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.

_____________________________________/

Case No. 361470

PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING JURISDICTION FOR SUPERINTENDING CONTROL

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

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TABLE OF CONTENTS

Index of Authorities iii

Introduction 1

Argument 1

I. Under MCR 3.302, this Court has jurisdiction to grant an order of superintending control when an appeal is not available to Plaintiffs. It makes no difference that others may be able to appeal 1

II. Plaintiffs cannot intervene in the Court of Claims to appeal its preliminary-injunction order 5

III. Prosecutors Jarzynka and Becker lack any adequate remedy for the violation of their due process rights 9

Conclusion 11

RECEIVED by MCOA 7/1/2022 12:57:34 PM

INDEX OF AUTHORITIES

Cases

Barham v Workers' Comp Appeals Bd, 184 Mich App 121; 457 NW2d 348 (1990) 4

Broadrick v Oklahoma, 413 US 601; 93 S Ct 2908 (1973) 7

Cahill v Fifteenth District Judge, 393 Mich 137; 224 NW2d 24 (1974) 3

Chrysler Corp v Mich Civil Rights Comm'n, 68 Mich App 283; 242 NW2d 556 (1976) 4

Council of Organizations & Others for Educ About Parochiaid v State, 321 Mich App 456; 909 NW2d 449 (2017) 5, 8

Doan v Kellogg Cmty Coll, 80 Mich App 316; 263 NW2d 357 (1977) 6

E Jordan Iron Works v Workers' Comp Appeals Bd, 124 Mich App 324; 335 NW2d 23 (1983) 5

Estes v Titus, 481 Mich 573; 751 NW2d 493 (2008) 8

Frank v William A Kibbe & Assoc, Inc, 208 Mich App 346; 527 NW2d 82 (1995) 4

Hanselman v Killeen, 419 Mich 168; 351 NW2d 544 (1984) 7

In re McCarrick/Lamoreaux, 307 Mich App 436; 861 NW2d 303 (2014) 4

In re Payne, 444 Mich 679; 514 NW2d 121 (1994) 2

In re Rood, 483 Mich 73; 763 NW2d 587 (2008) 10, 11

Jacobs v City of Highland Park Police & Fire Civil Serv Comm'n, 98 Mich App 691; 296 NW2d 634 (1980) 4

Matter of Hague, 412 Mich 532; 315 NW2d 524 (1982) 3

Matthews v Blue Cross & Blue Shield of Mich, 456 Mich 365; 572 NW2d 603 (1998) 6, 7

Mays v Snyder, 323 Mich App 1; 916 NW2d 227 (2018) 6

McCahan v Brennan, 492 Mich 730; 822 NW2d 747 (2012) 4

Meda v City of Howell, 110 Mich App 179; 312 NW2d 202 (1981) 6

Mullaney v Wilbur, 421 US 684; 95 S Ct 1881(1975) 7

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RECEIVED by MCOA 7/1/2022 12:57:34 PM

Muskegon Cnty Bd of Comm'rs v Muskegon Circuit Judge, 188 Mich App 270; 469 NW2d 441 (1991) 7

Penson v Ohio, 488 US 75; 109 S Ct 346; 102 L Ed 2d 300 (1988) 10

People v Burton, 429 Mich 133; 413 NW2d 413 (1987) 2

People v Iannucci, 314 Mich App 452; 887 NW2d 817 (2016) 4

People v Peeler, ____ Mich ____, ____; ____ NW2d ____ (2022) (Docket No. 163667) 10

Pub Health Dep't v Rivergate Manor, 452 Mich 495; 550 NW2d 515 (1996) 3

Shaughnesy v Mich Tax Tribunal, 420 Mich 246; 362 NW2d 219 (1984) 2

The Cadle Co v City of Kentwood, 265 Mich App 240; 776 NW2d 145 (2009) 9

Varran v Granneman, 312 Mich App 591; 880 NW2d 242 (2015) 4

Statutes and Court Rules

MCL 600.6419 6

MCL 600.6419(7) 6

MCR 2.209 8

MCR 2.209(A)(3) 7

MCR 3.302 .... 1, 2, 5

MCR 3.302(B) 2, 4, 5

MCR 3.302(D)(2) 1, 2, 4

RECEIVED by MCOA 7/1/2022 12:57:34 PM

INTRODUCTION

This Court's June 27, 2022, order asks "whether this Court has jurisdiction over the present complaint in light of the availability of an appeal. See MCR 3.302(D)(2)." 6/27/22 Order at 1. The answer is yes, for three reasons. First, the question under MCR 3.302 and longstanding precedent is not whether *others* have a right to appeal but whether *the plaintiffs* requesting a superintending-control order have an appeal available. The Legislature's right to appeal is irrelevant here. Second, Plaintiffs cannot intervene as defendants in the Court of Claims to appeal the preliminary injunction because they are not state bodies or officials. The Court of Claims's limited jurisdiction deprives Plaintiffs of an ability to appeal the injunction order that uniquely harms them. Third, an order of superintending control is the only adequate remedy for the trial court's violation of Prosecutors Jarzynka and Becker's due process rights, which are unique to them and cannot be vindicated by the Legislature, either in the Court of Claims or on appeal.

Orders for superintending control were created precisely for cases like this one: where a trial court purports to exercise power over non-parties in a case where the trial court lacks jurisdiction, and the non-parties have no authority to intervene and appeal. This Court should grant the order immediately.

ARGUMENT

I. Under MCR 3.302, this Court has jurisdiction to grant an order of superintending control when an appeal is not available to *Plaintiffs*. It makes no difference that *others* may be able to appeal.

This Court's order questions its jurisdiction in light of the Legislature's intervention in the Court of Claims and a possible, interlocutory appeal. 6/27/22

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Order at 1. But under MCR 3.302, the question is not whether *others* have "an appeal . . . available," MCR 3.302(D)(2), but whether "another adequate remedy is *available to the party seeking the order*." MCR 3.302(B) (emphasis added). "[A]n appeal in the Supreme Court, the Court of Appeals, or the circuit court," MCR 3.302(D)(2), is simply the rule's hard-and-fast example of "another adequate remedy . . . available *to the party seeking the order*" that precludes "a complaint for superintending control," MCR 3.302(B) (emphasis added). Under the rule's plain language, *the Legislature's* ability to appeal has no effect on this Court's jurisdiction to grant *Plaintiffs'* request for an order of superintending control: only Plaintiffs' right to appeal matters.

A mountain of precedent makes this clear. For nearly 40 years, the Michigan Supreme Court has framed the question as whether "the *plaintiffs before the Court* might have obtained adequate relief . . . by appealing" the order. *Shaughnesy v Mich Tax Tribunal*, 420 Mich 246, 254; 362 NW2d 219 (1984) (emphasis added). "The only limit as to whether a complaint for superintending control can be filed is that an appeal must be unavailable to *the party seeking the order*." *People v Burton*, 429 Mich 133, 141; 413 NW2d 413 (1987) (emphasis added).

The Supreme Court has clarified how MCR 3.302(B) and MCR 3.302(D)(2) work together: "Superintending control is available only where *the party seeking the order* does not have another adequate remedy. MCR 3.302(B). An appeal would be an adequate remedy, and a complaint for superintending control must be dismissed when one is available. MCR 3.302(D)(2)." *In re Payne*, 444 Mich 679, 687; 514 NW2d 121 (1994) (emphasis added). In short, "[a]n order of superintending control will not

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be granted when t*he party seeking the order* is entitled to pursue an appeal." *Pub Health Dep't v Rivergate Manor*, 452 Mich 495, 500; 550 NW2d 515 (1996) (emphasis added).

Plaintiffs in this case are the ones "seeking" a superintending order, and they are not "entitled to pursue an appeal" of the Court of Claims order. Therefore, Plaintiffs fulfill requirements to obtain an order of superintending control. In contrast, the Legislature is not the party "seeking the order" for superintending control. Whether the Legislature can appeal is legally irrelevant.

Notably, the Michigan Supreme Court has explained that the availability-of-an-appeal analysis is not even jurisdictional but merely procedural:

> It is clear from this Court's opinion in *Cahill v. Fifteenth District Judge*, 393 Mich. 137, 224 N.W.2d 24 (1974), that availability of an appeal in the individual case does not preclude superintending relief when that procedure does not provide an adequate remedy. Implicit in *Cahill* is the idea that *a superior court always has jurisdiction to issue an order of superintending control and that adequacy of the appeal remedy is not a jurisdictional test but merely a procedural requirement to be met before relief can be granted*.

Matter of Hague, 412 Mich 532, 546-547; 315 NW2d 524 (1982) (emphasis added). So the actual issue in this case is not whether this Court has jurisdiction to issue an order for superintending control; such jurisdiction always exists. Instead, the only question is a procedural one: whether the plaintiffs seeking the order of superintending control have a right to appeal. Plaintiffs in this case do not have a right to appeal the Court of Claims order. Accordingly, relief through an order for superintending control "can be granted."

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Decades of this Court's case law agrees. *E.g.*, *People v Iannucci*, 314 Mich App 452, 546; 887 NW2d 817 (2016) ("[A] complaint seeking superintending control may not be filed *by a party* who has another adequate remedy available.") (emphasis added); *Barham v Workers' Comp Appeals Bd*, 184 Mich App 121, 131; 457 NW2d 348 (1990) ("An order of superintending control is not available *to a plaintiff* who has another adequate remedy by way of an appeal.") (emphasis added); *Jacobs v City of Highland Park Police & Fire Civil Serv Comm'n*, 98 Mich App 691, 702; 296 NW2d 634 (1980) ("A literal reading of [MCR 3.302(B) and MCR 3.302(D)(2)'s predecessors] would support dismissal of a writ of superintending control where the underlying statute gives *the petitioner* the right to appeal . . . .") (emphasis added); *Chrysler Corp v Mich Civil Rights Comm'n*, 68 Mich App 283, 289; 242 NW2d 556 (1976) (considering only "other avenues of review open *to the party* requesting an order of superintending control") (emphasis added).

This outcome is further supported by principles of statutory construction, which apply to the interpretation of court rules. *Frank v William A Kibbe & Assoc, Inc*, 208 Mich App 346, 350; 527 NW2d 82 (1995). When interpreting a court rule, this Court "must read the rule's provisions 'reasonably and in context.'" *In re McCarrick/Lamoreaux*, 307 Mich App 436, 446; 861 NW2d 303 (2014), citing *McCahan v Brennan*, 492 Mich 730, 740; 822 NW2d 747 (2012). The Court "should not read court rules in isolation." *Id*. Rather, to discern the drafter's true intent, the provision at issue "must be read as a whole." *Varran v Granneman*, 312 Mich App 591, 619; 880 NW2d 242 (2015) (citation omitted). Thus, MCR 3.302(D)(2)'s directive of dismissal when "an appeal is available" must be read in conjunction with the

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"Policy Concerning Use" of superintending-control, MCR 3.302(B), which expressly references subsection (D)(2) and frames the issue in terms of an adequate remedy "available to the party seeking the order…." As noted above, Michigan's appellate courts regularly have given the rule that reading.

MCR 3.302's plain text does not take the Legislature's potential appeal of the preliminary injunction into account. That feature is irrelevant to this Court's jurisdiction. All that matters is whether *Plaintiffs* have a right to appeal.

In addition, though the Legislature "may, on occasion, [be required] to defend against a meritless action, . . . no such consideration supports requiring [the Legislature] to participate in proceedings beyond the [Court of Claims's] jurisdiction." *E Jordan Iron Works v Workers' Comp Appeals Bd*, 124 Mich App 324, 332; 335 NW2d 23 (1983). Similarly, Plaintiffs in this case cannot be required to participate in a meritless proceeding which was "beyond the court's … jurisdiction."

The preliminary injunction entered by the Court of Claims "was one which it had no jurisdiction to enter." *Id.* Consequently, the Legislature's right to "appeal after further proceedings before the [Court of Claims is] . . . [in]adequate" and incapable of depriving this Court of jurisdiction to grant an order of superintending control to Plaintiffs. *Id.*

II. Plaintiffs cannot intervene in the Court of Claims to appeal its preliminary-injunction order.

The Court of Claims is no ordinary court, it "is a court of legislative creation" and "[i]ts statutory powers are explicit and limited." *Council of Organizations & Others for Educ About Parochiaid v State*, 321 Mich App 456, 466; 909 NW2d 449 (2017)

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(citations omitted). Reviewing those limitations shows that Plaintiffs cannot intervene in the Court of Claims to appeal its preliminary-injunction order. That means this Court has jurisdiction to enter an order of superintending control.

First, "'the Court of Claims is a court of limited jurisdiction which does not possess the broad and inherent powers of a constitutional court.'" *Id.* (quoting *Meda v City of Howell*, 110 Mich App 179, 183; 312 NW2d 202 (1981)). It may hear only claims against "the state or any of its departments or officers," MCL 600.6419, a term that explicitly refers to

> this state or any state governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of the state, or an officer, employee, or volunteer of this state or any governing, legislative, or judicial body, department, commission, board, institution, arm, or agency of this state, acting, or who reasonably believes that he or she is acting, within the scope of his or her authority while engaged in or discharging a government function in the course of his or her duties. [MCL 600.6419(7)]

In short, the Court of Claims may hear claims against *state bodies* or *state officers*. Non-state actors are categorically outside its jurisdiction.

Second, none of Plaintiffs are state bodies or state officers. "[T]he jurisdiction of the Court of Claims does not extend to local officials" like county prosecutors. *Mays v Snyder*, 323 Mich App 1, 47; 916 NW2d 227 (2018) (citing *Doan v Kellogg Cmty Coll*, 80 Mich App 316, 320; 263 NW2d 357 (1977)). County prosecutors are quintessential examples of a *local official*. Their election and jurisdiction are not statewide but limited to each county.

The Supreme Court has made this explicit: prosecutors are "the chief law enforcement officer of the county." *Matthews v Blue Cross & Blue Shield of Mich*,

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456 Mich 365, 384; 572 NW2d 603 (1998). "[T]he county prosecutor and the sheriff are clearly local officials elected locally and paid by the local government." *Hanselman v Killeen*, 419 Mich 168, 188; 351 NW2d 544 (1984). As this Court has recognized, a list of "local officials" necessarily includes "the sheriff, *prosecutor*, judges, the county commissioners, and the county executive." *Muskegon Cnty Bd of Comm'rs v Muskegon Circuit Judge*, 188 Mich App 270, 274; 469 NW2d 441 (1991) (emphasis added).[1]

Prosecutors Jarzynka and Becker are local (not state) officials. Because Planned Parenthood could not sue either Prosecutors Jarzynka and Becker (local officials and nonstate actors) in the Court of Claims, the prosecutors cannot intervene in the trial court due to a lack of jurisdiction. What's more, Right to Life of Michigan and the Michigan Catholic Conference are private, non-governmental entities; no one claims that they are state bodies or state officers. So there is no way any of the Plaintiffs could intervene as defendants in the Court of Claims.

As the Supreme Court explained in a comparable situation in which a creditor attempted to intervene in a divorce action contrary to the court's jurisdiction:

> Plaintiff's motion to intervene was based on MCR 2.209(A)(3), which allows an intervention of right in cases in which the intervenor's interests are not adequately represented by the parties. The court rule would otherwise have applied in the divorce because neither of the Tituses adequately represented plaintiff's interest as a potential

[1] To the extent a federal court suggests that Michigan law is otherwise, its reading of state law is "obviously not binding." *Broadrick v Oklahoma*, 413 US 601, 617 n16; 93 S Ct 2908 (1973). This Court and the Supreme Court are the "ultimate expositors of state law." *Mullaney v Wilbur*, 421 US 684, 691; 95 S Ct 1881(1975).

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> creditor. However, the rule did not apply because the creditor sought to intervene in a divorce action in which *the court did not have statutory jurisdiction to decide the intervenor's rights*. Court rules cannot establish, abrogate, or modify the substantive law. [*Estes v Titus*, 481 Mich 573, 583–84; 751 NW2d 493 (2008) (emphasis added)]

The Court of Claims must have jurisdiction for Plaintiffs to intervene. MCR 2.209's intervention rule "cannot . . . abrogate[ ] or modify the substantive law" *Id.* As this Court held in a case where Plaintiff the Michigan Catholic Conference (and others) moved to intervene as defendants in a Court of Claims action against the State of Michigan and various state officers,

> [I]n *Estes*, 481 Mich. at 583, 751 N.W.2d 493, the Supreme Court stated that MCR 2.209 "would otherwise have applied" but that it did not, in fact, apply because "the court did not have statutory jurisdiction to decide the intervenor's rights." Just as the court did not have statutory jurisdiction to decide the intervenor's rights" in *Estes*, *the Court of Claims does not have statutory jurisdiction to decide the potential intervenors' rights as defendants in the present case*. The Court of Claims correctly held that given the nature of the proceedings, MCR 2.209 is inapplicable because the Court of Claims lacked subject-matter jurisdiction over claims against appellants as defendants. [*Council of Organizations & Others for Educ About Parochiaid*, 321 Mich App at 468 (emphasis added)]

The Court of Claims must have jurisdiction to determine the rights of defendants, regardless of whether they are named in the original complaint or intervene as defendants later. But "the very essence of the Court of Claims is to hear claims against the state," *Id.* at 467. And, because Plaintiffs are not state bodies or officers, "the Court of Claims [does] not have subject-matter jurisdiction over" claims against them. *Id.* at 468 (quotation omitted).

As a result, Plaintiffs cannot intervene in the Court of Claims to appeal the preliminary-injunction order that purports to bind Prosecutors Jarzynka and

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Becker, and uniquely harms Right to Life of Michigan and the Michigan Catholic Conference. The Court of Claims lacked jurisdiction to order Prosecutors Jarzynka and Becker to do anything, just as the Court of Claims would lack authority to order a divorce. The preliminary injunction exceeds the trial court's jurisdiction and is "absolutely void." *Id.* at 466 (quotation omitted). Yet there is nothing Plaintiffs can do to intervene or appeal the injunction that harms them. Their *only* option was to seek an order of superintending control. Because Plaintiffs lack the ability to appeal, this Court plainly has jurisdiction to grant one. *Supra* Part I.

III. Prosecutors Jarzynka and Becker lack any adequate remedy for the violation of their due process rights.

To obtain an order of superintending control, the plaintiff must show "the absence of an adequate legal remedy." *The Cadle Co v City of Kentwood*, 265 Mich App 240, 246; 776 NW2d 145 (2009) (quotation omitted). Prosecutors Jarzynka and Becker lack any adequate remedy for the violation of their due process rights, which are unique to them and cannot be vindicated by the Legislature either in the Court of Claims or on appeal.

Consider what happened here. Planned Parenthood, the Attorney General, and the trial-court judge participated in a non-adverse proceeding—where Planned Parenthood lacked standing to sue (since it was under no enforcement threat by the Attorney General) and the case was moot and unripe to boot—that resulted in an injunction that cannot be contested or appealed by county prosecutors—the very parties the trial court's order purports to control. But non-adverse proceedings

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cannot produce a valid interpretation of the Michigan Constitution or a lawful preliminary injunction. As Justice Bernstein recently stated:

> [P]rocedure matters. It is, in fact, the foundation of our adversarial process. Indeed, our adversarial system of justice 'is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.' *Penson v Ohio*, 488 US 75, 84; 109 S Ct 346; 102 L Ed 2d 300 (1988) (quotation marks and citations omitted) . . . ." [*People v Peeler*, ____ Mich ____, ____; ____ NW2d ____ (2022) (Docket No. 163667) (BERNSTEIN, J., concurring); slip op at 2.]

Justice Bernstein further explained that "[p]roper procedure is arguably most necessary in cases of great public significance," and "[i]n such cases, adherence to proper procedure serves as a guarantee to the general public that Michigan's courts can be trusted to produce fair and impartial rulings for all [parties]." *Id*. at 4.

It is apparent that adversity was lacking below. To her credit, the Attorney General admitted as much on multiple occasions. Yet the Court of Claims went full-steam ahead and, in the process, violated foundational principles of due process.

"The fundamental requisite of due process of law is the opportunity to be heard. . . . at a meaningful time and in a meaningful matter." *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2008) (quotations omitted). The Court of Claims action never gave Prosecutors Jarzynka and Becker any opportunity for a meaningful hearing. As Planned Parenthood designed, it *could not* because the Court of Claims lacks jurisdiction to determine county prosecutors' rights or obligations. *Supra* Part II.

That violates due process. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

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pendency of the action and afford them an opportunity to present their objections." *In re Rood*, 483 Mich at 92 (quotation omitted). Because Prosecutors Jarzynka and Becker never received notice or an opportunity to object to the preliminary injunction that purports to bind them, either in the trial court or on appeal, the Court of Claims action violated their due process rights. The *only* way to vindicate their constitutional rights is for this Court to grant Prosecutors Jarzynka and Becker's request for an order of superintending control. And it should do so without delay to restore the rule of law in Michigan.

CONCLUSION

Just as this Nation is emerging from 49 years of turmoil caused by judicial short-circuiting of the political process with a fabricated federal constitutional right to abortion, the Court of Claims has improperly acted in a non-adversarial action between Planned Parenthood of Michigan and the Attorney General to re-inflict that state of affairs on the People of Michigan, contrary to the policy of this State as represented in a validly enacted law. The Court of Claims exceeded its jurisdiction by entering a preliminary injunction and failed to perform its clear legal duty to dismiss Planned Parenthood's non-adverse, non-justiciable, unripe, and moot case. The Legislature's ability to appeal is irrelevant. Plaintiffs have no ability to intervene and appeal the unlawful order that purports to bind Prosecutors Jarzynka and Becker. Their *only* remedy is to seek an order of superintending control, and this Court has jurisdiction to grant one. It should do so immediately.

Accordingly, Prosecutors Jarzynka and Becker, Right to Life of Michigan, and the Michigan Catholic Conference respectfully ask this Court to issue an order of

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superintending control, vacate the injunction, and dismiss the underlying case for lack of jurisdiction forthwith.

Respectfully submitted,

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