STATE OF MICHIGAN
IN THE COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients; and SARAH WALLETT, M.D., M.P.H., FACOG, on her own behalf and on behalf of her patients,

Plaintiffs,

v

ATTORNEY GENERAL OF THE STATE OF MICHIGAN, in her official capacity,

Defendant.
_____/

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

Proposed Amici Curiae Brief of Right to Life of Michigan and the Michigan Catholic Conference (1) in support of dismissal for lack of jurisdiction, (2) for recusal, and (3), if necessary, a briefing schedule

THIS CASE INVOLVES A CLAIM THAT A MICHIGAN STATUTE IS UNCONSTITUTIONAL

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over a matter that lacks an actual controversy and adverse parties.

Amici answer: No.

2. Whether a disinterested observer would question the presiding judge's partiality where she previously represented Plaintiff while working for Plaintiff's counsel, litigating substantially similar issues as those presented here, and where the presiding judge has, since taking the bench, continued to make annual donations to Plaintiff.

Amici answer: Yes.

3. Assuming that the presiding judge declines to recuse and refuses to dismiss a case that lacks any actual controversy or adverse parties, whether a briefing schedule should be set so that Amici may seek to intervene as plaintiffs and to file a disqualification motion.

Amici answer: yes.

STATEMENT OF INTEREST

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, the subject of this case.

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.

INTRODUCTION

Amici Right to Life of Michigan and the Michigan Catholic Conference urge this Court to immediately dismiss this action for lack of jurisdiction.

On April 7, 2022, Governor Gretchen Whitmer took the extraordinary action of filing a lawsuit in Oakland County Circuit Court to invalidate MCL 750.14, a Michigan law on the books since 1931 and which the Governor is supposed to faithfully enforce. See Const 1963, art 5, § 8 (Governor must take care "that the laws be faithfully executed"). The same day, the Governor sent an Executive Message requesting that the Michigan Supreme Court authorize the circuit court to certify the questions that the case presents. Yet still on the same day, Planned Parenthood, represented by ACLU attorneys, filed the present lawsuit in this Court against Attorney General Dana Nessel, seeking substantively identical relief under virtually indistinguishable legal theories. The Attorney General promptly issued a prepared public statement declaring that she would not defend MCL 750.14—even though that is her job—unless a court orders her to do so. And all three legal actions are founded on an event that has not happened yet: the possibility that the U.S. Supreme Court may overturn *Roe v Wade*, 410 US 113 (1973). Governor Whitmer then used her flouting of Michigan law to initiate a national fundraising campaign.

Any one of these factors should cause a court to pause and question whether it is being used as a political football in a matter which should be pursued through the democratic process—either a legislative enactment or a ballot initiative. (In fact, Plaintiff Planned Parenthood is already supporting such an initiative that is gathering signatures right now.) But this Court need not get involved for a more

basic reason: it lacks jurisdiction. Where, as here, there is no adversity of parties nor an actual case or controversy, the case cannot move forward. Full stop.

Amici Right to Life of Michigan and the Michigan Catholic Conference also file this brief for a second reason: to respectfully suggest that recusal is warranted. The presiding judge, who in private practice used to represent Planned Parenthood on behalf of the ACLU in seeking to invalidate Michigan pro-life laws, who has received an award from Planned Parenthood, and who continues to make annual contributions to Planned Parenthood since taking the bench, seeks to preside over a case where the ACLU represents Planned Parenthood, seeking to invalidate all of Michigan's pro-life laws and to create a non-existent right to abortion in Michigan's Constitution. Because any reasonable, disinterested observer would question the appearance of the judge's impartiality in such circumstances, recusal is required under Michigan's Code of Judicial Conduct.

If the presiding judge declines to recuse and further declines to dismiss an unripe case that lacks adverse parties, the People of Michigan will reasonably ask whether the Michigan judiciary really serves as an independent arbiter of justice or is instead merely a tool for parties to obtain political goals they have been unable to achieve through ordinary, democratic processes. In that unlikely event, Right to Life of Michigan and the Michigan Catholic Conference respectfully request that the Court set a briefing schedule so that they and others can (1) move to intervene as plaintiffs in this case, seeking a declaration that MCL 750.14 and any other Michigan statute or regulation that protects innocent, unborn life is valid as a matter of Michigan and federal constitutional law, and (2) move to disqualify.

BACKGROUND

In 1931, Michigan legislators enacted MCL 750.14, a law that makes it a felony for any person in Michigan to perform an abortion unless necessary to save the life of the mother. The law does not target women, only medical professionals or others who seek to take innocent, unborn life or who endanger the health and safety of women. The 91-year-old law has existed side-by-side peaceably with the Constitution that Michigan citizens ratified in 1963. And in a case personally litigated by the presiding judge, the Michigan Court of Appeals has already held that Michigan's Constitution does *not* secure a right to abortion independent of the abortion right that the U.S. Supreme Court found in the constitutional "penumbras" in *Roe v Wade*. *Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997) (per curiam). The Michigan Supreme Court in *People v Bricker*, 389 Mich 524; 208 NW2d 172 (1973), judicially modified the statute so that it would comport with *Roe*.

Against this backdrop, the Governor, Attorney General, and Planned Parenthood have concocted an extraordinary, three-pronged attack on Michigan law, of which this lawsuit represents one part. All three attacks are premised on a hypothetical future event: that the U.S. Supreme Court in *Dobbs v Jackson Women's Health Org*, No 19-1392, may overrule *Roe*. See, e.g., V Compl ¶¶ 27–28 ("The Michigan Supreme Court's construction of" MCL 750.14 incorporates a federal constitutional abortion doctrine that is "at risk of significant modification by the United States Supreme Court's forthcoming decision in the *Dobbs* case, which presents the question whether *Roe v Wade*—on which the *Bricker* construction is founded—should be overruled." "The United States Supreme Court could issue its

decision in *Dobbs* any day….") (citation omitted); see also Br in Supp of Governor's Exec Message at 10–11, *Whitmer v Linderman*, No 164256 (Mich Sup Ct Apr 7, 2022) (same concerns about "U.S. Supreme Court's looming decision in *Dobbs*").

Because these are anticipatory lawsuits, there are no facts or even controversies presented on which a court could opine. For example, if a Michigan state court were to "find" a constitutional right to abortion in Michigan's 1963 Constitution—which is just as silent about the subject as is the federal Constitution—the Court would have to articulate the contours of that right. Does that purported right prevent laws that reasonably require medical providers to notify the parents of minor children before performing an abortion procedure? Does it stop the State from imposing requirements that protect the health and safety of women undergoing hospital procedures, such as admission privileges at a nearby hospital? Does it cut short the State's ability to require that a mother is adequately informed before she consents to have the life of her baby taken? It is impossible to answer these questions without facts and an actual controversy.

What's more, there are no adverse parties here. After Plaintiff Planned Parenthood filed this suit, Defendant Attorney General Nessel announced that she will not defend Michigan law nor create a firewall that would allow other members of the Attorney General's office to do so unless ordered by a court. Dave Boucher, *Nessel cites own abortion, says AG's office won't defend Michigan in lawsuit*, Detroit Free Press (Apr 7, 2022), https://bit.ly/3vwxyL1. And while every Michigan Attorney General's primary duty is to defend Michigan laws, it would be inappropriate for a court to force the Attorney General to perform a discretionary act.

ARGUMENT

I. This Court should dismiss this case for lack of jurisdiction.

This Court lacks jurisdiction to resolve Plaintiffs' complaint for three, fundamental reasons: (1) the lack of adverse parties, (2) the lack of an actual case or controversy, and (3) the lack of ripeness. The case should be dismissed.

The Michigan Constitution vests Michigan courts with "the judicial power of the state." Const 1963, art 6, § 1. The Michigan Supreme Court has "described that power as 'the right to determine *actual controversies* arising between *adverse litigants*, duly instituted in courts of proper jurisdiction." *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) (emphasis added) (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)). So, even when a party seeks a declaratory judgment, the case must present "adverse interest[s]" that form an actual controversy. *Associated Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 126; 693 NW2d 374 (2005), overruled on other grounds by *Lansing Schs Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 372 n20; 792 NW2d 686 (2010); MCR 2.605 (requiring an actual controversy).

Absent adversity, a lawsuit like this one is nothing more than "a friendly scrimmage brought to obtain a binding result that both sides desire." *League of Women Voters v Sec'y of State*, 506 Mich 905; 948 NW2d 70, 70 (2020) (Viviano, J, concurring). Except whereas a "scrimmage" has two opposing sides—as did the *League of Women Voters* case—this proceeding lacks any. It consists of Plaintiffs

and a Defendant who all agree on what they would like the Court to do. Accordingly, the Court "must instead wait for an 'actual controversy where the stakes of the parties are committed and the issues developed *in adversary proceedings*.'" *In re Constitutionality of 2018 PA 368 & 369*, 936 NW2d at 241 (Clement, J, concurring) (cleaned up) (quotation omitted).

Start with first principles. The U.S. Supreme Court has long recognized that it lacks authority to adjudicate a case when both sides of the "dispute" want the same result. *E.g.*, *Moore v Charlotte-Mecklenburg Bd of Educ*, 402 US 47, 47–48 (1971) (per curiam) (dismissing case involving a plaintiff and defendant who agreed a law was valid and should be upheld). The U.S. Supreme Court has done the same even as to agreed-upon *issues*, despite the existence of adversity on other claims in the case. For example, in *Webster v Reproductive Health Servs*, 492 US 490 (1989), the Court dismissed one of multiple claims because the appellees abandoned their argument as to that claim, *id.* at 512–13. And in *Williams v Zbaraz*, the Court reached several issues in the case but vacated a lower-court judgment in part for lack of jurisdiction based on the lack of party adversity as to that issue. 448 US 358, 367 (1980).

The reason for all this is because courts cannot fulfill the judicial role absent party adversity:

> [A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court. [*Lord v Veazie*, 49 US (8 How) 251, 255 (1850).]

Any other practice turns courts into "self-directed boards of legal inquiry and research." *Carducci v Regan*, 714 F2d 171, 177 (CA DC, 1983) (Scalia, J).

Michigan state-court jurisdiction is no different, being "limited to determining rights of persons or of property, *which are actually controverted* in the particular case before it." *Anway*, 211 Mich at 615 (emphasis added) (cleaned up). A "controversy must be real and not *pro forma*," even when a *pro forma* case presents "real questions." *Id.* at 612 (cleaned up). Otherwise, "the most complicated and difficult questions of law … might be settled … when no real controversy or adverse interests exist." *Id.* (cleaned up). Indeed, the "actual controversy" requirement that MCR 2.605(A)(1) imposes on declaratory-judgment actions "subsume[s] the limitations on litigants' access to the courts imposed by [the Michigan Supreme] Court's standing doctrine." *Associated Builders & Contractors*, 472 Mich at 126.

Here, Plaintiffs and the Attorney General are not adverse; they are in lockstep. The Attorney General will not defend this lawsuit or MCL 750.14 unless a court orders her to do so. And it would be inappropriate for a court to order the Attorney General to defend a law that she believes to be unconstitutional, even if that belief is erroneous. Such an order amounts to mandamus, an extraordinary remedy that can only be used to compel governmental acts that are ministerial in nature. *Citizens for Protection of Marriage v Bd of State Canvassers,* 263 Mich App 487, 492; 688 NW2d 538 (2004) (per curiam). Accordingly, this Court should "wait for an actual controversy where the stakes of the parties are committed and the issues developed in adversary proceedings." *In re Constitutionality of 2018 PA 368 & 369*, 936 NW2d at 241 (Clement, J., concurring) (quotation omitted).

The Court also lacks jurisdiction because this case is not ripe. In addition to a case or controversy with adverse parties, justiciability requires a ripe dispute. A Michigan "court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Anway*, 211 Mich at 615. Ripeness prevents courts from adjudicating hypothetical claims before any actual injury has taken place. Accordingly, a claim is not ripe if it depends on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v Union Carbide Agric Prods Co*, 473 US 568, 580–81 (1985) (citation omitted); see also *Dep't of Soc Servs v Emmanuel Baptist Preschool*, 434 Mich 380, 389; 455 NW2d 1 (1990) (mem) (declining to decide whether state law violated the defendants' free-exercise and freedom-of-association claims because the State had not exercised its statutory authority, "making these issues unripe for review"); *In re Indep Citizens Redistricting Comm'n for State Legis and Cong Dist's Duty to Redraw Dists by Nov 1, 2021*, 507 Mich 1025; 961 NW2d 211, 213 (2021) (Welch, J., concurring) ("a majority of this Court believes that the anticipatory relief sought is unwarranted").

Here, Plaintiffs are under no imminent threat of prosecution. *Roe* has protected their conduct in taking innocent, human life for nearly half a century. It is not clear how the U.S. Supreme Court will rule in *Dobbs*. And even if *Dobbs* eventually overturns *Roe* in whole or in part, a prosecutor would still need to make the decision to enforce MCL 750.14 against these Plaintiffs. This case is not ripe.

II. The presiding judge should recuse herself.

Under the Michigan Court Rules, a judge should recuse herself when, "based on objective and reasonable perceptions," she "has either (i) a serious risk of actual bias impacting the due process rights of a party, as enunciated in *Caperton v Massey*, 556 US 868 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." MCR 2.003(C)(1)(b) (cleaned up). That means that a judge must "accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." Michigan Code of Judicial Conduct Canon 2A.

Here, the presiding judge has served as an ACLU lawyer for Plaintiff Planned Parenthood in challenging a Michigan pro-life law requiring informed consent before an abortion procedure may take place. *Mahaffey v Attorney General*, 222 Mich App 325; 564 NW2d 104 (1997) (per curiam). The presiding judge has 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). The presiding judge has served as a lawyer for the ACLU and represented Planned Parenthood in challenging a Michigan pro-life law requiring minors to obtain the consent of their parents before obtaining an abortion. UPI, *Judge strikes down parental consent law* (Aug. 5, 1992).[1] The presiding judge has served as a lawyer for the ACLU and represented a halfway-house resident against federal

[1] https://www.upi.com/Archives/1992/08/05/Judge-strikes-down-parental-consent-law/3640712987200/

officials who tried to prevent the 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.[2] The presiding judge received the "Planned Parenthood Advocate Award" in 1998. ICLE, *Contributor Directory*.[3] And the presiding judge disclosed that she makes "yearly contributions to Planned Parenthood of Michigan." Letter from Jerome W. Zimmer, Jr., Clerk of Mich Court of Claims, to Counsel (Apr 14, 2022). Notably, the presiding judge did not disclose her work in the several additional matters noted above, or her Planned Parenthood award.

This action is brought by the ACLU on behalf of Planned Parenthood. And while the presiding judge may believe "she can sit on this case with requisite impartiality and objectivity," Clerk Zimmer Letter, the test is whether the 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." *Caperton*, 556 US at 888 (quoting ABA Model Code, Canon 2A, Commentary) (emphasis added). Given her long history of working with the ACLU in support of Planned Parenthood and its allies on substantially similar matters—both the matter the judge disclosed and those noted above—and the fact that her charitable contributions are effectively helping fund this litigation, there can be no doubt this conduct would create in reasonable minds a perception that the judge's ability to rule with impartiality has been compromised. Recusal is warranted.

[2] https://www.aclumich.org/sites/default/files/pdfs/winter01.pdf
[3] https://www.icle.org/modules/directories/contributors/bio.aspx?Pnumber=P30369

III. At a minimum, this Court should set a briefing schedule for amici to file a motion to intervene and a motion to recuse.

If the presiding judge declines to recuse and decides to move forward with this case despite the lack of a case or controversy, the absence of adverse parties, and the want of a ripe dispute, then amici Right to Life of Michigan and the Michigan Catholic Conference respectfully request that the Court set a briefing schedule for them, and others, that would allow for the filing of motions to intervene as plaintiffs, defendants, or intervenors in support of neither party, and motions to disqualify under MCR 2.003. (Because amici are not parties, they cannot file a disqualification motion now.)

Defendant Attorney General Dana Nessel, as well as Michigan's Governor, have both made crystal clear their belief that MCL 750.14 violates Michigan's Constitution. If this Court has jurisdiction to declare that MCL 750.14—as well as "any other Michigan statute or regulation to the extent that it prohibits abortion"—is unconstitutional at Plaintiffs' request, see V Compl, Relief Requested, then it certainly has jurisdiction to declare that MCL 750.14 is constitutional, either because Michigan's Constitution is completely silent about a right to abortion, or because the Fourteenth Amendment to the U.S. Constitution prohibits any state from depriving "any person of life" without due process, and medical science definitively establishes that life begins at conception. But there is no need for this Court to reach those merits issues given the lack of justiciability in this premature and improper case.

CONCLUSION

In recently agreeing that a case should be dismissed for lack of an actual case or controversy and the absence of adverse parties, Michigan Supreme Court Justices Cavanagh and Bernstein observed that "Michigan's citizens follow the law. And they will, undoubtedly, continue to follow the existing laws unless those laws are held to be unconstitutional by order of this Court in an actual case or controversy." *In re Constitutionality of 2018 PA 368 & 369*, 936 NW2d at 260. Their confidence is equally well-placed here. The Court should dismiss this case for lack of jurisdiction and decline to wade into a hotly contested political issue that the Michigan Constitution does not address until a case is filed with actual facts, an actual controversy, and actual, adverse parties.

Respectfully submitted,

Dated: April 20, 2022

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