeting shortly after the proceedings began.

152. Judge Gleicher then issued a preliminary injunction order about two weeks later *without* holding the hearing her scheduling order indicated would be held approximately two weeks after the ACLU and Planned Parenthood filed their reply. Her order specifies that "[t]he parties have waived the requirement of a hearing under MCR 3.310(A)(1)," presumably at the status conference from which Judge Gleicher had counsel for Right to Life of Michigan and the Michigan Catholic Conference removed. 5/17/22 Op & Order at 25.

153. Judge Gleicher refused to dismiss the case for lack of jurisdiction even though there is no adversity between the parties or actual controversy, and the ACLU and Planned Parenthood's claims are moot and not ripe.

154. Judge Gleicher purported to find a right to abortion in the Michigan Constitution and enjoined the Attorney General—and all prosecuting attorneys under her "supervision"—from enforcing MCL 750.14. *Id.* at 27. She did so without the benefit of any adversarial briefing, argument, or hearing on the crucial question of whether the Michigan Constitution creates a right to abortion. And her injunction

order purports to bind non-parties who are not acting in concert with the Attorney General, in clear violation of MCR 3.310(C)(4).

155. Judge Gleicher's preliminary injunction order refuses to abide by this Court's published decision in *Mahaffey*, a case she personally litigated and lost on behalf of the same plaintiff, even though it has binding precedential effect under MCR 7.215. 5/17/22 Op & Order at 15–16.

156. Judge Gleicher's deep personal connections with the plaintiff (Planned Parenthood) and plaintiff's counsel (the ACLU), personal role in advocating their legal theories in *Mahaffey* and other cases designed to create an unrestricted right to abortion, as well as her conduct during the present litigation—all combined—creates an objective appearance of impropriety.

157. If this Court does not order the Court of Claims to dismiss this case in its entirety, it should issue an order vacating the Preliminary Injunction order and requiring Judge Gleicher to adhere to the objective appearance-of-impropriety standard and recuse herself from the case.

158. This Court is authorized to grant peremptory relief on preliminary hearing of an original action in lieu of proceeding to a full hearing on the merits. MCR 7.206(B)(4). Given the ongoing harm being caused by the Court of Claims's injunction and refusal to dismiss a collusive action over which it plainly lacks jurisdiction, Plaintiffs request that the Court grant peremptory relief.

CONCLUSION AND RELIEF SOUGHT

Judge Gleicher refused to dismiss the case for lack of jurisdiction even though the Attorney General—a preeminent supporter of abortion rights—admits there is no adversity between the parties or actual controversy because the Attorney General refuses to defend or enforce the challenged law. The ACLU and Planned Parenthood's claims are obviously moot and not ripe.

Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference respectfully ask this Court to issue an order of superintending control requiring the Hon. Elizabeth Gleicher of the Court of Claims to dismiss the case for lack of jurisdiction. Doing so will not prevent *other* adverse cases from moving forward. As the Attorney General noted, "Planned Parenthood would be better off if they were focusing on the governor's case and filing an amicus on behalf of the governor and her actions." Beth LeBlanc, *Nessel: Dismiss Planned Parenthood abortion case; Whitmer's suit should take precedence*, The Detroit News (May 3, 2022), https://bit.ly/3LrKaZJ.

At a minimum, Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference respectfully ask the Court to issue an order vacating the preliminary injunction order and requiring Judge Gleicher to adhere to the objective appearance-of-impropriety standard and recuse herself.

Respectfully submitted,

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