STATE OF MICHIGAN

COURT OF CLAIMS

PLANNED PARENTHOOD OF MICHIGAN, on behalf of itself, its physicians and staff, and its patients, and SARAH WALLET, 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,

and

MICHIGAN HOUSE OF REPRESENTATIVES and MICHIGAN SENATE,

Intervening Defendants.
_____/

AMENDED OPINION AND ORDER

Case No. 22-000044-MM

Hon. Elizabeth L. Gleicher

AMENDED OPINION AND ORDER DENYING MOTION FOR DISQUALIFICATION

Pending before the Court is a motion by intervening defendants Michigan House of Representatives and Michigan Senate seeking my disqualification under MCR 2.003. I DENY the motion for the reasons discussed in this opinion.

I. FACTUAL BACKGROUND

I began practicing law in 1979. During the next 27 years, I frequently provided pro bono legal services. See MRPC 6.1 ("A lawyer should render public interest legal service."). I regularly volunteered to work on public interest cases brought by various legal organizations, including but

not limited to, the American Civil Liberties Union of Michigan. I continued to participate in pro bono legal activities until I was appointed to the Michigan Court of Appeals in September 2007.

At no time did I receive a fee or compensation of any kind for my pro bono work. In every case in which I worked pro bono, I did so as a volunteer.

In 2021, the Michigan Supreme Court appointed me to the Court of Claims. I have served as the Chief Judge of that Court, and of the Michigan Court of Appeals, since 2022.

The four judges of the Court of Claims are randomly assigned new cases every Monday. I was assigned this case on Monday, April 11, 2022. On April 14, 2022, at my request, the Clerk of the Court, Jerry Zimmer, provided a letter to counsel notifying them that I "make[] yearly contributions to Planned Parenthood of Michigan, a 501(c)(3) organization," and that I "represented Planned Parenthood as a volunteer attorney for the ACLU in 1996-1997, in *Mahaffey v Attorney General*, 222 Mich App 325 (1997)."

After the letter was sent, I learned that my memory regarding the *Mahaffey* case was incorrect. Planned Parenthood was not a party in the *Mahaffey* case. The plaintiffs in that matter were the President of the City Council for the city of Detroit and four physicians specializing in obstetrics and gynecology. See *Mahaffey*, 222 Mich App at 325.

To the best of my recollection, I have never represented Planned Parenthood.[1] I apologize to counsel for this error.

[1] In an affidavit filed with this motion, counsel for intervening defendants point to a newspaper article from 1992 indicating that in a case brought in Kalamazoo challenging the parental consent

I have contributed to Planned Parenthood of Michigan for many years. My contributions have never exceeded $1,000 per calendar year. My last contribution was made in December 2021, long before I was assigned this case and before the public leak of the draft opinion in *Dobbs v Jackson Women's Health Org*, __ US__ ; 142 S Ct 2228 ; ___ L Ed 2d ___ (2022). I have not made any contributions to Planned Parenthood of Michigan since December 2021.

I have never been endorsed for election by Planned Parenthood, nor have I filled out any questionnaires from any organization seeking my opinion regarding the subject of abortion. I have never received any contributions from Planned Parenthood.

As counsel for the intervening defendants correctly point out, in 2018, I contributed $1,000 to the campaign of Governor Gretchen Whitmer, and in 2021 an equal amount to the campaign of Attorney General Dana Nessel.

II. LEGAL BACKGROUND

MCR 2.003 governs the disqualification of a trial court judge. It delineates the grounds for seeking disqualification including, in relevant part, the following:

> Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

---

statute, I represented Planned Parenthood of Mid-Michigan. It is possible that I did. I do not have any files dating back 30 years, and I simply do not remember how many plaintiffs there were in that case, and whether I or an attorney retained by Planned Parenthood represented Planned Parenthood. If I did represent Planned Parenthood in that case or any other, my legal analysis remains unchanged, since any representation was concluded a long time ago and is not a ground for disqualification. Perhaps the difficulty in reconstructing one's client list going back 20 or 30 years is a reason MCR 2.003(C)(1)(e) sets a two-year look-back limitation for the purpose of judicial disqualification.

(a) The judge is biased or prejudiced for or against a party or attorney.

(b) The judge, based on objective and reasonable perceptions, 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]; 129 S Ct 2252; 173 L Ed 2d 1208 (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.

* * *

(d) The judge has been consulted or employed as an attorney in the matter in controversy.

(e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years. [MCR 2.003(C)(1) (alteration in original)].

The court rule also states that

> a judge is not disqualified based solely upon campaign speech protected by *Republican Party of Minn v White*, 536 US 765 (2002), so long as such speech does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or an attorney involved in the action." [MCR 2.003(C)(2)(b).]

In *Republican Party of Minn v White*, 536 US 765; 122 S Ct 2528; 153 L Ed 2d 694 (2002), the United States Supreme Court held that the First Amendment to the United States Constitution protects the right of state court judges to express opinions on disputed political subjects. In accordance with this opinion, Michigan's Code of Judicial Conduct does not prohibit a judge from making contributions to candidates for political office, and specifically provides that a judge may "contribute to a political party." Code of Judicial Conduct, Canon 7(A)(2)(c).

MCR 2.003 also instructs that "to avoid delaying trial and inconveniencing the witnesses, all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification." MCR 2.003(D)(1)(a).

III. ANALYSIS

The intervening defendants have raised several arguments in support of their motion for disqualification, which I will address in turn. I first consider the untimeliness of the intervening defendants' motion.

A. TIMELINESS

Intervening defendants likely became aware of the facts disclosed in Chief Clerk Zimmer's April 14, 2022 letter before their official entry into this case on June 15, 2022. The letter was publicly filed in this Court and available to intervening defendants two months before intervening defendants sought leave to participate. On April 20, 2022, amicus curiae Right to Life of Michigan and the Michigan Catholic Conference filed a publicly available brief in this Court urging my disqualification. At the latest, intervening defendants were aware or should have been aware of the potential grounds for their disqualification motion at that time.

Instead of complying with the court rule in a reasonable fashion, intervening defendants waited to file this motion until after I had granted their motion for intervention and denied their motion for reconsideration of my order granting a preliminary injunction (on June 15, 2022). Intervening defendants seek to excuse their delay by claiming to have only recently "discovered" my contributions to the campaigns of Governor Whitmer and Attorney General Nessel. Their excuse is not credible. My contributions have been a matter of public record for more than three years. As discussed above and below, these contributions were ethically proper, and do not call into question my objectivity in this case or impair the intervening defendants' right to a fair tribunal. Further, intervening defendants were aware of the other grounds they cite for my disqualification more than a month ago and should have filed their motion by the end of June, at the latest.

But because this case is of considerable importance and because intervening defendants and amicus curiae have repeatedly and publicly called into question my ethics and my ability to impartially decide the legal issues presented, I will address the arguments raised.

B. THE CONTRIBUTIONS

Intervening defendants first contend that my contributions to Planned Parenthood, Governor Whitmer, and Attorney General Nessel create "a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*," and that by making these contributions I have "failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct." (Citations and quotation marks omitted.) Those assertions are legally incorrect.

My contributions to Planned Parenthood and to the political candidates were proper under the Michigan Code of Judicial Conduct, as discussed above. It bears repeating that the Michigan Code of Judicial Conduct does not prohibit or even discourage a judge from making such contributions. I violated no ethical canons, statutes, or rules of any kind by making the contributions.

My contributions to Governor Whitmer and Attorney General Nessel are irrelevant to my ability to fairly hear this case and do not give rise to an objective appearance of impropriety. Governor Whitmer is not a party to this action. Like the intervening defendants, Attorney General Nessel, in her official capacity, is a *defendant* in this case. I have rejected Attorney General Nessel's legal argument that this case is non-justiciable, providing but one example that my political support for her candidacy does not equate with a likelihood that I will agree with her in the cases that come before me.

As a judge on the Court of Appeals and the Court of Claims, I regularly hear cases brought by and against the Attorney General. An objective review of my rulings readily reveals that my contribution to Attorney General Nessel's campaign does not foretell my alignment with any of her legal positions. I have not canvassed my opinions to tally a score, but I estimate that the Attorney General has lost several dozen of the cases she or her office have brought or defended before me. Perhaps the best examples of my strong disagreement with the Attorney General's position in cases of significant public interest are my concurring opinion in *People v Simon*, __ Mich App __; __ NW2d __ (2021) (Docket No. 354013), and my majority opinion in *People v Klages*, __ Mich App __; __ NW2d __ (2021) (Docket No. 354487). Attorney General Nessel did not start those prosecutions, but she continued them, and I did not hesitate to express my displeasure regarding her decision to do so.

Intervening defendants have cast vague aspersions about my campaign contributions, but have failed to articulate a coherent argument explaining how or why my contribution to a named defendant in this case relate to the grounds for disqualification cited above. An objective person aware of my rulings would recognize that my support for Attorney General Nessel's election has never had any bearing on my ability to fairly decide the cases in which her office is a party or counsel.

Similarly, my small and ethically proper contributions to Planned Parenthood of Michigan do not give rise to "a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*." A review of *Caperton* demonstrates that the due-process principles announced in that case have no relevance here.

Caperton involved $3 million in contributions made by Don Blankenship, the chairman, chief executive officer, and president of a West Virginia coal company, to a candidate for the West Virginia Supreme Court. *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 873; 129 S Ct 2252; 173 L Ed 2d 1208 (2009). The amount of Blankenship's contributions to the judicial candidate far eclipsed those of the candidate's other supporters. *Id.* A case in which Blankenship's coal company was the defendant reached the West Virginia Supreme Court. *Id.* at 873-874. A jury had rendered a large verdict against the coal company. *Id.* at 872, 874. The Blankenship-funded justice refused to disqualify himself and ruled with the majority in favor of the coal company. *Id.* at 873-874.

The United States Supreme Court reversed the West Virginia Supreme Court, explaining:

> [T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." [*Id.* at 884.]

The United States Supreme Court continued, "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." *Id.* The Court further observed, "The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." *Id.* at 886.

My contributions to Planned Parenthood of Michigan were regular, never exceeded $1,000 (and for many years were much less), and the last one was made in December 2021. *Caperton* is

a far cry factually and legally from these facts and lends no support to intervening defendants' argument.

The question that I must answer for myself in *every* case in which I sit as a judge, including this one, is whether I can fairly judge the facts and the law before me, and whether my participation gives rise to an appearance of impropriety. I have engaged in this critical exercise on many occasions during the 15 years of my Court of Appeals tenure. Sometimes the inquiry forces me to consider that I know the lawyers involved, or that when in practice, I handled similar cases or sued the same defendant. Other times, like this one, I consider whether an aspect of my personal life requires recusal from a case. For example, I make yearly charitable contributions to Henry Ford Hospital, the provider of my personal health care. I have not considered these contributions, or my deep affection for the Hospital's personnel, as reasons to disqualify myself from cases involving Henry Ford Hospital, and have not even felt the need to disclose any of this to counsel in Henry Ford Hospital cases. Like many judges, I make charitable contributions. As discussed above, those contributions are ethically proper. They do not equate with support for an organization's legal position in a case that has not even been filed. Nor do my relatively small financial contributions to Planned Parenthood give rise to a personal stake in the outcome of the case, contrary to intervening defendants' argument.

Like Henry Ford Hospital, Planned Parenthood is a health care organization. Planned Parenthood provides a range of health care services to men and women. Planned Parenthood also provides abortion services. From 1973 until June of this year, abortion was a constitutionally protected form of health care. My pre-2022 contributions to an organization that provides health care, including abortion, do not objectively demonstrate a risk of impermissible bias regarding the issues presented in this case. As is true in every case in which I sit in judgment, my job is to follow

the law, not make it. My record on the Court of Appeals and the Court of Claims proves my fidelity to this precept.

C. THE *MAHAFFEY* CASE

Intervening defendants rather remarkably contend that my 1996-1997 involvement in the *Mahaffey* case requires my disqualification because my involvement then means that I am "an attorney" in the matter *now* pending before the Court. This argument borders on frivolous. As counsel for the intervening defendants are aware, *Mahaffey* was a challenge to a specific statute, 1993 PA 133. *Mahaffey*, 222 Mich App at 329. That statute, which required physicians to provide abortion patients with certain information and mandated a 24 hour waiting period, is not at issue here. See *id.* The arguments made by the plaintiffs in *Mahaffey* were summarized by the Court of Appeals as follows: "Plaintiffs claimed that *the act* violates a woman's right to privacy and due process, violates a physician's right to free speech, and is unconstitutionally vague with regard to what constitutes a 'medical emergency.' Plaintiffs also claimed that the act was unconstitutional because, in violation of the Headlee Amendment, the Legislature did not enact a specific appropriation for funding the act." *Id.* at 332 (emphasis added). The plaintiffs did not raise any arguments in *Mahaffey* even vaguely resembling the legal arguments raised here. Furthermore, even had I been an attorney for Planned Parenthood in that case, MCR 2.003(C)(1)(e) provides for disqualification only if a judge represented a party "within the preceding two years."

This time limitation is significant. The Court Rules recognize that after a two-year period, a judge may hear a matter involving a party that the judge represented. Here, more than 23 years have elapsed since my involvement in *Mahaffey*. No ethical canon or legal principle supports that

my involvement in a case that concluded more than two decades ago requires my disqualification, particularly since Planned Parenthood was not a party or in any manner involved in that case.

Finally, I will address the real argument underlying intervening defendants' motion. Intervening defendants' filings in this case establish that they vigorously opposed the Supreme Court's decision in *Roe v Wade*, 410 US 113, 132; 93 S Ct 705; 35 L Ed 2d 147 (1973), and continue to do so. For fifty years, *Roe* was a flashpoint for legitimate political debate. It is highly unlikely that any judge on the Court of Claims, the Court of Appeals, or the Michigan Supreme Court would claim to have no opinion regarding whether *Roe* was correctly decided.

Similarly, every judge on my two Courts almost certainly has a deeply-held opinion regarding whether abortion should be legal, and the extent to which the state or federal constitutions should be interpreted to encompass such a right. The constitutionality of abortion is an important legal question, and it is appropriate that all citizens of this country consider it -- including judges. My colleagues who have contributed to or been endorsed by Right to Life of Michigan understand that their association with an anti-*Roe* position would call into question their objectivity had one of them been assigned to this case. I am confident, however, that every judge on my two Courts, regardless of any previously expressed or personal views regarding *Roe*, can address the legal issues presented in this case in a fair and impartial manner. A well-informed, thoughtful observer would perceive that judges regularly confront cases and issues that test their objectivity and impartiality. That fact, standing alone, does not require recusal—and no more than that is evident here.

Judges are presumed to be unbiased and impartial. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). In *Crampton v Mich Dep't of State*, 395 Mich 347, 351; 235

NW2d 352 (1975), our Supreme Court identified the following circumstances as presenting an intolerable risk of judicial bias, none of which are present here: a judge's pecuniary interest in the outcome; a judge having been "the target of personal abuse or criticism from the party before him;" a judge who is "enmeshed in (other) matters involving" a party, and a judge who "might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker." Intervening defendants' claim that a judge who has made small contributions to an organizational party must recuse herself is simply unprecedented.

Just as judges must be presumed to be impartial even if they have repeatedly ruled against or previously represented a party or its interests, judges must be presumed to be capable of separating the objects of their personal charitable giving from their professional obligations. Religious beliefs, church membership, and affiliations with community groups do not automatically suggest bias in cases involving the involved organizations. Nor do relatively small contributions to institutions providing health care. Intervening defendants' advocacy of a blanket disqualification requirement in these circumstances would unnecessarily chill a judge's ability to meaningfully participate in charitable giving in her community, in direct conflict with Code of Judicial Conduct, Canon 4(C)'s unambiguous encouragement of judicial engagement in civic and charitable activities.

Intervening defendants have failed to demonstrate that my previous contributions to Planned Parenthood reasonably and seriously risk my actual bias impacting their due-process rights as enunciated in *Caperton*, or that I have failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. Their motion for my disqualification is therefore DENIED.

This order is not a final order and does not close the case.

Date: August 1, 2022

Elizabeth L. Gleicher
Judge, Court of Claims