

**STATE OF MICHIGAN
IN THE COURT OF CLAIMS**

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

Plaintiffs,

v

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

Defendant,

and

MICHIGAN HOUSE OF REPRESENTATIVES
and MICHIGAN SENATE,

Intervenor-Defendants.

Case No. 22-000044-MM

Hon. Elizabeth Gleicher

**JULY 18, 2022
INTERVENOR-DEFENDANTS'
MOTION FOR
DISQUALIFICATION**

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JULY 18, 2022 INTERVENOR-DEFENDANTS' MOTION FOR DISQUALIFICATION

Pursuant to MCR 2.003, the Michigan Code of Judicial Conduct, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Intervenor-Defendants Michigan House of Representatives and Michigan Senate (the Legislature) move to disqualify Chief Judge Elizabeth Gleicher from this case. In support of this motion, the Legislature states:

1. The Chief Judge has disclosed that she makes “yearly contributions” to the lead Plaintiff in this case, Planned Parenthood of Michigan (PPMI). She did not, however, disclose the

total amount of her yearly contributions or how long she has been making these contributions. Nor did she say that she would pause her contributions while this case is ongoing. It is fair to infer from what she disclosed and did not disclose that the Chief Judge has provided substantial financial support for PPMI for many years up to the present and that she intends to continue to do so even while this case is pending.

2. While working as an ACLU attorney in 1996-97, the Chief Judge represented PPMI in *Mahaffey v Attorney General*, 222 Mich App 325 (1997) (per curiam). In *Mahaffey*, the Chief Judge advocated on behalf of PPMI for judicial recognition of a constitutional right to abortion under the Michigan Constitution. The Court of Appeals held in *Mahaffey* that no such right exists. Here, PPMI and the ACLU attorneys who represent PPMI seek the same outcome—the creation of a Michigan abortion right—for which the Chief Judge advocated in *Mahaffey*. Shortly after representing PPMI in *Mahaffey*, she received the “Planned Parenthood Advocate Award” in 1998.

3. In 2021, the Chief Judge contributed \$1,000 to the political campaign of the Defendant in this case, Michigan Attorney General Dana Nessel. In 2018, the Chief Judge contributed \$1,000 to the political campaign of Michigan Governor Gretchen Whitmer.

4. Based on these facts, and others set forth in the supporting brief, the Chief Judge should be disqualified from presiding over this case.

5. On July 18, 2022, counsel for the Legislature requested the concurrence of Plaintiffs and Defendant in the relief requested in this motion. Concurrence was not obtained.

WHEREFORE, the Legislature respectfully requests that the Court (1) grant this motion for disqualification, (2) randomly assign this case to another judge of this Court, and (3) vacate the Court’s order of May 17, 2022, granting a preliminary injunction.

BRIEF IN SUPPORT OF JULY 18, 2022
INTERVENOR-DEFENDANTS' MOTION FOR DISQUALIFICATION

INTRODUCTION

The Chief Judge has served with distinction on the Court of Appeals and Court of Claims, but her recusal is appropriate in this particular case. Disqualification is necessary to ensure that this consequential case is decided by an unbiased judicial officer and to avoid the appearance of impropriety and to maintain public confidence in the integrity and impartiality of the judicial system.

This is unquestionably a significant case. The fundamental question presented is whether the Michigan Constitution includes an unstated right to abortion or, conversely, whether the people of Michigan and their elected representatives have the right to decide the extent to which abortion shall be permitted in this State. The lead Plaintiff here, Planned Parenthood of Michigan, and the nominal Defendant, the Attorney General of Michigan, both agree that there is an unenumerated right to abortion implicit in the Michigan Constitution. The Michigan House of Representatives and Senate had to intervene in this case because the Attorney General refused to defend against PPMI's lawsuit. Before the Legislature intervened, however, the Chief Judge held there is a constitutional right to abortion in the Michigan Constitution and, on that basis, preliminarily enjoined a duly enacted Michigan statute, MCL 750.14, concerning abortion.

In the Legislature's view, the Chief Judge should have recused herself when this case was assigned to her for three reasons. First, in 2021, as a sitting judge, she donated \$1,000 to Attorney General Nessel's political campaign—a fact that the Chief Judge did not disclose but the Legislature learned of only two weeks ago. Second, the Chief Judge did disclose that, since taking the bench, she has made and continues to make yearly contributions to PPMI. But she did not

reveal the total amount of money she has contributed to PPMI over the years while holding judicial office or whether she intends to continue to contribute to PPMI while this case is before her.

To be clear, the Legislature does not contend that it was unlawful for the Chief Judge to contribute money to Attorney General Nessel's political campaign or to the Chief Judge's former client, PPMI. Instead, having made those contributions to both the Plaintiff and Defendant in this case, however, the Chief Judge should have recused herself.

Third, before she became a judge, the Chief Judge, while working as an attorney for the ACLU, represented PPMI in a case in which she took the same position PPMI takes today: advocating for recognition of a right to abortion under the Michigan Constitution. The trial court in that case agreed with her argument, but the Court of Appeals rejected it. See *Mahaffey v Attorney General*, 222 Mich App 325 (1997) (per curiam).

Since the Chief Judge has not recused herself, the Legislature's motion for disqualification should be granted. Given the Chief Judge's past and present financial contributions to both Plaintiff and Defendant, as well as her previous advocacy for the exact position Plaintiff takes in this case, disqualification is necessary to avoid actual bias, a serious risk of such bias, or the appearance of impropriety. MCR 2.003, the Code of Judicial Conduct, and the Due Process Clause all prohibit biased adjudicators, and thus require disqualification here. The Legislature's motion should be granted, this case should be randomly assigned to another judge of the Court of Claims, and the preliminary injunction should be vacated.

BACKGROUND

The Chief Judge has served on the Michigan Court of Appeals since 2007. She has also served on the Michigan Court of Claims since 2022.

On March 30, 2021, the Chief Judge contributed \$1,000 to Attorney General Dana Nessel's

political campaign. The Chief Judge also contributed \$1,000 to the political campaign of Governor Gretchen Whitmer on September 30, 2018.

On April 7, 2022, Plaintiffs PPMI and Dr. Sarah Wallett, PPMI's Chief Medical Officer, sued the Attorney General, contending that the Michigan Constitution encompasses a fundamental right to abortion and asking for a preliminary injunction. The case was randomly assigned to the Chief Judge.

One week later, on April 14, 2022, the Clerk of the Court of Claims wrote to the parties on behalf of the Chief Judge "to notify all counsel of record that she makes yearly contributions to Planned Parenthood of Michigan, a 501(c)(3) organization, and she represented Planned Parenthood as a volunteer attorney for the ACLU in 1996-1997, in *Mahaffey v Attorney General*, 222 Mich App 325 (1997)." Letter from Jerome W. Zimmer Jr., Clerk, Court of Claims (Apr 14, 2022) ("Clerk's Letter") (Exhibit 3 to the Bartolomucci Affidavit). The Clerk's Letter also stated that the Chief Judge "does not believe this warrants her recusal, and is certain that she can sit on this case with requisite impartiality and objectivity." *Id.* Following the Clerk's Letter, neither Plaintiffs nor the Attorney General moved to disqualify the Chief Judge, and she did not recuse herself.

On April 20, 2022, the Court of Claims received a proposed *amici* brief from Right to Life of Michigan and the Michigan Catholic Conference arguing, *inter alia*, that the presiding judge should recuse. See Proposed *Amici* Br at 9–10 (Ex 4 to the Bartolomucci Affidavit). The brief documented the Chief Judge's lengthy history of leading abortion-related litigation in Michigan, including on behalf of the Plaintiff PPMI in *Mahaffey v Attorney General*, 222 Mich App 25 (1997), which sought (unsuccessfully) to establish a right to abortion in Michigan's Constitution.

Id. A year later, Plaintiff PPMI honored the Chief Judge with the Planned Parenthood Advocate Award for her work in *Mahaffey*. *Id.*

Without addressing *amici*'s disqualification concerns, and without a preliminary injunction hearing, the Chief Judge granted Plaintiffs' motion for a preliminary injunction. The Chief Judge's May 17, 2022 Opinion and Order ("PI Op") is attached as Exhibit 6 to the Bartolomucci Affidavit. The Chief Judge found a substantial likelihood that the Due Process Clause of the Michigan Constitution provides a right to abortion (the same position she had taken as Plaintiffs' attorney in *Mahaffey*) and that MCL 750.14 violates that right. In so ruling, the Chief Judge distinguished *Mahaffey*, which she conceded "forecloses a constitutional argument premised on the right to privacy found in the Michigan Constitution." PI Op at 6. But the Chief Judge sidestepped *Mahaffey* by recasting the alleged due process right as the right to bodily integrity, which she claimed was separate from the due process right to privacy. *Id.* But as the Legislature has argued to this Court and the Court of Appeals, there is no principled way to get around *Mahaffey* in this case.

DISQUALIFICATION STANDARDS

A. MCR 2.003 and the Michigan Code of Judicial Conduct

Under MCR 2.003, the disqualification of a judge is "warranted" in several circumstances, "includ[ing] but not limited to" those set forth in the rule. MCR 2.003(C)(1).

MCR 2.003(C)(1)(b) requires disqualification when "[t]he 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 (2009), "or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct."

MCR 2.003(C)(1)(d) requires disqualification when “[t]he judge has been consulted or employed as an attorney in the matter in controversy.”

Canon 2 of the Michigan Code of Judicial Conduct, cited in MCR 2.003(1)(b), begins:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities.

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

In addition, Canon 4(E)(1) states:

A judge should refrain from financial and business dealings that tend to reflect adversely on the judge’s impartiality or judicial office, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

B. The Due Process Clause

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” US Const Am XIV, § 1. The United States Supreme Court has explained that “[d]ue process guarantees ‘an absence of actual bias’ on the part of a judge.” *Williams v Pennsylvania*, 579 US 1, 8 (2016) (quoting *In re Murchison*, 349 US 133, 136 (1955)); see also *Murchison*, 349 US at 136 (“A fair trial in a fair tribunal is a basic requirement of due process.”). “Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’” *Withrow v Larkin*, 421 US 35, 47, (1975) (quoting *Murchison*, 349 US at 136). “Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.” *Williams*, 579 US at 16.

Because “[b]ias is easy to attribute to others and difficult to discern in oneself,” the United States Supreme Court’s “precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present.” *Williams*, 579 US at 8. “The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *Id.* (cleaned up) (citing *Caperton v AT Massey Coal Co*, 556 US 868, 881 (2009)). The relevant question is “whether, under a realistic appraisal of psychological tendencies and human weaknesses,” there is “such a risk of actual bias or prejudgment” that due process requires recusal or disqualification. *Caperton*, 556 US at 883–884 (cleaned up).

ARGUMENT

I. The Chief Judge’s Recent \$1,000 Political Contribution to the Attorney General, Her Yearly Contributions to Planned Parenthood of Michigan, and Her Representation of PPMI as an ACLU Attorney Advocating for Recognition of a State Constitutional Right to Abortion in *Mahaffey v Attorney General* Require Her Disqualification.

Disqualification is required by the Chief Judge’s disclosed and undisclosed conduct, including: (1) the Chief Judge’s yearly contributions as a sitting judge to Planned Parenthood of Michigan, the lead Plaintiff in this case; (2) her representation of her then-client PPMI as an attorney for her then-employer the ACLU in *Mahaffey* and her advocacy in that case for recognition of a state constitutional right to abortion—the same outcome that her former client PPMI and her former employer ACLU seek in this case; and (3) her recent political contributions, as a sitting judge, to the Attorney General, the named defendant in this case. Taken together, these facts warrant the Chief Judge’s disqualification in this consequential case.

A. The Chief Judge’s “Yearly Contributions” to the Plaintiff in This Case, Her Former Client PPMI, Require Disqualification.

Through the Clerk’s Letter, the Chief Judge disclosed that she “makes yearly contributions to Planned Parenthood of Michigan.” The Chief Judge did not, however, disclose the total number of contributions she has made to PPMI; the years in which she contributed money to PPMI; or the total amount of money she has contributed. Nor did the Chief Judge pledge to refrain from making contributions to PPMI while this case is pending. It is fair to infer from what the Clerk’s Letter says (using the present tense “makes”), and from what it does not say, that the Chief Judge has been making substantial contributions to PPMI for many years and is still doing so.

The Chief Judge’s “yearly contributions” to PPMI require her disqualification here. PPMI is the lead Plaintiff in this case. It is also the Chief Judge’s former client in the *Mahaffey* case and other cases. See *Planned Parenthood of Mid-Mich v Attorney General of Mich*, Case No. 139293 (Mich App Apr 26, 1991). And the Chief Judge received the “Planned Parenthood Advocate Award” in 1998, presumably because of her work in *Mahaffey*.

Because “money is fungible,” *People v. \$176,598.00 US Currency*, 242 Mich App 342, 347 n 4 (2000), the Chief Judge’s yearly contributions to PPMI support the organization’s litigation efforts, including this very case. See Proposed *Amici* Br at 10 (noting that the Chief Judge’s “charitable contributions are effectively helping fund this litigation”). Her contributions also help to pay the salary of the other plaintiff in this case, Dr. Sarah Wallett, PPMI’s Chief Medical Officer. These facts require disqualification under MCR 2.003.

MCR 2.003(C)(1)(b) requires disqualification when “[t]he 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 (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.” Even if the Chief Judge does not believe she has a bias in favor of her former client and present financial recipient, her involvement with PPMI presents, at a minimum, a serious risk of bias and the appearance of impropriety.

Furthermore, no less than three canons of the Michigan Code of Judicial Conduct make it improper—and make it appear improper—for the Chief Judge to sit on this case given her annual contributions to former client PPMI. First, Canon 2(A) provides that “A judge must avoid all impropriety and appearance of impropriety.” It is improper, and appears exceedingly improper, for the Chief Judge, the recipient of the “Planned Parenthood Advocate Award” in 1998, to make yearly contributions to her former client, PPMI, and then sit on a case brought by PPMI seeking to establish a Michigan constitutional right to abortion, the same result for which she advocated on PPMI’s behalf in *Mahaffey*.

Second, Canon 4(E)(1) provides that “A judge should refrain from financial and business dealings that tend to reflect adversely on the judge’s impartiality . . . or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.” The yearly contributions that the Chief Judge makes to PPMI are “financial . . . dealings that tend to reflect adversely on [her] impartiality.” *Id.* They suggest she is not impartial when it comes to PPMI, as she financially supports their mission, and they claim in this case that the challenged statute jeopardizes their ability to carry out that mission. The Chief Judge’s financial contributions also “involve the judge in frequent transactions with lawyers or persons likely to come before” the two Michigan courts on which she serves. *Id.*

Third, Canon 4(C) provides that “A judge may participate in civic and charitable activities that do not reflect adversely upon the judge’s impartiality” The Clerk’s Letter notes that PPMI is “a 501(c)(3) organization.” But Canon 4(C) does not permit even charitable contributions

that “reflect adversely upon the judge’s impartiality.” The Chief Judge’s annual contributions to PPMI have precisely that effect in this case.

Due process also requires disqualification because of the Chief Judge’s yearly contributions to PPMI. The due process inquiry is “not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.” *Williams*, 579 US at 8 (cleaned up) (citing *Caperton*, 556 US at 881). Here, the annual contributions to PPMI objectively demonstrate an unconstitutional potential for bias.

In *Caperton*, the United States Supreme Court observed that “[t]he ABA Model Code’s test for appearance of impropriety is ‘whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.’” 556 US at 888 (quoting Model Code of Judicial Conduct, Canon 2A (Am Bar Ass’n). The Chief Judge’s yearly contributions to PPMI create such a perception.

Rule 2.4(C) of the ABA’s Model Code of Judicial Conduct (2020) is also relevant. That rule states that “[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.” The Chief Judge’s yearly contributions to PPMI clearly convey that the organization is one of her influencers. Her annual contributions are an outward sign of support for PPMI’s stance on abortion. One who visits the PPMI website today is greeted with this message in large letters: “Abortion is legal. It is still your right in Michigan.” <https://www.plannedparenthood.org/planned-parenthood-michigan> (last visited July 17, 2022). Because the Chief Judge makes yearly contributions to the organization, her former client, the suspicion that she is biased when it comes to PPMI and its views on abortion

is impossible to shake. “In deciding cases, a judge is not to follow the preferences of his supporters”—or of those he (or she) supports. *Williams-Yulee v Fla Bar*, 575 US 433, 446 (2015).

The Supreme Court said in *Caperton* that “[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge’s recusal.” 556 US at 884. Here, we are dealing with annual contributions going the other way—from the judge to her former client. That client is the lead Plaintiff in this case. And the client is advocating for an outcome—judicial recognition of a state constitutional right to abortion—for which the Chief Judge herself advocated on behalf of the client in *Mahaffey*. Because of the fungibility of money, her yearly contributions are supporting this very lawsuit and Dr. Walleff’s salary. There is “here a serious, objective risk of actual bias that require[s]” the Chief Judge’s recusal. *Id.* at 886.

The Chief Judge is free to make yearly contributions to PPMI, her former client. But she cannot sit on a case brought by PPMI where the question presented is whether there is a right to abortion under Michigan Constitution and thus whether PPMI can carry out its fundamental mission of providing abortion. Michigan law, the Due Process Clause, and common sense require disqualification in this case.

B. The Chief Judge’s Representation of PPMI as an ACLU Attorney Advocating for Recognition of a Michigan Constitutional Right to Abortion in *Mahaffey* Requires Disqualification.

Before the Chief Judge took the bench, she represented PPMI while working as an ACLU attorney and advocated for recognition of a Michigan constitutional right to abortion in *Mahaffey*. The Chief Judge’s client in *Mahaffey*, PPMI, is the lead Plaintiff in this case. Her employer during her representation of PPMI in *Mahaffey*, the ACLU, represents PPMI here. And the issue here is the same as in *Mahaffey*: whether the Michigan Constitution includes a right to abortion. In these circumstances, the Chief Judge should have recused. Since she has not done so, she should now

be disqualified. Disqualification is required by MCR 2.003(C)(1)(b), MCR 2.003(C)(1)(d), Canon 2A of the Michigan Code of Judicial Conduct, and the Due Process Clause.

MCR 2.003(C)(1)(d) provides that disqualification is warranted where “[t]he judge has been . . . employed as an attorney in the matter in controversy.” Similarly, the ABA’s Model Code of Judicial Conduct provides that a judge shall disqualify herself if she “served as a lawyer in the matter in controversy.” Model Code of Judicial Conduct r 2.11(A)(6)(a) (Am Bar Ass’n 2020).

In this case, the “matter in controversy”—or at the very least the issue in controversy—is whether the Michigan Constitution includes a right to abortion. PPMI, represented by attorneys from the ACLU, urges the Chief Judge here to recognize a Michigan abortion right. The matter in controversy in *Mahaffey* was the same. In that case, the Chief Judge urged the trial court and the Court of Appeals to recognize a Michigan constitutional right to abortion. The Chief Judge prevailed in the trial court, see 222 Mich App at 333, but lost in the Court of Appeals. See *id.* at 339 (“We . . . hold that the Michigan Constitution does not guarantee a right to abortion that is separate and distinct from the federal right.”). In sum, because the Chief Judge worked as an ACLU attorney on the matter in controversy, representing the same client that presses the same matter here, MCR 2.003(C)(1)(d) requires the Chief Judge’s disqualification.

Disqualification is also required by MCR 2.003(C)(1)(b) and Canon 2: “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 . . . or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.” Canon 2(A) admonishes judges to “avoid all impropriety” and even the “appearance of impropriety.” Subsection (ii) of MCR 2.003(C)(1)(b) and Canon 2(A) require disqualification because the Chief Judge’s refusal to recuse creates the appearance that she is improperly seeking to accomplish in this case what she

failed to accomplish for PPMI and the ACLU in *Mahaffey*: establish that the Michigan Constitution includes a right to abortion.

Subsection (i) of MCR 2.003(C)(1)(b) and the Due Process Clause also require the Chief Judge's disqualification. The reasoning of the United States Supreme Court in its 2016 decision in *Williams v Pennsylvania*, 579 US 1, is instructive. "When a judge has served as an advocate" for a client in a case that presented the same legal issue that is now before her as a judge in a case in which the former client is a party, "a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Id.* at 9. "There is, furthermore, a risk that the judge 'would be so psychologically wedded' to his or her previous position . . . that the judge 'would consciously or unconsciously avoid the appearance of having erred or changed position.'" *Id.* (quoting *Withrow*, 421 US at 57). This risk remains "[e]ven if decades intervene before the former [attorney] revisits the matter as a jurist." *Id.* at 11. "In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate" the position that she advocated for her former client. *Id.* "[T]he passage of time do[es] not relieve the former [attorney] of the duty to withdraw in order to ensure the neutrality of the judicial process" *Id.*

The *Williams* Court's explication of the requirements of due process confirms that the Chief Judge may not sit in judgment on a case brought by her former client and her former employer, PPMI and the ACLU, that asks her to decide the same important constitutional question raised in a prior case brought by PPMI, the ACLU, and the Chief Judge herself. "An insistence on the appearance of neutrality" and the "objective risk of actual bias on the part of the judge" both require her disqualification to ensure "the public legitimacy of judicial pronouncements and . . . the rule of law itself." *Id.* at 15, 16.

The Legislature acknowledges that the facts of *Williams* are not identical to the facts here. *Williams* involved a judge who, decades earlier, had prosecuted the defendant. But the Supreme Court’s reasoning forcefully applies here as well. “Both the appearance and reality of impartial justice” required recusal in *Williams*, *id.* at 16, and those same vital principles command no less here. In this case, as in *Williams*, an objective assessment of “the risk of actual bias in the judicial proceeding rises to an unconstitutional level.” *Id.* “Due process entitle[d] Terrance Williams to a proceeding in which he may present his case with assurance that no member of the court is predisposed to find against him,” *id.* (cleaned up), and due process entitles the Legislature to the same assurance.

In response to this, one might argue that the Chief Judge was merely doing her job as an ACLU attorney in advocating for a client and that one cannot infer an attorney’s personal belief from their professional advocacy. In many cases—e.g., advocating for a corporation in a business dispute—this conclusion might be fair. But the facts bely such an interpretation here. For one, PPMI gave the Chief Judge *an award* for her abortion rights work. For another, the Chief Judge donates to PPMI yearly. Viewed objectively, winning awards from and donating thousands of dollars to the organization leading one side of perhaps the bitterest debate in American politics are not signs of dispassionate advocacy. The public could fairly assume that the Chief Judge’s advocacy for abortion rights was not just business but a matter of personal belief.

C. The Chief Judge’s \$1,000 Political Contribution to the Defendant, Attorney General Nessel, When Taken with Other Facts, Supports Disqualification.

The Chief Judge’s \$1,000 contribution in 2021 to Attorney General Nessel’s campaign, when taken together with her work for and financial support of PPMI, adds to the appearance of impropriety, which MCR 2.003(C)(1)(b) and Canon 2A of the Michigan Code of Judicial Conduct forbid. The Attorney General is a party-defendant in this case. She is a staunch advocate of

abortion rights, and she agrees with Plaintiffs that the Michigan Constitution includes a right to abortion and that MCL 750.14 is unconstitutional. She campaigned for Attorney General on her commitment to abortion rights and stated prior to her election that if *Roe v Wade* were overturned, she would challenge MCL 750.14.¹ She has been true to her word, shirking her duty to defend Plaintiffs’ lawsuit and therefore necessitating the Legislature’s intervention. Given the compounding facts already discussed, it is unseemly for the Chief Judge to sit on this case after making a substantial monetary donation to the Attorney General’s campaign last year.

In the average case, where parties hold opposing positions on the merits, donating to both the plaintiff *and* defendant could theoretically lessen the appearance of impropriety. But here, where PPMI and the Attorney General completely agree on the central question—agreement the public could easily assume the Chief Judge joins—it does not. To the contrary, that the Chief Judge donated to two parties who, despite being on opposite sides of the “v,” are fully aligned on the merits of this case signals to the public that this case lacks the neutral arbiter it deserves.

To be clear, the Legislature does not contend that it was unlawful for the Chief Judge to donate money to the Attorney General. Nor does it contend that donating to a party would, alone, automatically require recusal. But although Michigan judges may lawfully make political contributions, such contributions may in some situations result in the appearance of impropriety. See Ashenfelter, *The Giving Judge: Which comes first, impartial justice or partisan politics?*, BRIDGE MICHIGAN, <https://tinyurl.com/44m33tzm> (August 19, 2013).

¹ LeBlanc, *Volatile Michigan attorney general’s race shows gulf between Leonard, Nessel*, THE DETROIT NEWS, <https://tinyurl.com/4rkdfd5h> (October 23, 2018); Gray, *Nessel’s quest for AG’s office began on steps of U.S. Supreme Court*, DETROIT FREE PRESS, <https://tinyurl.com/44h94nyp> (October 19, 2018).

In other jurisdictions, political contributions by judges are forbidden to avoid the appearance of impropriety. For example, federal judges serving on district courts and circuit courts may not contribute to candidates. See Code of Conduct for United States Judges, Canon 5(A)(3) (2019) (“A judge should not . . . make a contribution to a political organization or candidate”); *Wagner v Fed Election Comm*, 793 F3d 1, 22 (DC Cir 2015) (en banc) (“[E]very judge on this court—indeed, on every lower federal court—is . . . banned from making political contributions.”). The purpose of Canon 5(A)(3) is “to avoid the appearance of bias or favor by federal judges.” *United States v Gmoser*, No. 14-cr-20048-JES, 2020 WL 4756774, at *15 (CD Ill August 17, 2020), aff’d 30 F4th 646 (7th Cir 2022). The ABA’s Model Code of Judicial Conduct, which has been called the “gold standard,”² also condemns making contributions to candidates for public office. See Model Code of Judicial Conduct, r 4.1(A)(4) (Am Bar Ass’n 2020) (providing that a judge shall not “solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office.”).

In sum, the Chief Judge’s recent \$1,000 contribution to the Attorney General, when coupled with her yearly contributions to PPMI, require disqualification here. This case is unique in that the Chief Judge has contributed money to both the Plaintiffs and the Defendant, who agree that the Chief Judge should find a Michigan constitutional right to abortion.

II. This Case Should Be Randomly Assigned to Another Judge and the Order Granting a Preliminary Injunction Should Be Vacated.

MCR 2.003(D)(4)(a) provides that “[f]or courts other than the Supreme Court, when a judge is disqualified, the action must be assigned to another judge of the same court.” Accordingly, this case should be randomly assigned to another judge of the Michigan Court of Claims.

² Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 Geo J Legal Ethics 1, 5–6 (2004).

In addition, Chief Judge’s order granting a preliminary injunction should be vacated due to her disqualification. See *Aetna Life Ins Co v Lavoie*, 475 US 813, 827–828 (1986) (“[W]e are aware of no case, and none has been called to our attention, permitting a court’s decision to stand when a disqualified judge casts the deciding vote.”). Clearly, “the ‘appearance of justice’ will best be served by vacating the decision.” *Id.* at 828.

III. This Disqualification Motion Is Timely and Deciding the Motion Is Necessary to Maintain Public Confidence in the Integrity and Impartiality of the Judiciary.

MCR 2.003(D)(1)(a) states that “[t]o avoid delaying trial and inconveniencing witnesses, all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification.” Here, one of the grounds for disqualification, the Chief Judge’s \$1,000 contribution to the Nessel campaign, was not disclosed in the Clerk’s Letter. The Legislature discovered the evidence of the contribution on July 4, 2022. See Bartolomucci Affidavit ¶ 8. Furthermore, this motion will not delay any trial—since no trial date has been set—or inconvenience any witness. Thus, MCR 2.003(D)(1)(a) does not bar this motion.

Even if this motion were untimely (it is not), there would be “good cause” to rule on and grant it. MCR 2.003(D)(1)(d). First, in their proposed *amici* brief submitted on April 20, 2022 (six days after the disclosures made in the Clerk’s Letter), Right to Life of Michigan and the Michigan Catholic Conference asked the Chief Judge to recuse based on her work as an ACLU attorney in abortion cases, including her representation of PPMI in *Mahaffey*. The Chief Judge did not, however, rule on the request. Public confidence in the integrity and impartiality of the judiciary will best be served by a ruling from the Court on all of the grounds for disqualification raised in both the Legislature’s motion and in the proposed *amici* brief.

CONCLUSION

For the foregoing reasons, the Legislature's motion for disqualification should be granted, the order granting a preliminary injunction should be vacated, and this case should be randomly reassigned to another judge of the Court of Claims.

If the motion is denied by the Chief Judge, the Legislature requests that it be referred to the State Court Administrative Office for assignment to another judge "who shall decide the motion *de novo*." MCR 2.003(D)(3)(a)(ii).

Dated this 18th day of July, 2022

Respectfully submitted,

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