STATE OF MICHIGAN

IN THE COURT OF APPEALS

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-Appellees,

v

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

Defendant-Appellee,

and

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Intervenor Defendants-Appellants.

Court of Appeals Docket No. 363125

Court of Claims Case No. 22-000044-MM

RIGHT TO LIFE OF MICHIGAN AND MICHIGAN CATHOLIC CONFERENCE'S BRIEF IN SUPPORT OF MOTION TO INTERVENE AS APPELLANTS

This Case Involves a Claim That a Michigan Statute Is Unconstitutional

Deborah LaBelle (P31595)
221 N. Main St., Suite 300
Ann Arbor, MI 48104
(734) 996-5620
deblabelle@aol.com

Mark Brewer (P35661)
17000 W. 10 Mile Road
Southfield, MI 48075
(248) 483-5000
mbrewer@goodmanacker.com

Fadwa A. Hammoud (P74185)
Heather S. Meingast (P55439)
Elizabeth Morrisseau (P81899)
Adam R. deBear (P80242)
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 30736
Lansing, MI 48909
(517) 335-7659
meingasth@michigan.gov
morrisseaue@michigan.gov
debeara@michigan.gov

Counsel for Defendant-Appellee Attorney General of the State of Michigan

Hannah Swanson
PLANNED PARENTHOOD FEDERATION OF AMERICA
1110 Vermont Avenue NW, Suite 300
Washington, DC 20005
(202) 803-4030
hannah.swanson@ppfa.org

Susan Lambiase
PLANNED PARENTHOOD FEDERATION OF AMERICA
123 William Street, 9th Floor
New York, NY 10038
(212) 261-4405
susan.lambiase@ppfa.org

Bonsitu Kitaba-Gaviglio (P78822)
Daniel S. Korobkin (P72842)
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, MI 48201
(313) 578) 6800
bkitaba@aclumich.org
dkorobkin@aclumichi.org

Michael K. Steinberg (P43085)
Hannah Shilling*
CIVIL RIGHTS LITIGATION INITIATIVE
UNIVERSITY OF MICHIGAN LAW SCHOOL
701 S. State Street, Suite 2020
Ann Arbor, MI 48109
(734) 763-1982
mjsteinb@umich.edu

**Student attorney practicing pursuant to MCR 8.120*

Counsel for Plaintiffs-Appellees Planned Parenthood of Michigan and Sarah Wallett, M.D., M.P.H., FACOG

H. Christopher Bartolomucci*
Nicholas P. Miller (P70694)
James A. Heilpern*
Cristina Martinez Squiers*
Annika M. Boone*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
cbartolomucci@schaerr-jaffe.com
nmiller@schaerr-jaffe.com
jheilpern@schaerr-jaffe.com
csquiers@schaerr-jaffe.com
aboone@schaerr-jaffe.com

**Pro hac vice application forthcoming*

Counsel for Intervenor-Defendants-Appellants Michigan House of Representatives and Michigan Senate

John J. Bursch (P57679)
ALLIANCE DEFENDING FREEDOM
440 First Street NW, Street 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

Michael F. Smith (P49472)
THE SMITH APPELLATE LAW FIRM
1717 Pennsylvania Avenue, NW
Suite 1025
Washington, DC 20006
(202) 454-2860
smith@smithpllc.com

Rachael M. Roseman (P78917)
Jonathan B. Koch (P80408)
SMITH HAUGHEY RICE & ROEGGE
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 458-3620
rroseman@shrr.com
jkoch@shrr.com

Counsel for Proposed Intervenors-Appellants Right to Life of Michigan and Michigan Catholic Conference

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INTRODUCTION

Since early April, a legal battle over the constitutionality of MCL 750.14 has raged in every level of Michigan's court system—at nearly all critical moments, featuring only one side of the story. In *this* iteration of the battle, Plaintiff Planned Parenthood of Michigan, seeking to have MCL 750.14 declared unconstitutional, not only "sued" its pro-abortion ally, Attorney General Dana Nessel, but did so in the Court of Claims, where no non-state entity—no matter how strong its interest in the subject matter—could intervene and upset the arrangement. After the case was assigned to a judge who herself is a former Planned Parenthood honoree and volunteer attorney, and current annual donor, the end result was practically foreordained: an invented constitutional "right" to abortion despite this Court's rejection of it a quarter-century ago, when the same Court of Claims judge—then an attorney—unsuccessfully advocated for it.

That ruling is now before this Court. Our adversarial system of justice demands that at some point this important legal debate should hear from other voices beside those who have dedicated their careers to seeking an unfettered right to abortion. That time is now. Right to Life of Michigan and the Michigan Catholic Conference are the only persons who have been closely involved in *all* the litigation over MCL 750.14, and their interest in intervening to defend its constitutionality is unsurpassed, even by the Legislature. Once they filed their first *amicus* brief below, the Attorney General agreed with them that the Court of Claims lacked jurisdiction. And it was their superintending-control complaint, filed with two county prosecutors, that led this Court to declare that the Court of Claims' preliminary injunction barring

MCL 750.14's enforcement does not extend to prosecutors. The collusive efforts of Planned Parenthood and the Attorney General threaten to undo decades of Proposed Intervenors' work, upend existing pro-life laws they sponsored or defended, and nullify their future efforts to protect unborn life. As is explained below, Right to Life of Michigan and the Michigan Catholic Conference meet all the requirements of MCR 2.209 for both mandatory and permissive intervention.

The Supreme Court agrees. Earlier this month, that court ordered onto the November ballot a measure that, if approved, will create the very thing the Court of Claims here has invented, a constitutional right to abortion. The Supreme Court's ruling was fractured, with a 5-2 vote and four separate opinions. Yet *all seven justices* agreed that the pro-life ballot-question committee spearheaded by Right to Life of Michigan and the Michigan Catholic Conference had a sufficient interest to warrant intervention, and granted it. *Reprod Freedom for All v Bd of State Canvassers*, __ Mich __ (Order), 2022 WL 4117489, at *1 (Sept. 8, 2022).

As discussed below, the same result should occur here. Allowing Right to Life of Michigan and the Michigan Catholic Conference to intervene as appellants is the only way to ensure their ability to protect their exceptional and weighty interests in passing, sustaining, and defending Michigan's pro-life laws.

STATEMENT OF FACTS

In 1931, the Legislature enacted MCL 750.14 to protect unborn children by making all abortions illegal, except when necessary to preserve the life of the mother. *See* MCL 750.14. The law has remained on the books, both before and after the current version of the Constitution was ratified in 1963, co-existing peaceably with that Constitution for nearly 60 years. Indeed, the 1963 Constitution is silent about abortion. No one who ratified that Constitution believed that they were invalidating MCL 750.14, which had already been on the books for 32 years. In fact, the same generation who ratified the Constitution voted to keep MCL 750.14 when they overwhelmingly rejected Proposal B in 1972. The one time a litigant raised a state right to abortion in the 1990s—represented by the Court of Claims judge below—this Court definitively held that "there is *no* right to abortion under the Michigan Constitution." *Mahaffey v Attorney General*, 222 Mich App 325, 336; 564 NW2d 104 (1997) (emphasis added).

I. Planned Parenthood files suit against the Attorney General and Proposed Intervenors argue the case should be dismissed.

On April 7, 2022, Planned Parenthood and one of its doctors filed suit against Attorney General Nessel in the Court of Claims, challenging MCL 750.14's constitutionality. *Planned Parenthood of Michigan v Attorney General of the State of Michigan*, Court of Claims No 22-000044-MM. The Attorney General promptly issued a prepared public statement declaring that she would not defend MCL 750.14. Because Attorney General Nessel has long agreed with Planned Parenthood's legal

position and declared that she would not enforce MCL 750.14 against anyone, there was no adversity between the original parties to the Court of Claims action.

Right to Life of Michigan and the Michigan Catholic Conference, as private organizations, could not intervene as defendants in the Court of Claims. *Council of Orgs & Others for Educ About Parochiaid v State*, 321 Mich App 456; 909 NW2d 449 (2017) (holding that only state entities and officials may intervene as defendants in Court of Claims actions). But they did everything legally possible to stop Planned Parenthood's lawsuit. On April 20, 2022, Proposed Intervenors filed a motion and proposed *amici curiae* brief with the Court of Claims. 4/20/22 Mot of Right to Life of Mich & the Mich Catholic Conf for Leave to File *Amicus Curiae* Brief, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM (**Exhibit 1**). The Court of Claims granted leave and accepted the *amici* brief the same day. 4/20/22 Order Granting Leave to File *Amicus Curiae* Briefing, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM (**Exhibit 2**).

Proposed Intervenors' *amici* brief maintained that the Court of Claims lacked jurisdiction because there was no adversity between the parties or actual controversy for the trial court to resolve, and the case was not ripe. They also argued that the presiding judge should recuse based on an objective appearance of impropriety. In support, Proposed Intervenors cited the presiding judge's current status as a donor to Planned Parenthood, her receipt of a Planned Parenthood award, her prior work as an ACLU attorney representing Planned Parenthood in abortion litigation, and

her direct representation of the plaintiffs in *Mahaffey* who tried (and failed) to create a state constitutional right to abortion decades earlier. Exhibit 2.

Notably, the Court of Claims Clerk's Office sent a letter to counsel informing them of some of the facts relevant to whether the presiding judge's involvement in the case would lead to an objective appearance of impropriety, but not others. 4/14/22 Letter from Clerk, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 2022-000044-MM (**Exhibit 3**). Right to Life of Michigan and the Michigan Catholic Conference were concerned. So, their counsel sent a letter to the Clerk's Office with a list of questions that they believed the presiding judge should answer. 4/29/22 Letter to Clerk, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 2022-000044-MM (**Exhibit 4**). Proposed Intervenors never received a response from the Court of Claims. When Counsel for Proposed Intervenors received a notice of a Zoom status conference and tried to attend, the presiding judge shut off his microphone and then disconnected him from the Zoom meeting. With no adverse party present at that status conference, it appears that Planned Parenthood and the Attorney General agreed that no one would ask the presiding judge to recuse herself and further agreed to dispense with oral argument as a prerequisite to the presiding judge ruling on Planned Parenthood's request for a preliminary injunction.

After the Court of Claims accepted Right to Life of Michigan and the Michigan Catholic Conference's *amici* brief, the Attorney General agreed with Proposed Intervenors' position that because there was no adversity between the parties or

actual controversy, the Court of Claims lacked jurisdiction.[1] Yet the Court of Claims refused to dismiss Planned Parenthood's case. On May 17, 2022, without a hearing or any opposition on the merits from the Attorney General, the only named defendant, the Court of Claims granted Planned Parenthood's request for a preliminary injunction and enjoined MCL 750.14's enforcement completely. 5/17/22 Opinion and Order, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No. 22-000044-MM. The Court of Claims' injunction purported to apply not just to the Attorney General's Office, but to every county prosecutor in the state. *Id.*

II. Proposed Intervenors file a superintending-control complaint, asking this Court to dismiss Planned Parenthood's case.

On May 20, 2022, Right to Life of Michigan and the Michigan Catholic Conference, along with Jackson County Prosecutor Jerard M. Jarzynka and Kent County Prosecutor Christopher R. Becker, filed a complaint for order of superintending control in this Court, asking the Court to order the Court of Claims to dismiss the case or vacate its preliminary injunction. 5/20/22 Compl for Order of Superintending Control, *In re Jarzynka, Ct of App No 361470* (**Exhibit 5**). Proposed

[1] *E.g.*, 5/5/22 Def's Resp to Pls' Mot for Prelim Inj at 1, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM ("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."); 5/12/22 Def's Surreply Br to Pls' 5/6/22 Reply at 2, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM (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.").

Intervenors' superintending-control complaint argued that the Court of Claims lacked jurisdiction because there was no adversity between the parties or actual controversy, Planned Parenthood lacked standing, the case was not ripe, and the dispute moot. *Id.* They also argued that *Mahaffey* required the Court of Claims to reject Planned Parenthood's claims. *Id.* Proposed Intervenors asked this Court to order the Court of Claims to dismiss the case for lack of jurisdiction or, at a minimum, vacate the preliminary injunction and order the presiding judge to recuse based on an objective appearance of impropriety. *Id.*

After comprehensive briefing, on August 1, 2022, this Court concluded that the Court of Claims lacked jurisdiction over county prosecutors because they are local—not state—officials. 8/1/22 Order at 2–5, *In re Jarzynka, Ct of App No 361470* (**Exhibit 6**). Thus, the Court of Claims' preliminary injunction did not apply to local prosecutors and Prosecuting Attorneys Jarzynka and Becker were free to enforce MCL 750.14. *Id.* This Court dismissed the complaint based on the standing doctrine. *Id.*[2]

III. Proposed Intervenors oppose Planned Parenthood's motion for summary disposition and the Court of Claims' permanent injunction enjoining MCL 750.14's enforcement.

Back in the Court of Claims, Planned Parenthood and the Legislature—which had intervened as a defendant to ensure that the court's injunction order did not become appeal proof—filed competing motions for summary disposition. On August

[2] Planned Parenthood has sought leave to appeal this Court's ruling that county prosecutors are local officials, and Proposed Intervenors have sought leave to appeal this Court's ruling that they lacked standing to file a complaint for order of superintending control. *In re Jarzynka*, S Ct Nos 164656 & 164753.

22, 2022, Right to Life of Michigan and the Michigan Catholic Conference filed a motion and proposed *amici curiae* brief, opposing Planned Parenthood's motion for summary disposition and supporting the Legislature's motion for summary disposition. 8/22/22 Mot & Br of Right to Life of Mich & the Mich Catholic Conf to File Combined *Amici Curiae* Br in Excess of 20 Pages, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM (**Exhibit 7**). The Court of Claims granted their motion and accepted the *amici* brief the next day. 8/23/22 Order Granting Mot of *Amici Curiae* to File a Combined Brief Exceeding 20 Pages, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM (**Exhibit 8**).

On September 7, 2022, the Court of Claims issued an opinion and order that declares MCL 750.14 facially unconstitutional and permanently enjoins the Attorney General's Office and all county prosecutors in the state from enforcing the law. 9/7/22 Opinion & Order, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM. The Court of Claims' ruling not only flouts this Court's precedential decision in *Mahaffey* that "there is *no* right to abortion under the Michigan Constitution," 222 Mich App at 336 (emphasis added), but also this Court's Order in *In re Jarzynka* that county prosecutors are local officials not subject to the Court of Claims' jurisdiction. Exhibit 6.

On September 23, 2022, the Legislature appealed the Court of Claims' summary disposition ruling to this Court. Three days later, on September 26, 2022, Right to Life of Michigan and the Michigan Catholic Conference filed this motion to intervene on appeal in this Court.

IV. Proposed Intervenors have been active participants in every court where plaintiffs have challenged MCL 750.14's constitutionality, not simply this Court and the Court of Claims.

Proposed Intervenors have been actively involved in every Michigan court where MCL 750.14's constitutionality is questioned. Right to Life of Michigan and the Michigan Catholic Conference moved to intervene as defendants (twice) in Governor Whitmer's similar lawsuit against thirteen county prosecutors in Oakland County Circuit Court. 5/4/22 Right to Life of Mich & Mich Catholic Conference's Mot to Intervene Pursuant to MCR 2.209, *Whitmer v Linderman*, Oakland Cnty No 22-193498-CZ; 8/3/22 Right to Life of Mich & Mich Catholic Conference's Renewed Mot to Intervene Pursuant to MCR 2.209, *Whitmer v Linderman*, Oakland Cnty No 22-193498-CZ. After three months, the Oakland County Circuit Court denied Proposed Intervenors' motion for invalid reasons. 8/16/22, Order re: Right to Life of Mich & Mich Catholic Conference, Mot to Intervene, Oakland Cnty No 22-193498-CZ. Proposed Intervenors have sought leave to appeal the circuit court's ruling to this Court. *Whitmer v Jarzynka*, Ct of App No. 362876.

When the Governor filed an executive message with the Supreme Court, asking it to certify the question of MCL 750.14's constitutionality and take charge of the Oakland County Circuit Court litigation, Proposed Intervenors filed a motion to intervene in the Supreme Court as well. 4/22/22 Right to Life of Mich & Mich Catholic Conference's Mot to Intervene Pursuant to MCR 2.209 & MCR 7.311, *In re Executive Message (Gov'r v Pros Atty's)*, S Ct No 164256. The Supreme Court has not decided whether to grant certification and, as a result, has not yet ruled on Proposed Intervenors' motion to intervene. 5/20/22 Order at 2, *In re Executive Message*, S Ct

No 164256 ("The Executive Message, motion to intervene, and motion to dismiss remain pending."). The Court has simply accepted Proposed Intervenors' filings opposing the Governor's request for certification as *amici* submissions, while it decides whether to grant certification. *E.g.*, 6/15/22 Order, *In re Executive Message*, S Ct No 164256.

Most recently, as noted above, the Supreme Court unanimously allowed intervention by Citizens to Support MI Women and Children—a pro-life ballot-question committee spearheaded by Right to Life of Michigan and the Michigan Catholic Conference. *Reprod Freedom for All*, 2022 WL 4117489, at *1.

Of all the parties involved in lawsuits regarding MCL 750.14's constitutionality, only Right to Life of Michigan and the Michigan Catholic Conference have been actively involved in the Court of Claims, Oakland County Circuit Court, and Supreme Court litigation. And Proposed Intervenors have not merely filed amicus briefs in those cases, they have sought to intervene in *all three*. *No one else* moved to intervene in any of these cases. Proposed Intervenors' unique interest, dedication, and involvement in defending MCL 750.14 is unmatched.

ARGUMENT

I. Proposed Intervenors may intervene as appellants in this Court, even though they could not intervene as defendants below.

Proposed Intervenors could not intervene as defendants in the Court of Claims. Yet they may intervene as appellants in this Court. Planned Parenthood may contend that Right to Life of Michigan and the Michigan Catholic Conference cannot move to intervene on appeal because they did not move to intervene in the trial court. But it makes no difference that Proposed Intervenors' first intervention motion came on appeal, especially as seeking intervention below would have been futile.

A. Proposed Intervenors could not intervene as defendants in the Court of Claims.

The Court of Claims is a statutorily created court of limited power. The Legislature has provided it with jurisdiction over claims against state departments or officers, and no one else. MCL 600.6419(1). As a result, Michigan Right to Life and the Michigan Catholic Conference, who are private actors, could not intervene as defendants in the Court of Claims to defend MCL 750.14's constitutionality.

Several years ago, the Michigan Catholic Conference—one of the Proposed Intervenors here—attempted to intervene in the Court of Claims to defend the constitutionality of § 152b of 2016 PA 249. *Council of Orgs*, 321 Mich App at 459–60; 909 NW2d 449. The Court of Claims denied the intervention motion, and this Court held that it was right to do so because the Court of Claims lacks jurisdiction over private defendants. *Id.* at 460–68.

What's more, Planned Parenthood has admitted that Right to Life of Michigan and the Michigan Catholic Conference could not intervene as defendants in the Court

of Claims *in this very case*. It's answer to Proposed Intervenors' superintending-control complaint recognizes that "non-state actors cannot intervene as defendants in the Court of Claims" and argues *only* that two county prosecutors, who were co-plaintiffs, should have filed a motion to intervene below. 6/9/22 Planned Parenthood of Mich & Dr. Sarah Wallett's Answer to Compl for Order of Superintending Control at 7 n5, *In re Jarzynka*, Ct of App No 361470.

B. Proposed Intervenors may intervene as appellants in this Court.

Unlike the Court of Claims, this Court was formed by Const 1963, art 6, §§ 1 & 8, and its jurisdiction is not limited to state defendants. This Court generally "has jurisdiction on appeals from all final judgments and final orders from the circuit court, court of claims, and probate court." MCL 600.308(1). Indeed, under MCR 7.203(A)(1), this Court "has jurisdiction of an appeal of right filed by *an aggrieved party* from . . . [a] final judgment or final order of the circuit court, or court of claims," regardless of whether that party is a private, state, or local actor. (emphasis added).

MCR 7.203(C)(1) confirms this Court's jurisdiction over non-state actors even in Court of Claims cases. It states that this Court "may entertain an action for . . . superintending control over a lower court . . . immediately below it arising out of an action or proceeding which, when concluded, would result in an order appealable to the Court of Appeals." MCR 7.203(C)(1). As we've already seen, this Court has jurisdiction over the Court of Claims' final judgments. So, nothing prevents non-state actors from seeking superintending control over the Court of Claims in an original action filed in this Court. MCR 3.302(D) states clearly that "the Court of Appeals . . . ha[s] jurisdiction to issue superintending control orders to lower courts." Indeed, this

Court considered Proposed Intervenors' superintending-control complaint involving *this very case*, recognizing this Court has jurisdiction over private defendants' claims, even if the Court of Claims does not.

Functionally, it makes no difference whether Proposed Intervenors serve as intervening-appellants in a direct appeal or as superintending-control plaintiffs in an original action. This Court would exercise jurisdiction over their claims either way, even though the Court of Claims could not. The only distinction is that superintending-control actions are disfavored and must come only as a last resort. MCR 3.302(B) & (D)(2). That is why Proposed Intervenors seek to intervene on appeal, rather than filing another superintending-control action here.

C. It makes no difference that Proposed Intervenors did not move to intervene (pointlessly) in the Court of Claims and filed their first intervention motion on appeal.

The Supreme Court's ruling in *League of Women Voters of Michigan v Secretary of State*, 506 Mich 561; 957 NW2d 731 (2020), explicitly provides for motions to intervene on appeal that are not preceded by a motion to intervene in the trial court. *Id.* at 570 (granting the Legislature motion to intervene on appeal). In fact, the Court "contrast[ed] . . . a motion for a stay pending appeal," which must be first "decided by the trial court" under MCR 7.209(A)(2) (quotation omitted), with MCR 2.209's requirements for intervention, which contain "[n]othing similar." *Id.* at 577 n7. Under *League of Women Voters*, no doubt exists that parties may move to intervene on appeal "before a lower-court judgment becomes final," even if they did not move to intervene in the trial court. *Id.* at 576. The intervention "rule does not require a motion to intervene to be filed any sooner." *Id.* at 577.

This Court's decision in *Zalewski v Zalewski*, __ Mich App __; __ NW2d __, No. 357047, 2022 WL 3006779 (July 28, 2022) (per curiam), confirms that Right to Life of Michigan and the Michigan Catholic Conference may move to intervene for the first time on appeal. *Zalewski* discusses a similar case in which the trial court's jurisdiction was "'strictly statutory and limited.'" *Id.* at *2 (quoting *Estes v Titus*, 481 Mich 573, 582; 751 NW2d 493 (2008)). As a result, "intervention [was] not permitted" in the trial court and adversely effected third parties "had to pursue a remedy through means other than involvement in the [trial court] proceedings." *Id.* at *2–*3. The same is true here: Proposed Intervenors could not intervene in the Court of Claims and were limited to filing a superintending-control complaint until now.

The only impediment to intervention in *Zalewski* was that the third party did not "follow the appropriate procedural requirements" and "never moved to intervene" on appeal. *Id.* at *4. In contrast, Proposed Intervenors have moved to intervene on appeal at the earliest opportunity. Under *Zalewski*, their motion is both necessary and proper. *Id.* (criticizing the third party for "never mov[ing] to intervene. . . on appeal"); *accord Burton-Harris v Wayne Cnty Clerk*, 508 Mich 985; 966 NW2d 349 (2021) (aggrieved party upon intervening in Court of Appeals has standing to appeal, though appellant Davis did not because he failed to move to intervene in Court of Appeals), citing *League of Women Voters*, 506 Mich at 579). And this Court certainly has the power to grant the motion.

II. Proposed Intervenors are entitled to mandatory intervention.

Under MCR 2.209(A)(3), a person has a right to intervene upon establishing three elements: (1) timely application; (2) the applicant claims an interest relating to

the action and is so situated that the disposition of the action may as a practical matter impair or impede their ability to protect that interest; and (3) the applicant's interests may be inadequately represented by existing parties.[3] MCR 2.209(A)(3); *accord Oliver v Dep't of State Police*, 160 Mich App 107, 114-115; 408 NW2d 436 (1987). "[T]he rule should be liberally construed to allow intervention when the applicant's interest otherwise may be inadequately represented." *Precision Pipe & Supply, Inc v Meram Constr, Inc*, 195 Mich App 153, 156; 489 NW2d 166 (1992).

Because Proposed Intervenors satisfy every requirement for mandatory intervention, they are entitled to intervene on appeal.

A. The application was timely.

The first requirement for intervention of right is a timely application. MCR 2.209(A). Michigan Courts have not articulated a bright line rule, but an application is generally timely so long as it is filed within a reasonable time. *Am States Ins Co v Albin*, 118 Mich App 201, 209; 324 NW2d 574 (1982). Because Proposed Intervenors could not intervene as defendants in the Court of Claims, their intervention motion was filed at the earliest possible opportunity, three days after the case came to this Court on appeal. So, the motion is undoubtedly timely.

What's more, the Supreme Court has explained that

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[3] MCR 2.209(A)(3) provides that:

> [o]n timely application a person has a right to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

> where the proposed intervenors [on appeal] participated in some capacity below but did not move to intervene, a motion to intervene filed for the first time in [an appellate court] poses no threat of delay or prejudice. Indeed, it is functionally equivalent to an appeal from a lower court's denial of a motion to intervene. That is, the case is in nearly the same posture now as it would be if [Proposed Intervenors] had unsuccessfully moved to intervene below and were now appealing that ruling. [*League of Women Voters*, 506 Mich at 577 n7.]

Right to Life of Michigan and the Michigan Catholic Conference did far more than "participate in some capacity below." *Id.* Their first amicus brief spurred the Attorney General to admit that there was no adversity between the parties and argue that Planned Parenthood's case should be dismissed. Then came Proposed Intervenors' superintending-control complaint, which resulted in this Court's order declaring that the Court of Claims' preliminary injunction did not bind county prosecutors because they are local, not state, officials. This order alone briefly allowed county prosecutors to enforce MCL 750.14 before the Oakland County Circuit Court entered a TRO in Governor Whitmer's case.

In addition to all this, Proposed Intervenors filed a second amicus brief opposing Planned Parenthood's request for a permanent injunction and supporting the Legislature's position that the Court of Claims lacked jurisdiction and that Planned Parenthood's claims failed on the merits. The Court of Claims' disregard of their arguments led to the permanent injunction that is the subject of this appeal. Right to Life of Michigan and the Michigan Catholic Conference have opposed the Court of Claims' rulings longer and more broadly than anyone. Their motion to intervene is undoubtedly timely.

B. Proposed Intervenors claim an interest relating to the action, and disposition of the action may impair or impede their ability to protect that interest.

The second requirement for intervention of right is satisfied when the applicant claims an interest relating to the action and is so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest. MCR 2.209(A)(3). Proposed Intervenors claim an interest in promoting, enacting, and defending Michigan's pro-life laws. That interest would be impaired and impeded if Planned Parenthood is successful in manufacturing a right to abortion and permanently enjoining MCL 750.14, along with other pro-life statutes.

Courts recognize that "public interest group[s] that [are] involved in the process leading to adoption of legislation [have] a cognizable interest in defending that legislation" and they grant intervention on that basis. *Mich State AFL-CIO v Miller*, 103 F3d 1240, 1245 (CA 6, 1997); *accord id.* at 1245–47. Like the Legislature itself, interest groups "certainly [have] an interest in defending [their] own work. *Mich All for Retired Ams v Sec'y of State*, 334 Mich App 238, 250; 964 NW2d 816 (2020); *accord Reprod Freedom for All*, 2022 WL 4117489, at *1 (granting intervention). This is especially true when they seek to "defend[ ] the constitutionality of several of [their] statutes," which gives them a unique and "significant interest in [the case]. Indeed, it is difficult to envision interests that would assure more sincere and vigorous advocacy." *Id*. The interests of such groups are apparent when they: (1) "filed a timely motion to intervene," (2) "supported the legislation challenged in the instant case," (3) "had been active in the process leading to the litigation," (4) serve as "vital participant[s] in the political process," (5) are

"repeat player[s] in . . . litigation," and (6) represent "significant part[ies] which are adverse to the [plaintiff] in the political process." *Id.* at 1246–47 (quotation omitted).

Proposed Intervenors satisfy all these factors. Right to Life of Michigan is a nonprofit organization whose members across Michigan are dedicated to protecting human life from conception to natural death. To that end, it provides educational resources to Michiganders and encourages community participation in programs that foster respect and protection for human life. Right to Life of Michigan also seeks to give a voice to the voiceless on life issues like abortion, and fights for the defenseless and most vulnerable humans, born and unborn. As a result, Right to Life of Michigan has a strong interest in maintaining laws that promote life throughout Michigan, including MCL 750.14.

The Michigan Catholic Conference is 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. The Michigan Catholic Conference has a deep, abiding interest in 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. The Michigan Catholic Conference was the lead voice against Proposal B in 1972, a referendum that sought to invalidate MCL 750.14 and legalize abortion up to the 20th week of pregnancy. The Conference led the campaign against Proposal B, which saw 61% of the People vote "No."

Proposed Intervenors pursued passage of a Human Life Amendment and other laws that promote and protect innocent life, including the lives of the unborn. They also oppose laws that destroy life, including those that encourage abortion. As part of these efforts, Proposed Intervenors have dedicated significant human and financial resources to combating efforts like the misnamed Michigan "Reproductive Freedom for All" Initiative (2022) that seeks to undo almost a century of Michigan law by creating a right to abortion at any stage, while voiding Michigan laws that protect women's health and ensure that mothers are fully informed before making a decision to take their child's life. Given the resources that they have expended defending the rights of the unborn, Proposed Intervenors have a substantial interest in advocating for and defending pro-life legislation, including MCL 750.14, which the Court of Claims purported to completely enjoin.

Further, Proposed Intervenors regularly work with the Michigan Legislature to enact pro-life legislation, strive to enact pro-life laws through ballot initiatives, and defend pro-life laws in court. Just some of the pro-life legislation that Proposed Intervenors have helped shepherd into law includes: the Parental Rights Restoration Act (MCL 722.901–08), the informed consent law (MCL 333.17015), laws regulating the teaching of or referring for abortion in public schools (MCL 380.1507 & MCL 388.1766), laws forbidding public funding of abortion (MCL 400.109a), laws protecting infants intended to be aborted but born alive (MCL 333.1071–73), and the Abortion Insurance Opt-Out Act (MCL 550.541–51).

What's more, Proposed Intervenors were instrumental in enacting bans on delivering a substantial portion of a living child outside her mother's body and then killing the child by crushing her skull or removing her brain by suction, a procedure known as partial birth abortion (MCL 750.90g & MCL 333.1081–85). Proposed Intervenors were also actively involved in litigation defending the Legal Birth Definition Act, as well as other pro-life laws. The staggering breadth of the Court of Claim's permanent injunction and the sweeping scope of the constitutional right to abortion that the Court of Claim's ruling envisions imperils *every one* of Proposed Intervenors' efforts.

Recognizing their unique and strong interests, Michigan courts regularly allow Proposed Intervenors to intervene in lawsuits challenging the constitutionality of abortion laws, including in the Michigan Supreme Court's ruling earlier this month concerning Proposal 3, the proposal to amend Michigan's Constitution—which is silent about abortion—to add an abortion right. *See*, *e.g.*, *Doe v Dep't of Soc Servs*, 439 Mich 650; 487 NW2d 166 (1992) (Right to Life of Michigan permitted to intervene as defendant in action challenging constitutionality of statute prohibiting use of public funds to pay for abortion unless abortion is necessary to save a woman's life); *Ferency v Bd of State Canvassers*, 198 Mich App 271; 497 NW2d 233 (1993) (per curiam) (Right to Life of Michigan allowed to intervene in action challenging the constitutionality of proposed legislation entitled "The Parental Rights Restoration Act"); *Reprod Freedom for All*, 2022 WL 4117489, at *1 (allowing intervention of

ballot-question committee formed by various pro-life groups, including Right to Life of Michigan and Michigan Catholic Conference).

Simply put, Proposed Intervenors have a vital interest in the resolution of this action because it could not only invalidate laws enacted as a direct result of Proposed Intervenors' efforts, but also impede their interests in enacting and promoting pro-life laws permanently. Proposed Intervenors have much more than a preference regarding the outcome of this case. They have concrete interests relating to the action and are so situated that the disposition of the action may impair or impede their ability to protect those interests. MCR 2.209(A)(3).

C. Proposed Intervenors have unique interests and arguments that may not be adequately represented by existing parties.

The third requirement for intervention of right is that existing parties may not adequately represent the applicant's interests. MCR 2.209(A)(3). "[T]here need be no positive showing that the existing representation is in fact inadequate. All that is required is that the representation by existing parties *may be inadequate*." *Mullinix v City of Pontiac*, 16 Mich App 110, 115; 167 NW2d 856 (1969) (emphasis added). The rule must be "liberally construed to allow intervention where the applicant's interests *may be* inadequately represented." *Hill v LF Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008) (per curiam) (emphasis added and citation omitted).

MCR 2.209(A)(3)'s possibly-inadequate-representation standard "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *D'Agostini v City of Roseville*, 396 Mich 185, 189; 240 NW2d 252 (1976) (citation omitted); *accord Karrip*

v Cannon Twp, 115 Mich App 726, 731; 321 NW2d 690 (1982) (per curiam). Indeed, this Court has held that "the *concern* of inadequate representation of interests need only exist." *Vestevich v W Bloomfield Twp*, 245 Mich App 759, 761-762; 630 NW2d 646 (2001) (per curiam) (emphasis added).

Here, existing parties may not adequately represent Proposed Intervenors' interests. Planned Parenthood and one of its employees asked the Court of Claims to create a right to an abortion and hold MCL 750.14—as well as other pro-life laws—unconstitutional. The Court of Claims issued the permanent injunction that they requested. So Planned Parenthood and one of its employees are adverse to—and cannot adequately represent—Proposed Intervenors' interests.

The Attorney General, the sole original defendant, agrees with Planned Parenthood's contention that MCL 750.14 is unconstitutional. She has refused to defend the law and issued a news release praising the Court of Claims' permanent injunction. 9/7/22 AG Nessel Issues Statement on Ruling from Court of Claims on Abortion Access, Mich Dep't of Att'y General, https://bit.ly/3B1LE9K (**Exhibit 9**). Plainly, Attorney General Nessel is adverse, and she cannot adequately represent Proposed Intervenors' interests.

The Legislature intervened as a defendant in the Court of Claims to defend MCL 750.14's constitutionality after the trial court issued a preliminary injunction. But the Legislature may not adequately protect Proposed Intervenors' interests for at least six reasons.

First, Proposed Intervenors have raised different legal arguments for upholding MCL 750.14's constitutionality than the Legislature. Especially when it comes to the merits of Planned Parenthood's claims, there are material and wide-ranging differences between Proposed Intervenors' *amici* brief (**Exhibit 7**) and the Legislature's motion for summary disposition, 7/26/22 Intervenor Def's Mot for Summ Disposition Under Rule 2.116(C)(8), *Planned Parenthood of Mich v. Attorney General*, Ct of Claims No 22-000044-MM (**Exhibit 10**). As a result, the Court of Claims' order does not address many of Proposed Intervenors' key arguments, including that: (1) *Mahaffey*'s stare decisis effect extends beyond identical questions to substantially similar issues; (2) *Mays v Snyder*, 323 Mich App 1; 916 NW2d 227 (2018), *aff'd by Mays v Governor of Mich*, 506 Mich 157, 167; 954 NW2d 139 (2020), adopted a right to bodily integrity that is identical to its federal counterpart, which does not create a right to abortion; and (3) Planned Parenthood fails to allege a sex-based classification and thus raises no valid equal-protection claim. This is direct evidence that Proposed Intervenors' interests and arguments were not, *in fact*, adequately represented, when only a *possibility* of inadequate representation is required for intervention.

Second, Proposed Intervenors will advance and preserve alternative arguments regarding the constitutionality of abortion that the Legislature may choose not or be unable to raise all the way to the U.S. Supreme Court. For example, if this Court or the Michigan Supreme Court accepts Planned Parenthood's contention that a silent Michigan Constitution creates a right to an abortion, then Proposed Intervenors will argue—to the U.S. Supreme Court, if necessary—that that

the U.S. Constitution supersedes that right because the Fourteenth Amendment protects all life beginning at conception. Proposed Intervenors have already raised this affirmative defense in the Proposed Answer they filed with the Oakland County Circuit Court. 5/4/22 Proposed Answer of Intervening Defs Right to Life of Mich & Mich Catholic Conference at 45–46, *Whitmer v Linderman*, Oakland Cnty No 22-193498-CZ (**Exhibit 11**).

Third, unlike the existing defendants, Proposed Intervenors will advance and preserve additional constitutional arguments to rebut Planned Parenthood's legal theories that the Legislature may choose not or be unable to raise all the way to the U.S. Supreme Court. For example, if this Court or the Supreme Court were to take seriously Planned Parenthood's claim that MCL 750.14 has been invalid since the moment the Michigan Constitution became effective in 1963, then Proposed Intervenors will argue that the U.S. Constitution's Republican Form of Government Clause requires Michigan Courts to honor the language and the silence of Michigan's Constitution, rather than imposing language and rights that the People of Michigan never endorsed or ratified through the democratic process. This violation is all the more egregious since the constitutional "right" was first "discovered" by a Court of Claims judge not a single Michigander ever voted to put in office—instead, she was installed on that court by the Supreme Court. MCL 600.6404(1). Proposed Intervenors have already raised this affirmative defense in the Proposed Answer they filed with the circuit court. *Id.* at 46.

Fourth, the Michigan House and Senate that chose to defend MCL 750.14 could be replaced in an election by a majority of legislators who share Planned Parenthood's views and who want to see MCL 750.14 permanently enjoined. That may eliminate *any* defense of MCL 750.14 and could leave the case without the adversity of parties necessary for the courts to exercise jurisdiction.

Fifth, because they are composed of elected officials, the Michigan House and Senate are subject to electoral pressures that may blunt or impede their defense of MCL 750.14. But Proposed Intervenors' commitment to protecting innocent life is universal and unflinching, regardless of which party denominates the Legislature, and they are not constrained by electoral pressures.

Sixth, this lawsuit places the Legislature in a difficult political and legal position. In the Governor's and Attorney General's view, silence in Michigan's Constitution creates a right to abortion that invalidates MCL 750.14, which has been on the books since before the Constitution's ratification. And, because the Court of Claims and Oakland County Circuit Court have now adopted the same position, any defendant who argues that MCL 750.14 is valid will be attacked politically for opposing constitutional rights, even though the Michigan Constitution creates no right to abortion. Proposed Intervenors have no such constraints on their advocacy.

For all of these reasons, the existing parties *may* not (and do not) adequately represent Proposed Intervenors' interests. Because Proposed Intervenors satisfy all of the requirements for intervention of right, this Court should grant their motion to intervene on appeal.

III. Proposed Intervenors also satisfy the requirements for permissive intervention.

MCR 2.209(B) provides that, on timely application, a party "may intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common." Under that rule, "common question[s] of law and fact alleged should be the basis for granting the motion for leave to intervene unless the court in [its] discretion determines that the intervention would unduly delay or prejudice the adjudication of the rights of the original parties." *Burg v B&B Enters, Inc*, 2 Mich App 496, 499; 140 NW2d 788 (1966). Because Proposed Intervenors satisfy all of the requirements for permissive intervention, this Court should grant their motion to intervene.

Permissive intervention on appeal is appropriate where "the parties . . . seek a declaratory judgment as to the constitutionality of [a statute], as do[ ] the [proposed intervenors]." *League of Women Voters*, 506 Mich at 575. That is the exact situation here. Whereas Planned Parenthood and the Attorney General seek a declaratory judgment that MCL 750.14 is *unconstitutional*, and the Legislature and Proposed Intervenors seek a declaratory judgment that it is *constitutional*. So, permissive intervention is appropriate here just as it was in *League of Women Voters*.

Additionally, Proposed Intervenors' motion to intervene on appeal was timely. *Supra* Part II.A. And intervention is proper under MCR 2.209(B) because Proposed Intervenors' raise claims or defenses that raise questions of law or fact that are identical to those in the main action. Proposed Intervenors have argued, directly contrary to Planned Parenthood's claims, that the Michigan Constitution does not

create a right to abortion. And they will raise federal defenses that are directly related to the legal questions presented here but which the existing parties have not emphasized, including: (1) the Fourteenth Amendment to the U.S. Constitution protects human life from the moment of conception, superseding any state constitutional right to abortion, and (2) any state court declaration that the Michigan Constitution protects a right to abortion would violate article IV, section 2 of the U.S. Constitution, which guarantees a Republican form of government.

For essentially the same reasons the Legislature satisfied the intervention rule in *League of Women Voters*, Proposed Intervenors satisfy the requirements for permissive intervention here. 506 Mich at 575–77 & n7.

IV. Proposed Intervenors need not show independent appellate standing.

This Court need not consider whether Proposed Intervenors have independent appellate standing. "[A] party seeking to intervene need not possess the standing necessary to initiate a lawsuit." *Purnell v City of Akron*, 925 F2d 941, 948 (CA 6, 1991). Because there is an actual controversy between an existing "plaintiff and defendant," *i.e.*, Planned Parenthood and the Legislature, there is "no need to impose a standing requirement on . . . would-be intervenor[s]." *Id.* (quoting *U.S. Postal Serv v Brennan*, 579 F2d 188, 190 (CA 2, 1978)); *accord Providence Baptist Church v Hillandale Comm, Ltd*, 425 F3d 309, 315 (CA 6, 2005).

As intervening appellants, Proposed Intervenors have the "ability to ride 'piggyback' on the [Legislature's] undoubted standing." *Diamond v Charles*, 476 US 54, 64; 106 S Ct 1697 (1986). Or, as the Supreme Court put it, that "at least one

[Appellant] has standing" is enough. *Dodak v State Admin Bd*, 441 Mich 547, 550; 495 NW2d 539 (1993); *accord id.* at 561. Courts "need not consider whether [all Appellants] have standing." *Horne v Flores*, 557 US 433, 446; 129 S Ct 2579 (2009).

The *only* situations in which Proposed Intervenors must show independent standing is if: (1) they seek broader relief than the party invoking the court's jurisdiction, *Little Sisters of the Poor Saints Peter & Paul Home v Pennsylvania*, 140 S Ct 2367, 2379 n6 (2020); or (2) they appeal without the party they originally intervened to support, *Cherry Hill Vineyards, LLC v Lilly*, 553 F3d 423, 428–29 (CA 6, 2008). In this case, the Legislature and Proposed Intervenors seek the same relief and Proposed Intervenors have not sought to appeal on their own.

To counsel's knowledge, the only published cases in which Michigan courts have required an intervenor to show independent standing involve a lone intervenor appealing without a party to the proceeding below. *E.g.*, *League of Women Voters of Mich*, 506 Mich at 575 ("[N]either of the losing parties below filed a timely appeal . . . ."; *Mich All for Retired Ams*, 334 Mich App at 251 ("The Legislature . . . is essentially taking the place of defendants in this case."); *Federated Ins Co v Oakland Cnty Rd Comm'n*, 475 Mich 286, 290; 715 NW2d 846 (2006) ("[T]he Attorney General . . . sought to appeal in this Court, even though neither of the losing parties in the Court of Appeals sought timely leave to appeal."). That is not the case here. The Legislature is defending MCL 750.14's constitutionality and has appealed the Court of Claims' order to this Court.

Notably, the bar is higher for standing than for intervention. *Chapman v Tristar Prods, Inc*, 940 F3d 299, 307 (CA 6, 2019); *Providence Baptist Church*, 425 F3d at 318. So, Planned Parenthood cannot rely on this Court's unpublished standing order in *In re Jarzynka* to oppose Proposed Intervenors' motion here.[4] This Court scrutinized Proposed Intervenors' independent standing to file a superintending-control complaint because it previously concluded that the Court of Claims' injunction *did not apply* to Prosecuting Attorneys Jarzynka and Becker—co-plaintiffs who joined the complaint for order of superintending control. Accordingly, the county prosecutors lacked standing to challenge the injunction, and without the ability to "piggyback" on those prosecutors' standing, Proposed Intervenors' independent standing became relevant. The exact opposite is true here. All agree that the Legislature has appellate standing. Proposed Intervenors may piggyback on the Legislature's undoubted standing on appeal. There is no need for this Court to examine whether Proposed Intervenors have appellate standing too.

V. Proposed Intervenors have appellate standing.

Even though Right to Life of Michigan and the Michigan Catholic Conference need not show appellate standing, they easily can. "[A]ppellate standing" turns on whether the person in question is "an aggrieved party." *League of Women Voters*, 506

[4] This Court's unpublished order on Proposed Intervenors' standing to file a superintending-control action is both nonprecedential and non-final. The Court of Appeals issued the order on August 1, 2022. Proposed Intervenors filed an application for leave to appeal that order with the Supreme Court on September 1, 2022. Under MCR 7.215(F)(1)(a), this Court's order does not take effect until the Supreme Court resolves that matter and Planned Parenthood's separate bid to appeal this Court's ruling. Any reliance on a nonprecedential order that is non-final and may be reversed would be inappropriate.

Mich at 576. An aggrieved party "'suffer[s] a concrete and particularized injury . . . from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case.'" *Id.* at 578 (quoting *Federated Ins Co*, 475 Mich at 291–92.

Proposed Intervenors have suffered a concrete and particularized injury from the Court of Claims' order for at least two reasons. First, the Court of Claims "considered and rejected" some of Proposed Intervenors' arguments that (1) the trial court lacked jurisdiction to decide Planned Parenthood's claims, (2) *Mahaffey* barred those claims, and (3) Planned Parenthood's arguments for a constitutional right to abortion failed on the merits. *Id.* And the Supreme Court has classified that as "a concrete and particularized injury" that creates appellate standing. *Id.*

Second, the Court of Claims' order purports to enjoin not just the Attorney General's Office, but every county prosecutor in the state. Proposed Intervenors' superintending-control complaint argued that the Court of Claims lacked jurisdiction over county prosecutors, thus allowing them to enforce MCL 750.14 despite the Court of Claims' injunction. Exhibit 5 at 21, 23. And this Court's order on Proposed Intervenors' complaint in *In re Jarzynka* agreed that county prosecutors are local—not state—officials who are *outside* the Court of Claims' jurisdiction and injunction. Exhibit 6 at 2–5. Yet the Court of Claims' latest order declares that county prosecutors are *within* its jurisdiction because they are mere agents of the Attorney General. And the Court of Claim's order explicitly applies the permanent injunction

against MCL 750.14's enforcement to them. 9/7/22 Op & Order at 36–39, *Planned Parenthood of Mich v Attorney General*, Ct of Claims No 22-000044-MM.

The only benefit that Proposed Intervenors accrued from this Court's order in *In re Jarzynka* was a holding that the Court of Claims' injunction applies only to the Attorney General, a non-adverse defendant who refuses to enforce MCL 750.14 regardless of what a court may say. But now the Court of Claims' has doubled down and (again) purported to enjoin all county prosecutors from enforcing MCL 750.14 on a permanent basis. Proposed Intervenors are now back to stage one with nothing to show for all of their efforts in filing and briefing a superintending-control complaint. That concrete and particularized injury stems directly from the Court of Claims' order, rendering Proposed Intervenors "aggrieved parties" with standing to serve as appellant-intervenors on appeal. *League of Women Voters*, 506 Mich at 578.

CONCLUSION

For all these reasons, Right to Life of Michigan and the Michigan Catholic Conference ask this Court to grant their motion and enter an order allowing Proposed Intervenors to intervene as an appellant in Case No. 363125. Proposed Intervenors also request that the Court issue a briefing schedule.

Dated: September 26, 2022

Respectfully submitted,

ALLIANCE DEFENDING FREEDOM

By */s/ John J. Bursch*
John J. Bursch (P57679)
440 First Street NW, Street 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

By */s/ Michael F. Smith*
Michael F. Smith (P49472)
The Smith Appellate Law Firm
1717 Pennsylvania Ave. NW, Suite 1025
Washington, DC 20006
(202) 454-2860
smith@smithpllc.com

By */s/ Jonathan B. Koch*
Rachael M. Roseman (P78917)
Jonathan B. Koch (P80408)
Smith Haughey Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503
(616) 774-8000
rroseman@shrr.com
jkoch@shrr.com

Attorneys for Proposed Intervenors Right to Life of Michigan and the Michigan Catholic Conference

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 8,298 countable words in 12-point Century Schoolbook, a proportionally spaced font with serifs, according to the word-count function of the system used to prepare it, Microsoft Word. MCR 7.212(B)(3); MCR 7.211(A)(3). It also complies with the additional requirements of MCR 7.212(B)(5).

/s/ John J. Bursch
John J. Bursch (P57679)

/s/ Michael F. Smith
Michael F. Smith (P49472)

/s/ Jonathan B. Koch
Jonathan B. Koch (P80408)